IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-1210

BETWEEN	THE MINISTRY OF SOCIAL DEVELOPMENT Appellant
AND	ROBERT CODRE Respondent

Hearing: 16 November 2009

Counsel: E J Child and T Bromwich for Appellant
P D McKenzie QC and T McGurk for Respondent

Judgment: 17 November 2009

JUDGMENT OF SIMON FRANCE J

The Appeal

[1] Mr Codre lives in rental accommodation. He pays $240 a week. That figure includes electricity and water because his rental property is linked to other units, all of which share a common electricity meter. Thus the landlord pays the electricity and factors it into the rent.

[2] Under the Social Security Act 1964, people living in certain areas of New Zealand, where rentals are higher, may be eligible for an accommodation supplement. The Act provides a formula for calculating this supplement. The benchmark is the applicant's "weekly accommodation costs".

[3] In relation to a tenant, which everyone accepts Mr Codre is, the Act defines accommodation costs this way:

> In relation to premises rented by the person, the total cost, excluding appears, of the premises to the person.

[4] The Ministry does not accept that this definition applies to the full sum of $240 that Mr Codre pays. It asked the landlord what the rent would be excluding electricity, and was told $200. For accommodation supplement purposes, it thereafter treated Mr Codre's accommodation costs as being $200.

[5] Mr Codre challenged this. Initially unsuccessful, his arguments found support before the Social Security Appeal Authority. The Ministry has appealed by way of case stated pursuant to s 12Q(6) of the Social Security Act 1964. Two questions are posed:

> [i] Did the Authority err in law in finding that the meaning of the words "*total costs*" is that the whole amount of the rent paid by the beneficiary for the premises must be considered accommodation costs and must be taken into account in calculating Accommodation Supplement?
>
> [ii] Did the Authority err in law in determining that the Chief Executive did not have any discretion to exclude or disregard a part of a client's total accommodation costs in determining the beneficiary's accommodation costs for the purpose of calculating Accommodation Supplement?

[6] For convenience I set out s 61E of the Act:

> 61E Interpretation
>
> (1) In this section and sections 61EA, 61EB **[[**and 61EC]], of, and in Schedule 18 to, this Act, unless the context otherwise requires,—
>
> **Accommodation costs**, in relation to any person for any given period, means,—
>
> [[(a) in relation to premises rented by the person, the total cost, excluding arrears, of the premises to the person:**]]**
>
> [[(aa) *Repealed.***]]**
>
> (b) In relation to premises that are owned by the person, the total amount of all payments (including essential repairs and maintenance, local authority rates, and house insurance premiums, but excluding any arrears) that—
>
> (i) **[[**Subject to section 68A of this Act, are**]]** required to be made under any mortgage security for money

advanced under that security to acquire the premises, or to repay advances similarly secured; or

(ii) The [[chief executive]] is satisfied are reasonably required to be made:

(c) In relation to a person who is a boarder or lodger in any premises, [[62%]] of the amount paid for board or lodging (excluding any arrears):

Provided that, where a person is a joint tenant or owner in common of any premises with another person or other persons living in the premises, that applicant's accommodation costs shall be the share of the total accommodation costs of the premises that the [[chief executive]] is satisfied the person is paying:

Case stated Question two – a discretion?

[7] I deal with this question first. The Authority said:

> Whilst the Chief Executive has a discretion to grant Accommodation Supplement, he does not have a discretion to determine what constitutes accommodation costs.

[8] The Chief Executive is concerned this implies he has no power to inquire into the validity of a claimed accommodation cost. I do not read it that way, and plainly the Chief Executive can cause inquiry to be made. He may also disallow a claim in whole or part. That this is so is clear from cases such as *Prasad* v *Chief Executive of Ministry of Social Development* CA 119/04, 22 December 2005 and *Stowers* v *Director-General of Social Welfare* High Court, Auckland, AP404/100/00, 27 September 2000.

[9] However, at least as regards s 61E(1)(a), which deals with tenants, as long as the concept of discretion is properly understood, the Authority's statement must be correct. Whilst the Chief Executive can make a decision as to whether, in his opinion, the claim falls within the statutory definition or not, it is not a question of discretion. The Act defines what accommodation costs are for a tenant. It is then a matter of whether a particular sum or claim falls within the definition.

[10] I do consider that the Authority's statement is too broad if applicable to all of s 61E. For example, in relation to homeowner accommodation costs the Act, paragraph (b)(ii), talks of payments which:

> the Chief Executive is satisfied are reasonably required to be made.

[11] That is much more the language of discretion and clearly calls for the exercise of a judgment to a particular set of circumstances.

[12] I do not consider the question should be formally answered because it is both correct and incorrect, but I make these findings:

a) the Chief Executive may inquire into the correctness of an accommodation cost claim, and may reach a decision as to whether something falls within the statutory definition. That decision is subject to the Act's review and appeal routes;

b) as regards the accommodation costs of tenants, the Act defines what those are. The Act does not give the Chief Executive a discretion concerning whether items are or are not the accommodation costs of a tenant.

Case stated Question one – does "*total costs*" include electricity?

(i) The appellant's submissions

[13] Mr Child began by submitting the Authority erred in its focus on "*total costs*" when the correct emphasis was on the fact that the section was about costs arising in relation to the *renting of premises*. The emphasis on premises shows the focus is on the physical location, not on supplementary services such as power and phone.

[14] In the appellant's submission, electricity is a service a third party provides to the premises; it is not part of the premises and not a cost of accommodation. It was

noted that the consistent theme of the statutory language was this physical connection – premises, place, accommodation, occupies. In Mr Child's words:

> The implied distinction is between:
>
> - possessing the physical thing (the premises); and
> - using services that are supplied to it (in this case, electricity).

[15] Looking at the terms of s 61E, the Chief Executive takes strength from the wording of the tests for homeowners and boarders. As regards homeowners, the focus is on payments made in relation to monies borrowed to acquire the house; as regards boarders there is a 38% fixed deduction clearly designed to exclude the living expenses component of board. Both these provisions are said to highlight what the section is aimed at.

[16] The appellant accepts that its interpretation leaves the word "total" in paragraph (a) as having no meaning or effect. However, the word's use is explained as being to emphasise the contrast with paragraph (c) which allows only 62% of costs to be taken into account.

[17] A topic in issue is the treatment of what may be like situations. For example, no apportionment is made by the Chief Executive in relation to rentals that include the use of a garage, or furnishings. Mr Child submits these examples are different in type as being things that are linked to the property and come with it, rather than being an extra service provided to the property.

[18] Finally, the Chief Executive submits that unfairness is created if the present situation remains in that Mr Codre is better off than most other beneficiaries who are not able to factor in electricity into the accommodation cost figure which is then used to assess the level of the accommodation benefit.

Decision

[19] I did not take oral submissions from the respondent. Mr McKenzie QC's written submissions were full and in my view compelling. They inform the Court's decision and will not be separately discussed.

(i) What the legislation says

[20] I begin by focussing on s 61E. It may be that the legislature, in the interests of settling upon a simple comprehensive definition, did not consider this type of anomaly. Or perhaps it considered the potential variations so many that it was preferable to fix upon a settled rule. I do not know, but the simple fact is that Mr Codre's situation plainly comes within the wording of s 61E(1)(a).

[21] The "*total cost*" of the premises to Mr Codre are $240. Further, this is not a figure that in any sense reflects optional extras. One cannot rent these premises other than on this basis. It is not possible to separately assess electricity usage. There is no choice for the tenant as to electricity provider; nor is there any evidence that it is possible to cut off the electricity to just Mr Codre's flat, or to any of the many premises that contribute to the usage figure.

[22] Mr Child accepts that the appellant's interpretation gives no effect at all to the statutory wording "total". However, the proposition that it is used just to emphasise a contrast with paragraph (c) is not convincing. The interpretation that the Chief Executive contends for does not in fact produce that contrast at all; rather, by reading down "total" to exclude electricity it would bring paragraph (a) into line with (c). The percentage figure will be different, but the underlying concept would be the same.

[23] The more obvious statutory interpretation reading produces the contrast which the appellant submits the use of "total" is designed to achieve. Read in the obvious way, with boarders an adjustment to the rent is made to exclude living costs but with tenants, the total cost of their rent is included.

[24] It is also notable that paragraph (b), the home owners rule, is equally precise with its inclusions and exclusions. Concerning homeowners, it is made plain:

a) essential repairs and maintenance, local authority rates and house insurance premiums are included; and

b) mortgage payments are included if they relate to borrowings used to acquire the house.

[25] Further, because it is recognised that there may be a variety of payments and situations needing individualised assessment, the Chief Executive is expressly given a discretion concerning payments that he:

> is satisfied are reasonably required to be made.

[26] In summary, to accept the appellant's interpretation one has to first ignore that paragraph (c) specifically provides for this type of deduction whereas paragraph (a) does not, then ignore that paragraph (b) both sets out inclusions and exclusions and provides the Chief Executive with a discretion concerning any other payments that need consideration whereas paragraph (b) does not, and finally ignore that paragraph (a) specifically says the accommodation costs of the tenant are the "*total cost*" of renting the premises.

[27] Whereas, to accept the respondent's position, as the Authority did, all one has to do is apply the section as it is written.

(ii) Policy reasons for reading paragraph (a) down

[28] The only concern I can see with the outcome reached by the Authority is that it might be perceived to open the door to rents including many optional extras. That is, of course, assuming landlords would be at all interested in facilitating such matters by accepting responsibility for payment of utilities and other services.

[29] That unlikelihood aside, there is little difficulty in limiting the case and its effect. It is important, as I see it, that the electricity cost is a genuine cost of rental.

It is not an optional extra, and this lack of choice must be significant. Mr Child (to be fair, only when pressed in oral argument) suggested situations of concern could be where Sky Television or broadband were included in the rent. However, it is not to distort the language of the section to say those are not a cost of renting the place, but an optional extra which the parties have chosen to add on to the rental package. I see no difficulty in excluding those.

[30] However, if one imagined a building wired for Sky Television which provided the link to every unit regardless of whether you wanted it or not, then in my view it would come within the definition and rightly so. If one cannot discontinue the service because it is in-built, then it is a cost to the tenant of renting the premises.

[31] The fairness concerns of the appellant are far from compelling. There appear to be many other situations which are allowed to pass without any effort by the Chief Executive to adjust or apportion. Furnished/non-furnished is the most compelling example. It is common experience that rents will be higher if the place is furnished. Furnishings (bed, chest of drawers, chairs, sofas, whiteware) are surely as much a living expense as electricity, and one imagines significantly affect the cost of rental accommodation. Yet no adjustment is made.

[32] Likewise, the Authority observed it had in another judgment held that separately rented garages were not able to be included as accommodation costs, yet garages that are included within the rent do not lead to apportionment.

[33] None of this is to criticise the appellant's approach on those matters. Rather, it is to observe that there seems little by way of policy imperative to encourage a reading of the legislation other than its plain reading. There is no great precedent effect to Mr Codre's case, and other situations of benefit or windfall are arguably much more common than this one.

Conclusion

[34] I am of the view the section should be applied as it reads. Where the rental for the premises includes electricity because there is no separate meter able to

individualise usage, then the total rent is the total accommodation costs, and apportionment should not occur.

[35] This is not to query the capacity to assess whether something is an accommodation cost. Nor to say that every item the parties choose to include as rent will necessarily be covered. Without needing or wishing to lay down rules in relation to situations not in front of the Court, I suggest choice and common renting practices will be useful initial touchstones. Here, electricity is not usually within accommodation costs, but there is no choice concerning these premises and no capacity other than to include a factor for electricity in the rent.

[36] Concerning the formal questions:

a) I answer the first question – No;

b) I decline to answer the second question but make the observations set out in paragraphs [7] to [12] above.

[37] The respondent is entitled to costs. Memoranda may be filed if there is no agreement.

Simon France J

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