

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA423/2017
[2019] NZCA 201**

BETWEEN CHIEF EXECUTIVE OF THE MINISTRY
OF SOCIAL DEVELOPMENT
Appellant

AND GWYNETH BROADBENT
Respondent

Hearing: 10 July 2018 (further materials received 27 July 2018, 10 August 2018 and 17 August 2018).

Court: Williams, Clifford and Gilbert JJ

Counsel: J K Gorman and O J G Upperton for Appellant
S G Broadbent as attorney for Respondent
W L Aldred and D W Ballinger as Counsel assisting

Judgment: 31 May 2019 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We answer the approved question as follows:

(a) Whether the Chief Executive can include any income capable of being derived from gifted assets valued below the permitted threshold in a person's means assessment under ss 147 and 147A of the Social Security Act 1964.

No.

C There is no order as to costs.

Table of contents

Introduction	[1]
<i>Trust debts forgiven.....</i>	[6]
<i>Trust income counted back.....</i>	[9]
The long-term residential care means tested subsidy regime.....	[14]
<i>Step One — Assets.....</i>	[16]
<i>Step Two — Income.....</i>	[18]
<i>Deprived income or property.....</i>	[21]
<i>Statutory purpose — the regime in context.....</i>	[26]
The facts in more detail	[28]
Submissions.....	[44]
<i>Chief Executive.....</i>	[44]
<i>Mrs Broadbent.....</i>	[47]
<i>Counsel assisting.....</i>	[52]
Identifying the correct gift.....	[59]
<i>Chief Executive.....</i>	[62]
<i>Counsel assisting.....</i>	[64]
<i>Chief Executive's reply.....</i>	[67]
<i>Our approach.....</i>	[68]
Analysis	[69]
Conclusion.....	[88]
Result.....	[92]

REASONS OF THE COURT

(Given by Williams J)

Introduction

[1] Gwyneth Broadbent is 81. She has been in long-term residential care since 2014. She will remain in such care indefinitely.

[2] Irrespective of her income, the maximum amount Mrs Broadbent can be required to contribute to the cost of her care is \$1,217.28 per fortnight (the maximum contribution). Any additional cost is met by the relevant District Health Board (DHB).

[3] Mrs Broadbent applied for an additional subsidy to reduce her contribution further. Such assistance is available but is means tested.

[4] The question arising in this appeal is whether when means testing Mrs Broadbent, the Chief Executive of the Ministry of Social Development (the Chief Executive) can take into account income she could have earned from assets she no longer owns because she transferred them to certain family trusts.

[5] We note at this point, that pt 4 of the Social Security Act 1964 (the Act) was repealed on 26 November 2018 and replaced by the Residential Care and Disability Support Services Act 2018. That Act came into force on 26 November 2018.¹ We must nonetheless apply the law as it existed at the date of the appeal.²

Trust debts forgiven

[6] Over the years of their marriage Mrs Broadbent and her late husband sold most of their property interests at fair value to two trusts in which they were trustees and/or discretionary beneficiaries (the Trusts).³ In return the Trusts acknowledged debts back to the Broadbents. These loans were repayable on demand. There is a question as to whether there was an entitlement to interest on the loans, but as we shall see, the inference is none was provided for or claimed.

[7] The Broadbents then undertook an orthodox debt forgiveness programme up to a maximum of \$27,000 per annum. By 2013 the entire debt had been forgiven.

[8] In 2014, the Ministry of Social Development undertook the required means assessment to determine whether Mrs Broadbent qualified for an additional subsidy.⁴

¹ Residential Care and Disability Support Services Act 2018, s 2(1).

² Residential Care and Disability Support Services Act, sch 1, cl 2(3) provides as follows:

2 Needs assessments and means assessments under Part 4 of 1964 Act

...

(3) Needs assessments and means assessments begun under Part 4 of the Social Security Act 1964, and not withdrawn or completed on the repeal of that Part, must be completed by [the Ministry of Social Development] under the corresponding provisions of this Act.

This provision relates to applications that were being processed by the Ministry of Social Development at the time pt 4 of the Social Security Act 1964 was repealed. The Ministry of Social Development is defined in s 5 as the responsible department, the chief executive of that department or other statutory delegate. It does not include decisions or determinations of the Ministry of Social Development that are before the Social Security Appeal Authority or the courts.

³ See below at [28].

⁴ We note that the means assessment was undertaken by Ministry of Social Development employees acting on the Chief Executive's behalf. We will refer to the actions of those employees as actions of the Chief Executive.

Trust income counted back

[9] The Chief Executive found that Mrs Broadbent did not qualify for this additional subsidy because, by transferring most of her and her late husband's properties to the Trusts, she had deprived herself of income from those assets that would have been available to meet the costs of care.⁵ The Chief Executive considered he was entitled to disregard these transfers when calculating Mrs Broadbent's income and so count that deprived income back in.

[10] On appeal, the Social Security Appeal Authority (the Authority) upheld the Chief Executive's assessment.⁶ On further appeal to the High Court on a question of law, Katz J reversed the Authority.⁷ The Judge found it was inherent in the notion of an unconditional alienation of property that the right to any income from it is also lost.⁸ The Judge reasoned that, since Mrs Broadbent's debt forgiveness programme did not breach the applicable gifting rules, the Chief Executive could not (in effect) count back in notional income from validly alienated assets. It was, the Judge found, not the intention of the residential care means testing regime to allow the Chief Executive to treat income differently from its parent asset.⁹ Rather, gifting the asset took any associated income out of reach for the purpose of means assessment.¹⁰

[11] The Chief Executive was then granted leave to appeal that finding in the form of the following question:¹¹

[4] ... [w]hether the Chief Executive can include any income capable of being derived from gifted assets valued below the permitted threshold in a person's means assessment under ss 147 and 147A of the Social Security Act 1964.

⁵ Social Security Act 1964, s 147A.

⁶ *An appeal against a decision of the Benefits Review Committee* [2015] NZSSAA 91 [Authority decision].

⁷ *Broadbent v Chief Executive of the Ministry of Social Development* [2017] NZHC 1499, [2017] NZAR 1127 [High Court decision].

⁸ At [42].

⁹ At [44].

¹⁰ At [42] and [44].

¹¹ *Chief Executive of the Ministry of Social Development v Broadbent* [2017] NZCA 474.

[12] It became apparent during the hearing of this appeal that this question presented difficulties. The Authority, the High Court and the parties in the appeal all appear to have proceeded on the erroneous basis that the gifting programme related to the Trusts' assets. The Broadbents did not gift their properties to the Trusts but sold them for fair value. The gifting related to the reduction to zero of the resulting debt back.

[13] We have taken this difficulty into account when formulating our answer to the question. As will be seen, issues may arise for further consideration.

The long-term residential care means tested subsidy regime

[14] No-one assessed as requiring long-term residential care "indefinitely" is required to pay the full cost of that care. Rather, they must make a contribution to that cost. The contribution is capped and referred to in the Act as the "maximum contribution".¹² It varies by region.¹³ Any shortfall between the maximum contribution and the actual cost of care must be met by the local DHB irrespective of the financial situation of the person in care (the general subsidy).

[15] A person in need of care may also apply for an additional subsidy which is designed to relieve the applicant of liability to pay some or all of the maximum contribution (the additional subsidy).¹⁴ This additional subsidy is means tested.¹⁵ The Chief Executive must undertake the required means assessment in two steps. First the applicant's assets are assessed to determine whether their value is at or below the "applicable asset threshold".¹⁶ In Mrs Broadbent's case the applicable asset threshold is \$224,654.¹⁷ Second, the applicant's income is calculated.¹⁸

¹² Social Security Act 1964, s 139(2).

¹³ Section 152.

¹⁴ Section 141(2).

¹⁵ Section 141(1)(a).

¹⁶ Section 146(2).

¹⁷ Schedule 27, cl 1(2).

¹⁸ Section 147(2).

Step One — Assets

[16] “Assets” for the purpose of this assessment are relevantly defined in sch 27, cl 4 as assets capable of being realised. An applicant’s assets include the value of any assets the applicant and/or their spouse or partner have gifted in the five years preceding the date of the means assessment.¹⁹ The exception to that rule is “allowable gifts” as prescribed by regulations made under the Act.²⁰ Gifts are allowable gifts if they are made within the five-year gifting period provided their value did not exceed \$6,000 per annum.²¹ That annual value may be averaged across the whole period.²²

[17] If the Chief Executive considers the applicant’s assets are equal to or less than the value of the asset threshold, he or she must proceed to calculate the applicant’s income under s 147.²³

Step Two — Income

[18] In this second step, the Chief Executive must calculate the annual income of the applicant “as at the date of the means assessment”,²⁴ in order to determine whether he or she is entitled to receive the additional subsidy. “Income” for this purpose is defined expansively in s 3(1) by reference to an extensive list of specific examples of income, but for present purposes the general catch-all in subsection (a) is relevant. It provides income “means any money received or the value in money’s worth of any interest acquired, before income tax, by the person which is not capital ...”.

¹⁹ Schedule 27, cl 4; and Social Security (Long-term Residential Care) Regulations 2005, reg 8.

²⁰ Schedule 27, cl 4(b) (definition of assets); and Social Security (Long-term Residential Care) Regulations, reg 9.

²¹ Social Security (Long-term Residential Care) Regulations, reg 9(1)(b).

²² Regulation 9(2). In addition to allowable gifts, there are also a number of assets specifically exempted from the assets calculation in sch 27, cl 4. None of these exemptions is relevant in this case.

²³ Social Security Act, s 147(2).

²⁴ Section 147(3).

[19] Schedule 27, pt 3 applies to income assessments. It relevantly excludes:

- (a) income from assets up to \$982 per annum;²⁵ and
- (b) any amount or type of income specified by regulations.²⁶

[20] At the end of this two-step process the Chief Executive will have determined the applicant's income in order to decide whether he or she should receive the additional subsidy.

Deprived income or property

[21] Section 147A(1) of the Act enables the Chief Executive "in his or her discretion" to include in either step of the means assessment, "income or property,"²⁷ of which the applicant or their spouse or partner "has directly or indirectly deprived himself or herself". Its terms are as follows:

147A Deprivation of assets and income

- (1) If the chief executive is satisfied that a person who has applied for a means assessment, or the spouse or partner of that person, has directly or indirectly deprived himself or herself of any income or property (other than an exempt asset), the chief executive may in his or her discretion conduct the means assessment as if the deprivation had not occurred.

[22] Section 155(1)(e) of the Act provides for the promulgation of regulations "prescribing for the purpose of s 147A, rules relating to deprivation of property, income, or both, and the circumstances in which those rules apply".

[23] Regulation 9B of the Social Security (Long-term Residential Care) Regulations 2005 (the Regulations) was promulgated pursuant to s 155(1)(e). It sets out six "instances" of property or income deprivation which the Chief Executive may choose to ignore when carrying out a means assessment. That is, he or she may choose to treat the property or income as if it is still owned or earned by the applicant when calculating her total assets or annual income. The list is inclusive and expressly

²⁵ Schedule 27, cl 5, definition of income-from-assets exemption at (a).

²⁶ Schedule 27, cl 5, definition of income at (k).

²⁷ Provided it is not a specifically exempted asset.

declared to be non-exhaustive. After each “instance” an “example” of the drafter’s intention with respect to the relevant instance is set out. Although it does not arise in this appeal, there may well be a question as to whether this regulation prescribes rules at all, when it simply offers an inclusive list of instances of deprivation. We take that matter no further here.

[24] It is necessary to set out reg 9B in its entirety:

9B Deprivation of property and income

For the purposes of section 147A of the Act, instances of deprivation of property or income include, but are not limited to, the following:

- (a) gifts that are gifted in the 12-month period prior to the commencement of the gifting period, or in any 12-month period preceding that period, to the extent that the total value of the gifts in each such period exceeds \$27,000:

Example

In the year before the commencement of the gifting period the person being means assessed and that person’s spouse jointly make gifts having a total value of \$100,000.

The person being means assessed and his or her spouse may be treated as having deprived themselves of \$73,000 in respect of the gifts.

- (b) a disposition of property at any time before the commencement of the gifting period for no consideration, or for a consideration less than the market value of the property at the time of disposition, may be treated as a gift for the purposes of paragraph (a):

Example

Two years before the commencement of the gifting period the person being means assessed and that person’s partner transfer the \$300,000 house that they jointly own to a family member for \$100,000. One year before the commencement of the gifting period the person being means assessed and that person’s partner gift \$50,000 to another family member.

The person being means assessed and his or her partner may be treated as having deprived themselves of \$196,000 in respect of the disposition and the gift (being the sum of \$200,000 less \$27,000 for the disposition of the house and \$50,000 less \$27,000 for the monetary gift).

- (c) a disposition of property during the gifting period for no consideration, or for a consideration less than the market value of the property at the time of disposition:
-

Example

During the gifting period the person being means assessed sells his or her car for \$10,000. The market value of the car at the time of sale was \$20,000.

The person being means assessed may be treated as having deprived himself or herself of property to the extent of \$10,000 in respect of the car sale.

- (d) a failure at any time to exercise any right or entitlement to demand a payment:
-

Example

The spouse of the person being means assessed makes a loan to another person with interest on the loan being payable on demand. The spouse of the person being means assessed never makes a demand for the interest.

The spouse of the person being means assessed may be treated as having deprived himself or herself of interest to the extent of the amount of interest that is payable on demand.

- (e) a waiver of a right at any time to receive any entitlement or payment:
-

Example

The person being means assessed and that person's partner jointly own a rental property. The tenants of that property fail to pay the rent payable under the tenancy agreement. The person being means assessed and that person's partner take no action to recover the unpaid rent.

The person being means assessed and his or her partner may be treated as having deprived themselves of income to the extent of the unpaid rent.

- (f) an investment at any time in non-income-earning assets:
-

Example

The person being means assessed deposits savings in a non-interest-bearing bank account.

The person being means assessed may be treated as having deprived himself or herself of income to the extent of income that could have been earned on the savings if the savings had been invested in an interest-bearing bank account.

[25] Two instances have particular relevance to the present case. The first is the excessive gifting instance in sub-reg (a). This allows the Chief Executive to ignore gifts made *before* the five-year gifting period, the value of which *exceed* \$27,000 per annum. The implication is, the Chief Executive must respect gifts of property or income up to \$27,000 per annum if made before the five-year gifting period. The second is sub-reg (f) giving the Chief Executive the discretion to treat investments in non-income earning assets as if they do in fact earn an income.²⁸

Statutory purpose — the regime in context

[26] The language of s 147A of the Act and reg 9B of the Regulations must be read in light of the relevant statutory purposes. Section 1A of the Act sets them out. Paragraphs (b) and (c) are particularly relevant:

1A Purpose

...

- (b) to enable in certain circumstances the provision of financial support to people to help alleviate hardship:
- (c) to ensure that the financial support referred to in paragraphs (a) and (b) is provided to people taking into account—
 - (i) that where appropriate they should use the resources available to them before seeking financial support under this Act;

...

²⁸ The latter arises because the relevant assets in this case are the debts back.

[27] Thus, for the purposes of this case, the focus of the long-term care means testing regime must be the alleviation of hardship which means those in need of care must first look to the resources available to them to meet the costs of that care.²⁹

The facts in more detail

[28] In 1989, Mrs Broadbent's brother-in-law settled the AW & GI Broadbent Family Trust (the Family Trust) for Mr and Mrs Broadbent. The Broadbents, their children and grandchildren and the spouses of such issue were discretionary beneficiaries. The Broadbents were the trustees. They sold their holiday home and shares in certain investment properties to the Family Trust over the ensuing three years. Together these assets were valued at \$46,750. The Broadbents loaned back the entire purchase price and forgave that debt over three years in tranches of between \$15,000 and \$16,000 per year. In later years the Broadbents transferred their family home to the Family Trust, together with other property, and progressively forgave that debt. We were not provided with evidence to suggest the Broadbents charged the Family Trust interest during the term of the loan.

[29] In 1998, Mr Broadbent died. His entire estate, including his interests in certain commercial buildings, a term deposit, a life insurance policy and various cars, boats and other assets, were left to Mrs Broadbent. She then sold them to the AW & GI Broadbent Children's Trust (the Children's Trust).³⁰ This trust was also settled by her brother-in-law. Mrs Broadbent was appointed the sole trustee of the Children's Trust. The children, grandchildren and their spouses were discretionary beneficiaries. Mrs Broadbent sold these assets at market value and took a loan back for the purchase price. The value of the loan was \$282,000. Mrs Broadbent then set about reducing the loan by way of a debt forgiveness programme in annual tranches at or less than \$27,000 per annum. The programme ended in 2013 by which time

²⁹ Similar comments have been made by the High Court in the context of other benefit entitlements. For example see *Chief Executive of the Department of Work and Income v Vicary* [2001] NZAR 628 (HC) at [25] "[t]he concern and purpose of the Act is to aid those who are truly in need of financial assistance in a way that is administratively efficient and not wasteful of public funds". See also *Director-General of Social Welfare v W* [1997] 2 NZLR 104 (HC) at 108 "[i]t is policy to provide benefits where there is need; but it likewise is policy to expect claimants to call upon their own resources, and the resources of those properly obliged to them, before calling on the state."

³⁰ The relevant assets of the Children's Trust and Family Trust are set out below at [31]–[35].

the Children's Trust debt had been entirely forgiven. At an early stage the Children's Trust lent its entire capital to the Family Trust and the latter managed the assets of both trusts. It is accepted that the Family Trust made occasional capital distributions to Mrs Broadbent in the period before 2013 but did not distribute income.

[30] As noted, by the date of Mrs Broadbent's means assessment in 2014, she owned no significant assets and had no private income.

[31] When the Chief Executive undertook his means assessment, he accepted that Mrs Broadbent and her late husband's annual gifts to the Trusts were valued at less than the excessive gifting threshold in reg 9B(a) of the Regulations. This in turn meant that Mrs Broadbent's assets were valued at less than the asset threshold for the purpose of step one of the means assessment. However, when he turned to assessing her income at step two, the Chief Executive counted back in (what he considered were) gifted assets because the gifts deprived Mrs Broadbent of potential income.

[32] The Chief Executive applied alternative approaches to calculating the deprived income. Both approaches focussed on the income earning potential of the Trusts. The Chief Executive erroneously ignored the fact that the gifts were by way of debt forgiveness, they were not gifts of the assets themselves. We come back to this point in our analysis.

[33] Option one identified the 2014 income of the trust owned companies as follows:

(a)	Polaris Rentals Limited	\$26,189
(b)	Seychelle Properties Limited	\$9,830
(c)	Eldon Chambers Limited	\$8,227
	Total A	\$44,246

[34] The Chief Executive added a notional income figure from the other assets of the Trusts that were not income earning to this (except for the family home and holiday home which the Trusts also retained). The assets were as follows:

(a)	Investments	\$33,290
(b)	Westpac term deposit account	\$195,056
(c)	Loan to Mrs Broadbent's daughter	\$87,099
	Total Assets	\$315,445

[35] The Chief Executive then calculated the notional income figure using the applicable Reserve Bank rate at the time of 4.19 per cent. This produced "**Total B**" of \$13,217.15.

[36] The calculation was then as follows:

(a)	Total A	\$44,246.00
(b)	Total B	\$13,217.15

		\$57,463.15
(c)	Less tax at 21%	\$12,067.26
(d)	Assessed income	\$45,395.89

[37] In option two, the Chief Executive grossed up the current value of all assets held by both Trusts (presumably including the home and holiday home), to produce a figure of approximately \$1,935,000. Then applying the Reserve Bank rate of 4.19 per cent, notional income on those assets would have been \$81,093.50.

[38] The Chief Executive concluded that, on either basis, Mrs Broadbent was disqualified from further assistance because her income for the purposes of s 147, including deprived income under s 147A, was too high.

[39] On appeal to the Authority, the Chief Executive’s decision was upheld.³¹ The Authority found that Mrs Broadbent had not deprived herself of assets within the meaning of the Act but had deprived herself of their associated income:

[28] In this case the appellant and her late husband at various times have deprived themselves of assets and the associated income by:

- (a) transferring their assets and any income associated with those assets to the Family Trust;
- (b) making decisions to place assets acquired after the establishment of the Family Trust in the ownership of the Trust rather than in their personal ownership;
- (c) in the case of the appellant, transferring the funds and assets she inherited from her husband to the Children’s Trust;
- (d) failing to ensure that interest was paid on the loan made to the Family Trust by the Children’s Trust;
- (e) failing to ensure that loans made to other beneficiaries of the Family Trust generated an income; and
- (f) failing to ensure all of the Family Trust would be paid to the appellant.

[40] The Authority took the view that the means assessment criteria for assets and income are separate and not interdependent.³² Because, the Authority considered, the regulations in relation to income make no provision for the exemption of income from validly gifted assets, it was not required to exclude such income.³³

[41] In the High Court, Katz J took a different view. The Judge carefully analysed the concept of “gift” in the common law.³⁴ The applicable principle is, the Judge considered, that the absolute or unconditional gift of an asset to another person necessarily includes all of the rights, benefits and entitlements associated with that asset, including any right or entitlement to future income.³⁵

³¹ Authority decision, above n 6.

³² At [32].

³³ At [33].

³⁴ High Court decision, above n 7, at [39]–[41].

³⁵ At [42].

[42] The Judge then reasoned that the means assessment scheme “must be interpreted consistently with these long-standing principles of the common law”.³⁶ Any gift of assets must be taken to be unconditional. The Judge then found:

[45] It follows that, if the \$27,000 permissible gifting threshold is exceeded, then the Ministry may conduct the assets assessment as if the donor still retained that portion of the gift in excess of \$27,000. Similarly, when conducting the income assessment, the Ministry is entitled to take into account the actual or notional income on the excessive portion of the gift. It may not, however, conduct the income assessment as if there had been no gift at all.

[43] The Judge considered that this orthodox approach was consistent with the overall purpose of the Act, including that where appropriate people should use resources available to them before seeking financial support from the state. The Judge then moved to pt 4 of sch 27 of the Act. Its purpose was to provide specific guidance as to the circumstances in which those in need of residential care are required to pay for it:

[46] ... Part 4 excludes from consideration gifts of up to \$6,000 per annum during the gifting period and gifts of up to \$27,000 per annum in any year prior to that. As the Court of Appeal observed in *B v Chief Executive of the Ministry of Social Development*, people are not allowed to preserve their resources for the use of their families or themselves by gifting *beyond* a permitted limit.^[37] In this case that “permitted limit” has not been exceeded.

Submissions

Chief Executive

[44] The Chief Executive submitted that the High Court’s approach was inconsistent with the purpose of the deprivation rules. Section 147A, it was argued, entitled the Chief Executive to adopt a counterfactual premise for the purpose of his assessment. That is the applicants own assets when they do not, or received income when they did not. There is, it was argued, therefore no reason to conclude that s 147A proceeds on the common law-based assumption that income is taken out of play when its source asset is transferred without deprivation. Rather the Chief Executive submitted that the Authority was correct when it concluded assets and income assessments are separate and unrelated steps in the means assessment.

³⁶ At [44].

³⁷ *B v Chief Executive of the Ministry of Social Development* [2013] NZCA 410, [2013] NZAR 1309 at [17].

[45] Regulation 9B of the Regulations should, it was submitted, be read purposively. It provides, by inference, only limited exceptions to the Chief Executive's broad discretion in s 147A of the Act. The Chief Executive submitted:

... the examples in [reg] 9B are divided into instances of property deprivation and instances of income deprivation. The reference to gifting over \$27,000 in a 12-month period means that gifting of assets under this threshold will not trigger the discretion in s 147A, but this does not mean that income from such assets are exempt from the discretion.

[46] In this case, the value of the Trusts' assets is now much higher than that of the original gifting. And it is entirely within the control of Mrs Broadbent's family. The whole point of s 147A is to allow the Chief Executive to take proper account of that reality.

Mrs Broadbent

[47] For Mrs Broadbent, her son and attorney Stephen Broadbent advanced the following submissions on her behalf.

[48] First, income from validly gifted assets cannot be said to be deprived income of the donor because the natural reading of reg 9B(a) is that it applies both to the property and its related income.

[49] Second, if income from non-deprived property can be counted back, this will provide the Chief Executive with an additional power not intended by s 147A. It effectively makes the first stage of the means assessment (as to assets) irrelevant. The second stage cannot have been designed to produce that result. Third, even if the Chief Executive is right, Mr Broadbent submitted that any ruling ought to apply prospectively only, and exclude Mrs Broadbent's case.

[50] Mr Broadbent made further submissions in support of the reasoning in the High Court, and they do not need to be repeated here.

[51] Finally, Mr Broadbent argued there were natural justice issues in terms of the way the Chief Executive failed to disclose informal policies being applied, and (allegedly) abused his power in various ways. While these arguments were genuinely

advanced in good faith, they are not relevant to the question that must be answered, and so we set them to one side.

Counsel assisting

[52] This Court appointed Ms Aldred to assist the Court by acting as a contradictor for the appeal and to ensure that all relevant arguments were put before the Court. She was directed to confer with Mr Broadbent for that purpose.

[53] Ms Aldred submitted that the interpretation adopted by the High Court is consistent with the scheme of the Act and the purpose and text of the deprivation provisions. The scheme of the Act is that people like Mrs Broadbent who require care are entitled to financial support where they lack the resources to support themselves.

[54] While s 147A contains a wide discretion, it would undermine the policies of the permissible gifting regime if income from gifted assets could be counted back. First, Ms Aldred argued it would greatly add to the administrative complexity of the scheme because all gifts made by applicants over their lifetimes are potentially available for consideration under s 147A. Second, it would render the whole field of retirement planning far less certain for New Zealanders and that ought to be avoided.

[55] Further, Ms Aldred submitted, the text of the relevant provisions is also consistent with the High Court's interpretation. Section 147A focusses on the act of deprivation and its consequences. It is not focussed on the value of the deprivation. Regulation 9B provides instances of deprivation of income or property and reg 9B(a) includes gifts of excessive value as one such instance. Gifts that are not of excessive value are not deprivations, so the discretion in s 147A is, by definition, not triggered in relation to them.

[56] Ms Aldred called in aid the structure of reg 9B. Instances (a)–(c) relate to gifts while instances (d)–(f) relate to waiver of rights to payment, failure to exercise such rights or foregoing an opportunity to obtain income through investment. Tellingly, it was submitted, the example given to explain the ambit of the excessive gifting clause does not differentiate between property and income. All other examples identify the income or property nature of the deprived item, including the other gifting examples

in (b) and (c). This, it was argued, recognised the fact that gifts of property will always have two dimensions, the property and its associated income.

[57] To interpret the deprivation provisions as if they are intended to override the longstanding common law rules about the effect of unconditional dispositions of property, would require clear wording. While s 147A is admittedly broad, the clear words are missing.

[58] Ms Aldred argued that the Chief Executive’s concern was the practical one that Mrs Broadbent could support herself from the income streams of the assets she gifted to the Trusts. But, she submitted, s 147A is not a “trust-busting” provision. It does not suggest that the identity of the donee is relevant to the discretion. On the contrary, the provision applies equally to donees who might be either able or unable to return the income stream to the applicant donor.

Identifying the correct gift

[59] As we have said, it became clear during the course of argument that the Authority had proceeded on the premise that it was the assets formerly owned by Mrs Broadbent and her late husband that were gifted to the Trusts.³⁸ This can be seen in the terms of the Authority’s finding at [28], which focusses on deprivation of the “assets and the associated income [of the Trusts]”. In the High Court, Katz J was not called upon to question that proposition. She accurately recorded that the Trusts had purchased all assets at what appeared to be fair value, and that it was in fact the associated debts that were steadily gifted in the ensuing years.³⁹ But because of the view she formed that income always follows assets anyway,⁴⁰ it was not necessary for her to identify precisely what the gifts in question were because it made no difference.

[60] On the facts as we have them, the position is that the actual property Mrs Broadbent deprived herself of was the principal of the forgiven loans — i.e. the right to repayment of that principal and not the Trust’s assets themselves. If this

³⁸ Authority decision, above n 6, at [28].

³⁹ High Court decision, above n 7, at [2].

⁴⁰ At [42].

is correct, the only deprived income (if it was such) was interest on the loans. The current value of the Trusts' assets and/or their actual income were irrelevant for the purpose of calculating Mrs Broadbent's deprived income.

[61] The parties made further submissions on this question. It is appropriate to address these separately.

Chief Executive

[62] For the Chief Executive it was argued that since the loan was not interest bearing, there was nonetheless still a deprivation of income. First, there was deprivation in relation to the unforgiven (but steadily reducing) portion of the principal. Second, there was deprivation of income derivable from the validly gifted portion of the principal. All of this income could be counted back. Given the difficulty in assessing and applying historical interest rates, which at least in the 1980s would have been high by current standards, the Chief Executive was entitled to take a "holistic view" of the situation. The approach he took, though not strictly in compliance with legal form, produced a result that was workable and fair and so was within the broad discretion available to the Chief Executive under s 147A.

[63] The Chief Executive argued further that, if that was wrong, it was nonetheless open for the Court to reconsider by focussing on the correct act of deprivation and to answer the question on that alternative factual basis. There was, it was argued, no prejudice to Mrs Broadbent in this approach and it was consistent with r 48(5) of the Court of Appeal (Civil) Rules 2005 allowing the Court to exercise its powers "even though the notice of appeal ... may state that only part of a decision is appealed from."

Counsel assisting

[64] Ms Aldred submitted that it was not open to this Court on a third appeal to engage in general error correction or to undertake a new fact-finding exercise. Both steps were required if the Court proceeded to answer the question on a different factual basis to that found or assumed in the forums below.

[65] Furthermore, Ms Aldred argued there will be evidence relevant to these matters that is not before us. For example, she submitted, Mrs Broadbent and her husband occupied the family home and the holiday home rent free for many years after the transfer. Had the issue been advanced in the manner postulated, Mrs Broadbent could have argued that there was no deprivation of income in fact because the interest free loan was off-set by the provision to them of free accommodation. Expert evidence may have been required in that and other respects. Further, Ms Aldred argued there was no clear evidence before the Court that the loans to the Trusts were non-interest bearing. That simply seems to be assumed because of evidence in relation to a different loan from Mrs Broadbent to the Children's Trust.

[66] Ms Aldred argued that it was, all in all, too late for this Court to answer a different question from that posed, in relation to a different set of facts.

Chief Executive's reply

[67] In reply, the Chief Executive submitted, Mrs Broadbent has never suggested that the loans were interest bearing and it would be wrong for this Court to proceed to resolve the question before it on an artificial (and ultimately irrelevant) factual basis.

Our approach

[68] While it does seem to us that the focus in this proceeding should have been the principal (and any acts of deprivation in relation to it), in our view the best practical approach now is to answer the question as posed and then to address the question of how to deal with any factual issues that arise following that.

Analysis

[69] The question is specific. It asks whether the Chief Executive can include any income capable of being derived from validly gifted assets, that is gifted assets valued below the excessive gifting threshold contained in reg 9B(a). In other words, can an asset that Mrs Broadbent disposed of without deprivation nonetheless generate notional income capable of being treated as deprived income under s 147A?

[70] The starting point is that the assets and income assessments are separate and serve different purposes in a means assessment. The assets assessment establishes whether the applicant qualifies to be considered for an additional subsidy.⁴¹ That is presumably because a person with more assets than the maximum allowable value can be expected to sell some or generate sufficient income from them to avoid hardship. The income assessment establishes how much the subsidy should be.⁴² Its focus is on how much the applicant actually lives on. The two assessments are governed by separate provisions (s 146 and pt 2 of sch 27 as to assets; s 147 and pt 3 of sch 27 as to income).

[71] The original deprivation count back provisions were also separate. They were contained in sch 27. Clause 4(c) related to deprived assets and cl 5(e) related to deprived income. But by a 2006 amendment those clauses were brought together as s 147A.⁴³

[72] The discretion in the Chief Executive to count back deprived property and income has always been broad. It closely follows the drafting formula long used in means assessments for other benefit categories.⁴⁴ That is probably why s 147A refers to “income or property” rather than assets and income which is the terminology employed in ss 146, 147 and sch 27.

[73] Section 147A contains its own two-step process. In the first step, the Chief Executive must be satisfied that an arrangement affecting the applicant’s income or property amounts to a deprivation. In the second step, he or she must then decide whether to ignore that arrangement when carrying out the means assessment. Here the Chief Executive has a discretion as to how to proceed. He or she may choose to ignore the deprivation or, alternatively, decide to respect it.

⁴¹ Social Security Act, s 146.

⁴² Section 147.

⁴³ Social Security (Long-term Residential Care) Amendment Act 2006, s 21.

⁴⁴ See for example Social Security Act, ss 74(1)(d). The formula appears to have been first used in Social Security Act 1938, s 62(d) and applied to superannuation, age-related benefits, widows’ pensions, orphans’ benefits, family benefits, invalids’ benefits, miners’ benefits, sickness or incapacity benefits, unemployment benefits, Maori war pensions (sic), and hardship benefits.

[74] Deprivation is therefore a gateway requirement. The sense here is that Mrs Broadbent has dispossessed herself of certain rights to, or taken steps to prevent herself from, directly accessing the benefit of the property or income in question. A common indicator of such deprivation will be an unequal exchange of value in return for the right or benefit given up. This is reflected in reg 9B's focus on gifts, dispositions at undervalue, the forgoing of valuable rights without compensation, and the failure to utilise valuable assets retained in a financially prudent way. Assets sold or exchanged for good value are not deprivations. Section 147A therefore has no application to them.

[75] Deprivation may be direct or indirect. The most obvious example of indirect deprivation is that contained in reg 9B(f) — the failure to invest valuable assets in a manner that generates income. In such circumstances, deprivation of income is an indirect result of that failure.⁴⁵

[76] The Chief Executive's discretion at step two of s 147A (if triggered) is broad, but not unfettered. It is informed and constrained by the relevant purposes of the Act in s 1A(b) and (c)(i) to which we have already made reference. They provide that the focus of the Act is the alleviation of hardship. The means assessment regime for long-term residential care is designed to ensure that only those who cannot afford to pay the maximum contribution for care, receive additional help. Therefore, people should look to any private "resources available to them" to meet the costs of their care before turning to the state for additional taxpayer funded support.⁴⁶ Section 147A is thus a practical tool to assist the Chief Executive in deciding whether an applicant is in genuine hardship.

[77] The key driver at step two therefore is the "availability" to the applicant of alternative resources. To be available in this context means able to be accessed or utilised. Whether an applicant can access alternative resources will be a question of fact.

⁴⁵ See for example *Chhima v Chief Executive Ministry of Social Development* [2007] NZAR 484 (CA).

⁴⁶ Social Security Act, s 1A(c)(i).

[78] The corollary must be that *all* of those in need of long-term care and in genuine hardship are entitled to the extra support in pt 4 of sch 27. The Chief Executive may use his or her discretion to require applicants to put their available resources to work in order to earn a reasonable income, but may not use it to punish applicants for past bad investment decisions or profligacy. The discretion is informed by factual circumstances not moral judgements.

[79] With that background in mind, we agree with Katz J that reg 9B(a) warns asset owners that any gift having the effect of excluding income or property from means testing under ss 146 and 147 will be ineffective if the value of the income or property subject to the arrangement exceeds the permitted annual limit.⁴⁷ We were not provided with background material that might have explained why the figure of \$27,000 per annum was adopted in reg 9B(a), but it is clearly no coincidence that it is the same as the annual gifting limit which applied in estate planning until the abolition of gift duty in 2011.⁴⁸ It is therefore a number familiar to those who had, prior to that date, amassed sufficient property or income to make the adoption of a gifting programme advantageous for estate planning purposes. Its adoption in long-term residential care means testing allowed those who made estate planning arrangements in reliance on that figure, to repurpose them for long-term care planning.

[80] The term “gift” is not defined in the Act or the Regulations, but as Katz J discussed,⁴⁹ it must be taken to carry its ordinary and well understood meaning unless there is a good reason to adopt a different meaning. Both regs 9 and 9B(a) have wide coverage. Gifts may be “real or personal property (for example money)”,⁵⁰ or they may be “property or income”.⁵¹

[81] We acknowledge the Chief Executive’s point that the assets assessment under s 146 is separate from the income assessment under s 147, but that does not necessarily mean he is entitled to a second bite at validly gifted property that has income earning potential. The natural inference from the employment of “gift” in the Regulations is

⁴⁷ High Court decision, above n 7, at [46], citing *B v Chief Executive of Ministry of Social Development*, above n 37, at [17].

⁴⁸ Estate and Gift Duties Act 1968, s 61.

⁴⁹ High Court decision, above n 7, at [39]–[42].

⁵⁰ Social Security (Long-term Residential Care) Regulations, reg 9(1).

⁵¹ Regulation 9B(a).

that if it relates to property capable of earning income, the gift will include its income earning potential. Indeed such potential is usually an important element in the monetary value of the property gifted. The greater its income earning potential, the higher its fair value will be. It seems to us there is no particular reason to set that natural inference aside when applying s 147. On the contrary it is consistent with the intention of the regulations to create a minimum value below which the deprivation gateway cannot apply.

[82] Three points follow. First, where, as here, the property is sold at fair value, there cannot have been a deprivation of its potential income because the income stream has also been sold for fair value as part of the price of the property. Second, annual gifting of portions of the value of the resulting debt (where the purchase price is satisfied by a loan back) at a rate below the excessive gifting threshold would logically also transfer, without deprivation, the income stream associated with that portion of the debt. Third, and as a corollary, income deprivation will occur in relation to the steadily decreasing loan principal if the lender has not claimed interest on that figure. The Chief Executive will have a discretion to calculate that notional reducing income stream and to treat it as income of the applicant for the purpose of s 147. As Katz J found, when he or she calculates Mrs Broadbent's income, the Chief Executive cannot take account of any gift whose annual value was below the excessive gifting threshold.⁵²

[83] Moving then to the second of the two steps in s 147A, if the Chief Executive is satisfied that the applicant has directly or indirectly deprived himself or herself of income such that the discretion in s 147A(2) is triggered, the question for the Chief Executive is whether there are resources available to which the applicant should have recourse. If there are, then the Chief Executive is entitled to ignore the fact (if it is the case) that Mrs Broadbent did not charge interest on the outstanding debt and calculate her current income as if she had.

[84] In this case, a trustee of the Family Trust is empowered to make distributions of trust income to Mrs Broadbent. It does not matter that Mrs Broadbent is merely

⁵² High Court decision, above n 7, at [45].

a discretionary beneficiary. She has a right to request payment from the Family Trust.⁵³ In a closely held family trust with a history of payment to her, trust income must be assumed to be available unless there are particular circumstances that demonstrate it is not.

[85] As we have said, the income calculation (on the facts as we know them thus far) under ss 147 and 147A can only relate to interest on the reducing debt principal, because that is what, if anything, was deprived. But it must be remembered this is a counterfactual calculation — it is presumed income. Assessing availability at the discretionary stage is a more practical task. Here, as we have said, Mrs Broadbent appears to have available to her other resources to provide that presumed income. To that extent, we agree with the Chief Executive that s 147A is designed to look through the thicket of legal arrangements in order to make decisions about the allocation of public funds based on the real economic and social relationships that exist. But there are limits to how far that can go. Even if the trust produces more income than the deprived amount under s 147A, the Chief Executive cannot treat the Trust's income as if it is Mrs Broadbent's income. That would be to fail to comply with the directive of s 147 which is to calculate Mrs Broadbent's *income* in accordance with s 3(1), pt 3 of sch 27, s 147A and reg 9B; and then to decide whether *that* income is so low that further state support is required. It is important therefore to keep the two steps in s 147A separate.

[86] In practical terms that means the Chief Executive is not entitled to gross up the value of the assets of the Family Trust, calculate a notional income from that value, and treat that as if it were Mrs Broadbent's income for the purposes of s 147. This is essentially the second income calculation methodology approved by the Authority in its decision. Nor can the Chief Executive ignore the debt validly forgiven by Mrs Broadbent (and her husband before he passed away) in order to adopt a notional and constant interest rate available to her on that debt. Rather, the Chief Executive must adopt a calculation methodology that recognises Mrs Broadbent's notional income from the debt would have steadily reduced over time and then determine in

⁵³ See *Blackledge v Social Security Commission* HC Auckland CP81/87, 17 February 1992 (transfer of all assets to community trust) in relation to a similar trust arrangement at 26; and *Keenan v Director-General of Social Welfare* HC Auckland AP24-SW00, 19 June 2000 (interest free loan to trust).

light of that, what a reasonable current income figure should be taking into consideration the terms and purposes of the means testing regime.

[87] We acknowledge that there is no single way of doing this. We do not think it appropriate or helpful to attempt at this stage to constrain how it should be worked out. We simply note that, to be consistent with the Act and the Regulations, that is the task the Chief Executive must undertake.

Conclusion

[88] The answer to the question posed at [11] is therefore, no, the Chief Executive cannot include any income capable of being derived from gifted assets valued at less than the excessive gifting threshold.

[89] It is plain nonetheless that the controversy between the Chief Executive and Mrs Broadbent is not finally resolved by that answer. That is because, when the Authority focussed directly on income from trust assets in calculating deprived income, it was in error. It should have focussed instead on the deprived income (if any) of the debt back, that is, any interest free component. We accept Ms Aldred's submission that the Authority probably did not have sufficient evidence before it to resolve whether the \$27,000 "gifts" were deprivations at all (for example, Ms Aldred submitted there could have been no deprivation in substance if the Broadbents enjoyed free accommodation — see above at [65]), and if they were, whether they were deprivations of property or income or a mix of both. It follows that when reconsidering its determination in accordance with the judgment of the High Court, the Authority must also undertake a further factual inquiry into these matters.

[90] Section 12Q of the Act provides that appeals to the High Court are brought by way of case stated on a question of law. Section 12R provides for second appeals to this Court. The procedure adopted is that set out in sub-pt 8 of pt 6 of the Criminal Procedure Act 2011 which relates to appeals on a question of law. This Court must proceed on the basis that the High Court's determination had been made under section 300 of that Act.

[91] Our remedial powers are constrained under this procedure. Section 306 provides that on second appeal, this Court must either allow the appeal or dismiss it, but there is no power to make further orders if the appeal is dismissed.⁵⁴ The appeal must therefore be dismissed. The matter will be remitted to the Authority in accordance with the judgment of the High Court subject to the observations we made at [88] of this judgment.

Result

[92] The appeal is dismissed.

[93] We answer the approved question as follows:

- (a) Whether the Chief Executive can include any income capable of being derived from gifted assets valued below the permitted threshold in a person's means assessment under ss 147 and 147A of the Social Security Act 1964.

No.

[94] There is no order as to costs.

Solicitors:
Crown Law Office, Wellington for Appellant.

⁵⁴ According to s 307 of the Criminal Procedure Act 2011, this Court has the High Court's wider powers under s 300 only if the appeal is allowed.