

IN THE MATTER of a Civil Appeal

BETWEEN **ANTHONY ARBUTHNOT**

Appellant

AND

**CHIEF EXECUTIVE OF THE
DEPARTMENT OF WORK AND INCOME**

Respondent

Hearing 29 May 2007

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel P D McKenzie and T McGurk for Appellant
U Jagose and G A J Stanish for Respondent

CIVIL APPEAL

10.02am

McKenzie May it please the Court I appear with my friend Mr McGurk for the appellant.

Elias CJ Thank you Mr McKenzie, Mr McGurk.

Jagose May it please Your Honours Miss Jagose for the respondent. I appear with Mr Stanish.

Elias CJ Thank you Miss Jagose, Mr Stanish. Yes Mr McKenzie.

McKenzie I seek leave of the Court to provide a short points in reply which I will use to simply address the principal points initially sent to Your Honours that may be helpful. There's one preliminary matter which I need to raise with Your Honours. I just discovered this morning from my office that it's possible that the copy of the submissions sent to Your Honours was one which my office had not finally corrected and there were some hand-written corrections on it. In fact the corrections were made by the office but it appears that the copy that was photocopied may have, I'm not sure, but it may have not made the corrections which are noted in handwriting.

Elias CJ I don't have any hand-written

Blanchard J These are the ones on page 24?

McKenzie Yes.

Elias CJ Oh those, yes.

McKenzie I do apologise for that. They were in fact corrected but it appears the wrong earlier copy was photocopied. I can provide to the Court if it is of assistance a fresh copy.

Elias CJ But it's exactly the same with those alterations is it?

McKenzie Yes.

Elias CJ Don't bother Mr McKenzie, thank you though.

McKenzie Thank you. If I could take Your Honours then just briefly through the points of reply. On the first page, and perhaps I don't need to go through those in detail, simply for the assistance of the Court I have endeavoured to summarise the principal points of issue between the appellant and the respondent and I could probably then move straight to deal with each of those points in turn at the middle of page 2. And the first submission if I make my way of reply there is that the respondent gives insufficient weight to s.10A(9). Now in making that submission I am addressing the first of the grounds 1(a) that I've mentioned on the first page, that is that the respondent that the decision under appeal to the authorities, the Chief Executive's decision, and that the provisions for review by the BRC do no more than add a step of internal review. There is no decision binding on the Chief Executive made by the BRC and it exercises no judicial function and I give some references there to my friend's submission. The respondent says that the decision appealed against is not the decision of the BRC. It's the decision emphasised of the Chief Executive. So I come

to para.2 and responding to that which is really a foundational submission on the part of the respondent, that the respondent does not refer to and fails to recognise the weight to be given to s.10A(9) which requires the BRC to give reasons for its decision and advise the applicant that the applicant has a right of appeal against the decision. And I emphasise those words to the authority and my submission is that it is wrong to suggest that the BRC does not make a decision in terms of the statutory provision. Your Honours may wish to look at that provision which is s.10A at tab 1 of the bundle on the second page where ss.9 provides, well I could perhaps go back to ss.8, because it's so significant throughout both party submissions. 'As soon as practicable after receiving its application for review the Review Committee shall review the decision' and then ss.9m - Your Honours will see the two subsections there, and the reference in ss.9 to a decision part of the Review Committee. In para.3 the appeal to the authority is as the respondent points out an appeal against any decision or determination of the Chief Executive that has been confirmed or varied by a Benefit Review Committee, and that's accepted of course the words of the Statute. What the respondent fails to recognise however is that it is not the original decision of the Chief Executive which is the subject of the appeal, but the decision as confirmed or varied by the BRC. Now the respondent doesn't suggest otherwise, but the implication in my submission from the reading of the respondent's submissions is that there has been a merging there of the original and the varied decision.

- Elias CJ Well the BRC decision supersedes the Chief Executive's decision.
- McKenzie Exactly Your Honour, yes, that's really my submission here that it supersedes and becomes then the decision of the Chief Executive and what's important in that respect is that the revocation aspect of a decision also has that same effect, so to return to my submission midway through para.3 'in effect the decision of the BRC replaces the decision of the Chief Executive insofar as the Chief Executive's decision is varied or revoked'. It is the decision as confirmed or varied that becomes the Chief Executive's decision and it's my submission that a decision which is revoked ceases to be the Chief Executive's decision and there is no right of appeal then on the part of the Chief Executive, hence no right of appeal on the Chief Executive's part.
- McGrath J There's no right of appeal against the Chief Executive's decision because there's simply no provision in the Act for a right of appeal.
- McKenzie That's right.
- McGrath J It doesn't really turn on this particular subtlety does it of whether or not it's the decision as revoked or not, it's a decision being appealed against?

- McKenzie It may not turn on that Your Honour but the effect is the same, namely that because the BRC's decision in effect supersedes the decision of the Chief Executive, the revoked part, if you can call it of that decision no longer forms part of the Chief Executive's decision.
- Blanchard J But surely the reason why there is no appeal right for the Chief Executive is precisely because the BRC's decision effectively becomes his decision and he can't appeal against his own decision.
- McKenzie Yes I would agree with that Your Honour and I would submit as it comes up later in the submission, that the Court of Appeal was with respect in error in bringing in s.81 at that point, giving that as the reason for the omission of the appeal right. Then coming to para.4, the BRC has real decision-making power. This goes as far as the power to revoke the Chief Executive's decision – that is negate that decision. That power must necessarily be binding on the Chief Executive. A decision issued by the BRC by virtue of its exercise of decision making power under s.10A(8) becomes the decision of the Chief Executive. It's wrong for the respondent to suggest in para.80.2, the respondent's submissions, that the BRC does not exercise judicial functions that bind the Chief Executive. It's my submission that it is a necessary outcome of the legislative scheme in s.10A that the BRC after judicial consideration must hear both parties, can overturn a decision of the Chief Executive and substitute another decision for the original decision. That is an extensive power and in my submission it would be inadequate not to view that as embodying a decision-making power.
- Tipping J Well if it didn't bind the Chief Executive it would have no purpose, it would have no point.
- McKenzie Exactly Your Honour, yes.
- Tipping J You could immediately turn around and say well I'm not going to bother about that, sorry, here we are again.
- McKenzie We're going through a futile process. My friends suggest that that is simply because the review function is a pre-condition to getting in before the appeal authority, but in my submission that really devalues the statutory process here. It is more than simply a mechanical pre-condition. There is a real hearing, there is a real determination and it has significant effects. And in para.5 I refer to a Bill of Rights case that Your Honours will have seen – *Daniels and Chief Executive* as supporting that view, given the view expressed there that the BRC was a tribunal with the power to make a determination about rights, obligations or interests.

McGrath J When you refer to a real hearing before the BRC Mr McKenzie, that might be important the nature of what the statute provides as opposed to what Departmental policy provides in relation to the form of the BRC and at some stage will you be taking us to the statutory provisions in that regard?

McKenzie Yes well perhaps I should do that now.

McGrath J That would be helpful.

McKenzie Your Honour will have seen the Departmental Resource Kit as it's called which Your Honour is quite fair in recognising sets out a detailed process of obtaining documents. The process in the section is much more circumscribed but I would submit to Your Honour that what we have in the section looking at page 2 of tab 1 is provisions for the appointment of this Body. It has a secretarial and administrative service so that it is a Body that exercises functions that require that. It has a quorum. There is a degree

McGrath J Are you reading from page 2 of your

McKenzie No, sorry Your Honour, from page 2 of tab 1 of the bundle of authorities from the section.

McGrath J Yes, will you just tell us the subsection of s.10A we're looking at.

McKenzie S.10A, ss.5, the secretarial administrative services provided; ss.6 the quorum; ss.7 indicates the intention that there be independence and that is reinforced by the Departmental Resource Kit.

McGrath J Yes, yes.

McKenzie And ss.8 really is the key to Your Honour's question. This states the review function that the Review Committee is to review the decision and may in accordance with this Act confirm, vary or revoke the decision and then it's to give notice of its decision to the beneficiary.

McGrath J There's really nothing in what you've pointed to so far that indicates sort of the formal requirements of natural justice are being imposed in the statute on the process. It looks so far to be a process that could be described as administrative albeit subject to certain obligations of fairness and perhaps the Bill of Rights Act. Is that fair? I mean the trappings of natural justice really come from the policy statement.

McKenzie I would submit that the policy statement indicates what's implicit in the statute

- McGrath J I understand that.
- McKenzie That in conducting a review which is what's required of the BRC, it is to examine all of the information that's relevant; provide an opportunity to the beneficiary to be heard if the beneficiary is the party that has sought the review and then there is the power in my submission, extensive power, which corresponds to the language used in relation to the appeal authority's power of decision-making. So that in my submission although the statement in the statute is spare it carries with it, and clearly the Department itself appears to recognise the clear implication that in carrying out this review function, there is to be an opportunity for the beneficiary to be heard.
- McGrath J Well I perhaps could accept that Mr McKenzie, but it's hard to read in a sort of full-blown tribunal process. There might certainly be a need to hear the person who's seeking review of the decision, that might be implicit, but when we come to matters such as initial issue estoppel it is as you say a spare process of the statute prescribed is it not?
- McKenzie In my submission it is a statutory body or committee, one could call it that, appointed under statute to carry out review functions and that certainly the *Daniels* case considered that its functions were such as to give rise to natural justice implications under the Bill of Rights and to be a tribunal for that purpose. It submitted that it would be very surprising to find that if the consequence were to follow that where the statute itself expressly confers on the beneficiary the power to seek a review and the powers that are conferred on this Body are quite extensive, it's not a recommendatory part of the Chief Executive, that this Body can in fact confirm or revoke or vary a decision so this decision supersedes that of the Chief Executive. Given that extensive function it is my submission that it follows.
- McGrath J We speak of the Chief Executive because that's the statutory formulation, but the reality of this process is that before decisions of a single official that the Department concerned can go to the Appeal Authority, there is a process that involves two other officials of the Department plus a community representative appointed by the Minister, that must scrutinise the decision according to whatever process the Act requires or internal policy requires. It seems to me that part of this is to make sure that tough decisions at first instance of the Department don't go through to the Appeal Authority until others not involved within the Department and the community representative have had a look at them to make sure they're correct. Would that be one way of looking at it?
- McKenzie It may be one way of looking at it but in my opinion it doesn't give fair weight to what the Royal Commission had to say in advocating in terms of New Zealand's obligations under the ILO that there be established a

process for what beneficiaries could seek and apply for review. It's more in my submission that an internal review where the Chief Executive seeks a peer review if you could call it from another group to second guess or check that his officers have properly carried out their function. It goes much beyond that in my submission.

McGrath J Right, well you'll no doubt refer us to those matters in the Royal Commission Report in due course.

McKenzie Yes.

Tipping J Mr McKenzie before you move on could I just ask you whether you agree with this that if as you have indicated the decision of the BRC becomes in effect as if it were the decision of the Chief Executive, if there is still an extant decision there, but whether the Chief Executive is bound surely is closely related to whether the Chief Executive is bound by his own decisions and what power of review he has of his own decisions

McKenzie I would certainly

Tipping J And that takes one into the argument about s.81 which

McKenzie I would certainly accept that Your Honour that s.81 is the section on the face of it a very wide import, but the submission that I do make is that where there is this review process provided for by the statute, then s.81 must be read in the context having regard to giving fair and proper effect to that process so that unless there is a change of circumstances is a submission that's made later on, is that then the Chief Executive ought not to revisit a decision under 81.

Tipping J Yes, you're saying that s.81 doesn't give the Chief Executive the power to just change his or her mind?

McKenzie Yes, yes.

Tipping J Simplicity.

McKenzie Yes, it would simply subvert any need for a review if the Chief Executive could do that.

Tipping J Yes, it would make the whole process somewhat facile if the Chief Executive could come along apropos of a BRC Committee and say this is now deemed to be my decision but actually I'm now changing my mind without any overt circumstances justifying that.

McKenzie Yes.

Tipping J That's the argument I take it?

McKenzie That's exactly it Sir.

Blanchard J What would be the situation if the decision had been made by the Chief Executive, one of those rare cases provided for by the statute where it doesn't go to the BRC? Your argument presumably would be that he couldn't make a determination and then use s.81 to revisit it in the absence of some fraud or different factual situation having arisen?

McKenzie As there's no right of review in that case, Your Honour's observations in that event would apply to decisions of the Appeal Authority because that's the point at which the Chief Executive's decisions would be reviewed.

Tipping J I think my brother is inviting a slightly different approach from that and I don't want to intervene, but I don't think that's my brother's question at all. He's saying that in the same way as I suggested to you that a deemed decision of the Chief Executive he can't revisit under s.81, so an original decision of the Chief Executive he can't revisit under s.81, absent some legitimate reason.

McKenzie Well yes I think that that

Tipping J It's nothing to do with the Appeal Authority that point?

McKenzie No I brought in the Appeal Authority because that's the next step in the process, but no I would agree that if during the intervening period the beneficiary may lodge an appeal to the Appeal Authority but there's a generous period of time to do that and within that period in my submission

Tipping J But it's not a situation where the beneficiary would be wanting to appeal. The Chief Executive has made a decision favourable to the beneficiary.

McKenzie Yes.

Tipping J The point is he can hardly revisit that at a whim.

Blanchard J Can I just add something to that? Presumably if some Departmental official has made a decision favourable to a beneficiary and then the Department thinks oh wait a minute that doesn't seem right, the Chief Executive could use s.81 to review the position, and if there was then substituted pursuant to that review a decision unfavourable to the beneficiary then the beneficiary could start on the process of going to the BRC and then through to the Appeal Body, so s.81 would operate it would seem to me at that stage, but if there's been a decision unfavourable to the

beneficiary to start with and the beneficiary has then elected to take the matter either to the BRC, which would be the most common route, or the statute seems to permit direct decision-making of the Director-General, Chief Executive, then if either the BRC or the Chief Executive has made a decision the question is whether s.81 could be used at that stage, there being no element of fraud and there being no change of fact situation.

McKenzie No in my submission not Your Honour. If there was no fraud concealment, if the facts, the circumstances have not changed then the Chief Executive could be in my view judicially reviewed for seeking at that point of time to substitute another decision. I believe that Her Honour put the matter appropriately in her judgment.

10.27am Video conferencing ringing.

Elias CJ Very pleasant.

Tipping J You've struck a cord Mr McKenzie.

McKenzie It's not my phone.

Elias CJ It's someone close to a microphone isn't it.

Blanchard J I'm just wondering whether it's coming over the system.

Jagose My screen has woken up to say that there is a phone call incoming. Let's hope it's the system of the building not mine.

Elias CJ Right it's gone, we'll get a voice mail now.

Tipping J Technology.

10.28am Video conferencing ringing again.

Elias CJ Someone's very keen to get hold of you I think. Can you Madam Registrar fix that? Yes kill it. Thanks. They are in fact working on the system today so let's hope they don't test all the screens in turn.

McKenzie Yes I was referring if Your Honour pleases after we seemed to have a higher call to the judgment of Her Honour in the High Court, that's at tab 4 of the case on appeal, and just the way Her Honour put this matter at para.32.

Elias CJ Sorry did you say tab 4.

McKenzie Tab 4, para.32. If new information were to come to hand the situation there what should happen, and Her Honour was of the view the Chief Executive could no doubt establish a new over-payment on the basis of that new information under s.81 of the Act and seek to recover the additional sum under s.86. In that event Mr Arbuthnot would be entitled to another review by a BRC and a fresh right of appeal cannot do this in the context of the present review and appeal process.

Blanchard J But your argument is that the Chief Executive can't just take a different view of the same information

McKenzie Yes

Blanchard J Having either himself or via the BRC earlier made a decision.

McKenzie Yes.

Anderson J Suppose the new information arose while an appeal was extant, would the CEO then be obliged to have recourse to s.81 rather than raising the new information issues on the appeal?

McKenzie The present case has certain particular aspects there that of course are an issue here, but it would be my submission that in the ordinary case if the beneficiary has appealed, if there's new information, the proper course for the Chief Executive would be to present that in the context of the appeal process.

Elias CJ But Mr McKenzie I

McKenzie But that is not the case in my submission here.

Elias CJ Well I understood that that really is almost the crunch issue here, because I would have thought on your argument he can't present additional evidence supportive of his determination on the appeal, because isn't that exactly what's in issue here if the determination is that the accommodation allowance, I'm sorry, I've sort of lost my train of thought about it, but I thought the very issue that you were raising is that on the accommodation allowance he couldn't raise the relationship in the nature of a marriage.

McKenzie That's certainly my submission Your Honour that in relation to that issue the BRC's revoked the Chief Executive's decision

Tipping J But there's no suggestion of new evidence or new material is there? I mean we're not facing that, we're just simply being asked whether he can ask the Appeal Authority apropos of the accommodation supplement to take a different view of the relationship than did the BRC.

McKenzie In this case the Chief Executive sought to introduce new evidence before the Appeal Authority and that was challenged by the beneficiary.

Tipping J New evidence?

McKenzie Yes.

Tipping J Further evidence?

McGrath J Does this further evidence relate to the period that was covered by the BRC in its decision or does it relate to a later period?

McKenzie It relates to a period before the BRC decision.

Tipping J Yes.

McKenzie There were facts, but they became available to the Chief Executive subsequently.

Tipping J Yes, but does it relate to the same period during which the cohabitation is supposed to have taken place, not the timing of the new evidence, but does it relate to that period that was before the BRC.

McKenzie My understanding is that it would relate to that particular period.

Tipping J Same period?

McKenzie Yes.

Tipping J Well this is a new twist.

Elias CJ I really would quite like to explore it conceptually without getting too hung up over whether it's new evidence or not.

Anderson J Just as it's a hypothetical proposition to test the principle.

Tipping J Well if it is truly new evidence that makes a huge difference.

Elias CJ I don't know if it does. Because the fact is isn't it Mr McKenzie, we've got two decisions here. We've got a decision on the accommodation allowance and a decision on the other allowance and what you have to do is demonstrate why in the appeal a question of fact relevant to both can't be further developed.

- McKenzie Yes, my friend Mr McGurk has indicated to me with his familiarity with the facts before that the evidence that the Chief Executive sought to introduce, or the matters that the Chief Executive sought to raise were not in the nature of new evidence, so it was revisiting purely an earlier decision.
- Elias CJ Well but an earlier decision in another decision - an earlier determination in another decision. I think the concepts are separate. If there hadn't been a parallel determination of the other allowance what would be your point on appeal? You wouldn't would you be seeking to argue that the Chief Executive was limited to the evidence put forward in the review process on a re-hearing?
- McKenzie I would like to go that far but I don't need to go that far Your Honour. There are two High Court decisions that were put in issue. The *Lawrence* case was one of them, and in those cases the Chief Executive did seek to introduce further evidence and indeed did so and the Appeal Authority allowed that evidence and determined the case then on the basis of further material that was put before the Appeal Authority. I would like to go as far in this Court as arguing that the approach taken in those cases was wrong and that the proper course for the Appeal Authority to have followed in those cases was to have referred those issues back to the Chief Executive for further consideration which could take place in that case under s.81 following the Appeal Authority decision, and the appeal rights would then have been available to the beneficiary in relation to those newly introduced issues.
- Blanchard J Well what you really seem to be saying is that if there is genuinely some new evidence s.81 can be brought into play. Presumably the Chief Executive could do that himself without waiting for the Appeal Authority.
- McKenzie Yes those cases which indicate that he could introduce that evidence before the Appeal Authority might lead one to suggest if they were good authority that that would be the course for the Chief Executive to follow.
- Blanchard J But he wouldn't even need to do it before the Appeal Authority. He could just say well never mind the fact that there is an appeal going on, it's going on on the wrong facts, I'm invoking s.81 and we go back to the beginning.
- McKenzie If those cases are wrongly decided I agree.
- Blanchard J I'm not suggesting that they're necessarily wrongly decided, all I'm trying to get across is that it seems to me that the Chief Executive doesn't have to wait for the Appeal Authority, he can invoke s.81 and do his own review under s.81 if there is new evidence.

- McKenzie If there's new material, yes, I think I would need to accept that. Good practice might indicate that if the matter was before the Authority, and it was permissible to introduce it there, that may be the place to do it.
- Tipping J Well it's consistent with what you've just submitted, that there should be a reference back so there may as well be a pre-emptive strike.
- McKenzie No, my argument is that that's my preferred position Your Honour. I don't need to go that far, but if
- Elias CJ I'm not sure that you don't need to go that far and I'd like you to explain why you say you don't need to go that far. Yes I would like to know.
- McKenzie I agree with Your Honours that consistency in approach would lead to
- Elias CJ I'm sorry, the other point that I'm concerned about is how realistic it is to put people through these hoops if they are on track and the Appeal process is capable of rectifying it. It looks a little algebraic to approach it in this way, to say you should actually go back and get the Chief Executive to look at it.
- Blanchard J Well I wasn't suggesting that the Appeal Authority is necessarily then precluded from determining it. All I'm trying to get to the bottom of is when s.81 operates and it seems to me that once there's new evidence then s.81 comes into play. That's one of its reasons for existence, so that theoretically at least the Chief Executive could say well I'm now going to do my own s.81 review. He might well, and I assume it's permissible, say well I'll leave it to the Appeal Authority because it's there. And one wouldn't assuming the statute permit the Appeal Authority to look at the new evidence, one wouldn't say that that was an inappropriate course by the Chief Executive.
- Elias CJ Mr McKenzie would say it should always go back to the Chief Executive.
- McKenzie Yes that would be my preferred position and that if it did get to the Appeal Authority it should be referred back to the Chief Executive. Why I say I don't
- Tipping J Surely we can't lay down any rigid rules about this. It would depend entirely on the character of the new evidence. I mean it doesn't have to work. Surely you're not asking us to say it has to. When there's a sniff of new evidence it has to go back to the beginning.
- Blanchard J A Body with a power to re-hear a matter surely has an ability to admit new evidence if it is appropriate to do so and to re-hear on the basis of the original evidence plus the new evidence.

McKenzie Yes I would accept that Your Honour and that course would mean that there are proper appeal rights then available to the beneficiary from the decision made by the Chief Executive under s.81. We have then the difficulty that Her Honour the President raised and that is what Your Honour called the algebraic difficulty which I expect my friends are going to emphasise and that is if you've got an appeal to the Appeal Authority extant, then why not short circuit the process by dealing with it there and that is a view that on pragmatic reasons in my submission rather than on the strict legalities here could be urged.

McGrath J It's not just pragmatic reasons Mr McKenzie is it, there is a right of re-hearing and the Body as I understand the statutory provision has not only the ability to receive new evidence but doesn't it have an obligation if it thinks that new evidence might have a bearing on the matter? What I'm suggesting to you is that the scheme of the statute contemplates that in such situations in order to avoid all of the delays about (inaudible) groups the matter will go on to an Appeal Authority which is a plainly independent Body unlike arguably the BRC is for a full appellate re-hearing which can if necessary re-hear the whole of the evidence, it can certainly receive new evidence.

McKenzie Its proper course in that circumstance may be having investigated the matter which it has power to do, to refer those issues back to the Chief Executive for further determination so that the review and appeal rights can be exercised.

McGrath J But why should that be if as Justice Blanchard put it to you there is an appeal by way of re-hearing in the matter? Doesn't that suggest that Parliament contemplated that the Appellate Authority would and should make its own decision on the evidence before it which may differ in some respects from what was before the lower committee and the original Departmental Officer?

McKenzie Yes, the re-hearing there would though have the effect of excluding in that case in view of this process the right of review that a beneficiary would otherwise have at the BRC stage were the matter referred back

McGrath J It's not a matter of excluding that anymore than if the High Court on appeal has a general right of appeal and is to re-hear something to say that somehow the District Court hearing has been excluded if it goes on and exercises its powers and decides the matter and I'm suggesting to you that the statute contemplates that once a matter gets to the Appeal Authority it should be making the decisions in this matter, receiving further evidence as necessary according to proper principles that is appropriate in the case, but that it should be deciding matters rather than referring them back

which to my mind is really just delaying matters that should be the subject of the speediest possible determination than the interests of those who you represent.

McKenzie I would submit not in the circumstances of this case and perhaps I should come back to Her Honour The President's earlier question which is if the *Lawrence* and *Scrimgeour* cases are correct, and they would certainly support the view that Your Honour has expressed, if those cases are considered to be correct and the Appeal Authority can receive further evidence and re-hear the matter before it, the question was well why does that not apply in the present circumstances. Here I would support Her Honour in the High Court, Justice Goddard, in distinguishing those cases from the present facts.

McGrath J Just looking at s.12M, do you agree that that sets out the nature of the hearing that the Appeal Authority undertakes, stating that every appeal is to be by way of a re-hearing?

McKenzie Yes.

McGrath J It then goes on to say that the evidence taken before or received by the Chief Executive bearing on the subject can be the basis for dealing with it, or further evidence can be. Yes, I understand.

McKenzie Yes, the provision there is directed that every appeal, and the issue becomes there what is the matter before the Appeal Authority in relation to which it is entitled to re-hear.

McGrath J I appreciate as an argument that on one view that the matter is the actual application for the accommodation supplement and the other the various factual determinations that would have been made in reaching that particular decision or determination of what it is, but whether or not that's so, we're dealing at the moment with the question of whether there should be in general a reference back and I am suggesting to you that it's in the nature of appeal by way of re-hearing that Parliament's charged the Body concerned with getting on and deciding the matter according to the evidence before it which may be supplemented in appropriate cases. There is an argument here as to whether it would be appropriate to allow the supplementation of evidence that goes to the relationship in the nature of marriage which is quite independent, but whatever the scheme of the Act is that the Appeal Authority should be deciding this matter, not referring it back in general.

McKenzie It has power to refer it back clearly. Power to re-hear and power to refer back, but

- McGrath J Yes.
- McKenzie And I'm not looking at the facts of this case now, I'm considering the *Lawrence* and *Scrimgeour* situation where the whole matter is before the Appeal Authority. In that case clearly the Appeal Authority has it could be argued in terms of ss.1, power to re-hear the matter that is before it. Given that issues have been raised which were not put in issue before the BRC, then it may well be considered as a matter of good judicial administration that the Authority, although it has power to determine the matter itself, should refer it back so that the BRC itself can be involved.
- Blanchard J Well whether or not it actually does that, in order to get to the point where it decides whether it will determine the matter on the new facts itself or refer it back, it surely must be the case in that situation of new evidence, genuine new evidence, that the Chief Executive is allowed to support his original decision which was negative for the beneficiary, on the basis of the new evidence which may involved contradicting his original findings or the BRC's original findings in that respect.
- McKenzie Yes that's the *Lawrence* and *Scrimgeour* situation Sir.
- Blanchard J So you accept that that would be permissible in those circumstances? He's not cross-appealing, he's simply supporting his decision on a different ground and saying well I was wrong in the view that I took on the facts because here is the new evidence which shows that I was wrong.
- McKenzie You see in my view the Chief Executive, or rather the Appeal Authority, has the power under the section to receive that evidence and to inquire into that matter
- Blanchard J And to allow the Chief Executive to take that stance.
- McKenzie And to take that stance, but
- Blanchard J Right, but your distinction would be, I think your argument is that if the facts haven't changed the Chief Executive can't contradict his earlier decision or the BRC's decision which is substituted for his and becomes his.
- McKenzie What I'd submit is that if the whole matter that is an issue which is the subject of the appeal is before the Appeal Authority as it was in *Lawrence* and *Scrimgeour* then there would be power on the part of the Appeal Authority to re-hear and to determine, although it may be appropriate in my view, in particular circumstances to refer the matter back to the Chief Executive so that the step before the BRC could be undertaken.

- Blanchard J No I'm changing the scenario on you in my question and I'm sorry if I didn't get the message through. We've dealt with the situation of new evidence. If there's no new evidence however, is it your argument that the Chief Executive can't contradict his own earlier decision?
- McKenzie Yes that would be my submission
- Tipping J Because that's this case.
- Blanchard J Yes.
- McKenzie It's this case and this case also has other features I think that strengthen it insofar as it's the appellant's submission that the matter before the Appeal Authority, subject to the appeal did not include the question of
- Blanchard J But this would have nothing to do with issue estoppel, it simply that it is his decision and he can't contradict it.
- McKenzie I would accept that. Yes if one approached the matter on that basis Your Honour then it may not be necessary to bring an issue estoppel. If it were not viewed in that way then I would wish to do so.
- Elias CJ But you put it on the basis of the whole appeal and I'm suggesting to you, well first of all I would like your best authority in support of the proposition that he can't advance in argument that he had not advanced to himself, or had not relied upon as to how the evidence should be evaluated, so I would like some authority on that, but secondly you do say that this case is different because the whole appeal was not before the Appeal Board but I mean that is establishing your ground. If the decision here is the decision as to the accommodation allowance, then it seems to me you have to go as far as saying that if that was the only decision that he had made, he would be precluded from arguing that a different view should be taken of the evidence that was before him when he made his initial decision.
- McKenzie Yes, that would be an unusual case where the finding had been made in favour of the beneficiary. The matter is only going
- Elias CJ No, no, it could be a case exactly like this where there are two bases on which a decision could be made. He's confident on one basis, and that's the one he makes his decision on. It goes on appeal he thinks oh maybe the one ground is not going to cause the Appeal Authority to uphold the decision and I would like to invite the Appeal Authority to consider the other ground I didn't rely on.

- McKenzie Well in that circumstance, yes we are close to this case and I would submit that if there are no new circumstances the Chief Executive would not be permitted to revisit his earlier decision before the Appeal Authority.
- Elias CJ But he isn't revisiting his earlier decision because his earlier decision is to turn down, or is to say that the allowance was wrongly paid, but he did that on one ground. He now seeks to rely on a ground he didn't rely on in coming to that determination. What precludes him and what authority do you have because it's a proposition of some general significance?
- McKenzie The assumption I'm proceeding on there is that as in this case the beneficiary in appealing the decision does not appeal that part of the decision where the finding was made in his favour
- Elias CJ The beneficiary is simply appealing the decision which is that the allowance was wrongly paid. I mean it happens all the time in appeals Mr McKenzie doesn't it, that a decision is taken for one reason, it goes on appeal, the decision is upheld but additional make weight grounds are pulled in by the Appeal Authority. On your argument it seems to me that the Chief Executive would be precluded, would be muzzled and indeed the Appeal Authority would be prevented from taking the broader view even though the appeal comes to it by way of re-hearing.
- McKenzie In my submission in appealing the Chief Executive's decision, as an appeal in the ordinary Court process, the appellant need not put in issue all of the matters that were determined in relation to the case involving the appellant. There's no power in this case for the crown, or rather the Chief Executive, to cross-appeal
- Blanchard J It doesn't require a cross-appeal.
- McKenzie And that part of the chief Executive's decision which we say dealt with conjugal status has been revoked. It is no longer there and
- Elias CJ No it's not, the decision as to the, oh I keep forgetting what the
- Tipping J Sorry to interrupt Mr McKenzie, this is really your argument on decision determination I think isn't it that what you say is that the appeal is not in fact against the decision to refuse the accommodation supplement, it's against a finding reached in the course of that decision and that is the subject of the appeal. Is that right? You bring it back from the actual broad decision itself to a particular step in the reasoning it was reached and you say that can't be challenged.
- McKenzie No I'm not suggesting to Your Honours that the reasons put forward can't be revisited. Clearly they can on an appeal and that would be an

impossible situation to sustain, but what I do say is that on the facts of this case there is a very clear ruling dealt with independently by the BRC on the issue of conjugal status which affected both benefits.

- Tipping J Yes.
- McKenzie And in appealing the appellant accepts the finding on conjugal status that was made in relation to the community wage and that is not a matter in my submission that is open then to the Chief Executive to challenge in relation to the accommodation supplement
- McGrath J But it would be fair that the basis on which you approach that argument is that that must be implied from the facts that unusually under this particular legislation the Chief Executive has no power of appeal so therefore it must be implicit that he can't get an appeal as you would put it I think by the back door, by endeavouring to support the decision on a ground that was decided adversely to him by the committee?
- McKenzie Yes, yes, no power to appeal or no power to revisit a decision on the part of a Chief Executive that has been revoked.
- McGrath J A finding adverse to it?
- McKenzie Yes.
- Tipping J What you're really saying is that he's bound for all relevant purposes.
- McKenzie Yes.
- Elias CJ By what?
- Tipping J By the BRC's determination.
- McKenzie By the BRC determination
- Elias CJ Of what?
- McKenzie Determination in relation
- Elias CJ Of conjugal status.
- McKenzie Yes.
- McGrath J But the other view Mr McKenzie I suppose would be that while your position might be right in relation to the community wage decision and that certainly can't be challenged, putting aside s.81 for the moment, as the

appeal is an appeal by way of re-hearing it must contemplate that the Appeal Authority will reach in the end its own decision in the matter and it's not to be circumscribed and in those circumstances the Chief Executive should be free to raise anything that might have been adversely decided against him in the other collateral matter that was before the committee. That's the other argument isn't it?

McKenzie That's obviously the way it will be put, but in my submission one of the key aspects here is of course the meaning of the words 'the same matter' and Her Honour in the High Court rightly in my submission regarded those words in this case as covering the matters that were put before the Appeal Authority on the basis of the appeal that the same matter did not include the issue of conjugal, or the determination in relation to conjugal status.

Elias CJ There's a whole jurisprudence of course in Australia about the meaning of 'matter' because the word 'matter' is used in their Constitution.

McKenzie Ah that's not a context in which I looked at it Your Honour but yes

Tipping J A short visit to Canberra. Mr McKenzie while we've diverted you, what seems to me to make this case particularly difficult is the fact that one of the parties here is the decision-maker. In the ordinary litigation context the party can challenge the decision-maker below and say well that decision-maker got this point wrong and I'm trying to defend the appeal on that basis, but here the party, whether it be the Chief Executive in his own right or the Chief Executive qua the BRC, the decision-maker is a party and the question then is can the decision-maker alter his stance higher up from the very decision he made as decision-maker lower down and that's what makes it somewhat unusual.

Blanchard J That's why I was using the word 'contradict' earlier because I was thinking along the same lines.

McKenzie Yes.

Blanchard J Now there would be no contradiction if the Chief Executive or the BRC had not taken any account of the relationship in the nature of marriage and had just gone straight to the other point. I can't see why in those circumstances the Chief Executive couldn't say well my decision's defensible even if I was wrong about the failure to give the address because in fact there was a relationship in the nature of marriage. But the other scenario, and I haven't looked at it closely yet, but I'm imagining that it is this scenario is where the Chief Executive effectively makes two determinations. One relating to the nature of marriage which is favourable to the beneficiary and then one unfavourable on the change of address. No

in those circumstances I wonder whether the Chief Executive can contradict his decision about the relationship in the nature of marriage.

Tipping J In defence of the appeal on the other point. This is the tricky point. This is really all this case is about when one boils it down in spite of the very learned and sophisticated arguments that have been addressed to it.

McKenzie I think it is the nub of it Your Honour I would agree and the difficulty is illustrated by what's called the 'odd result' here which in my submission should drive the Court in the direction of holding that the Chief Executive ought not to be able to revisit the decision on conjugal status. It leads to an odd result; it leads to inconsistency in the outcome in that in relation to community wage we've got one finding, got one ruling, and in relation to the combination supplement another, and that's clearly an outcome that should lead the Court to look very carefully at whether that's the proper course for the Chief Executive

Blanchard J But Mr McKenzie, assume that the matter had come up sequentially rather than at the same time, if the Chief Executive having made a decision on the community wage favourable to the beneficiary had then thought when the question of the accommodation supplement came up 'gee I think I got that wrong' wouldn't he be entitled to say well I appreciate I can't now disturb the community wage situation because there's no change of circumstance, but I was wrong and for the purpose of the accommodation supplement I'm going to determine the other way. He can't surely be prevented from doing that simply on the grounds that there's going to be an inconsistency. And he's got to do what he considers to be right.

McKenzie In my submission if there was no new evidence before the Chief Executive, if it was a question of revisiting a determination that had already been made and in that case by the BRC on the very issue that he now wants to revisit but the Chief Executive could not in contradiction of what the BRC had already ruled make a different finding or even in that case if it was his own finding the outcome was still the same, it's the Chief Executive's decision; he's made it in relation to particular facts and he ought not to be permitted to revisit it.

Blanchard J Well I'm not sure about that.

Elias CJ Are there any indications in public law of that? These are people exercising statutory powers of decision-making.

Tipping J You could make the example even more vivid. Say the community wage had gone all the way to the Appeal Authority and the Appeal Authority had said oh no the people below me were wrong, this isn't a relationship in the nature of marriage, are you saying that would necessarily bind the

Chief Executive when the accommodation supplement came up three months later? You have to say that don't you because it's a stronger case if you like than the BRC?

McKenzie Yes.

Tipping J So there has to be if you like what one might call a general preclusion from anything above the Chief Executive, or are you saying the Chief Executive would be bound by his own decision and he couldn't change his own mind later? Does it depend on being above in that sort of sense or is it just simply he can't change his mind unless there's new facts.

McKenzie That consistency in decision-making and it's important from an administrative perspective that there be a consistency in the approach taken by the Chief Executive, particularly in relation to the same beneficiary on the same issue that he should be precluded from taking a different approach if there are no new facts which can lead him to revisit that decision.

Tipping J Is the essential plank in your argument in this particular case, this inability to appeal from the BRC, is that what you say is the fundamental plank of the implicit inability to revisit but for a change of circumstances or fraud?

McKenzie It's certainly an important aspect of it that there is no power in the statute, expressed in the statute on the part of the Chief Executive to revisit a matter that has been determined against him by the BRC. Now that may be as His Honour Justice Blanchard observed because of the statutory scheme which makes that decision the decision now the Chief Executive and he can't therefore in a sense appeal his own decision. It comes to the same thing in my view that you can't revisit a good administrative practice decision that he's already made in relation to this beneficiary on the same issue.

Elias CJ It depends on the terminology used. It depends what you mean by decision and the appeal is from the determination that there's been an over-payment. That's the basis of the appeal. It's not an appeal from a decision as to conjugal status and there is an extant appeal and what I still am grasping for is why there is any impediment to the matters being fully canvassed in the Appeal Body which are relevant to that determination, the determination of the over-payment. Of course the Chief Executive doesn't have a power to appeal but the appeal's been brought.

McKenzie Yes it's my submission again that the determination which formed part of his decision that a very significant determination in relation to conjugal status

Elias CJ Well describe it as the view of the facts.

McKenzie Yes.

Elias CJ The view of the facts which were part of that decision can't be revisited.

McKenzie Yes, yes, that may be a helpful way of looking at it. It's not a question of reasons for the decision. Different approaches may be taken but it is a view of the facts I think that's a helpful way to see the matter.

McGrath J Mr McKenzie can I put something to you in relation to the odd results that the policy of the Act may not actually turn on such refinements as whether a person can appeal against his own decision. It simply reflected desire for early finality in a matter which the committee has decided and has overruled the decision of the Chief Executive because the reality being that the Department has changed its mind if you like or the Department supplemented by an outsider has changed its mind. So the whole policy here in relation to not allowing an appeal against the community wage decision may simply be that as a Departmental review has reached a conclusion favourable to the beneficiary that in those circumstances the matter should stop. People have to get on with their lives and beneficiaries in particular can't be delayed by unnecessary legal tangling because they have to live day by day, but where separately in a separate matter the beneficiary, I won't say 'matter' because that might be pejorative, the separate benefit, the beneficiary has an adverse decision and wishes to appeal it, Parliament is wanting the whole matter to be opened for reconsideration by a truly independent Body established with full judicial functions. Now the results which in this case if that was the way the Act is to be read, it would not be odd, it would simply be to say that there will be finality in one aspect, because that was what the decision that the Department reached and you just can't allow them to revisit these sort of things indefinitely, but on the other matter where the beneficiary wants the whole matter revisited, the Department should have the ability to advance matters in support of the decision that it had reached, or the committee had reached, even though they were favourable to the beneficiary.

McKenzie Yes, well Your Honour has emphasised the policy really here of finality and obviously that's an area that one can address, but in my submission there are other policies that compete with that policy which are very important here and they're the policies of fairness and consistency. Insofar as fairness is concerned, beneficiaries will be deterred from using the appeal process in the circumstance where a beneficiary finds that a decision quite clearly made in relation to the beneficiary on a significant matter such as conjugal status, if it's going to be appealed on a related ground in a related area, could be upset. Beneficiaries will be deterred

from exercising their appeal rights and the appeal process in that respect in my submission would be undermined.

McGrath J Well won't that really depend on the extent to which the Department's allowed to use s.81 in relation to the community wage decision, not the accommodation supplement decision?

McKenzie Well again under s.81, the Department if it wished to revisit the issue of conjugal status which the Chief Executive has already determined through the BRC, unless there's some new material that can be introduced, ought not in my submission to use s.81 to revisit that decision.

McGrath J But doesn't that really assume that the issue of whether a person is in that sort of relationship, a relationship in the nature of marriage is a static thing, that once you've taken a snapshot of a particular point of time it's like that for as long as there is an element of cohabitation

McKenzie Oh clearly Your Honour I agree and if there are subsequent developments in the marriage clearly that can be revisited under s.81.

McGrath J I'm not even really sure that if you're looking at the matter the next year what was decided the previous year should necessarily be that relevant.

McKenzie If the period

McGrath J It's not the present case I acknowledge

McKenzie If the period is the same which is the situation here, we're looking at the same period again and revisiting the decision in relation to that then I would submit that that does introduce a substantial element of unfairness into the process.

McGrath J I'm not particularly disposed to going to look into the future either Mr McKenzie.

Tipping J Mr McKenzie, I'm sorry this is no doubt rather difficult for you but just looking at this at the very most basic level, clearly all other points aside conjugal status is relevant to the intended appeal.

McKenzie Yes.

Tipping J No question? To preclude the Chief Executive from raising a relevant matter, it seems to me that there must be something either in the statute scheme or specific or an issue estoppel. I can't think of any other juristic animal that would preclude him from raising a relevant matter in defence of the appeal. Now are you with me that far?

McKenzie Yes.

Tipping J So you have to be able to point to it, being that we haven't got to issue estoppel yet, but either it's got to be an issue estoppel in the correct sense or you've got to be able to point to something in the statute that precludes him from raising a relevant matter. Now are you able to articulate sort of off-the-cuff or do you want to come back to what precisely it is in the statute, because at the moment I can understand this inability to appeal from the BRC over here, up that tree, so to speak but I'm not quite persuaded that it stops you from raising it over on this tree, and I would be helped by a clear delineation of what it is in this statute that precludes the Chief Executive from raising a relevant matter.

McKenzie That's under s.81.

Tipping J No, no anyhow. I think s.81 may be part of it but you've already persuasively urged that there is no ability to use 81 in the way that's available here. I don't want to hear you anymore on that unless you felt that was helpful, but was else is there, because that's simply saying what's not available. What else is there that stops him from doing it? That's the point, that stops him from raising irrelevant matter, because I'd be inclined to focus my thinking that way. It's got to be something that stops him like an issue estoppel if it is, or something clearly express or implicit in the statute.

McKenzie There's issue estoppel but it's also in the statute the argument in relation to the same matter – the wording there is s.12I ss.2, which is

Tipping J So could you just help me by listing it? There's the no appeal; there's the in the same matter, and what else just in shorthand?

McKenzie There's the wording used which refers to decision or determination.

Tipping J That's alright, I just want the shorthand headings so that I can look at it

McKenzie So decision or determination

Tipping J Decision or determination point.

McKenzie Yes.

Tipping J And anything else?

McKenzie And s.12J my friend Mr McGurk draws attention to that and the words there in relation to any particularity.

Tipping J 12J. Right of appeal.

McKenzie My friend considers that the words 'state with particularity' appear. It may not be in that section. In 12K, ss.2.

Tipping J 12K(2)?

McKenzie Yes the notice of appeal shall state with particularity the grounds of appeal.

Blanchard J Well that's a fairly standard provision and that in itself wouldn't stop the respondent to an appeal in supporting the decision on another ground.

Tipping J I think we can cross that one out with great respect. I don't think that takes us anywhere. Maybe you want to come back to this but I'd like to have just a list of the points which you say together, I appreciate it's together, lead to this moderately startling conclusion that he can't rely on the relevant point.

Blanchard J I don't think that the use of the words 'in respect of the same matter' are particularly determinative here. It seemed to me that the same matter encompasses all the elements of the decision below which is being appealed. You couldn't use the word 'decision' very sensibly in the particular context of that subsection so the word 'matter' fits better.

Elias CJ Well powers, duties, functions and discretions must be the powers, duties, functions and discretions conferred for the purpose of the determination by the Act or necessarily implicit in it. It does all come back to what the appeal is from. Where's the authority under this to make a determination of conjugal status? It's not that at all. It's a determination as to whether the benefit was wrongly paid that's the determination and it's in respect of that determination that the authority has the powers, duties, functions and discretions that the Chief Executive had. I don't find this development of the statutory scheme particularly helpful because it does all tie back into the function being exercised by the Chief Executive. What's been put to you by Justice Tipping applies equally to the Appeal Authority, because on your argument the Appeal Authority would be precluded, leave-alone whether the Chief Executive can say 'well actually I want to make this submission'. The Appeal Authority would be precluded from coming to a different determination of an incidental finding of fact relevant to the, or an important finding of fact relevant to the decision.

McKenzie Yes If I could respond Your Honour, the Appeal Authority also can't in my submission decide to review or revisit any matter unless it's a matter that is before it.

- Elias CJ But it is before it. The whole question of the overpayment it is seized of, but on your argument it would only be able to consider that on the basis of the view of the facts taken by the Chief Executive or the Review Panel.
- McKenzie Yes because in my submission the matter that had to be determined in order to come to a decision the BRC has determined that matter in favour of the beneficiary. The Chief Executive's decision then on this matter is one which that particular determination negates that aspect of his decision. It's not there to be appealed against and the beneficiary is not putting it in issue. The Chief Executive can't himself in my submission put it in issue – it's not there.
- Elias CJ I understand the argument but it all turns on what the decision is, whether it's a decision as to conjugal status or whether it's a decision as to the payment of the benefit.
- Tipping J Do you think that the provision in the authorities section, 12M, where the authority, that's the appeal authority, is deemed to be a Commission of Inquiry? I know that's a bit of a pro forma sort of inclusion but it demonstrates perhaps that it is its duty to get to the truth of the matter and that might not possibly be a point quite in your direction Mr McKenzie.
- McKenzie It's only again as the *W* case made clear, and His Honour Justice Anderson was presiding in that case and amongst the bundle of authorities it's only in relation to those matters that are an issue before the Authority that it has these
- Tipping J But what is an issue before the Authority is whether this person has been overpaid. That's what an issue for him, that the reasons why for and against that proposition are boned up obviously but the essential issue from the point of view of both the State and the beneficiary is whether he's been overpaid. If you constituted a Commission of Inquiry to decide that, it doesn't seem to fit very easily that you've got one hand tied behind your back because you can't hear relevant evidence.
- McKenzie But in my submission that is simply because it's not a matter that is before you, it's a matter that has been determined in a sense against the Chief Executive and no longer forms part of the decision which has been the subject of appeal.
- Tipping J Yes well it may come back, but that with respect I think is a rather narrow view of what is in issue. The ultimate question in issue is whether there has been an overpayment. That must be the position mustn't it? All sorts of factors contribute to the party's cases on that, but that must be the ultimate question.

McKenzie But in coming to that ultimate question there was a determination that had to be made one way or the other on the issue of conjugal status.

Tipping J But the question is whether that binds the Appeal Authority as a Commission of Inquiry. That's the question that I'm wrestling with and it just doesn't seem quite right.

McKenzie Yes well I come back to my submission that it then really turns on whether that is a matter before the Appeal Authority, or properly before the Appeal Authority, and in my submission it's not and one goes back to the earlier

Tipping J Yes it's back to that

McKenzie The earlier arguments.

Tipping J So your only escape from that line of argument is saying that that is a subject matter that is not properly before the Commission of Inquiry.

McKenzie Yes.

Tipping J You have to say that don't you?

McKenzie I have to say that.

Blanchard J I don't think you can appeal against anything other than the decision. You can't appeal against things that go before the decision, only against the decision itself, and classically once you do that the person on the other side where there's a true contest, is entitled to support the decision on other grounds. A cross-appeal may as here be precluded by the statute but that doesn't stop supporting the decision, saying I'm not asking for it to be changed, I merely wish it to be upheld on a different ground.

McKenzie I would agree with all the genres said except would qualify what Your Honour is suggesting is the decision and the matter of conjugal status having been determined in favour of the beneficiary no longer formed part of the Chief Executive's decision which was then the subject of the appeal. It wasn't there in my submission and so what is the subject of the appeal is yes the question of decision on the accommodation supplement but that issue minus conjugal status, it's as though that particular matter had not been introduced. It's passed. It has been determined.

Tipping J Your client doesn't want it introduced for very obvious and good reasons, but the crucial issue is whether the other side can introduce it.

McKenzie Yes, and in my submission having already been determined by the Chief Executive through the BRC it doesn't form part of the decision which is now on review, on appeal.

Tipping J That has to be your stance. Now is the other limb of your argument, that's on the statute, the other limb of your argument which presumably we'll come to after the break, is issue estoppel?

McKenzie Issue estoppel, yes.

Tipping J Those are the two, yes.

Elias CJ Alright thank you, we will take the adjournment.

11.32am Court Adjourned
11.53am Court Resumed

Elias CJ Thank you. Yes Mr McKenzie.

McKenzie Just before I come to the issue of issue estoppel, just to draw Your Honours' attention to the passage in the Appeal Authority's decision that indicates that there was no evidence as to any changed, or there was no changed evidence in issue but rather the Chief Executive was simply wishing to adduce evidence relating to the issue, there was nothing that was put in issue here, that's at page 35 of the case at tab 6. It's simply an observation from the Appeal Authority the Chief Executive may wish to adduce evidence. There's nothing in that decision or in the record to indicate that there was any such evidence. I thought I should just clarify that, and the way the Appeal Authority approached the matter was on the basis that Mr McGurk indicated that the Chief Executive was seeking to revisit an earlier decision. Coming into issue estoppel I turn to para.7.17 of the principal submissions

Elias CJ Sorry Mr McKenzie, just looking at the approved ground of leave to appeal in this case, it's really whether the Authority had jurisdiction to consider the matter. I mean most of your argument has been directed to the position of the Chief Executive. How do you say it affects the jurisdiction under s.12J of the Authority?

McKenzie Well I would submit there that the Authority's jurisdiction under s.12J relates to the appeal that is brought before it.

Elias CJ I see, so it's the same argument that

McKenzie Same argument.

Elias CJ Yes, I understand.

Tipping J It's as if the grounds had read, I've taken it, in holding that it could consider. It's not a sort of technical jurisdictional point, but whether it can consider this evidence.

McKenzie Yes.

Elias CJ But it doesn't have jurisdiction on the basis that the appeal before it excludes the determination of conjugal status?

McKenzie Yes, does not cover that matter because the appeal is against any decision or determination of the Chief Executive.

Blanchard J Because the notice of appeal isn't limited in that way.

Elias CJ Where's that?

Blanchard J Even the grounds aren't limited.

McKenzie Well what's sought is the decision to be overturned and the question there is what is the decision

Blanchard J Well the decision is that there shouldn't be a payment of accommodation supplement.

Tipping J He's actually, by a splendid piece of instinctive drafting, put his finger precisely on what the deal's about.

McKenzie But throughout the beneficiary has maintained that the conjugal status determination is not a matter

Tipping J Speaking for myself I wouldn't hold that against him if the point was otherwise valid Mr McKenzie. I just say it's an interesting, instinctive piece of drafting.

Anderson J The discussion has proceeded so far as a decision and determination in distinguishable terms, but they're there for particular reasons. A decision may be a consequence of a number of determinations

McKenzie Yes.

Anderson J Or there may be a determination that something will take effect from a certain time and what goes to the Appeal Authority really is defined by the

appellant. The appellant may for example say well I accept that I shouldn't have got it but it shouldn't have been back-dated beyond such-and-such a date, and the determination to back-date it to that date is what I want to appeal, and here we have to look at the notice of appeal and say what has he put in issue with his notice of appeal, and he's put it broadly in issue. He says I want to take issue with the fact that I have to pay the money back and that that scope may encompass everything relevant to it.

McKenzie Yes with respect Your Honour in dealing with the beneficiary here, who has completed that form, it is submitted that an unduly technical approach to the way in which the notice is framed should not be taken.

Anderson J I don't think it's technical. It's a question of what does the appellant wish to put in issue. He might have said I think it shouldn't have been backdated beyond such a point. That's the only thing I want to put in issue. In which case that might have been the only thing that could have been considered.

McKenzie Yes well had there been legal advice thus no doubt matters could have been phrased in a way that better reflected the expectations of the beneficiary.

Anderson J What that tends to show then is that this is a question we can't approach in the sort of broad abstract way. It becomes fairly case-specific.

McKenzie There are principles in my submission that affect other cases and that in this Court would be appropriate to pronounce on.

Anderson J Just help me with this. This is just on the side. I just want you to confirm whether my understanding of the process is correct. The decision of the Review Committee is fairly cryptic as to the consequence but I take it that what is really envisage is this, that an accommodation supplement or benefit or whatever it is, is payable in respect of specific premises which have to be the home of the beneficiary and the beneficiary here left that home and therefore immediately became dis-entitled to the payment of the benefit. What he should have done is to try and have it attached to his new home.

McKenzie Yes.

Anderson J And he didn't do that.

McKenzie That's the position. He believed according to the evidence that because the rent was the same and the rate of benefit wouldn't be changed, that wasn't necessary.

Anderson J And that's how he would argue it on appeal if it was a narrow appeal?

McKenzie Yes, yes.

Anderson J So really he's not being penalised for not notifying a change of address specifically, he just didn't become entitled to anything after he left the address?

McKenzie Yes, yes.

Anderson J But even then the CEO would have a discretion.

McKenzie The CEO has very broad discretions in all of these matters, yes.

Anderson J Say ah well yes, you would have got it in your new home so we won't deprive you of it. Thank you.

McKenzie If I could Your Honours please turn to the original submissions at para.7.17 in relation to issue estoppel and just take Your Honours very briefly through those submissions and then the points that I have in reply on this issue. It's submitted that as a tribunal of competent jurisdiction, the BRC was subject to the principles of issue estoppel and the Court of Appeal was in error in holding otherwise and then the well-known passage from *Sheils and Blakeley* is cited 'that where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties, and the subject matter of litigation any party privy to the litigation etc is estopped'. There's no question but if this was a judicial tribunal of competent jurisdiction that that statement would apply to it and in my submission also if Your Honours look at the

Tipping J That's the classic statement of cause of action estoppel, it's not a classic statement of issue estoppel.

McKenzie No, but in relation to issue estoppel one would still also have to establish a final determination by a Court of competent jurisdiction.

Tipping J Oh yes, I'm saying they are similar but that is not

McKenzie Yes, no I accept that.

Tipping J As you say per rem judicatam - cause of action estoppel. You don't actually cite the most recent authorities on issue estoppel which is a case in the New Zealand Court of Appeal called *Lynch* in a decision of the House of Lords called *Arnold*, but be that as it may Mr McKenzie, I think the points you raise are on the track.

- McKenzie In my submission, looking at the often-cited statement in *Fodey v Fodey* which is cited there can be little controversy
- Tipping J Well it's just that I was rather thinking that a decision of the New Zealand Court of Appeal called *Lynch* might actually be more in your favour because it's a more liberalising approach to issue estoppel than some of the more technical approaches, but I don't want to divert you.
- McKenzie No, I'm grateful to Your Honour. I would simply submit that on the facts of this case there can be little controversy that what we have in this case is an issue which does require to be determined for the purposes of the decision made by the BRC.
- Tipping J But the BRC is significantly different in structure and hierarchy and how it's placed in the general framework from the Medical Practitioners Disciplinary Tribunal isn't it?
- McKenzie I think that the key issue here is really whether what is before the Court is a judicial tribunal of competent jurisdiction. In my submission it is. It may be very different from a formal Body such as the Medical Disciplinary Tribunal but it has the essential features in my submission of a judicial tribunal. Perhaps I could take Your Honours directly to para.7.25.
- Elias CJ Are any of the cases you cite here public law cases?
- McKenzie Involving a Public Body? Well the case that indicates the nature of the BRC is the one that's been referred to earlier and that's the *Daniels* case.
- Elias CJ Yes.
- Tipping J *Thraysvoulou* is the one at 7.34, which is the closest to what you might call a statutory body. That was the *Secretary of State for the Environment* so that's the closest one, but I'm not sure that it actually assists because it just simply states
- Elias CJ And that states res judicata doesn't it?
- Tipping J That's res judicata.
- Elias CJ Yes.
- Tipping J Although it does I think touch briefly on the more general just from my recollection of it.

- Blanchard J The impression I had Mr McKenzie, and I haven't gone back to the cases, is that the modern law relating to issue estoppel doesn't preclude the raising of an issue where in the earlier decision the person now seeking to raise it either didn't have a right of appeal or was not granted a right of appeal. In *Arnold* the tenants of the building were unsuccessful on some question relating to the rent review mechanism I think it was. The first time around they tried to appeal and they were denied that right. The rent review then came up the next time around and they took the same point and the House of Lords said 'yes you can'.
- Tipping J Their petition for leave to appeal from the Court of Appeal to the House of Lords in the first step was denied and the House of Lords said that in no circumstances because it hasn't been to us before, it can be entertained, because it hadn't been determined at the ultimate level.
- Blanchard J So if you're not denied the right to raise the matter again in a subsequent proceeding where you tried to raise it and were denied the ability to do so a fortiori, if you didn't have the right the first time around, which is the position that the Chief Executive is in.
- Tipping J And this is a point quite separate from whether the BRC is a sufficiently judicial body.
- Blanchard J Yes it's assuming it is.
- Tipping J Yes, so there are two problems you've got. (1) judicial body, (2) no right of appeal.
- McKenzie Yes, in relation to the right of appeal, that of course would depend on the determination made by the Court in relation to the Chief Executive's position here.
- Tipping J But if there is nothing in the statute – you see if you'd won on the statute you don't need issue estoppel, but if there's nothing in the statute bar a plain inability to appeal that's not favourable territory for issue estoppel is what's been put to you on the precedent cases.
- McKenzie I would need to accept here that it's certainly the case of the appellant that the Chief Executive is not given by statute, that it is not conferred on by statute any right to appeal this particular issue and that indeed is the position of the appellant, but were the Court to hold that the Chief Executive can re-open this issue before the Appeal Authority notwithstanding the absence of an express right of appeal, that it can be re-opened, then in those circumstances it's my submission that issue estoppel would rise because the Court would then have found that the Chief Executive was entitled in another Court or before another body to raise

this same issue and that being so then the question of issue estoppel must be addressed.

- Tipping J Well *Lynch* was involved in an allegation of issue estoppel from an interlocutory ruling and there was discussion in the Court of Appeal 1993 I think it was because I wrote it about that context which I would see as having some analogy with this sort of low-level determination by the BRC and it was decided that although theoretically it was possible to have an estoppel in the interlocutory context, one would have to be very very careful before imposing one otherwise the doctrine might become more of an instrument of oppression than, you know it's the balance of the equities if you like, well equities strictly, but the balance of the interests on both sides, and to that extent that decision liberalised the doctrine from the more sort of precise rule-base to a more conceptual based where does the balance of interest properly lie in the instant case and at this low-level, but the precedent cases including *Lynch* suggests that it would have to be something very overwhelming to give rise to an issue estoppel.
- McKenzie Well in my submission the policies that were the subject of argument earlier it would favour intervention in this case
- Tipping J But you failed on the statute. If you win on the statute you're not interested in estoppel. You ex hypothesise, you failed on the statute.
- McKenzie Yes I accept that but the policy here insofar as the beneficiary, a right of review is conferred on the beneficiary by statute before an independent body and that's an issue I wish to come to, to determine the beneficiary's rights and interests, that the desirability of having such a review step was the subject of the Royal Commission Report which
- Blanchard J But that's all to do with the statute. We are now discussing pure issue estoppel, and it seems to me that there can't be an issue estoppel that *Arnold* really precludes it.
- Tipping J If we decide to follow *Arnold* which I must say the reasoning I find pretty persuasive, but if you've got no chance of taking it further it's not fair that you should be bound, and that was even at the level of the Court of Appeal as I recall wasn't it, had they gone as far as the Court of Appeal
- Blanchard J They haven't been back, but I'm working from memory, but I think that's right.
- McKenzie But then if I understand the point Your Honour is putting it's on the basis that you have no right to take it further, but were the Court

Blanchard J Well the Chief Executive didn't have a right to take it further in relation to the other benefit

McKenzie Yes

Blanchard J That's where as I understand it it's being said that an issue estoppel comes from.

Tipping J Not taking it any further when you couldn't.

McKenzie If the Court were to hold that the Chief Executive does have the right to take it further, that is that he can bring that issue before

Blanchard J But he couldn't, he couldn't in relation to the other benefit because there was no appeal by the beneficiary.

McKenzie In relation to community wage, yes, oh I understand Your Honour, yes.

Blanchard J And that is I understand it is where it's being said that there is an issue estoppel and instinctively I don't think that can be so, and *Arnold* seems to support that view. *Joseph Lynch* again I haven't gone and looked at again would support that view although in *Joseph Lynch* there is an overlay of policy. I don't know whether it was adverted to in the judgment, which I'm sure was an excellent judgment, but the overlay of policy there is that you don't want to encourage interlocutory appeals and there's authority going back a long way that you can actually leave interlocutory questions until a substantive determination and then if it's still relevant appeal at that point. But *Arnold* wasn't of that character. There was a definitive determination against the tenants. They couldn't go any further. They weren't given leave to go further but when the point arose again on the next rent review they were allowed to go further by the House of Lords.

McKenzie Here we do have s.81 and issues

Blanchard J What's that got to do with it?

McKenzie Well the power on the part of the Chief Executive to revisit this issue.

Tipping J But the proper compass of s.81 is quite different from whether there is at common law an issue estoppel. I'm sorry I can't quite see the connection.

McKenzie But if the Chief Executive is bound by the determination earlier made

Tipping J Appropos of that benefit.

McKenzie Yes.

Tipping J Not appropos of another benefit that happens to be further litigated.

McKenzie Yes.

Tipping J That's the problem.

McKenzie Yes I understand.

Blanchard J And on your argument s.81 doesn't come into play until there's a change of fact, so I don't see that it really is in the mix when one is looking at whether there is an issue estoppel.

McKenzie Yes, I've approached the matter on the basis that there has been determination in relation to the Chief Executive by the BRC in relation to a particular issue which formed really a pre-condition to that condition in the determination and that having been made by the Chief Executive, and before a judicial body of competent jurisdiction, would bind the Chief Executive and to stop the Chief Executive from reasserting again in relation certainly to the community wage but in my submission in relation to the issue which arises under s.33 of the Act, given the broad way in which that provision is framed.

Tipping J Is a cause of action estoppel in relation to the community wage as a result of inability to appeal, but the fact that you can't appeal, well that marches the other one in relation to an issue estoppel. So there's some good in it and there's some bad in it from your client's point of view, this inability to appeal.

McKenzie Yes I can see from Your Honour's approach that there could be double-edge sword there but if I could direct Your Honours to s.63 which deals really with conjugal status and the determination that was made here in that respect.

Tipping J 63.

McKenzie 63, which is at page 13 in tab 1 of the authorities.

Tipping J Well that raises an interesting thought in my mind at the very first sentence. Can there be an issue estoppel in relation to rate of benefit?

McKenzie That would have very wide-reaching implications if that were so.

Tipping J What was it specifically you wanted us to take out of this Mr McKenzie?

- McKenzie Yes my reason for directing Your Honours to that section was that it's a section that applies for the purposes of determining any application for any benefit or reviewing any benefit already granted and then there is reference also there for determining the rate of any benefit but that's not the issue here. It's admitted that it's a determination that is made by the Chief Executive for the purposes of any benefit, and having made that determination in relation to the community wage, I would prey that provision in assistance in relation to any other benefit because it is the section of general application.
- Anderson J They're different benefits though aren't they?
- McKenzie They are different benefits.
- Anderson J It's for the purpose of renewing any benefit and here the benefit we're reviewing is the accommodation supplement. I doubt whether there will be an estoppel in relation to the review of another benefit, particularly when it's a matter of discretion.
- McKenzie But where that finding is made it's a finding that has application, generally it's my submission it would certainly give rise to anomalies were the Chief Executive to be able to make inconsistent determinations under s.63.
- Blanchard J That's an argument which has got nothing to do with issue estoppel. You've leapt back to the argument that we were having previously about the Chief Executive's ability to contradict his own decision. Issue estoppel arises only where you have an independent body having made the decision and forcing it upon the parties and in particular upon the losing party and then whether the losing party is entitled to reargue the same point in a later case. This section it seems to me doesn't share any light at all on that question.
- McKenzie It may assist in this limited respect that the BRC when it made its determination on conjugal status did so of course pursuant to s.63, that's where that power derives from, and it's the determination which in terms of that section can effect any benefit and it's for that reason that I bring the provision in that it may well assist in this case when we are dealing with two benefits and a determination made in relation to one of them that the impact that that has in relation to all benefits.
- Elias CJ Mr McKenzie I'm sorry to go back to, because I know we're talking about issue estoppel but now I look at s.63 it strikes me as almost fatal to your principal argument because that is the conferral of a discretion and under s.12I which you took us to before the Appeal Authority has all the same powers, duties, functions and discretions the Chief Executive had, so it's

very difficult to see that the Appeal Authority can be limited in considering this matter in the way that you have been putting to us earlier.

McKenzie I would come back to 12I the words there 'had in respect of the same matter' so that we did come

Elias CJ But the matter is made explicit also by s.63 because it's for the purposes of determining any application for benefit, so that's the matter initially.

McKenzie I don't doubt that the Appeal Authority can exercise the Chief Executive's powers under s.63, but it can only do so in my submission in relation to the matter that is before it and if the particular matter which we're concerned on here is not before the Appeal Authority then s.63 won't help it.

Elias CJ Well I understand the argument but it's hard to reconcile with the scheme of the legislation.

McKenzie Yes well it's my submission that it would in fact subvert the review and appeal process provided for in the legislation were one to keep that section in the way in which Your Honour is doing. Well that linked with s.12I.

McGrath J Mr McKenzie can I come back to the nature of the BRC?

McKenzie Yes.

McGrath J And I think that you signalled you might come back to the question of its independence in the course of your making a submission. What I'd like you to address here is whether a Review Body comprising principally officials, albeit officials who have not been involved in the decision to date, but presumably in some respect subject to policy dictates of the Ministries involved, can truly be sufficiently independent to make the nature of its decision one for which issue estoppel should apply.

McKenzie Yes well perhaps if I took Your Honours to the supplementary submission where I briefly address the arguments that were put forward by the Crown on that issue and then I can develop that. In para.19 of the points in reply, 'the appellant also takes issue with the respondent's statement at para.83 that the Ministry members of the BRC would be bound by their duty of loyalty to obey the lawful instructions of their employer and apply Ministry policy. The members of the BRC are required under s.10A(8) in reviewing the Chief Executive's decision to act in accordance with the Act. A policy which was in direct conflict with the Act should not be applied. Those members of the BRC could also in the context of the circumstances of the individual case consider whether applying a policy to those circumstances would unduly fetter the discretion of the Chief Executive. If the respondent is correct the Ministry members could be

exposed to disciplinary action for not applying policy'. A very surprising outcome and what is clearly intended to be in my submission an independent process. So that too much

McGrath J Just how independent is it intended to be given that you don't have people outside the Ministry in the majority?

McKenzie It's certainly a body that's weighted with Ministry members, but the non-Ministry member has to form part of any quorum and

McGrath J And the Ministry people have to be true to the statute I accept.

McKenzie They have to be true to the statute and the same persons who looked at the original matter can't be appointed.

McGrath J Yes.

McKenzie If one looks at the Department's policy it certainly proceeds on the basis that the statute requires a degree of independence and I refer particularly to page 46, that's at tab 3.

Tipping J Isn't it fair to say that these people are independent of the original decision-maker but not independent of the Department?

McKenzie Well they can't be wholly independent of the Department. They are Department employees or officers.

Tipping J And very striking and startling to derive an issue estoppel from such a

Anderson J Administrative body.

Tipping J Administrative body, thank you.

McKenzie With respect even the Court of Appeal didn't go that far Your Honour and it didn't regard this as simply an administrative body, and

Tipping J Well isn't it there simply so that the Chief Executive just doesn't get deceived with the applications to reconsider lower-level type decisions made sort of on the run, at the front desk, just a sort of administrative failsafe sort of – that's the impression I get from the background and the statutory provisions and so on.

McGrath J To stop the Ministry losing too many appeals.

Anderson J It's protection against delegated powers.

McKenzie If that were the case there would purely be a power of recommendation to the Chief Executive and that's not the case here. There is a power in my submission undoubtedly I submit of a decision, the power to revoke the Chief Executive's or delegates' decision.

Blanchard J Unless there was a power of recommendation the poor old Chief Executive would end up having to reconsider everything personally. It's surely just administrative convenience.

McKenzie In my submission the Ministry itself doesn't view it in that way. If Your Honours were to look at page 46 of page 3

Blanchard J Tab 4.

McKenzie 3.

Blanchard J Not in my tabs.

McKenzie Oh I'm sorry.

Tipping J 46, impartiality.

McKenzie You're volume may be mis-tabbed.

Tipping J This is the resource kit?

McKenzie Yes.

Tipping J Yes, well it's tab 3 for me.

Blanchard J It's tab 4 for me regrettably.

McKenzie Oh I'm sorry Your Honour.

Blanchard J Never mind I'm at page 46.

McKenzie I hope that doesn't mean that Your Honour's volume is missing some other matter. We'll endeavour to rectify that. But Your Honours will notice there that there's a reference to the panel member not being on the benefits Committee as an advocate or representative of the Ministry. The issue of independence is very important. The Act requires the Ministry members to have had no involvement in the case. There's a reference there to the Act and then the Benefits Review Committee is an independent body and you must act accordingly to take care to ensure that you act openly, independently and fairly.

Tipping J Well that's all very excellent but I don't think it turns the tide if you like in relation to where this organisation fits in the general hierarchy of things. It's not a judicial body.

McGrath J It's a policy statement. It can't change the statutory character of the committee can it?

McKenzie It can't change the

McGrath J The statutory character of the Review Committee can't be changed by the policy statement which you referred us to in relation to impartiality. I mean don't get me wrong I thoroughly approve of what the Department's done in this respect but I just query whether it is changing the nature of the Body that the statute sets up. So that it's in relation to issue estoppel

McKenzie In my submission it's giving effect to what's implicit in the statute.

McGrath J Yes.

McKenzie And the status that the statute gives to a Body has a power to bury or revoke which are the same powers possessed by the Appeal Authority in decision-making.

Tipping J If the Chief Executive makes the decision personally, it must follow must it that he creates an issue estoppel against him or herself.

McKenzie That's not this case Your Honour.

Tipping J I don't mind about this case Mr McKenzie, but we are here to look wider. I think it must follow. I've been cogitating and wanting you to have the opportunity of turning my mind. The decision-maker creates an issue estoppel against the decision-maker. That is revolutionary

McKenzie Yes I can see that there are difficulties in that except that here what we do have, no not in the example Your Honour has posited, where the BRC's decision supersedes that of the Chief Executive there would be different

Tipping J There may be all sorts of other grounds upon which a decision-maker should not be allowed under the *functus officio* or other doctrines, but it's issue estoppel getting there that agitated Mr McKenzie. Intellectually agitated.

McKenzie Well I would draw Your Honour's attention to the *Daniels* case where the BRC in that case was reviewed by the High Court as having the character of a judicial tribunal and that was for the Bill of Rights purpose.

Tipping J For what purpose? For the purposes of issue estoppel?

McKenzie No, for the purposes of the Bill of Rights.

Tipping J Oh right. Well that's a different issue altogether.

Elias CJ The Bill of Rights Act would have to apply in any event because they're exercising public powers.

McKenzie The question was whether they were a tribunal than the meaning of s.27.

Tipping J I think they're undoubtedly a tribunal, but can they create an issue estoppel against either themselves or against the Chief Executive?

Blanchard J Or against anyone who has no right of appeal. That's I think the fatal problem, even if they are an independent tribunal.

Anderson J The principle which underpins issue estoppel, which is the desirability of finality, might well be something that the Appeal Authority would have regard to in deciding what relief to grant or how to approach any particular case. It might be an irrelevant consideration but that's a different issue from whether it's even got jurisdiction to entertain it. There seems to be a confusion here between what might be good practice and good governance and how the authority might be influenced by that on the one hand and strict legal principles on the other.

McKenzie Yes well I'm not sure that I can take this issue a lot further. There certainly are the former elements that Your Honour has referred to and are significant in this case, particularly if the appeal process is to be given proper effect; beneficiaries are not to be deterred from exercising it. And perhaps I could draw Your Honours' attention there to what was said in the *McCarthy Report* which is at tab 4, first page. I trust Your Honour Justice Blanchard's got that particular document in Your Honour's bundle.

Blanchard J Yes, also under tab 4.

McKenzie It refer to an article in

Blanchard J Which page?

McKenzie At the first page under the heading *Chapter 29:Rights of Appeal*, and para.1 is reference to Article 71 of the International Labour Conference Convention about minimum standards of social security which stated that every claimant shall have a right of appeal in case of refusal of the benefit or complaint as to its quality or quantity and then the reference to the this convention has not been ratified by New Zealand. The appeal rights of

New Zealand beneficiaries fall short of this standard, and it appears that the introduction of these review provisions, although they do not follow in all respect what the *McCarthy Commission* advocated in that that committee advocated appeal committees of three people drawn from the community nonetheless was the legislative response.

Tipping J But this is a body between the Department and the Appeal Authority in a sense, at best from your point of view. It was interposed as a first-tier if you like reviewing body.

McKenzie Yes.

Tipping J I don't quite understand this business of appeals in the International Labour Conference. That's satisfied by a further appeal isn't it from the BRC, if you're the beneficiary and you're still unhappy?

Anderson J It's not called an appeal to the BRC.

Tipping J No.

Anderson J You can ask for a review and then

Tipping J Exactly, it's an internal review.

McKenzie Well this part of the machinery of review that was suggested and the committee proposed a three person very similar-looking body, but a three person body imposed of community representatives.

Anderson J It's a relatively informal body isn't it, so that it will be accessible to people of very limited means and resources. It doesn't have the formality of the Appeal Authority.

Tipping J You just write in and you know but you may have ground hearings but you know the scheme of it is that you just write in.

McKenzie It's a procedure that is made very accessible because of the kind of people that are going to use it, but that in my submission should not be a reason that should lead the Court because of the lack of formality to view this as less than tribunal, exercising in this case clearly in my view a judicial rather than administrative functions. It has that decision-making power, includes the power to revoke a decision which becomes the decision of the Chief Executive. That's a very substantial power.

Anderson J This is the crucial point though isn't it? You see the fact that its decision is inputted to the CEO indicates that it's not worthy in the nature of a judicial body at all, it's in the nature of an administratively reviewing

body, doing for the CEO what the CEO wouldn't have time to do for himself, where the decision is actually being made by a delegate, and probably fairly often a junior employee, so it's a protection against delegated decisions, but the fact that it can be so useful and functional and desirable doesn't convert it into a judicial body of the type that would raise an issue estoppel.

McKenzie Well it's my submission that the body is clearly carrying out functions of a judicial rather than an administrative character. They are judicial functions.

Anderson J Why do you say that?

McKenzie Because this body is reviewing. It's given a power of review; it's reviewing decisions and determinations made by the Chief Executive or the Chief Executive's delegate and is given a power to in fact confirm, vary or revoke without further reference to the Chief Executive those decisions

Blanchard J But as I tried to point out before Mr McKenzie, if everything had to go back to the Chief Executive he wouldn't be able to cope and the whole point of having this body in place is that the Chief Executive can't cope himself, so you wouldn't want everything being referred back to him for the ultimate decision.

McKenzie That may be but the way in which the statute has achieved this may well be for the purpose of relieving some of the load of the Chief Executive, but the way the statute has achieved this is by entrusting a judicial role to that body.

Blanchard J So that the Judge's decision, or the judicial decision, becomes as if it was the Chief Executive's decision?

McKenzie Yes.

Blanchard J It's a very curious structure in that content.

McKenzie It is unusual.

Anderson J So it's not actually doing anything other than making the CEO's decision. It's exercising all the CEO's powers, authorities and it's making the CEO's decision on a more elaborate process than the one that preceded it.

McKenzie It's more than making the CEO's decision. It does in fact have that outcome but in the process it's reviewing a decision already made. It can challenge that decision and reverse it.

Blanchard J Yes.

McKenzie Well perhaps that's as far as I can take that particular matter. I'm not sure whether wishes to hear me on the odd result which featured in the original submissions and I have some observations on that in the points of reply.

Tipping J Isn't the oddity in the beneficiary's favour?

McKenzie It may be in the beneficiary's favour

Anderson J Potentially.

Tipping J Potentially, yes.

McKenzie But if the Chief Executive seeks to address the oddity and resolve the anomaly then that may well work against the beneficiary.

Tipping J But say the Appeal Authority says 'oh actually I'm looking at it all afresh, we think there was a conjugal relationship'? No one can alter the fact that there isn't for the purposes of the other benefit, that's sacrosanct isn't it? I don't think the respondent argues that it effects that.

McKenzie No, that's accepted by the Crown, yes.

Tipping J So in a sense the oddity is to the advantage of the beneficiary.

Anderson J If there is an oddity that must the

Tipping J Well yes I mean I'm just assuming that we call it an oddity for the moment. It's not my language but

McKenzie Well it would be to the advantage of the beneficiary if that oddity were resolved in favour of the beneficiary, but it may not be, and by

Tipping J No, the advantage Mr McKenzie is that the higher level body says well actually there is a conjugal relationship here and there always was, so sorry you can't have the accommodation supplement but the beneficiary still walks away with the community wage because nothing can change that.

Anderson J Unless it were reviewed under section.

Tipping J Well no, no, don't go there.

Elias CJ But until reviewed there would be no over-payment presumably.

Tipping J Absolutely not, and subject to your point about s.81, it can never be reviewed on the same facts.

McKenzie I hope that right.

Tipping J So you've got away with, no with modified language, your client on this, the beneficiary, the hypothetical beneficiary on this hypothesis has had a stroke of good fortune.

McKenzie Right, the beneficiary wouldn't necessarily see it that way Your Honour in that the beneficiary having secured if you could call it a win in relation to community wage

Elias CJ Well it's a 'win win'.

McKenzie Finds that on taking the other benefit on appeal that becomes an opportunity for the Chief Executive to seek to use a different ground to undermine the beneficiary's case on appeal.

Tipping J Well at least you're left with half the cake. You don't get the other half but you're left with half the cake.

McKenzie Well yes we say that half can't be touched but on the other hand there is certainly an inconsistency

Tipping J Oh yes, there's an inconsistency.

McKenzie Where the opportunity is available to the Chief Executive on the basis of that decision to proceed to the

Tipping J The inconsistency derives from the policy decision for whatever reason it was not to allow an appeal to the Chief Executive from the BRC, which is to the beneficiary's advantage in general terms.

McKenzie Yes I accept that and in my submission it must mean something in the context of the legislation.

Tipping J But it does mean something. It means they can't, subject to the argument of 81, they can't touch that ultimate position. It means a lot. It means instead of having it all taken away, only half of it gets taken away.

McKenzie Well

Tipping J I mean we've got to be pragmatic about this when we talk about odd results and sort of intuitive and those sort of terms. I mean it's odd in one

sense but it's not unfair if the true facts are as found by the Appeal Authority. It's very fair.

McKenzie It may be unfair if that process results in the beneficiary not having the right to have that decision reviewed before the BRC which made the original decision. The Chief Executive, by being able to assert issues of conjugal status which had already been determined one way by the BRC assert that again before the Appeal Authority results if the Chief Executive is successful and the Appeal Authority giving a decision on that matter where the beneficiary has not had the benefit of the BRC itself which made the original decision looking at it again.

Blanchard J What's unfair about that?

Tipping J I just don't follow this.

McKenzie It deprives the beneficiary of a review right which would otherwise be available under the legislative scheme.

Blanchard J But he's had the benefit of the review from the Appeal Authority and we have to assume that the Appeal Authority is going to get it right.

McKenzie Well in the ordinary case the beneficiary could expect that if a matter is asserted against him by the Chief Executive the decision is made that that will go before the BRC and only then following that decision would it be heard by the Appeal Authority. That step is missed if the Court were to permit this process to be followed, and it may well mean if that step is allowed that the Ministry then proceeds in order to cure what would be an anomaly proceed under s.81 to correct that anomaly.

Tipping J Well we're going to have to engage with 81 because the Court of Appeal had 81 right up front didn't it?

McKenzie It did.

Tipping J So we're going to have to engage with that Mr McKenzie, so you may or may not bear fruit there.

McKenzie But I think those factors do impact on the process that we're concerned about here. That's simply the point I wish to make.

Elias CJ Mr McKenzie you've been interrupted a great deal. I wonder so that Miss Jagose can have a fair crack after lunch whether there are other matters that you want to refer us to in conclusion?

- McKenzie Yes if Your Honour wishes to hear me on the use of the s.81 powers, that's already been fairly extensively considered, but I would simply direct Your Honours' attention to the para.16 of the points in reply, and
- Tipping J You're really saying that we have to read down s.81 from its purely literal and linguistic terms so as to give some force to a decision already made but can't just be revisited at a whim?
- McKenzie Well one has to look at the whole Act and s.81 certainly provides broad powers of review
- Tipping J Because that would be really a vote of common law and from the point of view of good administration, something you'd need to see very expressly spelt out in legislation. At least from my point of view I foreshadow the view that that would be so startling that it would have to be there spelt out in lights before I would read it that way. Now Miss Jagose may be able to persuade me that there are enough lights there.
- McKenzie Yes, and there are similar considerations that could well arise under the ACC legislation in relation to the extensive review powers that are
- Tipping J But the idea you can make a decision one day and the beneficiary relies on it and orders their affairs on it and three months later you can come along and say whoops I'm sorry, I made a mistake, with no new facts, nothing, I would need a lot of persuasion that that's the right way to read it, but I obviously have yet to hear the argument in favour of that proposition.
- McKenzie Yes, well I don't need to take that matter any further. I would simply refer to that para.16 if Your Honours may wish to read this. That Your Honours please completes my submissions.
- Elias CJ Thank you. Miss Jagose, you don't need to start before lunch. You've only got about five minutes to go. Is there anything you wanted to kick off with or should we take the lunch adjournment now.
- Jagose I'll just say one thing now if I may Ma'am, I'm happy to take the adjournment now and to address you fully after lunch, but I just thought I should just flag that the respondent does say that if the authority had heard this decision and decided that the appellant was in a marriage-like relationship the Chief Executive's position would be that he would have to return and look at the different factual finding in the community wage decision, because over the same period the same facts in one of those decisions has got to be wrong, so I'll just signal that to you now
- Tipping J So he's got to revisit it under s.81.

Jagose Yes.

Elias CJ Yes.

Anderson J With a discretion though?

Jagose With a discretion, that's right, but it does seem if the Chief Executive's duty is to ensure that the Act is complied with and conjugal status is obviously to rate as well as eligibility of many benefits, it seems bizarre sitting two completely contra-decisions.

Tipping J So my just good luck, it's not quite such good luck as I was rather thinking it might be?

Jagose That's why I raise it now Sir

Tipping J Sorry, do you argue also my proposition that you can just wake up in three months time and change your mind with no new facts? Do you argue that s.81 should be construed that way?

Jagose No Sir, I'd say that s.81 can't be used capriciously or on a whim but where a decision is wrong or facts change there might be more on my list

Tipping J Wrong, meaning that you can wake up in three months time and say oh my goodness I think I got that wrong?

Blanchard J Or are you speaking only of a situation where the Appeal Authority has come to the conclusion that the facts were wrongly found?

Jagose That would be a better example for me but I still need to address Justice Tipping's point about what if the Chief Executive wakes up and thinks oh hell that wasn't right three months back.

Tipping J Yes that's what worries me Miss Jagose that they have relied on it, no new facts, no fraud, nothing, and then they're told three months later that you know I'm sorry you weren't entitled to it in the first place. That's a terrible situation.

Elias CJ Well, I don't know that it is so odd in the sense that the determination of the Appeal Authority must I would have thought be material that the Chief Executive can take into account

Blanchard J Yes, that's a different scenario.

Tipping J Yes I think there's force in that but just the waking up three months later and thinking oh goodness what have I done.

Blanchard J There's one scenario where the Junior Officer makes a decision and it's favourable to the beneficiary and the Chief Executive thinks no, no, that's wrong, now s.81 can be used there. There's been no appeal process of any kind, and then there's the situation where the matter goes to the Appeal Authority and the Appeal Authority says well factually you got that wrong, that would I imagine an ability to use s.81. It's the intermediate position between those two that we're considering.

Jagose And there are some other provisions in the legislation that I think might allay some of Justice Tipping's fears. So three months later the Chief Executive wakes up and thinks that was wrong. He goes back and uses 81 to review it and concludes that indeed he was wrong. He has further discretions to not recover a debt if the person has relied on it to their disadvantage and so on.

Tipping J No well that makes things a bit better.

Jagose He has a few tools at his disposal which takes some of the unfairness of your factual situation out I think.

Tipping J Yes it was just the unvarnished proposition that I was rebelling at.

McGrath J Section 81 has been amended I see and I think and I'm not sure if that's significant or not but after lunch I'd appreciate some guidance from you as to whether the changes made to para.(b) have any particular bearing on its meaning.

Jagose Thank you Sir, yes I'll address that.

Elias CJ We'll take the lunch adjournment now, thank you.

12.54 pm Court Adjourned
2.17 pm Court Resumed

Elias CJ Thank you Miss Jagose.

Jagose Thank you Ma'am. Can Your Honours hear me now? I think you can.

Elias CJ Sorry!

Jagose Can you hear me now? We've adjusted the microphone.

Elias CJ Oh you've adjusted the microphone. Yes I can hear you. I could hear you before.

McGrath J No I couldn't

Elias CJ Oh you couldn't hear, alright.

McGrath J I don't think you're coming strongly at me Mr Jagose but carry on because I can hear you without the microphone.

Elias CJ I wonder whether there is something wrong with the audio-system down your end.

Anderson J Well it's fine here.

Elias CJ Well you fire on.

Jagose Thank you Ma'am. We came to the point just before the morning adjournment where Your Honours were addressing my friend where I think it was the Chief Justice put it that what is the issue here is what is on appeal before the Authority and in my submission put at its most simple, this is what we have to grapple with today. What is the issue before the authority? Is the decision of the Chief Executive? Yes, it must have been a decision that was reviewed by the Benefit Review Committee. It remains in my submission the decision of the Chief Executive and I understand Your Honours to have put that proposition to my friend that the Benefit Review Decision becomes the Chief Executive's decision. That is what the Authority takes on appeal and in the context of the statute which gives the Authority very broad powers of jurisdiction if you like to decide the matter under appeal, it makes no sense in my submission to remove from the ambit of the Authority a central point of the statutory framework for determining the accommodation supplement. And in my submission what the appellant is trying to do is to slice and dice the decision prior to appeal so that he can bank those bits of the decision that are favourable to him and challenge only those bits that are unfavourable without bringing the whole matter under the spotlight if you like of the Appeal. And it's put most plainly in the appellant's written submissions at para.6.19, where the appellant says, it's at the bottom of page 18 of his submissions, 'if the terms 'decision' and 'determination' are treated as being the same, the consequence is that when a person appeals against an adverse finding in respect only of part of the benefit criteria' and that is in my submission the appellant's key misconception, that he can bring an appeal against part of a decision because of course in my submission, and I think it's well understood that appeals are against decisions, not steps in the reasoning, not reasons for decision although of course they may be given in support of why one appeals a decision, but appeals are against the decision. And

so if Your Honours look at the statute at tab 1 of the bundle, page 8, it begins with the accommodation supplement provisions, the interpretation sections don't assist, but if we turn to page 10 of the bundle s.61EA it sets out the eligibility for an accommodation supplement. It says in ss.2 when an accommodation supplement shall not be paid and importantly for my point that I'm making, ss.4D 'no person is entitled to an accommodation supplement if they're the spouse of a person already receiving an accommodation supplement. So one point there one has to consider conjugal status and whether the spouse is in receipt of the accommodation supplement, and also 61EB sets out the special rules for married joint tenants. So it seems rather obvious to me that the Authority when it considers was Mr Arbuthnot entitled to the accommodation supplement they have to consider his conjugal status. They cannot make the determination in accordance with the law without that assessment. If it's not put at issue between the parties they may not have to specifically take evidence on the point, but of course in my submission they may and here it was expressly at issue, the Chief Executive having raised previously that he did wish to raise this point again. My friend was unable to persuade Your Honours in my understanding that the statute supported his basic premise. By contrast I say there are three central aspects of the statute that indicate the Authority has a broad jurisdiction to consider appeals and not the limited one contended for by my friend. Those powers, and I don't need to take you to them unless there is anything specific arising, 12I, the Authority is a judicial body. 12I(2), it has all the powers of the original decision-maker who in my submission is the Chief Executive. 12K, which sets out the procedure on appeal. And relevant there is 12K(4) which requires the Chief Executive to send to the Authority five matters listed there in sub-paragraphs A to E, which are all of the documents including his reasons for the original decision. I've set this point out in my written submissions that there is no reference in any of these sections to the Benefit Review Committee decision except for one to say if a decision comes through the Benefit Review Committee, there's a certain time period for lodging an appeal otherwise these important provisions that the right of the appeal, the procedure on appeal, and how the Authority hears and determines the appeal don't mention it at all.

Tipping J When it says in 4E, ss.4E of the report setting out the considerations to which regard was had in making the decision that surely would include the Benefit Review Committee's considerations because it expressly doesn't say to which he or she had regard and I suspect that's deliberate because it's not confined to the Chief Executive. I don't think it harms your general point but I just think I would be a little cautious in suggesting that the BRC reasoning wouldn't have to go before the Appeal Authority.

Jagose Yes the Benefit Review Committee decision is no doubt of some use to the Authority and it will see it.

Tipping J I don't think it harms your general proposition but I think that you might have been a little bit overstating it by saying that it's not referred to. I would regard it as referred to under 4E.

Jagose Yes you might be right Sir. I'm just looking back at 10A to see if there is any provision that sends the decision. No I think you must be right.

Tipping J You see the passive way in which it was put which is apparently bad English in today's world may well have been deliberate.

Blanchard J What's the difference between D and E?

Jagose I understand that D is the decision itself while E might be the reasons for it. The considerations

Blanchard J Are they usually separate?

Jagose They would generally be combined in one document I would imagine.

Blanchard J Yes.

Jagose Although the decision might be a letter to the beneficiary saying I have decided X, although that would tend to be, and again is probably a matter of good administration, tell them why.

McGrath J Are you able to assist us at all on why the phrase decision or determination was used throughout? Are there distinct concepts here or is it just a merger, some teratology for the sake of completeness?

Jagose In my submission Sir is surplus wording. The phrase 'decision or determination' is sometimes used, although notably 'determination' is missing from 12M(1) 'every appeal against a decision of the Chief Executive', so it seems

McGrath J From 12?

Jagose 12M(1).

Anderson J There are some provisions both in the Act now and repealed provisions which says that the CEO shall determine – it is that word – shall determine the date from which something or rather will happen.

Jagose Yes, and s.63 is a good example of that. 'The Chief Executive determines conjugal status' and in my submission

Tipping J I think it's belt and braces which matches differing terminology in different respects throughout the Act.

Jagose That's my submission Sir, it doesn't change the nature of a decision or a determination.

McGrath J No, but why do you say notably it's only decision in 12M? I would have thought that was again just a case where the drafter forgot to use the phrases.

Jagose I use the phrase 'notably', yes you're quite right Sir, 12J says you can appeal against any decision or determination. 12M misses out the word 'determination', supporting in my submission my view that

McGrath J But there's no significance in that is there?

Jagose No, they're just used interchangeably.

McGrath J Yes, yes, so there's no significance if in the failure to use 'determination' in s.12M and there's no significance in the phrase 'decision or determination' where it's used elsewhere?

Jagose That is my submission Sir.

McGrath J Well the heading to 12 really makes your point.

Jagose Yes, that is what the Authority has to do – to hear and determine the appeal.

Tipping J Decide the appeal.

Anderson J I think it is just to make it clear that any decision whether it's a decision or a determination (inaudible) and that you might appeal a determination which is part of the decision, a greater decision, without appealing the whole decision.

Jagose Yes as I understand my friend's argument he says that Mr Arbuthnot was appealing the determination as to his conjugal status, I beg your pardon, the determination as to his entitlement to accommodation supplement on the grounds that it was because of the change of address and that's why I have submitted that really what this amounts to is saying that the appeal can be against the reasons, or steps in the reason, because the whole decision has to be taken. Just to finish off that point the *Wharerimu* case which is at tab 8, Justice Baragwanath did do some of this analysis and came to the view that decision and determination were not used with any precision, that they were used relatively interchangeably. I was just going

through the statute in support of my proposition and I was at 12M I think I can turn to now, 'that the Authority can modify, reverse or confirm the decision suggests also that it is a very wide power of decision to appeal because Authority doesn't simply say the decision on appeal was right or wrong. The Authority can also amend that decision, suggesting again a wide power to determine appeals. And Your Honour Justice Tipping has already noted 12M(6) that the Authority is deemed a Commission of Inquiry and I accept my friend's point that has been held by the Court of Appeal in *W* to be within the scope of its powers, but by contrast of my friend I say those powers are very broad. In the nature of the concept of an appeal by way of re-hearing too suggests this broad power to consider any matter on appeal. There is nothing in my submission in the statute that supports my friend's view for a very restrictive notion of an appeal. In fact it's quite common in appeals from administrative bodies like the Chief Executive to have one broad general appeal right. We see it in this context, in the Immigration Act, the Accident Compensation Legislation, the Resource Management Act. There's a raft of similar – the first appeal is a general appeal, thereafter to the High Court and beyond. Appeals tend to be limited to points of law.

Tipping J As is the case here?

Jagose Yes. If Your Honours accept my analysis that the decision of the Chief Executive is appealed to the Authority, then the *res judicata* or the issue estoppel concepts really have no place, because the whole matter shifts under the appeal spotlight. There is nothing that could be said to be finally determined. And I would like to address a matter that Justice Anderson raised in relation to the notice of appeal that Mr Arbuthnot originally filed in the year 2000 I think it was. He plainly put at issue the whole thing in my submission, but even if he hadn't, even if he had said 'appeal against the decision that I wasn't entitled to the supplement because I didn't notify my change of address', so let's say he was quite specific about how he formulated his grounds. I still say that makes no difference to my main argument which is what shifts under the spotlight for appeal is the decision. So in a broader sense it makes no difference. I mean notices of appeal of course are useful to indicate what the issues are between the parties. No doubt the Authority won't waste its time considering evidence on a matter that nobody puts at issue. So too you need to use reasons for decisions to support one's argument that the decision itself should be appealed and overturned, but that doesn't amount to this sort of fine splitting off of reasons or factual findings along the way. I'm quite content Your Honours to rely on my written submissions and have just set out for you the broad submission that the respondent makes, but I anticipate we perhaps should look in more detail at s.81, given some of the discussion from earlier this morning.

- Tipping J Well the Court of Appeal seemed to think that s.81 was sort of almost a universal panacea solving all the problems and I'd like to personally hear you on the proper scope of s.81. It may be that we're not directly into it, but I think it would be helpful to have your argument.
- Jagose If I could hand up two further parts of the statute, and I'm sorry that they're not in the bundle. First is the statutory history that Your Honour Justice McGrath asked me about just before lunch. The second is the point I mentioned about s.86 - the discretion, in fact the bar against collecting debts where they have been brought about by no fault of the beneficiary. Just to look back at the history of s.81, the third page in the print that's from the computer sets out the original s.81 - 'In the event of any change in the circumstances of a beneficiary' it begins, the Commission, now the Chief Executive, may review the benefit. So quite clearly in 1964 and until repeal in 1984 it was restricted to a change of circumstance. The last page of that little bundle sets out s.81 as it was between 91 and 93 and the reference to the change of circumstance has gone. 'The Director-General may from time-to-time review any benefit in order to ascertain whether the beneficiary remains entitled to receive it. See that was forward-looking. Now if we come to s.81 as it is which is on the top. Two significant changes. No reference to the change in circumstance, but also in my submission, and perhaps these are some of the lights that Your Honour Justice Tipping was looking for around the scope of s.81, the Chief Executive may exercise his discretion from time-to-time, whether the beneficiary remains entitled, forward-looking, or whether the beneficiary may not be or may not have been entitled to receive it, backward looking.
- Tipping J What's the difference between 'remains entitled' and 'may not be entitled'? This is a real belt and braces job this.
- Jagose 'Remains entitled' looks beyond today. 'May not be' perhaps looks at today and 'may not have been' looks behind us.
- Tipping J Yes I know may not have been certainly; look that's your key point isn't it?
- Jagose It is.
- Tipping J The legislation shows a continuing trend to widen the scope of the power, that's the point?
- Jagose Yes.
- Tipping J Both temporally and absent to any change of circumstances?

- Jagose Yes, and I do reiterate as I said before lunch, the Chief Executive doesn't or shouldn't exercise his power capriciously or on a whim, but the fact that he might exercise the discretion unlawfully, it doesn't mean that the discretion should be limited. Of course I don't support that he would act unlawfully but just the tension that he might should be no reason to read down what in my submission are very broad powers on the Chief Executive, and in my submission they relate to his duty. The legislation entitles certain people to benefits as of right on account of their circumstances and other benefits are given by way of discretion – special circumstances; particular need, where the Chief Executive is entitled to exercise his discretion. He has a duty in my submission to make sure that benefits are paid as Parliament said they should be, thus he's allowed to look forward and he is specifically allowed to look back to say 'were you entitled to this benefit in the past'?
- Tipping J Is the word 'entitled' here meaning entitled in the strict sense as you first used it or entitled generally, including as a matter of discretion? You made that quite appropriate distinction which I heard loud and clear and then we seem to find only entitled here.
- Jagose I think it would encompass both in this broad power because the legislation, well as I have just said, the legislation does make that distinction itself.
- Tipping J But why shouldn't one read it as picking up the concept of entitlement in the strict sense rather than as a matter of discretion? I'm being the devil's advocate but if you want this literally read why don't we just literally read it?
- Jagose Well a person may well be entitled to even a discretionary benefit if their circumstances are such that they have a particular need. The Chief Executive would say on the basis
- Tipping J But it's not a discretionary benefit then is it, it's a benefit to which you're entitled on establishing a pre-condition? I'm not sure this is going to matter but it's just the point was just triggered by your very apt distinction between 'entitlement' and 'discretion' which may perhaps not have been quite what you were endeavouring to convey.
- Jagose And the question Your Honour is putting is should entitled here in ss.1 be really literally only those first level if you like, just benefits
- Tipping J Yes, I doubt that it can reasonably be intended to mean that but it probably means entitled in the more general sense I would suspect. That would be my submission that it is the more general context given that the Chief

Executive, or the purpose of the Social Security Act is to make sure that people who are in need get assistance from the State.

Tipping J I think what it probably means is that the criteria making you eligible whether they still exist or whether they ever existed

Jagose Yes.

Tipping J Might have been a more precise way of putting it, but

Jagose Yes no doubt. There are more precise ways to put quite a lot of this.

Elias CJ Well ss.2 really identifies that there's only two. The present entitlement and that the person wasn't entitled, so it seems to subsume the 'may not be'.

Tipping J I'm focussing, and I think back myself into a blind alley, I'm focussing on the word 'entitled'

Elias CJ I know.

Tipping J And I don't think it can be meaning that in the most literal of senses as Miss Jagose distinguished it from the discretionary basis because otherwise it wouldn't really make any sense. So forgive me I've distracted you.

McGrath J Miss Jagose can I raise another point. As I hear your argument you're emphasising the breadth of s.81 as it's developed and on its present language, but can I ask you this, would you say the provision was so wide as to allow the Chief Executive to investigate whether the circumstances entitled someone to a benefit when the Appeal Authority had already held they were entitled?

Jagose I think that the scope of s.81 suggested is that broad, but as a matter of good administration rather than law in my submission

McGrath J Yes, I know that you say public law principles control this discretion but just putting aside that another way of looking at this provision would be to say that then investigating whether there is an entitlement under this section, the Chief Executive has to stop if there is an authoritative determination of the Appeal Authority in the matter, because that settles the question of entitlement, at least insofar as the decision covers it.

Jagose And in my submission Sir s.81 is even more broad than that. It would be incumbent on the Chief Executive then to point to something quite, although this is again my good public administrative decision-maker point,

it would be incumbent on the Chief Executive to be able to point to something that the Authority hadn't considered perhaps. Perhaps the new facts might become more starkly the point at which he can make a review decision.

Tipping J But surely you can't have the Appeal Authority to which the Chief Executive's decision is a party to that decision, saying the next morning ooh I don't like this I'm going to review it and come to the opposite point of view. Surely that can't be what it is designed for.

Jagose I agree those facts would be unacceptable and in fact the Chief Executive has a right of appeal from the Authority decision and if the next morning he was in that position perhaps an appeal is the more appropriate way to go.

Tipping J Well I would also wonder about whether he can do that to a BRC decision. He may be able to do it to his own, but this is a bit of a patchwork this and it's not really a very coherent whole, but the fact that he can't appeal from the BRC, surely 81 can't be used as a surrogate vehicle of appeal whereby he says oh I don't like that decision of the BRC, I'm going to review it and I'm going to come to the contrary view as my sensible delegate came to in the first place. I mean that just doesn't seem to make any sense.

Jagose It's very hard to resist agreeing with the proposition as you've put it but as a general proposition I don't agree with it with respect because the Chief Executive

Tipping J That's why I want to hear your argument.

Jagose The Benefit Review Committee decision is in effect the Chief Executive's decision. He has no right of appeal from it because it makes no sense in my submission to give one self a right of appeal from your own decisions, and here we have a power that says from time-to-time you can have another look and see if the person that's still entitled or was entitled.

Anderson J It can't apply where it's been settled by the Appeal Authority, otherwise what's the point of having an Appeal Authority?

Jagose Well let's imagine a situation where the Authority determined a matter on the material put before it and it says the answer is X, you are in a relationship which makes a marriage and you are entitled or you're not to this benefit. Sometime down the track the Chief Executive comes across some more information that suggests that that wasn't properly determined; that the information he now has wasn't properly put before the Authority; is he bound forever by that decision? In my submission he is not because

his primary duty is to make sure the entitlement is paid in accordance with the Act.

Anderson J It might be limited to what has occurred after the Authority's decision.

Jagose Yes, and the further you would go through the Authority making a final determination let say not appealed by either side, the more the Chief Executive would require something new to say it is proper for me to review it because as I've always submitted

Tipping J Something new apropos of the time-span before the Authority.

Jagose That the Authority hadn't seen?

Tipping J Yes.

Elias CJ Well, but even a new perception because as you say the Act is about entitlements fixed by Parliament and recognises that they will change and gives the Chief Executive a responsibility to keep it under review. I'm not sure why we're wasting so much time on abuse of power because obviously powers have to be exercised for proper purpose, but if it appeared to the Chief Executive, notwithstanding a determination of the Appeal Authority that a benefit was not being paid in accordance with the Act, because the matter appeared in a different, as long as he was acting in good faith for proper purpose I don't see the impediment.

Tipping J You mean even if absolutely nothing had changed from a factual point of view it was just a different view of the facts from that which the Appeal Authority had arrived at.

Blanchard J But that would be an abuse given that there is an Appeal Authority if there had been no new facts and he simply didn't like the Appeal Authority's decision there'd have to be more to it than that.

Elias CJ Anyway I think Justice McGrath was asking some questions and he was

McGrath J I don't myself see why we should necessarily assume that the word 'entitled' should be read as widely as you suggested, I can signal that. In this area there are strong policy considerations that favour finality and I just find that like Justice Tipping the scope of the word 'entitled' in this area a difficult issue once you come to the Appeal Authority's determination and perhaps even the Benefit Review Committee's determination. It's really a question of what the word 'entitle' means and what the purpose of the provision was, and apart from the statutory history of increasing breadth you've got nothing else to rely on have you? You've

got no Select Committee report or anything that explained to Parliament why the power was being broadened.

Jagose I have not Sir, no.

Tipping J If the Appeal Authority or the BRC for example says Mr Beneficiary you are entitled, we find you are entitled to this benefit, using that word in the normal colloquial sort of sense, I would find it very difficult absent some fraud or material change of new information if you like apropos of the time scale, but the Chief Executive can come along and say well I'm satisfied you weren't entitled to it.

Jagose It will in my submission absolutely depend on the facts that arise. I mean let's say for another example that the Benefit Review Committee says one thing, the Authority says perhaps the same thing. They make the same decision, then this Court or the Court of Appeal makes a decision that says the interpretation of s.63 has always been wrong and the interpretation is X

Blanchard J Well that's a clear case.

Tipping J That's easy, that's easy.

Jagose So another example of when you can go back

Tipping J That's very easy, that doesn't with respect engage

Elias CJ It's not a change of facts though; it's a change of view.

Tipping J Oh it's a change of law, it's to whether in law

Elias CJ Entitlement is always questioned.

Tipping J I'm worried about the case where the Review Committee or the Authority says you are entitled to this benefit. The proposition that the Chief Executive can come along without any change, relevant change, and say well I'm sorry I don't share that view, I'm reviewing it under 81, and I'm going to find you're not entitled. It just seems to me

Blanchard J Whereupon it would go back to the Authority which would presumably re-make its decision. You could keep going on and on forever, but like the Chief Justice it seems to me we're not really getting anywhere with this argument.

McGrath J We've got to remember it's not truly the Chief Executive we're talking about here, it's the officials who are actually administering the particular benefit system.

Jagose Yes in terms of going through the Benefit Review Committee route, that's right, it will be his delegate, yes.

McGrath J Yes.

Tipping J Well I think the other members Justice Blanchard and The Chief Justice think this is not helping but for diametrically different reasons. But speaking for myself I think this is important and with great respect I make no apology for examining this in some depth because it seems to me that this was a fundamental plank upon which the Court of Appeal based its decision and I want to be satisfied one way or the other whether the weight they put on this section in this present context was sound, so don't please for my point of view feel inhibited. You may have run out of steam Miss Jagose but

Jagose Not quite yet Sir because I have two other things if I may. The Court of Appeal in my submission, its fundamental point was the decision under appeal is the decision that Mr Arbuthnot was not entitled to the accommodation supplement.

Tipping J Yes, yes.

Jagose Where they brought s.81 into play was to think well there is potentially a funny result here, and odd result, as they called it, and really it was quite peripheral to the main point to say well the odd result doesn't really matter because in any instance there are these other mechanisms that the Chief Executive could use. But I agree with you Sir to the extent that they quite quickly got to that view at para.21, in any event subject to correction by s.81 Review. That review, and at the risk of repeating what Justice McGrath was not interested in me pursuing about good administrative practices, the Chief Executive cannot act capriciously or on a whim. To that end

Tipping J That would be an abuse of power.

Jagose It would be. To that end he takes and should take considerable notice of what the Authority says but there might well be situations in which he can return despite the Authority's judgment on the matter, and as a broad proposition I don't think that I can take that further because it will depend of course in every case what we have before us.

Tipping J Yes.

Jagose If I could just make my final point on s.81

Elias CJ So your position is that if the Appeal Authority does come to the conclusion that this man was in a conjugal relationship that the Chief Executive would be entitled to rely on that in exercising his rights under s.81?

Jagose Yes.

Elias CJ Yes.

Tipping J So as to revisit the community wage decision?

Jagose Quite.

Elias CJ Yes.

Tipping J And that's where it bites.

Jagose It does. I think I made the submission before lunch that if the Chief Executive is met with the same person, the same timeframe, the same facts, one finding he's in a marriage-like relationship, one finding he's not, something has gone odd somewhere in one of those processes and it's his duty in my submission to look at that again.

Elias CJ Just as if it had gone further on appeal to the High Court in a different view had been taken on the law; he would have been entitled to revisit it under s.81 there.

Jagose The community wage, yes Ma'am that's my submission.

Elias CJ It's a different view of law.

McGrath J Well if such an end was in sight wouldn't Parliament have simply given the Chief Executive a right to appeal?

Jagose Well conceptually giving the Chief Executive the right to appeal against what is in effect his decision is quite unusual

Tipping J But it's only deemed to be his decision, it's not in reality his decision.

Jagose Well there are no provisions in s.10A which is where all the BRC provisions are that make that point entirely clear. I think we can

Tipping J Well it must be correct that this is not in reality the Chief Executive's decision. It's legal status maybe as if it were his decision

Jagose Yes, quite.

- Tipping J So there's a very good reason for distinguishing between the Chief Executive personally and the BRC as a matter of reality
- Jagose Yes as a matter of reality, you're quite right Sir, but to give him appeal rights from that conceptual structure when he has a s.81 power to review would truly be surplus as he doesn't need it.
- Tipping J Well that risks begging the question as to what the purpose is of the 81 Review in such circumstances, but I understand the force of your argument.
- Jagose Can I make one more point on 81 and I touched on it before lunch which is why I just want to round off the point. The second little bundle that I handed up, which is the print from the boundary print of statutes of the Social Security Act, sets out s.86 I'm hoping, yes, s.86, and this was in response to Justice Tipping's comment about it seemed so unfair that the Chief Executive could just wake up one morning and think well that wasn't right I'm revisiting it. S86(9)A prohibits the Chief Executive recovering any sum that is part of a debt that was caused wholly or partly by an error to which the debtor did not intentionally contribute. If they received it in good faith and they have changed their position in reliance on it and the Chief Executive considers it would have been inequitable to require or to permit recovery. So the Chief Executive is now, I say now because this is a relatively new provision, prohibited from collecting such a debt, and that protects in my submission the beneficiary who in good faith is in receipt of a benefit who does nothing to contribute to the erroneous payment of the benefit, the Chief Executive is unable to recover that.
- Tipping J Yes well that certainly helps.
- McGrath J Yes. This is a provision that was inserted when, has it long been in the Act?
- Jagose No Sir it's recently inserted into the Act and prior to the arrival of ss.9A and 9B, which were substituted in 2002
- McGrath J Yes
- Jagose There was a discretion to the Chief Executive along similar lines but it wasn't a prohibition, but it provided that the Chief Executive could in his discretion write off any part of a debt to which the debtor did not intentionally contribute, who had shifted their position and reliance and so on.

Tipping J Well this is quite collateral but 9B(b) is a rather peculiar provision because if the Department pays something for which someone's not entitled, surely there must be an erroneous act or omission by an officer somewhere. But fortunately we don't have to engage with that.

Jagose Yes that seems to indicate that simply making a wrong payment if it's not the Department's error

Tipping J Who else's could it be, I mean it looks to me like a real sort of, well I won't pursue the point

Elias CJ Well I suppose if the Department's been misled by someone who's not the beneficiary into making the payment maybe. Leave it for another day.

Tipping J It's still an erroneous act.

McGrath J What I know he's certainly giving with one hand.

Jagose If I recall it is coming back to me, that provision was to deal with a High Court decision called *Moodie*, a decision of Justice William Young where it was determined there that simply making a payment to which someone's not entitled was enough to trigger the error concept.

Tipping J And that was thought offence, so it was foreclosed.

Jagose That was the intention as I recall of 9B.

Elias CJ Because that would have been an application perhaps of a Judicature Act provision, anyway

Jagose It was about the former provisions

Tipping J Anyway I'm sorry it just leapt off the page at me, and I couldn't.

Blanchard J The more I see of this statute the more I worry and this is a very tentative observation lest it in view of its age and the amount of patchwork done on it is getting itself towards the situation of the Immigration Act. Maybe it's time that it was completely looked at again. Now that's a very tentative statement and I'm not saying it on the basis of anything more than we've seen here. I'm certainly not suggesting it's as bad as the Immigration Act on what we've seen but I worry because my experience sitting on appeals in relation to legislation of this kind is that Departments get themselves into an awful bind when they don't keep their statutes up-to-date and when they don't regularly review them and re-enact them completely rather than just adding bits and pieces

Anderson J Like an inner-tube with so many patches.

Blanchard J Yes.

Anderson J Patches are stronger than the bits in between them.

Blanchard J What I'm saying for the benefit of any Departmental people who may be here is that we did give this, in the Court of Appeal we did give this kind of warning about the Immigration Act some years ago and it wasn't acted on, with terrible results.

Jagose Yes Sir, this legislation is some 40 years old. It's had over 100 amendments so I take your point Sir.

Tipping J Well my brother has said what I was thinking Miss Jagose.

Jagose Unless Your Honours have any other questions from me those are my submissions.

Elias CJ No, thank you.

Jagose May it please the Court.

Elias CJ Yes Mr McKenzie.

McKenzie If Your Honours please, if I could move briefly through the points made by my friend in the order in which they were raised. Firstly the question was raised what is an appeal must be the decision of the Chief Executive. Yes but as varied or confirmed, well really in a case of an appeal there would be if varied or confirmed by the Chief Executive so that we return really to the appellant's earlier submission as to the nature of that decision. It is not the original decision of the chief Executive, it is the decision as varied or confirmed and that is by the BRC. Secondly no appeal as my friend submitted could be made against part of the decision. There are two responses to that. First that in this case the determination made in relation to conjugal status in my submission did not form part; of the decision that was the subject of appeal. It had been negated – the Chief Executive's determination on that matter in relation to both benefits by the BRC so that on the appeal that was not a matter that was brought forward or could be before the Authority. Secondly, the interchange with His Honour Justice Anderson earlier the notice of appeal could in my submission have circumscribed the appeal so as to exclude the determination in relation to conjugal status. It could have stated that it raised all other issues the decision other than the determination with regard to conjugal status.

Blanchard J That as a general proposition would be pretty unusual wouldn't it?

McKenzie In the

Blanchard J In the ordinary Courts you can't limit the matter in that way. Anything that can be used to support the decision can be use. You can't cut that out.

McKenzie With appropriate wording that could be expressed here in my reference to the particular date that the payment's sought to be recovered were claimed. In other words the appeal related only to those dates and that concerned the accommodation supplement in relation to the change of address issue. It would be possible in my submission to frame the notice of appeal so as to limit it to that period.

Blanchard J But conjugal status would be relevant to any period wouldn't it?

McKenzie It would be but in relation to the appeal, that issue having already been determined, it would be open in my submission for the beneficiary to appeal only in relation to the particular period of time with respect to which he has been held to be subject to the overpayment.

Tipping J But in the ordinary Courts by limiting, or ostensibly limiting the escape of your appeal, you can't stop the respondent from supporting on another ground.

McKenzie Oh absolutely Sir and that's the very point that the appellant seeks to make in its earlier submissions that there's no opportunity given here to the Chief Executive to cross-appeal or to raise matters that have been revoked.

Blanchard J It's not a cross-appeal.

Tipping J I'm not sure you've fully caught the drift of my observation Mr McKenzie. You're asking for something more restrictive here than is present in the ordinary Courts. By focusing my appeal on point A, I can't preclude the respondent from relying on point B to support the appeal, to resist the appeal.

McKenzie But if the respondent is claiming that the Body that decided the question was wrong in the particular respect, it must file not of cross-appeal.

Tipping J No, no.

Blanchard J Absolutely not. Look at the Supreme Court rules and the Court of Appeal rules. You'll see the distinction between a cross-appeal and a situation where you support on another ground is spelt out so that this conception it is hoped doesn't persist. They are two different situations. If you are not

wanting the judgment below, the formal judgment below to be varied, then you don't have to file a cross-appeal.

Tipping J One is an attack on the decision below, the other is support of the decision below. It's as simple as that.

McKenzie Well my submission here is that the beneficiary is attacking the decision below which is the decision relating simply to payment of accommodation supplement for a certain period of time.

Blanchard J Which he's not entitled to if a certain conjugal situation exists.

McKenzie In terms of the decision from which he's appealing, not entitled to because of the failure to give a change of address.

Blanchard J Yes, but under ordinary principles the respondent to the appeal can bring up any other ground, and the other ground is the conjugal status one, and that doesn't amount to asking for any variation of the decision made below in terms of its outcome which is the distinction between when you need to cross-appeal and when you don't.

Tipping J This is not your most fertile field Mr McKenzie.

McKenzie No well I should perhaps move on, but given the nature of cross-appeals in other Courts, but I move to my next point which is my friend submitted that the Authority had to consider the issue of conjugal status. In my submission that does not follow. It's only if that was a matter that was before or properly before the Authority, placed before the Authority in the appeal brought by the beneficiary. And fourthly my friend referred to the fact that s.12K does not refer to the BRC's decision, at least in ss.4, where a number of matters that are required are set out. That in my submission is not surprising because the decision that's referred to there is the decision of the Chief Executive as varied or confirmed. I think that was a matter that was raised in the course of discussion with Your Honours by His Honour Justice Tipping and I would support that observation and that would be particularly the case in relation to ss.4E. A decision or determination, I repeat the submissions in the appellant's earlier written submissions but refer also in this respect to s.63, the section that was put before Your Honours earlier in relation to the assessment by the Chief Executive of conjugal status for the purpose of entitlement to every benefit and is with respect a discrete determination for the purposes of benefit entitlement, it does come in my submission within the description of a determination is one of the essential steps in the making of the decision. My friend submitted that Justice Baragwanath had dealt with this matter in the *Wharerimu* case by holding that there was no real difference between the use of the words 'decision' and 'determination' in s.12 and with

respect submitted that His Honour did not enter into any analysis of the meaning of those words and it was not necessary for him to do so on the facts of that case and that reliance should not be in my submission put on the observations that His Honour Justice Baragwanath made in that case. The *Chaney* case that's been referred to Your Honours and is in the bundle of authorities - it's referred to in the primary submissions, is an authority that Your Honours submitted should have regard to in considering whether determination in this particular context

- McGrath J Which case was that – *Chaney* did you say?
- McKenzie The *Chaney* case. That's in the authorities at tab 9.
- McGrath J Oh yes, thank you.
- Elias CJ Is there a particular passage you could take us to in that?
- McKenzie I could direct Your Honour to the appellant's primary submission where the *Chaney* case is discussed.
- McGrath J 618 I think it is.
- McKenzie I'm indebted to Your Honour, thank you. Yes 618 where reference is also made to the *Wharerimu* decision of Justice Baragwanath.
- Elias CJ Sorry, I'd just quite like to see where, because I haven't turned up the judgment.
- McKenzie That's at tab 9, page 590 and then to 590 in the second paragraph 'the word 'decision' is a word of indeterminate meaning. In some contexts etc'. It refers to the
- Tipping J Is that a Freudian juncture position of decision and determinant? I mean what exactly are we invited to take out of this Mr McKenzie. I mean if decision is the determinative meaning well presumably determination is equally a determinative meaning.
- McKenzie Yes, *Chaney* suggests in that passage Sir that the word takes its meaning from the statutory context and it's my submission that in the context in which the words 'decision' or 'determination' are used here, that word is not surplusage.
- Tipping J Is it any more complicated or sophisticated than scattered through this Act are various references to decisions and determinations and they were just anxious to make sure that nothing slipped through the cracks?

Anderson J In other Acts

Tipping J It's not an unfamiliar conjunction and difference of terminology.

Elias CJ Look at the last sentence on page 590 where he uses decision or determination.

Tipping J Yes, he must have

Elias CJ As the

Tipping J This is Justice Northrop.

Elias CJ As the overall application for review.

Blanchard J What's the distinction that you are seeking to draw between a determination and a decision?

McKenzie That a determination refers to the ruling

Blanchard J On the way to a decision.

McKenzie On the way to a decision on a matter which is essential; an essential component or step in this decision

Blanchard J Well can I draw your attention to s.12M, ss.7, which is plainly talking about the Authority's decision in the appeal and yet in the first line it uses only the word 'determination'.

McKenzie With respect there could be a determination made in relation to conjugal status alone.

Blanchard J This is in the determination of any appeal. That's the whole thing.

Tipping J And that's consistent with the heading to the section.

Blanchard J Because if it doesn't mean the whole thing, it means that that subsection giving the powers refers only to the bits, not the overall result, which would be ridiculous, so I just don't think that there's any force in this submission that determination and decision mean different things. It's just belt and braces, and a product probably of a fairly patchwork statute.

McKenzie If the word determination is used elsewhere in the statute to refer to an assessment made by the Chief Executive, Your Honours observed its use in s.63 in relation to the rate of benefit.

- Tipping J But I think you're putting on this point greater weight than the suspension can bear. I don't deny that there are differences but I don't think they support the conclusion for which you're contending.
- McKenzie I may be putting more weight on it than is necessary in terms of the matters on which I need to satisfy Your Honours. It's not an essential plank of the appellant's argument that that word be given a different meaning, although it clearly assists. Of more significance of course is the issue my friend recognised as the basic issue here
- Tipping J Well you're going well beyond the reply here. Miss Jagose was really fairly dismissive at this point and tagged herself on it for no more than about 30 seconds as I recall.
- McKenzie Yes, well I don't need to trouble Your Honours any further on that but as I've said it's not an essential point in the appellant's argument.
- Tipping J No.
- McKenzie In relation to s.81, my friend Your Honours to earlier versions of that section and the earliest version which referred to a change of circumstances
- Tipping J You can't resist the general submission that it's been a consistent pattern of broadening can you? You have to presumably say that you must read it down from the most extreme literal meaning that could theoretically be given to it.
- McKenzie Indeed Your Honour and if there's not to be abuse of process in the way in which that discretion, and it is a discretion, is exercised under s.61, then it necessarily needs to be read in my submission a circumscribed way and notwithstanding the removal of the words 'change of circumstances', a change in circumstances from the decision is required if there is not to be in relation
- Tipping J I think that's a difficult submission. I wasn't inviting you to go that far. I think that's a very difficult decision when they've expressly abandoned the concept of change of circumstances. I think the control on the section, if any, has to be found elsewhere.
- McKenzie Well the section now talks about 'remains entitled' or 'may or may not have been entitled' and that in my submission does involve a change in circumstances, if one is looking at whether a beneficiary remains entitled, remain indicates the need for well an absence there of change. If it's a change then the beneficiary may not remain entitled.

- Tipping J But it's not confined anymore to just remains, it has this backward looking. That's Miss Jagose's fundamental point that it looks backwards now to the past, not just the present, today and the future. How do you deal with that point? That's the change that she invokes in the legislation. And it's a point of real force because clearly they must have intended to widen it to some extent.
- McKenzie Indeed, but in my submission the legislature has not addressed the kind of circumstance we face here where there has been a decision which becomes the decision of the Chief Executive and the Chief Executive then seeks. When there are no new circumstances, no more than the Chief Executive simply wishes to reopen the matter, then uses the power under S.81. That in my submission would be an abuse of the discretion. It finds support in the *Dickson-McIver* case which Your Honours would have seen in the bundle and which was referred to in the primary submission. Now that's at tab 18 where settlement
- Tipping J And how does that case just short support your abusive process proposition?
- McKenzie In that case the beneficiary on the eve of the matter going before the Appeal Authority entered into a settlement with the Chief Executive and it was on different terms to the ministerial direction, which would ordinarily have been applied. It was argued in that case, as my friend has argued today, that the Chief Executive could decide on the very next day or at any time to revisit that matter and His Honour Justice Gallen rejected that contention, that's at page 216 of the volume at page 10 of the case. "I reject the contention for the respondent that the Director-General was entitled in the absence of a change of circumstances, to vary the benefit which the settlement accepted was to be paid to the applicant".
- Tipping J Are you relying on the fourth line on page 10 of the judgment 216 of the casebook? In this case as far as the first is concerned, sorry, line above, "as far as the second is concerned, whether it was entitled, that is resolved by the settlement" and you would say that is resolved by the finding of the BRC. Is that the precise linkage?
- McKenzie Yes, that's the precise point Sir, it's in the primary submission.
- Tipping J Yes, thank you.
- McKenzie I submit that s.81 in response to my friend cannot be used
- Elias CJ He describes it of course as a contract, is that significant? That the settlement was a contract?

- McKenzie It's significant insofar as a contract has binding effect, but it would be my submission that decisions of the BRC, particularly those that revoke the Chief Executive decisions, necessarily also bind the Chief Executive, so that there is an analogy there which moves into this particular set of circumstances. Then I would submit that s.81
- Tipping J But this was a decision clearly when change in circumstances was still alive was it, or is that Justice Gallen's parenthetical observation, because dropping a few lines from where we were, "not only however does the statutory review contemplate changes in the benefit being dependent on a change in circumstances" etc?
- McKenzie Yes, His Honour recognised that there could be changes in policy; changes of course in the statute, and in other respects which for reasons for fairness must mean that the Director-General under s.81 could revisit the matter to be fair to all beneficiaries, but the essential point that His Honour was making, namely that a change of circumstances was required, is apposite
- Tipping J Was that because that was required by statutory provision or had that gone from the statute by this stage?
- McKenzie It had gone from the statute at this stage. This was argued on the wording of the statute in its present form.
- Elias CJ But this case is really about the past isn't it? They compromised the entitlement, the past entitlement, but it didn't fetter reassessment of the, as I read it, sorry, as I'm reading it as fast as you speak and maybe I've got it wrong but it didn't effect a reassessment of entitlement.
- McKenzie Yes Your Honour it referred to future entitlement, yes that was entitlement. Yes that was argued in that case and His Honour Justice Gallen considered that it would effect future, not only the question of past entitlement unless there were a change of circumstances.
- Elias CJ Oh, it's just that doesn't seem to be what's being said at page 8 of the judgment because he says it wasn't opened for the Director-General to fetter future executive action, but it may be that I haven't read it properly.
- McKenzie Yes, that was certainly one of the arguments, but His Honour's view was that even in relation to future because the contract dealt with an ongoing circumstance, so that was an issue here that that could not be unilaterally in effect changed by the Chief Executive.
- Tipping J At the bottom of page 7 effectively the last three lines seem to capture what the issue was. The Chief Executive there wasn't going back on the settlement but was just saying the settlement had no effect on the future. It

wasn't as nasty as waking up the next morning and saying I'm going to ignore that settlement.

McKenzie No, no, to be charitable to the Chief Executive

Tipping J Yes, well that's rather the impression you gave earlier but I understand now it was for the future.

McKenzie Yes.

Tipping J I mean it's no doubt my fault for not understanding Mr McKenzie.

McKenzie And then if Your Honours please I submit that s.81 cannot be used and I use the words of His Honour Justice Blanchard here as the surrogate right of appeal I respectfully agree with that observation and again this goes to the question of change of circumstances. Tenthly in my submission the policy does favour finality and that important policy of the law would in my submission point in the direction of the Chief Executive not in the absence of new material be in a position to reopen this matter on the back of the appellant's appeal. I refer again to Her Honour Justice Goddard's summary of the situation in relation to s.81, paras.31 and 32 in tab 4 and I simply direct attention to that again in response to my friend. Then Your Honours s.86(9)A to which my friend refers deals with the special circumstance in relation to debts, but it's submitted is more limited in scope than my friend may have indicated. The error there in *Moodie* which was an earlier case, regarded as not involving a culpable error but the language of the section was reworded so that what it refers to now is not directed to the error in payment but directed to whether the payment has been caused by an error on the part of an Officer of the Department.

Tipping J But it substantially ameliorates my earlier concern Mr McKenzie if I can say the waking up three months later point. I mean they can't do it if it's contrary to that section, which whatever its precise parameters, very substantially overcomes the issue that I was a bit worried about.

McKenzie It would in some areas Your Honour but the beneficiary would still need to show that there was an error on the part of the Department.

Tipping J Oh it may not be quite as beneficial to a beneficiary as some would like but it very substantially ameliorates the problem.

McKenzie In the particular area that it addresses and in the circumstances where that provision can be applied

Tipping J Yes.

- McKenzie But it would be my submission that the Court should not in this case defer to that provision.
- Tipping J Well it avoids if I can intervene again, it avoids having to read it down to cope with such an outrageous outcome, because what might be perceived as an outrageous outcomes is already provided for a very large extent in the Act.
- McKenzie It may reduce the level of outrage Your Honour but it's still in my submission an unfairness and an injustice, a residual unfairness and injustice, notwithstanding that provision. It doesn't wholly ameliorate the situation. And finally it would also be my submission that s.81 can't properly for these reasons be used to remedy the odd result as was suggested by the Court of Appeal. It gives to the same difficulties with respect and in effect turns what is really a discretionary provision into one that would result in a mandatory exercise of power to correct the anomaly. Your Honours did refer before the luncheon adjournment to the *Lynch* case, *Arnold* and other cases. If it's of any assistance to Your Honours I can direct Your Honours to quite recent authority on the point that that Her Honour The President raised as to whether in a public law case issue estoppel is appropriate.
- Tipping J Well we may as well have the reference
- Elias CJ Yes.
- Tipping J But no argument on it because it wasn't really touched on against him.
- McKenzie Now Your Honours *Link Technology 2000 Limited and the Attorney-General* decision of the Court of Appeal 2006 one New Zealand Law Reports at page 1 and then there are two tax cases so I'll give Your Honours the reference to the second of them from which the reference to the first can be picked up. The second of these is *Douglas and the Commissioner of Inland Revenue* 2006, two New Zealand Law Reports at 513
- Blanchard J Decision of?
- McKenzie And it's a decision of Justice Courtney, and I'd thought that the other case was referred to there but it's not so I'll give Your Honours the other reference also. Justice Courtney – that's *YR Supplies Limited and the Commissioner of Inland Revenue* 2006, two New Zealand Law Reports at 384.
- Blanchard J And what's the significance of these cases?

McKenzie These cases establish that issue estoppel is available in relation to a public law decision. If Your Honours wish me to respond on the *Arnold* case I could make an observation there to Your Honours, but

Blanchard J Respond to what?

McKenzie The observations from Your Honour this morning that

Elias CJ On the what?

McKenzie That it's going well beyond I note the right of appeal and not being matters that were raised by my friend, but if Your Honours wished assistance in that area

Elias CJ I think you should confine yourself to matters of reply thank you Mr McKenzie.

McKenzie Yes Ma'am, happy to do so Your Honour. That concludes if Your Honour pleases the matter before us today.

Elias CJ Thank you Mr McKenzie. Thank you counsel for your assistance. We'll take time to consider our decision.

3.39pm Court adjourned.