IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY **Civ 2005-485-2140**

UNDER **The Human Rights Act 1993**

BETWEEN **THE ATTORNEY-GENERAL**

Appellant

AND **CHILD POVERTY ACTION GROUP INCORPORATED**

Respondent

RESPONDENT'S SUBMISSIONS AS TO JURISDICTION

Dated 10 May 2006

Judicial Officer: Justice Ronald Young

OFFICE OF HUMAN RIGHTS PROCEEDINGS
CA RODGERS
P O Box 12411
Thorndon
WELLINGTON

Telephone (04) 471-6758
Facsimile (04) 499-5998

MAY IT PLEASE THE COURT:

1 Following consideration of the appellant's submissions the respondent agrees that s 123(2)(e) of the Human Rights Act ("the Act") does not provide jurisdiction for the appeal which is now before Your Honour.

"REGULARISATION" OF PROCEEDING PURSUANT TO RULE 5 OR RULE 11 HIGH COURT RULES

2 The appellant notes that r 5 specifies it relates to circumstances where there has been a failure to comply with the requirements of the rules themselves. This is not the situation in the present case where there has been non-compliance with the jurisdiction provision concerning appeals to the High Court in the Act.

3 Nor for completeness does it appear to the respondent that any of the rules contained in Part X of the High Court Rules (which is relevant to appeals under the Human Rights Act) have not been complied with.

4 The appellant notes that r 11 provides a wide power for the Court to amend defects and errors in pleadings or procedure. The respondent has been unable to locate any authority concerning whether want of jurisdiction can reasonably be described as a defect or error.

A question of degree of seriousness of the irregularity

5 In *Invercargill City Council v Hamlin* (1994) 7 PRNZ 674 the Court of Appeal (per Richardson J) said the test for the use of r 5 is a question of fact in each case, as well as how serious was the irregularity (at p 676).

6 It is submitted that having no jurisdiction for proceedings commenced in this Court is a very serious irregularity not appropriately cured by the power in r 5. The entire basis for the proceeding is what is sought to be cured. This has significant consequences for the case, for example the usual pleadings are not

in place for any of the types of proceedings suggested by the appellant. Not only would an amended statement of claim be required but the present respondent would need an opportunity to file a statement of defence. Further if there were any changes to either the substance or focus of the proceedings resulting from the fresh pleadings the parties may wish to make further submissions to the Court. This is possible given the different legal framework and rules which would apply to reconstituted proceedings under any of the alternatives sought.

7 Dealing with these proceedings back to front will not only cause inconvenience and further expense to the Court and the parties but as well illustrates the very serious extent of the so called "irregularity" in this case.

8 What was described as a "*reconstituting*" an appeal into a judicial review proceeding using r 5 occurred in *Peach v The Medical Council of New Zealand* (unreported, High Court Wellington, AP 87/94, McGechan J) which is referred to by the appellant. That case can be contrasted with the present case as that significant step (reconstitution) was taken to allow a comparatively simple procedural matter (an adjournment of a hearing) to be revisited. This type of matter is one which r 5 is clearly intended to deal with.

9 The want of jurisdiction in the present case is not comparable in either nature or degree of seriousness (in terms of the test in the *Invercargill City Council v Hamlin* decision). Further, in the *Peach v The Medical Council of New Zealand* decision no further pleadings were required to be filed; no further submissions on substantive matters (including concerning an altered legal framework in which the issues needed to be dealt with) following a completed hearing (as has occurred in the present case) were required. The same considerations distinguish the present case from *Niak v Armitage* (1992) 6 PRNZ 566 (referred to by the appellant).

10 A second matter of degree concerns the stage at which the proceedings are at when an amendment is sought. This point was made in *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (referred to by the appellant). The Court of Appeal

(per Cooke P) described the granting of amendments using r 11 at a very late stage in the proceedings as being "*a notable indulgence*" (at p 384).

11 The Court set out the test for amendment at a late stage being "*three formidable hurdles*" which an applicant would need to establish namely: showing that the amendment is in the interests of justice, it will not significantly prejudice the defendant or cause significant delay (at p 385). The respondent submits that these hurdles have not been overcome. These points are discussed further below.

12 The nature of the prejudice which will arise if these proceedings are reconstituted as sought is discussed further below. In terms of the relevant legal principles the commentary to r 11 in *McGechan on Procedure* at paragraph 11.04 also suggests that amendments should not be made under r 11 if this would cause prejudice which could not be remedied by an appropriate award of costs (*Wright Stephenson and Co Ltd v Copland* [1964] NZLR 673).

Reconstitution of proceedings to avoid restrictions on appeals under Human Rights Act

13 The commentary to r 11 in *McGechan on Procedure* at paragraph 11.07 says that this rule cannot be used to override the provisions of a statute. The authority cited for this proposition is: *Kristensen v Global Flags Ltd (in liq)* (2001) 15 PRNZ 581. That case concerned a judgment irregularly obtained in breach of a specific rule as to service under the Companies Act 1993. The judgment was set aside.

14 Similarly in the present case the appellant is seeking an order under r 11 to effectively override the agreed effect or intent of s 123(2)(e) of the Act which appears to be to ensure that proceedings before the Human Rights Review Tribunal ("the Tribunal") are dealt with in full before any part of the substantive proceedings is subject to consideration by an appellate or higher Court.

15 Contrast the *Invercargill City Council v Hamlin* case where the irregularity at issue was a breach of service requirements contained in the High Court Rules. That type of "irregularity" which arose directly from the rules rather than pursuant to statute was seen to be appropriately cured by r 5. However, in *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404 Thorp J considered r 11 was not appropriately used to cure a failure to serve the Tribunal with a copy of a notice of appeal (along with filing the notice in the High Court and serving a copy on the respondent which two steps were completed within time).

EFFECTS OF RECONSTITUTING THE PRESENT APPEAL

16 If Your Honour considers that this appeal should be reconstituted on one of the alternate bases suggested by the appellant, the respondent has no preference as to which of these should be selected. However, as noted above, if the appeal is reconstituted not only will the filing of what would become the (amended) statement of claim be necessary but as well a statement of defence will need to be filed by the respondent. As well, depending upon the substance of those pleadings further submissions may then be required to be made to the Court.

17 As an alternative to the order sought by the appellant, the respondent seeks an order striking out the appeal for want of jurisdiction so as to enable it to pursue its substantive proceedings before the Tribunal.

18 This course of action would be consistent with what is now agreed is the effect of s 123(2)(e) of the Act which is to ensure proceedings are dealt with by the Tribunal in full before any part of the substantive proceedings is subject to consideration by an appellate Court. Whether the possibility of a legislative amendment should be considered to allow issues as fundamental as jurisdiction to be able to be appealed before complex and lengthy substantive proceedings are heard at first instance, in particular under the new Part 1A is a matter the parties need to consider but which is outside the scope of Your Honour's decision.

Prejudice and delay

19 Several of the points listed at paragraph 25 of the appellant's submissions as reasons why the order sought by the appellant is appropriate are disputed. These are discussed below. In summary it is not in the interests of justice to allow the appeal to be reconstituted because:

(1) there is likely to be additional expense and delay;

(2) the right of further appeal under reconstituted proceedings will not constrained as it is in the Human Rights Act;

(3) the present respondent has no interest in delaying its substantive complaint to assist with setting precedent for future cases;

(4) it should be permitted to pursue its substantive claim before the Tribunal without further delay particularly given that it is not in any of the categories of unattractive litigants (for example busy bodies) which the appellant is concerned about;

(5) it is not at all certain that the jurisdiction point will need to be raised on appeal and therefore there is not necessarily a waste of resources preparing for and hearing the substantive complaint before the Tribunal;

(6) nor is it at all certain that the appellant's interests will be served by fresh proceedings in the Court as alternative to the defunct appeal.

20 First, in contrast to the cases referred to by the appellant (discussed above) he is seeking this proceeding to in effect be conducted to a large extent back to front. Although the respondent has no interest in delaying or unnecessarily complicating the matter before the Court, the course of action sought by the appellant will not necessarily be a simple matter of amending the form of the

"claim" and then having Your Honour make a decision based upon the hearing last week. There is likely to be some delay and additional expense to both parties as a result of reconstituting the appeal.

21 Second, the respondent will be prejudiced if the appeal is reconstituted in the manner sought as the present appellant will have, in respect of all three alternate means suggested, a right of appeal from Your Honour's substantive decision to the Court of Appeal. No leave will be required. By contrast under the Human Rights Act a second appeal relating to a decision of an appeal to the High Court requires leave from the High Court or special leave from the Court of Appeal pursuant to s 124 of the Act. The prospective appellant needs to show that the question of law being sought to be appealed is a matter of general or public importance (see s 124(2) and (3)). Clearly the intent of the Act is to limit the ability of parties to appeal beyond the High Court unless this threshold can be met. No such restraint would apply if the current appeal is reconstituted as sought.

22 Third, although the appellant may wish to have the Tribunal's jurisdiction under the Act considered by the higher Courts, the respondent Child Poverty Action Group has no interest in clarifying this issue for future cases. The respondent has no statutory functions under the Act and its interests should not be confused with any interest the Office of Human Rights Proceedings or the wider Human Rights Commission may have in having this point considered by the higher Courts.

23 Fourth, as discussed above the consequences of reconstituting the appeal are likely to cause further delay in this Court as well as possibly as a result of further appeals (which will be available as of right). This is contrary to the interests of justice given that the respondent is not in any of the unattractive categories of litigant (namely a busy body or a group making use of the Human Rights Act to pursue a against the wishes of affected persons) which the appellant seems to be concerned about.

24 It is further contrary to the interests of justice to allow further delay of consideration of the substantive complaint before the Tribunal which concerns the unavailability of a tax credit, aimed at supporting low income families, to some of the poorest families in New Zealand. This is an important public interest issue and it is submitted that this Court needs to give substantial weight to encouraging the parties to deal with the substantive issue without further delay.

25 Fifth, the mischief in the Act could be cured by alternate means, for example by way of legislative amendment. This could ensure that future cases are not brought by unattractive categories of litigants without further delaying the present case. Of course this option would be subject to democratic Parliamentary processes. If this option was pursued it is possible that there would be no need for the jurisdiction point to then be raised on appeal in this particular case following the substantive proceedings before the Tribunal. This would mean that there would be no unnecessary cost and waste of resources in dealing with the substantive proceeding before the Tribunal in full (as envisage by s 124) prior to any appeal, without further delay.

Possibility appellant will file proceedings under one of the alternate bases notwithstanding the appeal being struck out

26 The sixth and final point which needs to be addressed is that the appellant appears to be suggesting that if he is unsuccessful in having the proceedings before Your Honour reconstituted he will consider bringing fresh proceedings in the High Court under one of the alternate bases he has suggested (refer paragraph 25.4 appellant's submissions).

27 With respect such a step will require serious consideration and balancing of a number of factors including those which have been discussed above, for example whether the cost of fresh proceedings outweighs the desire to seek further clarification on the jurisdiction provisions of the Act particularly given that the present respondent is not in any of the categories the appellant is concerned about and given that there are other means of achieving clarity,

including the exclusion of certain categories of litigants by way of clear words in the legislation itself, as has been done in legislation in other jurisdictions (refer respondent's submissions on substantive appeal).

28 Other factors to be considered include that jurisdiction under the Declaratory Judgments Act 1908 is discretionary (s 10) and the awarding of remedies in judicial review proceedings is discretionary (s 4 Judicature Amendment Act 1972). An important factor for a Court considering whether to hear or award remedies (respectively) in any such proceedings would be the agreed clear effect and intent of s 123(2)(e) to have the full substantive proceeding first heard by the Tribunal before consideration of any interlocutory points by the higher Courts. Although not precisely on point *Van Kessell v Human Rights Commission* [1986] 1 NZLR 628 provides an example of where Williamson J declined to hear an application under the Declaratory Judgments Act concerning a provision in the Human Rights Act.

29 The respondent also notes that a factor the present appellant would need to consider is that the respondent does not accept that the agreement reached between the parties with regard to each party bearing its own costs in these proceedings would extend to what were at the time the agreement was made entirely unanticipated proceedings brought separately under the Declaratory Judgments Act as a means of avoiding the restrictions on appeal under the Act.

30 These and possibly other factors would need to be weighed up by the appellant before embarking upon completely fresh proceedings to in effect appeal the Tribunal's decision as to its jurisdiction. However, it is suggested that this would be preferable to reconstituting the present appeal as this would allow such proceedings to be dealt with by this Court and the parties in the usual orderly manner rather than back to front which will require the filing of fresh papers from both parties in any event as well as possibly further hearing time.

CONCLUSION

31 In conclusion, as discussed above, it is disputed that reconstituting the appeal as sought by the appellant would benefit both parties in the present case or that this would not cause prejudice to the present respondent.

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Catherine Rodgers

Counsel for the Respondent