IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-004703

BETWEEN	MICHAEL OWEN BUIS Plaintiff
AND	THE ACCIDENT COMPENSATION CORPORATION Defendant

Hearing: 4 February 2009

Counsel: R Bedford for Plaintiff
AD Barnett for Defendant

Judgment: 6 March 2009 at 4.30 p.m.

JUDGMENT OF RODNEY HANSEN J

This judgment was delivered by me on 6 March 2009 at 4.30 p.m., pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors: Snedden & Associates, P O Box 105195, Auckland (Mr D Snedden) for Plaintiff
MJ Mercier, ACC, P O Box 242, Wellington for Defendant

[1] This application to review decisions of the Accident Compensation Corporation (ACC) raises a narrow but important issue of interpretation of the Accident Insurance Act 1998. It arises when a beneficiary has received an income-tested social security benefit and subsequently establishes an entitlement to an award under the Act.

[2] The ACC is obliged to refund the excess of the amount of the benefit, having regard to the beneficiary's entitlement to compensation under Act. The question is whether the excess benefit payment is to be calculated by reference to the gross benefit paid or to the net benefit received by the beneficiary after deducting income tax.

Background

[3] Mr Buis was injured in an accident in 1976. He became a paraplegic. In 1980 ACC accepted cover but there was a dispute as to the proper level of compensation which was not resolved until a settlement was reached in 1999. In April 1999 ACC began paying weekly compensation at the newly assessed rate but Mr Buis was not paid arrears until 29 October 1999.

[4] ACC deducted the sum of $101,879.75 from the arrears, being the aggregate sum paid to Mr Buis as an income-tested benefit between 1 October 1986 and 20 April 1999. Of that sum, $86,108.96 had been paid to Mr Buis. The balance of $15,770.79 was tax on the benefit which had been deducted and paid to the Inland Revenue Department (IRD).

[5] The ACC refunded the net benefit to Work and Income New Zealand (WINZ) in October 1999. (WINZ is the division within the Ministry of Social Development (MSD) responsible for the administration of benefits.) The tax component was paid to the IRD on 4 July 2000 and transferred by the IRD to WINZ by a credit to the Crown revenue account. This system of refunding benefits to WINZ was agreed by the ACC, WINZ and the IRD in March 1999. WINZ stipulated that, for administrative reasons, payment of the tax component should be

made via the IRD. This procedure has been followed ever since with all such sums being aggregated and credited to WINZ monthly.

Issues

[6] The plaintiff claims that the decisions of the ACC on 29 October 1999 and 4 July 2000 to deduct the PAYE tax from the sum paid to Mr Buis and to make the payment of $15,770.79 to the IRD, were wrong in law and *ultra vires* the ACC's powers under the Income Tax Act 1994, the Tax Administration Act 1994 and relevant ACC statues.

Relevant legislation

[7] Although the income tax legislation was pleaded as a source of the ACC's power to reimburse WINZ, it is common ground that the power derives from the ACC legislation. The only difference on this issue was whether the payments were made under the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act) or the Accident Insurance Act 1998 (the 1998 Act). Ms Bedford submitted that the applicable provision was s 78(2) of the 1992 Act which provides:

> **78 Payments to and from Department of Social Welfare**
>
> ...
>
> (2) Where any payment is made under Part I of the Social Security Act 1964 to a person who establishes a claim to any treatment, service, rehabilitation, related transport, compensation, grant, or allowance under this Act, if the amount paid in respect of the benefit is in excess of the amount properly payable having regard to the compensation, the Corporation (with the concurrence of the Department of Social Welfare) may treat the amount so paid or so much thereof as it thinks fit as having been paid in respect of that treatment, service, rehabilitation, related transport, compensation, grant, or allowance and may refund to the Department of Social Welfare, so much of the payment as is treated under this subsection as having been paid in respect of compensation, grant, or allowance. Any amount that is treated under this subsection as having been paid in respect of that treatment, service, rehabilitation, related transport, compensation, grant, or allowance shall for all purposes be deemed to have been so paid.
>
> ...

[8] The 1992 Act was repealed and replaced by the 1998 Act which came into force on 1 July 1999. The 1998 Act was itself repealed as from 1 April 2002 and replaced by the Injury Prevention, Rehabilitation, and Compensation Act 2001. Section 373 of the 1998 Act dealt with reimbursement of social security benefits. It provided as follows:

> **373 Relationship with social security benefits: reimbursement by insurers**
>
> (1) This section applies where a person—
>
> (a) Receives a payment of an income-tested benefit under the Social Security Act 1964 in respect of a period; and
>
> (b) Establishes a claim to an entitlement from an insurer (including the manager) in respect of all or part of the same period.
>
> (2) An excess benefit payment is treated as having been paid in respect of that entitlement.
>
> (3) An excess benefit payment is the part of the benefit payment (up to the amount of the entitlement) that is in excess of the amount of benefit properly payable, having regard to the entitlement under this Act.
>
> (4) The insurer must refund the excess benefit payment to the department responsible for the administration of the Social Security Act 1964—
>
> (a) If the insurer knows that this section applies; or
>
> (b) If requested to do so by the department.
>
> (5) For the purposes of this section, an excess benefit payment includes a payment of any part of a married rate of benefit that is paid to the spouse of the person who established the claim to the benefit.

Section 373 has been substantially re-enacted by s 252 of the 2001 Act.

[9] Mr Barnett submitted that, as the relevant decisions of ACC were made after 1 July 1999, s 373 of the 1998 Act applies. Ms Bedford's position is that s 78 of the 1992 Act applies because the policy to which the decisions gave effect was developed under s 78. She also relied on s 429(3) of the 1998 Act which provides that changes in the calculation of compensation payable under the 1992 Act must be made in accordance with the provisions of earlier applicable ACC legislation.

[10] I cannot see how s 429 assists Ms Bedford's case. It provides that a person who was entitled to compensation under the previous legislation shall continue to be paid in accordance with its provisions. It ensures that the earlier Acts will continue to govern the payment of compensation. I do not understand how this could limit the application of s 373 which, on its face, applies to any refund of excess benefit payment made after 1 July 1999 and is not concerned with the way in which compensation has been calculated.

[11] I am satisfied that the impugned decisions were made under the 1998 legislation. But even if s 78 applied, the key question is unaffected. There are significant differences between the two provisions – for example, a discretion to reimburse is replaced by an obligation – but there is no difference in the way the term benefit is used. The question of whether it refers to the gross amount paid or the net after-tax sum received arises under both sections.

Section 373 – overview

[12] By s 373(4) the insurer (in this case ACC) must refund to WINZ the excess benefit payment as defined in subs (3). It is the amount by which the benefit exceeds that which is properly payable, taking into account the sum which a person is entitled to receive by way of weekly compensation. As Mr Buis' weekly compensation entitlement as finally determined in 1999 exceeded his WINZ benefit entitlement, none of the WINZ benefit was "properly payable" and ACC was obliged to refund it under subs (4).

[13] By s 373(2) an excess benefit payment is treated as having been paid in respect of the entitlement to compensation. The insurer is accordingly required to refund to WINZ that portion of compensation which was paid by WINZ by way of an income-tested benefit.

Excess benefit payment

[14] Income-tested benefits are paid under the Social Security Act 1964 – see s 373(1) of the 1998 Act. I was advised that for many years (which included the period during which Mr Buis received the benefit) WINZ paid the benefit specified under the Security Act and "grossed up" the benefit by paying tax at prevailing rates so as to yield the benefit actually paid. So, if the benefit rate was $100 and at prevailing tax rates the gross sum required to yield net income of $100 was $130, the benefit was "grossed up" to $130. WINZ paid $100 to the beneficiary and $30 to the IRD.

[15] This practice was given legislative effect by s 12 of the Social Security (Social Assistance) Amendment Act 2005, which inserted s 83A into the Social Security Act. The explanatory note to the Bill stated, in part:

> The Bill includes a number of amendments to the Social Security Act 1964 to clarify existing legislation to reflect current policy and practice in order to –
>
> ...
>
> - legislate for the long-standing practice of "grossing up" benefit rates for income tax purposes instead of deducting tax from benefits.
>
> ...

[16] Section 18(1) of the amendment Act gave s 83A retrospective effect providing:

> For the purpose of determining the validity of any payment for tax on an income-tested benefit, the principal Act must be read as if at all material times it contained section 83A, as inserted by section 12 of this Act.

[17] Section 83A(2) provides that income tax on an income-tested benefit could be paid to the Commissioner of Inland Revenue calculated in accordance with subs (3) which provided for "grossing up" in the following terms:

> The amount for income tax payable on a source deduction payment is the amount of the tax deduction that would be made, at the rate determined under the appropriate specified provision, if the payment were increased by an amount that, after the tax deduction were made, would result in an amount equal to the source deduction payment.

[18] Section 83A(4) provides that the amount of income tax paid is to be considered a payment of benefit. It reads as follows:

> An amount for income tax paid to the Commissioner under subsection (2) must,—
>
> (a) for the purposes of this Act, be considered to be a payment of a benefit, within the meaning of that term in section 3(1), made on account of, and received by, the person; and
>
> (b) for the purposes of—
>
> (i) the Income Tax Act 1976, be considered to be assessable income of the person; or
>
> (ii) the Income Tax Act 1994, be considered to be gross income of the person; or
>
> (iii) the Income Tax Act 2004, be considered to be income of the person; or
>
> (iv) the Income Tax Act 2007, be considered to be income of the person

[19] Section 83A leaves no room for doubt that references to "benefit" in s 373 are to the gross benefit paid, including any sum paid to the Commissioner of Inland Revenue, and the excess benefit payment is to be calculated accordingly.

Reimbursement under s 373

[20] Ms Bedford maintained, nevertheless, that the tax paid by WINZ to the IRD in respect of Mr Buis' benefit cannot be recovered by WINZ. She relied on the "combined effect" of *Department of Social Welfare v Allan* (1993) 10 CRNZ 307 and ss 71A and 83(5) of the Social Security Act.

[21] *Allan* concerned an appeal against an order for reparation made following a conviction for fraudulently obtaining a domestic purposes benefit. The Department sought to recover the amount of the benefit paid to the offender plus tax deducted and paid to the Inland Revenue. Fraser J upheld the District Court Judge's decision to confine the reparation order to the amount paid to the offender. The nub of his reasoning is in the following passage at p 311:

> The Crown has suffered a loss in that it has paid the amount of the net benefit to the respondent. It has not suffered a loss in respect of the tax deduction payments because although paid by one Department to the other, the amount thereof is still retained by the Crown.

[22] Section 71A applies where a person is qualified to receive an income-tested benefit and also to receive weekly compensation. It provides that the rate of the benefit payable must be reduced by the amount of weekly compensation.

[23] Section 83A(5) provides:

> If, as a result of the review, suspension, cancellation, or termination of an income-tested benefit, the chief executive determines that an amount for tax on the benefit has been paid in accordance with this section to the Commissioner in excess of the amount that is properly payable under this section, the chief executive may not recover the excess amount as a debt due to the Crown within the meaning of section 85A, but may recover that amount by—
>
> (a) making an adjustment to any amount subsequently payable to the Commissioner under subsection (2) in respect of the source deduction payments for that or any other benefit payable to that beneficiary; or
>
> (b) making such other arrangements for its refund as are agreed with the Commissioner.

[24] Ms Bedford submitted that these provisions and the decision in *Allan* mean that WINZ cannot recover the gross benefit. She argued that WINZ can recover only the net benefit from ACC and deal with the IRD to obtain a refund of tax.

[25] This submission cannot survive critical analysis for the reasons put forward by Mr Barnett. The statutory provisions relied on and the decision in *Allan* apply to the recovery of an income-tested benefit by WINZ. They do not apply to the reimbursement of an excess benefit payment under s 373. Sections 71A and 83(5) relate to the recovery of a WINZ benefit by WINZ itself. Section 83(5) stipulates that WINZ cannot recover the tax component from the beneficiary but must look to the Commissioner of Inland Revenue. Section 71A similarly regulates the relationship between WINZ and the beneficiary.

[26] In contrast, s 373 is concerned with the reimbursement of an excess payment which is deemed to be weekly compensation, paid by WINZ and repayable by ACC. The beneficiary has no liability under s 373.

[27] The decision in *Allan* and in *Ioane v Department of Social Welfare* (1994) 11 CRNZ 489, also relied on by Ms Bedford, have no application. They concern the quantification of loss to the Crown arising out of fraudulent offending. As the tax component of the benefit had been retained by the Crown by virtue of a payment from WINZ to the IRD, the loss was the after-tax sum paid by the offender. In the circumstances, there could be no recovery of a greater sum from the person receiving the benefit. Any recovery of the tax component must be a matter for WINZ to resolve with the IRD. Section 83(5) provides accordingly. As Mr Barnett said, it gives statutory effect to the reasoning in *Allan*.

[28] In *Watson v Accident Rehabilitation and Compensation Insurance Corporation* DC TAU 111/98 25 May 1998 Judge MJ Beattie and *D v Commissioner of Inland Revenue* TRA3/2009 14 January 2009 Judge PF Barber, similar arguments to those advanced by Ms Bedford were rejected. In both cases, in reliance on *Allan* and *Ioane*, the claimants resisted payment by the ACC of tax paid on benefits. In *D v Commissioner of Inland Revenue* Judge Barber said, with reference to *Allan* and *Ioane* at 40

> I agree with Mrs Courtney that those cases are distinguishable and have no application in these circumstances. Here, the disputant's original entitlement to a taxable income-tested benefit was replaced with an entitlement to weekly compensation in respect of which she also had a tax liability. In the *Ioane* and *Allan* cases, no ongoing tax liability existed; the offenders were simply required to refund the full amount that they had actually received.

Practical outcomes

[29] The plaintiff's case appears to assume that he has been taxed twice, first by way of the payments made by WINZ to the IRD and, secondly, by ACC, including the tax on the excess payment benefit reimbursed under s 393. Among the grounds for relief pleaded is the following at para 26(n) of the amended statement of claim:

> When the defendant deemed, or treated, any amount of a benefit or excess benefit as having been paid to the plaintiff on account of compensation, it had to treat that sum as it was treated at the time it was originally paid and could not tax it again as though the plaintiff had been paid the gross sum without deduction of PAYE tax.

[30] The benefit was indeed taxed. As earlier noted, the sum of $15,770.79 was paid by WINZ to the IRD. The reimbursement by ACC of the gross benefit (including the tax paid to the IRD) does not, however, result in the tax being paid twice. Mr Buis is paying the same tax on the same income, and no more. But if, as Ms Bedford contended, only the net benefit were refunded by ACC, WINZ would be out of pocket and Mr Buis would receive a windfall benefit.

[31] Section 373 ensures that what had been paid as a benefit by WINZ becomes compensation paid by ACC. Liability for the gross benefit paid by WINZ is transferred to ACC when an entitlement to compensation is established. That is achieved by a mechanism which is tax neutral. The relative positions of the Crown and the taxpayer are unaffected. There is no reason for the plaintiff to think he has been disadvantaged.

[32] Ms Bedford sought to make something of the fact that the tax component of the benefit was paid to the IRD and not to WINZ. I understood her to contend that this was contrary to s 373(4) which requires the insurer to refund the excess benefit payment to WINZ. But, as earlier noted, the affected parties – ACC, WINZ and the IRD – agreed that the tax component should be refunded to the IRD in the first instance and then transferred to WINZ. By this means the full amount of the refund is made to WINZ, albeit in part through the agency of the IRD.

Result

[33] The decisions of the ACC to deduct the PAYE tax from the sum paid to MrBuis and to make the payment of $15,770.79 to the IRD were lawful. The application is accordingly dismissed.

[34] If there is any question as to costs, I will consider memoranda. The ACC should file its memorandum within 28 days, Mr Buis within a further 14 days.