NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF FIRST APPELLANT/SECOND RESPONDENT PROHIBITED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-485-000047
[2018] NZHC 1607

IN THE MATTER OF	An appeal by way of Case Stated from the determination of the Social Security Appeal Authority at Wellington under section 12Q of the Social Security Act 1964
BETWEEN	F First Appellant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT First Respondent
BETWEEN	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Second Appellant
AND	F Second Respondent

Hearing: 20 July & 27 October 2017

Appearances: F M Joychild QC & G E Whiteford for First Appellant/Second Respondent
S P Jerebine & H T N Fong for First Respondent/Second Appellant

Judgment: 2 July 2018

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 2 July 2018 at 2.30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:

Introduction

[1] Ms F is a solo parent with two dependent children. Between 2005 and 2010 she received the Domestic Purposes Benefit as well as other forms of assistance under the Social Security Act 1964. In 2010, following a tip-off from Ms F's ex-partner, the Ministry of Social Development commenced an investigation into her financial circumstances and reviewed her benefit entitlements. It found that she had received income from various additional sources and as a consequence had been paid more than she was entitled to in the form of social security assistance.

[2] The Ministry now seeks to recover $109,852.91 in overpayments from Ms F. Ms F has appealed its decision to the Benefits Review Committee and the Social Security Appeal Authority, and the Authority now poses two questions of law for this Court on appeal:

(a) Did the Authority err in law in its interpretation and application of what constituted "income" for the purposes of the Social Security Act 1964, in finding that money received by Ms F from her mother or other unknown sources constituted income?

(b) Did the Authority err in law in finding that Ms F's spending from bank loans borrowed on the security of her home to meet living expenses was not "income"?

Factual background

[3] Ms F earns some money through her company, of which she is the sole director, shareholder and employee. However, between 1 April 2005 and 10 July 2010 she also received the Domestic Purposes Benefit (Sole Parent); Accommodation Supplement; Disability Allowance; Special Benefit; Temporary Additional Support; and Special Needs Grants. The Ministry now contends that she was overpaid these benefits.

[4] Ms F moved from Christchurch to Auckland in 2005. She initially rented a home in Auckland, but by 12 May 2005 had purchased her own house (house 1). In October 2005, she sold house 1 and purchased house 2. Early in 2010 she sold house

2 and moved to house 3, which she sold in late 2012 or early 2013. She then purchased a more modest property. Ms F's evidence is that she found it necessary to move house because each property had severe structural defects.

[5] In 2010, Ms F's ex-partner made an allegation to the Ministry of Social Development that Ms F was buying and selling houses and receiving assistance from her parents while also receiving a benefit. The Ministry then investigated Ms F's financial records pursuant to s 12(1A) of the Act. It found that during the period between 2005 and February 2010, around 140 deposits from unidentified sources, totalling $181,000, had been paid into accounts operated by Ms F.

[6] As result of the information it received, the Ministry reviewed Ms F's benefit entitlement pursuant to s 81 of the Act. It assessed the amounts received in excess of her known income, and charged that excess sum as income against Ms F's benefit entitlement. This led the Ministry to determine that Ms F was not entitled to receive all of the benefit she had been paid, and it decided to take steps to recover the overpayment under s 86 of the Act.

[7] On 29 March 2011, the Ministry advised Ms F by letter that it had established an overpayment of $120,398.35 between 1 April 2005 and 10 July 2010:

> Our overpayment assessment is based on an analysis of your bank statements. All monies received, accepting business costs able to be identified, was used for living expenses and as such is income for benefit purposes. This action was taken because you did not respond to our previous invitation to provide more information about your income. You are still able to do this by contacting Steve Foy on [phone number] as soon as possible ...
>
> The overpaid benefit must be repaid.

[8] On 27 June 2011, Ms F applied for review of the decision by the Benefits Review Committee. In December 2011, the Ministry conducted an internal review and upheld its decision that an overpayment had occurred. It advised Ms F of this by letter dated 12 January 2012, informing her that the matter would accordingly proceed to a hearing by the Benefits Review Committee.

[9] Throughout 2012 the Ministry corresponded and met with Ms F and her solicitor. Following the provision of further information by Ms F's accountant, the

Ministry reassessed the overpayment at $127,275.05 and advised Ms F of this by letter dated 6 November 2012.

Benefits Review Committee decision

[10] The Benefits Review Committee hearing took place on 17 December 2012, and the Committee released its decision on 28 February 2013. Ms F contended that:

(a) the investigator failed to fully inform her of the details of the investigation so that she could supply the Ministry with the relevant information;

(b) the investigator failed to pass on information that she supplied to him so that it could be taken into account in the investigation;

(c) the investigator failed to supply her with all the relevant details in regard to the decision against her so that she could appeal in an informed manner;

(d) the Ministry had incorrectly interpreted the word "income", in particular by including loans in the definition of income;

(e) the Ministry had incorrectly assessed her income during the relevant period; and

(f) the Ministry had falsely accused her of failing to advise the Ministry of her income and of committing a benefit offence.

[11] The hearing focussed on the payments received by Ms F's parents, particularly her mother. The Ministry in its submissions accepted that genuine loan payments, for which there is a genuine obligation to repay, are not considered "income" and should not be included in income assessment for benefit purposes. However, gifts of money were considered "income". The Ministry pointed to the lack of documentation in relation to the purported loans of money from Ms F's mother, as well as the lack of any clear requirements for repayment.

[12] The Benefits Review Committee had regard to the definition of "income" in s 3(1) of the Act, and noted that neither party disputed that Ms F's mother made "periodical payments" to her. The Committee was satisfied that the amounts received by Ms F from her parents were used for "income-related purposes" as defined in s 3(1). It then referred to the decision in *Director-General of Social Security v K*,[1] noting that a loan is not income for benefit purposes. The Committee defined a loan as "monies which are advanced on the condition that they must be repaid". It accepted that a loan between family members may not require a written agreement, and may not charge interest.

[13] However, on the information before it the Committee was not satisfied that the amounts received by Ms F from her parents were loans. It noted that there was no evidence that this money was meant to be repaid:

(a) neither party to the transactions kept a record of how much money was advanced;

(b) there was no plan for repayment;

(c) no verification had been received that any of the money had been repaid;

(d) the claim that changes to Ms F's mother's trust were as a consequence of the loans was not convincing.

[14] The Committee therefore upheld the Ministry's decision.

Social Security Appeal Authority decision

[15] Ms F appealed the Ministry's decision, upheld by the Benefits Review Committee, to the Social Security Appeal Authority.[2] The hearing took place over three days on 5 December 2013, 14 May 2014 and 5 July 2014. The Authority released

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1 *Director-General of Social Security v K* HC Wellington AP255/95, 7 February 1997.
2 Pursuant to s 12J of the Social Security Act 1964.

its decision on 14 September 2015.[3] At that time the amount of the overpayment was assessed as being $117,919.32, following a further assessment in 2014 by Mr Hodgson, a financial analyst employed by the Ministry.

[16] The Authority began by setting out the purpose of the Act set out in s 1A and noted that given these objectives, it was unsurprising that the definition of income was broader than that contained in income tax legislation.

[17] The Authority then set out Mr Hodgson's analysis of Ms F's income, which was based on her personal spending. The Authority made some minor adjustments to Mr Hodgson's figures, but approved this method of assessing Ms F's income. It noted that where a beneficiary operates a number of different bank accounts and mixes personal and business spending, and receives multiple deposits from unknown sources, it may well be necessary to itemise the person's spending in order to quantify their income.

[18] Ms F submitted that spending on credit cards, spending derived from bank loans, her company's bank statements and spending derived from money received from her mother should be removed from the analysis of her income. The Authority addressed each of these in turn.

[19] First, the Authority analysed the circumstances surrounding the sums of money Ms F received from her mother and noted:

(a) there was no documentation of any loan by Ms F's mother to Ms F prior to the Ministry's investigation;

(b) no record of the amount of the loan was kept other than the record of transfers contained in the bank statements, and there were many of these transfers ranging in value from several hundred dollars to several thousand dollars;

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3 *Re F* [2015] NZSSAA 64.

(c) the evidence was that there was no firm date for repayment of the loan, and there was no repayment when Ms F sold house 1;

(d) there had been considerable variation in the amount Ms F and her mother said was borrowed, and other explanations about the alleged loan;

(e) the evidence as to repayments was unclear.

[20] There was evidence that Ms F's share as a beneficiary in a trust of which her mother was trustee was adjusted in 2006 (from 50 per cent to 25 per cent) and again in 2010 (to 20 per cent). Ms F said these adjustments reflected her mother's loans to her. However, the Authority considered that they could equally reflect the fact that her mother's estate had already been distributed to her through the trust or because she had received a gift from her mother.

[21] Taking into account the above factors, the Authority was satisfied on the balance of probabilities that the various deposits Ms F received from her mother were gifts. It stated:[4]

> Whether or not they were capital, they were periodic payments paid and used for income-related purposes and fall within the definition of "income" contained in the Social Security Act 1964. The calculation of the appellant's income should not be reduced by the amount received by her mother.

[22] Next the Authority considered Ms F's spending on her credit card, which sometimes amounted to as much as $20,000 in one year. The spending was funded by regular repayments, the majority of which were made with funds derived from Ms F's mother and some with funds borrowed from a bank. The Authority concluded that it was not unreasonable to include the expenditure incurred on the credit card as personal spending for the purposes of calculating Ms F's spending in excess of her income.

[23] Turning to Ms F's business spending, the Authority considered that it was appropriate to include Ms F's company bank accounts in the analysis because there was a mix of business and personal expenditure through those accounts. Further, Mr

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4 At [48].

Hodgson deducted business costs as detailed by Ms F, meaning that any potential miscoding of business expenditure as personal expenditure was offset.

[24] Ms F also said that her spending was funded in part by bank loans, and that bank loans should not be regarded as income for benefit purposes. The Authority noted at the outset that deposits to purchase houses were not included in Mr Hodgson's analysis of her spending; the only borrowing relevant to his analysis was borrowing which was used for spending on living costs and other personal spending. It considered there was evidence of spending from borrowed bank funds as follows:

(a) a loan of $20,000 in the year ending 31 March 2007;

(b) overdraft spending on living expenses of $25,604.76 in the year ending 31 March 2009; and

(c) overdraft spending on living expenses of $23,500 in the year ending 31 March 2010.

[25] The question for the Authority then was whether the portion of Ms F's spending based on bank borrowing could be regarded as income for the purposes of the Social Security Act. It noted that this was not unsecured borrowing as in *Director-General v K*; rather, Ms F was borrowing money against the security of her home. Arguably, her borrowing was a mechanism for releasing capital prior to the sale of the property. By drawing down on the loans from time to time, she was receiving periodic payments which she used for the purpose of meeting living expenses. The Authority commented that her spending suggested, bearing in mind the provisions of s 1A of the Act, that she did not need the benefit assistance she was receiving. It therefore considered that Ms F's spending derived from bank loans arguably met the definition of income.

[26] However, the Authority went on to note that there was insufficient evidence that Ms F was in the business of buying and selling homes. Had there been sufficient evidence to support that conclusion, it would have had no hesitation in finding that Ms F's spending from bank loans constituted income. However, the Social Security Act did not envisage beneficiaries borrowing money on the security of their home to meet

living expenses. The Authority therefore concluded that Ms F's spending from bank loans should be removed from the assessment of her income.

[27] The Authority summarised its conclusions as follows:[5]

> (a) The money received from the appellant's mother was not a loan. It was gifted to the appellant and should be regarded as income.
>
> (b) The inclusion of credit card spending and [Ms F's company's] bank accounts in the Ministry's analysis was correct.
>
> (c) Some of the appellant's spending was funded from bank loans and deductions as directed should be made from Mr Hodgson's chargeable income figures.
>
> (d) Credit card repayments made with borrowed money are accounted for by the deduction of the full amount of the bank loans specified.

[28] The Authority directed the Chief Executive to revise the assessment of Ms F's income based on its findings.

[29] In light of its assessment, the Authority then reviewed Ms F's entitlement to each form of benefit, allowance and grant she received during the relevant period, namely the Domestic Purposes Benefit, the Accommodation Supplement, the Disability Allowance, the Special Benefit, Temporary Additional Support and Special Needs Grants.

[30] As a consequence of the Authority's decision, Ms F has had a debt established against her of $109,852.91 which she is being required to repay.[6]

Case stated on appeal

[31] The parties had a right of appeal to the High Court from the Authority's decision by way of case stated on a question of law only.[7] Both Ms F and the Ministry exercised their right of appeal, posing one question of law each. The question of law arising from Ms F's appeal is:

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5 At [80].

6 The Authority issued a second decision on 31 May 2016 in which it quantified the debt and held that the Chief Executive was entitled to recover the debt: *Re F* [2016] NZSSAA 050.

7 Social Security Act 1964, s 12Q.

(a) Did the Authority err in law in its interpretation and application of what constituted income for the purposes of the Social Security Act 1964 in finding that money received by Ms F from her mother or other unknown sources constituted income?

[32] The question of law arising from the Ministry's appeal is:

(a) Did the Authority err in law by misapplying s 3(1) of the Act in finding Ms F's spending from bank loans borrowed on the security of her home to meet living expenses was not "income"?

[33] An appeal by way of case stated for the opinion of the High Court on a question of law is not a rehearing. As Kós J commented in *Koroua v Chief Executive of the Ministry of Social Development*:[8]

> The Court does not review the whole of the case from scratch. Rather it is a "form of consultation", with the Court, to obtain an answer to a specific point of law.

[34] There is therefore no appealable error of law where the lower Court correctly understood the applicable law and applied it to the facts, without overlooking any relevant matters or taking into account an irrelevant matter.[9]

[35] However, as the Supreme Court observed in *Bryson v Three Foot Six*, in rare cases a fact-finding body's ultimate conclusion on the facts may be "so insupportable – so clearly untenable – as to amount to an error of law".[10] That test sets a "very high hurdle" for the appellant.[11] To establish that an erroneous factual finding amounts to an error of law, the appellant must show that:[12]

(a) there is no evidence to support the determination;

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8 *Koroua v Chief Executive of the Ministry of Social Development* [2013] NZHC 3418 at [8].
9 *Harrison v Chief Executive of the Ministry of Social Development* [2017] NZHC 2041 at [6]; *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25].
10 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26].
11 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [27].
12 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26].

(b) the evidence is inconsistent with and contradictory of the determination; or

(c) the true and only reasonable conclusion contradicts the determination.

Issues

[36] Both questions of law engage the issue of the proper interpretation and application of what constitutes "income" for the purposes of the Act. In particular, they concern whether various types of loans fall within the definition of "income". I will begin by discussing this issue in a broad sense, by way of necessary background, before turning to the specific questions of law posed on this appeal.

What is the proper interpretation of "income" under the Social Security Act and does it apply to loans?

[37] The overarching question raised on both appeals is whether a loan falls within the definition of "income" in s 3(1) of the Act. The essence of a loan, of course, is a transfer of money from A to B with a corresponding contemporaneous obligation on the part of B to repay the money transferred from A to B.[13]

[38] I begin by considering the case law cited to me, before turning to undertake an interpretation of the relevant statutory provisions.

Case law

[39] Counsel have cited several New Zealand cases that have dealt directly or indirectly with this issue. The first is *McElroy v Director-General of Social Welfare*, which concerned a farmer whose farming business made it possible for him to obtain on credit (from the bank or his stock and station agent) money for his living expenses and goods and services for his day-to-day needs.[14] From time to time he sold parts of his farm or livestock, which went to reduce his indebtedness to the bank and stock and station agent. Judge Inglis in the Family Court was required to consider whether those

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13 *Federal Commissioner of Taxation v Rawson Finances Pty Ltd* [2012] FCA 753, (2012) 89 ATR 357 at [20]; see also *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 (CA) at 167.

14 *McElroy v Director-General of Social Welfare* [1992] 9 FRNZ 366 (FC).

personal drawings fell within the definition of income in s 3(1) of the Act. The Judge noted that the statutory definition characterises as income payments or benefits which are ordinarily regarded as being capital in nature, and that it was designed to capture those who were able to manipulate their financial affairs so as to have no taxable income and who might thus be entitled to claim state benefits. He held:[15]

> ... the fact remains that the [appellant] was in a position to obtain from the stock agent and the bank, on the security of the capital value of his farm, money, credits, and services of a kind which are commonly met from income, supplied on credit for the purpose of replacing or supplementing income lost or diminished owing to poor trading conditions or errors in management, and the supply of goods, services, and transport: paras (b) and (c) of the definition of 'income'.
>
> Looking at the matter from a different angle, the farm is [the appellant's] business base. In a broad sense his drawings for personal use are his income, whether derived from trading profit or capital.

[40] In *Director-General of Social Security v K*, Heron J distinguished *McElroy* on the facts.[16] *Director-General of Social Security v K* concerned the recovery of overpayments of a disability allowance because the respondents at the same time received a student loan with a living costs component, and the Director-General of Social Security contended that the living costs payments constituted income in terms of the wording of s 3(1). The living costs payments formed part of the student loan and had to be repaid.

[41] Heron J considered that the starting point had to be the conventional definition of income. He cited a taxation case in which it was observed that "income is something which comes in".[17] Although Heron J acknowledged that the meaning to be given to income for benefit purposes is wider than the meaning normally ascribed to income for income tax purposes, he considered that due regard had to be given to the underlying principles applicable to income and that "very plain language" would be required to bring loan monies into the definition of income.

[42] Heron J then distinguished *McElroy* for the following reasons:

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15 At 370.

16 *Director-General of Social Security v K* HC Wellington AP255/95, 7 February 1997.

17 *Reid v Commissioner of Inland Revenue* [1983] 6 NZTC 61,624 (HC).

> Here no recourse to her own capital is being made by the respondent. She is simply receiving an advance to be repaid. There is no question of capital being dissipated or reduced in return for advances made. Furthermore the current account run by the farmer with the bank or stock and station agent was being periodically affected by proceeds of farming including the sale of capital assets. In a sense the funds made available in that case may be truly seen as liquidation of capital items by virtue of and against the security held. The moneys advanced, if not otherwise repaid, would be recouped out of the individual's existing assets. In effect a receipt of capital albeit used for living expenses.
>
> The critical feature of *McElroy's* case is the use of capital in a manner that is generally served by income. The fact that the monies were advanced and were required to be repaid is not the critical consideration. What is important for present purposes was the resort in that case to an individual's assets to provide and serve the purposes of income, that resort facilitated by advances against the capital rather than a piecemeal and likely impossible disposal of parts of the same capital. I do not see *McElroy's* case as assisting the appellant's case here.

[43] Heron J accepted the proposition that the definition:

> ... requires the essential quality of income to be retained and monies being capital in origin or nature are income only where they truly add to the resources of the person receiving them.

[44] The Director-General submitted that the social welfare legislation provides a backstop of last resort and recourse must be had to all other resources before entitlement to a benefit arises. Heron J agreed that in general terms that was undoubtedly the purpose of the legislation, but noted that this could not affect the overriding consideration that the student loan scheme provided government assistance by way of loan rather than cash grant. Student loans were available without regard to need, and had to be repaid.

[45] Mr Fong submits that the High Court's decision in *Director-General v K* is inconsistent with the Court of Appeal's decision in *Bramwell v Director-General of Social Welfare*,[18] meaning it should not be followed.

[46] As Ms Joychild QC points out, however, *Bramwell* concerned different issues to those in *Director-General v K* and the present case. In *Bramwell*, the appellant received an Unsupported Child's Benefit under the Act, which was to be diminished by one dollar for every dollar of the annual income of the child (other than personal

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[18] *Bramwell v Director-General of Social Welfare* [2001] NZAR 890 (CA).

earnings). The appellant's partner was killed in an accident, and compensation was then payable under the accident compensation scheme to reflect the deceased's potential earning capacity at the time of her death, because she had a dependent child. The question was whether the accident compensation payments were properly regarded as income of the child, meaning the Unsupported Child's Benefit payments should be reduced accordingly. The appellant argued that if the Unsupported Child's Benefit was reduced because of the accident compensation payments, which were much lower than the deceased's earnings when she was alive, they would not compensate the child for the economic effect of the death of a caregiver.

[47] The High Court upheld the Social Security Appeal Authority's decision that the accident compensation payments were income under the Act and the Unsupported Child's Benefit payments should be abated accordingly. Mr Fong relies on the following passage from *Bramwell*:[19]

> In the face of the definitions, there is insufficient force in the argument that the payments are not income because in the circumstances they did not add to the resources available to the child, being merely in mitigation of the economic loss suffered by reason of a caregiver's death. It is the use to which payments are intended to be put, not whether they are capital in nature and not whether they are additional to or in replacement of other moneys, which, under para (b), is the feature which brings them into account as "income".

[48] Mr Fong submits that the Court of Appeal, in the above passage, expressly rejected the reasoning Heron J subsequently adopted in *Director-General v K*, namely that monies are income "only where they truly add to the resources of the person receiving them". However, the Court of Appeal in *Bramwell* was not dealing with the question of whether a loan was properly regarded as income, which is the context in which Heron J's statement must be read: a loan cannot be regarded as truly adding to a person's resources, because the person becomes a debtor and must repay the money. In *Bramwell*, however, the accident compensation payments did materially add to the child's resources following the death of one of the child's caregivers. They did not have to be repaid. The Court of Appeal in the above passage was simply making the point that it was irrelevant that the accident compensation payments did not adequately make up for the caregiver's earnings before her death; they were still properly regarded

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19 At [14].

as income. I therefore consider that Heron's J reasoning in *Director-General v K* remains valid and applicable to this case.

[49] Mr Fong also refers to English case law as to whether a loan is properly categorised as "income" for the purposes of the equivalent English social security legislation. The English legislation does not define "income", so the courts have applied the ordinary and natural meaning of the word. Mr Fong submits that in New Zealand, the courts should focus on the statutory definition of income, rather than the conventional or ordinary definition. Nevertheless, he relies on the English case of *Morrell v Secretary of State for Work and Pensions* in submitting that in any event, the fact that loans are repayable does not deprive them of their character as income even under the conventional definition.[20]

[50] The position taken by the English Court of Appeal has been that where the beneficiary regularly receives sums of money and uses them to meet living expenses, the sums of money have the character of income. The fact that they are loans and therefore subject to a repayment obligation does not automatically give them a different character.[21] Rather, the Court will examine the nature of the repayment obligation. For example, a sum received under a certain obligation of immediate repayment would not amount to income. That was the position in *Leeves v Chief Adjudication Officer*, where a student had been awarded a student grant but had abandoned his course partway through, meaning he had to repay the grant.[22] Potter LJ held that when the City Council sent the appellant a letter making demand for the repayment of the student grant, the appellant had an undisputed and immediate obligation of repayment. At that point the appellant's grant "lost its character of 'income' on any ordinary understanding of the word".[23]

[51] Where there is no immediate and certain obligation of repayment, however – such that it is not clear the monies were advanced by way of a loan at all – the English

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20 *Morrell v Secretary of State for Work and Pensions* [2003] EWCA Civ 526.
21 *Morrell v Secretary of State for Work and Pensions* [2003] EWCA Civ 526 at [33].
22 *Leeves v Chief Adjudication Officer* [1999] ELR 90 (CA).
23 At 100.

courts treat the money as income. That was the case in *Morrell v Secretary of State for Work and Pensions*, where the appellant had received money from her mother:[24]

> ... it is difficult to envisage anything less certain or immediate than the repayment obligation in the present case. On the basis of the mother's evidence, the sums would be repayable by the daughter either "gradually as her problems decrease" or "when she is able to find employment". In reality they might never be repayable at all, since the conditions for repayment might not arise or the mother might convert the loans into gifts at some future date (which, given the family relationship, must be viewed as a realistic possibility). In any event the obligation to repay is an uncertain and future obligation. In my view that is not sufficient to deprive the receipts of their character as income.

[52] Ms Joychild seeks to distinguish *Morrell* on the grounds that the English statutory scheme is different, in that there is no statutory definition of income and some form of misrepresentation by the beneficiary is required before recovery of overpayments can be effected. I do not consider that *Morrell* can be distinguished on those grounds. The absence of a definition of "income" in the English legislation does not make any material difference; or at least it is not helpful to Ms F's case, as the definition in the New Zealand legislation is very broadly framed. As for the requirement for a misrepresentation in the English context, I do not consider that this affected the English Court's assessment of the meaning of income and whether or not the term was properly applied to monies advanced from a parent to a child. The question of misrepresentation was addressed in the judgment as a separate issue.[25]

[53] Rather, I consider that the Court of Appeal's decision in *Morrell* was focused on the evidence that there was no certain obligation of immediate repayment. Indeed, it appears the Court was not persuaded that the sums of money were truly loans at all, commenting that the money "might never be repayable at all" and that the mother "might convert the loans into gifts at some future date".[26] I accept that in such a case, where there is a sum of money transferred with no certain obligation of repayment at all, the sum of money is not an authentic and bona fide loan and may be properly treated as income under the Act.

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24 At [33].

25 See [38]–[48], under the heading "Whether overpayments were made in consequence of misrepresentations".

26 At [33].

Statutory interpretation

[54] Having considered the case law, I now turn to the definition of income in s 3(1) of the Act. The relevant portions are as follows:

> **income**, in relation to any person,—
>
> (a) means any money received or the value in money's worth of any interest acquired, before income tax, by the person which is not capital (except as hereinafter set out); and
>
> (b) includes, whether capital or not and as calculated before the deduction (where applicable) of income tax, any periodical payments made, and the value of any credits or services provided periodically, from any source for income-related purposes and used by the person for income-related purposes

[55] The meaning of an enactment must be ascertained from its text and in the light of its purpose.[27] I begin by considering the text of the provision. The Ministry has relied on paragraph (b) of the definition of income, which for present purposes has three basic components:

(a) any periodical payments made from any source;

(b) for income-related purposes;

(c) used by the person for income-related purposes.

[56] "Periodical" is defined in s 3(1) as meaning "regular or intermittent". Like Heron J in *Director-General of Social Security v K*, I accept that the ordinary meaning of "periodical" is "supplied regularly over a period and not on only isolated occasions".[28] As for payment, I consider that in broad terms it refers to the transfer of money to another person, although typically in discharge of an obligation of some kind.[29] "Income-related purpose" is also defined in s 3(1) of the Act:

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27 Interpretation Act 1999, s 5(1).

28 *Director-General of Social Security v K* HC Wellington AP255/95, 7 February 1997, citing *Blackledge v Social Security Commission* HC Auckland CP81/87, 17 February 1992.

29 Lesley Brown (ed) *The Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford (UK), 2007) defines "payment" as "an act, or the action or process, of paying", and "pay" as: "Give (a person) money etc. that is due for goods received, a service done, or a debt incurred; remunerate. Also, hand over or transfer (money etc.) in return for something ..."

income-related purpose, in relation to any person, means the purpose of—

(a) replacing lost or diminished income; or

(b) maintaining the person or a member of his or her family; or

(c) purchasing goods or services for the person or a member of his or her family, being goods or services of a kind that are commonly paid for from income; or

(d) enabling the person to make payments that he or she is liable to make and that are commonly made from income

[57] It is not disputed that the money received by Ms F and included in the Ministry's assessment was received for income-related purposes and used by her for income-related purposes, so I will not dwell on this aspect of the definition of "income".

[58] On its face the definition of "income" is wide-ranging, and sufficiently broad to encompass regular loans of money that are used by the recipient for income-related purposes. I accept Mr Fong's submission that the statutory definition of the term, rather than its ordinary meaning, should be the starting point when it comes to interpretation. However, I observe as Heron J did in *Director-General of Social Security v K* that the conventional meaning of "income" refers to money coming in. A loan, which must be repaid, would not ordinarily be conceived of as income.

[59] I pause here to briefly refer to Ms Joychild's submission that the Ministry's policy, communicated to Ms F on multiple occasions, was that loans were not treated as income and did not need to be disclosed. Whether or not this was the Ministry's position is an evidential point that I am unable to resolve on an appeal by way of case stated on a question of law. In any event, even assuming this was the Ministry's stance, it does not assist me in determining as a matter of law the proper interpretation of the statutory definition of "income". The Ministry's position may well have been erroneous.

[60] For further interpretative guidance, I turn to the purpose of the Act. As Tipping J commented in *Commerce Commission v Fonterra Co-operative Group Ltd*:[30]

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30 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

> Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[61] First, it is relevant to note that the definition of "income" is significant because income-tested benefit entitlements abate when a beneficiary's income exceeds the specified level under the relevant income tests in the legislation. For example, "Income Test 1" provides:[31]

> **Income Test 1** means that the applicable rate of benefit shall be reduced—
>
> (a) by 30 cents for every $1 of the total income of the beneficiary and his or her spouse or partner which is more than $100 a week but not more than $200 a week; and
>
> (b) by 70 cents for every $1 of that income which is more than $200 a week

[62] The accurate assessment of income is therefore crucial to determining benefit entitlements under the Act.

[63] Next, I turn to the way in which the statutory definition of "income" has evolved. Prior to 21 November 1984, the definition simply read that income includes "all money and the value of all benefits derived or received by that person from any source for his own use or advantage". There was then a list of specific exceptions, none of which are relevant for present purposes except paragraph (a): income does not include capital money received from any source.

[64] As of 21 November 1984, the Social Security Amendment Act 1984 amended the definition of income so that the present paragraph (b) was included. The main purpose of that Amendment Act was to insert a new Part to provide for family care grants.[32] Those grants were intended to provide financial assistance to families with children and low to moderate earning levels.[33] The explanatory note to the Bill recorded that "income" was redefined, and that:

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31 Social Security Act, s 3(1).
32 Social Security Amendment Bill (No 3) 1984 (47-1, explanatory note).
33 (8 November 1984) 458 NZPD 1520.

> The purpose of the new definition is to include certain types of regular capital payments or other benefits in the nature of income, such as sick fund payments, free or subsidised accommodation, etc.

[65] When the Bill was introduced, the Minister for Social Welfare explained that the Department of Social Welfare had encountered several difficulties under the previous definition as it applied to income-tested beneficiaries, which was why the term was redefined.[34] Later, she also commented:[35]

> It must be made clear that those who derive their main income from investment, or choose to live a life-style with limited cash in hand, or choose by accounting practices to limit their income, will not be handed family care on a plate.

[66] The Amendment Act was enacted on 9 November 1984. On 28 November 1984, responding to a question as to why it was necessary to amend the interpretation of "income" in the Act, the Minister for Social Welfare said:[36]

> It was necessary to amend the definition of income to include periodical payments of money and the value of any credits or services supplied personally to enable account to be taken of such credits or services when they are received as part of or in substitution for remuneration. As eligibility for social security benefits is assessed on the basis of need as determined by an income test, it is only equitable to take account of the value of credits or services received in lieu of wages when assessing an applicant's income.

[67] Nothing in the legislative history of paragraph (b) of the definition of income suggests that the extension of the definition was intended to encompass loans. Rather, the explanatory note to the amendment bill expressly states that the new definition was intended to cover certain types of regular capital payments or other benefits in the nature of income, such as sick fund payments, or free or subsidised accommodation. A loan of money, which must be repaid, is plainly not in that category. Nor is a beneficiary who takes out a loan to meet personal living expenses in the category of those who derive their main income from investment, or choose to live a lifestyle with limited cash in hand, or choose by accounting practices to limit their income. In my view the definition is more broadly worded than was necessary to give effect to Parliament's intention.

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34 (8 November 1984) 458 NZPD 1522.
35 (8 November 1984) 458 NZPD 1537.
36 (28 November 1984) 459 NZPD 2159.

[68] Turning to the purpose of the Social Security Act more broadly, s 1A provides:[37]

> **1A Purpose**
>
> The purpose of this Act is—
>
> (a) to enable the provision of financial and other support as appropriate—
>
> (i) to help people to support themselves and their dependants while not in paid employment; and
>
> (ii) to help people to find or retain paid employment; and
>
> (iii) to help people for whom work may not currently be appropriate because of sickness, injury, disability, or caring responsibilities, to support themselves and their dependants:
>
> (b) to enable in certain circumstances the provision of financial support to people to help alleviate hardship:
>
> (c) to ensure that the financial support referred to in paragraphs (a) and (b) is provided to people taking into account—
>
> (i) that where appropriate they should use the resources available to them before seeking financial support under this Act; and
>
> (ii) any financial support that they are eligible for or already receive, otherwise than under this Act, from publicly funded sources:
>
> ...

[69] Section 1A of the Act makes it clear that the Act is designed to provide targeted financial support to those in hardship, who have no other resources available to them. As Faire J commented in *Harlen v Chief Executive of the Ministry of Social Development*, "[f]inancial help through the benefit system is intended for persons with a genuine need for such help".[38]

[70] Mr Fong submits that the purpose of the Act supports the categorisation of loans as income. The following passage from the English Court of Appeal in *Morrell* encapsulates Mr Fong's argument:[39]

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37 Portions of s 1A that are entirely irrelevant to this case (for example, concerning young persons) have been omitted.

38 *Harlen v Chief Executive of the Ministry of Social Development* [2015] NZHC 2663 at [53].

39 At [34].

> If there were otherwise any doubt about the matter, then in my view reference to the statutory scheme would strongly favour the conclusion that these receipts were income. Income support is a means-tested benefit designed to meet a person's essential needs on a weekly basis. These moneys were provided to the appellant, and were used by her, for the specific purpose of meeting her recurrent needs throughout the relevant period. It would be contrary to the purpose of the legislative scheme if such payments fell to be excluded from the calculation of income when determining entitlement to benefit.

[71] For the same reason, Mr Fong submits that if Ms F had sufficient access to other finance and borrowing to meet her needs during the relevant period, it is consistent with the purpose of the Act that those loans be treated as income when determining her entitlement to benefits.

[72] I consider that this approach misconceives the purpose of the Act. As Heron J observed in *Director-General of Social Security v K*, loaned moneys do not truly add to the resources of the person receiving them because they must eventually be repaid. While a beneficiary may have immediate spending money as a result of taking out a loan, alleviating immediate financial pressure and hardship, the beneficiary must nevertheless still repay the loan. Their underlying net financial position will not have improved by their borrowing, and may in fact have deteriorated by reason of the outstanding loan repayment obligation. Accordingly it is necessary to take this obligation of future repayment into account.

[73] Further, as Ms Joychild submits, borrowing money may at times be necessary for beneficiaries who find the benefit inadequate to meet basic needs. She cites a 2008 *Living Standards* survey by the Ministry of Social Development which found that beneficiaries experienced a significantly greater degree of hardship than those in employment.[40] Ms Joychild contends that the Act is merely intended to *help* alleviate hardship and therefore contemplates beneficiaries looking to other sources in order to alleviate hardship.

[74] I do not consider that the purpose of the Act supports an approach by which beneficiaries who find it necessary to take out loans are penalised for doing so by a

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40 Bryan Perry *Non-income measures of material wellbeing and hardship: first results from the 2008 New Zealand Living Standards Survey, with international comparisons* (Ministry of Social Development, Working Paper 01/09, December 2009).

consequent reduction in their benefit entitlements. As Ms Joychild submits, such an approach runs the risk of locking beneficiaries into the multiple deprivations that they face. I therefore consider that the statutory definition of "income", when interpreted in light of its purpose, does not encompass an authentic and bona fide loan, namely the transfer of a sum of money with a certain obligation of repayment.

[75] Contrary to Mr Fong's submission, I do not consider that this interpretation goes so far as to rewrite the statutory definition or to ignore the text. It is not unorthodox to read down the broad or general wording of a statute to reach a narrower construction that better aligns with the legislative purpose.[41]

[76] I am asked in the questions stated on appeal to determine whether the Authority erred in law in its interpretation and application of what constituted "income" for the purposes of the Act in finding that:

(a) money received by Ms F from her mother constituted income;

(b) money received by Ms F from other unknown sources constituted income; and

(c) bank loans borrowed on the security of Ms F's home to meet living expenses did not constitute income.

[77] I will address each of these in turn.

Money received from Ms F's mother

Submissions

[78] Ms Joychild for Ms F submits that the Authority erred in classifying the money from Ms F's mother as a gift, and that it should have been treated as a loan. She submits that the Authority has made three errors of law in relation to this issue:

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41 See RI Carter *Burrows and Carter: Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 229, citing *Police v Emirali* [1976] 2 NZLR 476 (CA) and *Agnew v Pardington* [2006] 2 NZLR 520 (CA).

(a) by requiring the arrangements between Ms F and her mother to have the characteristics of an arms-length formal loan, and failing to take into account the familial context of the loan;

(b) by finding that the money was a gift when this finding is inconsistent with and contradictory to the evidence, or of the only true and reasonable conclusion on the evidence; and

(c) ignoring the fact that the vast bulk of the loan has now been repaid.

[79] Mr Fong for the Ministry says that the Authority's factual finding that the money was a gift is supportable by the evidence available and does not amount to an error of law. He summarises the evidence indicating that it was open to the Authority to find that the money was a gift. He then deals with each of Ms F's objections in turn, submitting:

(a) the Authority did not "require" formal loan documentation; it simply noted that the absence of such documentation was a relevant factor in its decision;

(b) the Authority did not fail to have regard to emails between Ms F and her mother indicating it was a loan – there was only one email which referred to the word "loan" and the context in which it was used and what it referred to was unclear;

(c) whether Ms F's mother was in a position to provide money as a gift is of little relevance, and in any event it seems Ms F's mother could gift money to her daughter by reducing Ms F's interest in the family trust;

(d) insofar as Ms F relies on her own evidence, the Authority was entitled to find that Ms F was not credible and reject her evidence; and

(e) it is evident that the Authority did consider the evidence of Ms F's family members and this evidence did not persuade the Authority.

[80] Mr Fong submits that none of Ms F's objections demonstrate that the "true and only reasonable conclusion" on the facts is that the money was a loan.

The proper legal test

[81] The Federal Court of Australia in *Federal Commissioner of Taxation v Rawson Finances Pty Ltd* described a loan as follows:[42]

> The essence of a loan of money from A to B is a corresponding contemporaneous obligation on the part of B to repay the money transferred from A to B ... Absent that obligation, the transfer of the money from A to B is something else – a gift, a payment by direction, a payment or repayment of an anterior obligation – but it is not a loan. The obligation of repayment is not proved by subsequent payment of the same amount, let alone a different amount, from B to A; that may be explicable by reference to another obligation or circumstance having nothing to do with the original payment from A to B. Rather, the obligation of repayment is proved by the terms of the contract under which the money was transferred from A to B.

[82] The Court notes that the obligation of repayment is not proved simply by the subsequent payment of money from B to A. However, where there is every indication that a subsequent payment of money from B to A was made in repayment of the earlier transfer from A to B, the fact of repayment will usually be cogent evidence that the parties intended the original advance to be repayable and that it was therefore a loan.

[83] In the present case, the Authority failed to make any clear finding on the evidence as to whether Ms F had repaid the loan (in full or in part) to her mother. It did note that Ms F had, between 2005 and 2010, paid small sums of money into the joint account she operated with her mother.[43] In the Authority's view it was unclear whether these payments constituted repayments of earlier loans, as Ms F continued to access the funds in that account and the payments could therefore have been deposits for future use. It also noted that Ms F's mother advised the Ministry, in a letter dated 11 March 2013, that the loan had been repaid in full out of the proceeds of the sale of house 3.[44] That payment was for $130,000. The Authority later observed that it did not have the benefit of evidence from Ms F's mother in person.[45] It also noted that Ms

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42 *Federal Commissioner of Taxation v Rawson Finances Pty Ltd* [2012] FCA 753, (2012) 89 ATR 357 at [20]; see also *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 (CA) at 167.

43 At [38](iv)(e).

44 At [38](iv)(d).

45 At [46].

F said she still owed her mother approximately $27,000, and that this must be contrasted with her mother's declaration that the loan had been repaid in full.[46]

[84] However, despite these comments criticising a lack of clarity in the evidence, the Authority did not go on to state any conclusion as to whether it accepted the evidence that the sums of money had been repaid, in part or in full. In particular, it failed to state whether it accepted the evidence that $130,000 (the bulk of the loan) had been repaid after the sale of house 3. I consider that it erred in law in failing to do so. The issue of repayment was a crucial matter of fact that was necessary to inform the existence of a loan and the quantum of any monies advanced on loan or by way of gift.

[85] I also note that in the familial context, the Authority did not need to be satisfied that the loan was formally documented, as it will be in the context of third-party lending; nor did there need to be a certain repayment date or a constant record kept of the loan balance. The absence of such factors in the context of a loan from a parent to a child is hardly surprising; nor is it unusual that the payments were made in small regular amounts, rather than lump sums. Where there was no clear repayment date, it was open to the Authority to find that the funds were repayable on demand. Provided that the Authority could ascertain a genuine intention that the sums of money were to be repayable, that would have been sufficient for a finding that the sums of money were advanced by way of loan.

[86] Mr Fong says that the absence of formal documentation, clear repayment terms or a running loan balance was not regarded as determinative by the Authority; it simply listed these matters as relevant contextual factors as it was entitled to do. In determining the issue of loan or gift, the Authority was required to have regard to all relevant factors and disregard irrelevant factors. Matters of weight were for the Authority to consider and determine. However, although the Authority identified the evidence relating to Ms F's repayment to her mother, it reached no final conclusion as to whether repayment had in fact been made. The fact of repayment is in most cases direct and compelling evidence that the parties have treated funds advanced as a loan.

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46 At [42].

Absent repayment being undertaken for some ulterior purpose, it is cogent evidence of the intention of the parties at the time the advances were made. By failing to determine whether or not the "loan" was repaid, the Authority has proceeded to evaluate the issue by reference to other factors from which the parties' intention might be inferred (such as the absence of a repayment date or any documentation). Whilst the Authority is not precluded from proceeding in that manner, inferences that may be drawn as to intention pale in significance compared to the unequivocal demonstration of intention that may be evident from an actual repayment. Consequently, by not making a determination on repayment, the Authority made an error of law by failing to take into account a highly relevant matter of fact.

[87] I emphasise that in reaching this conclusion, I am not saying the Authority's conclusion was unsupportable as a matter of fact, such as to amount to an error of law. That is a very high threshold. Nor am I dictating the conclusion that the Authority should have reached on the facts, as this appeal is not the appropriate place for a merits-based review of the evidence. However, the Authority's failure to make a clear finding on a crucial matter of fact amounted to an error of law.

Conclusion

[88] On applying the proper test as stated above and reviewing the evidence, the Authority may reach one of three conclusions:

(a) the funds were advanced by way of loan;

(b) the funds were advanced by way of gift; or

(c) some of the funds were advanced by way of gift, and some of the funds were advanced by way of loan.

[89] As noted above, the Authority's findings on the repayment issue will be essential and crucial in this regard.

[90] In the case of (a), the money would fall outside the definition of "income", for the reasons expressed above in discussing the case law and interpreting the statutory

definition. In the case of (b), the money would fall within the definition of "income". In the case of (c), that which is gifted will be income and that which is loaned will not.

Money received from other unknown sources

[91] Ms Joychild submits that the Authority also wrongly included other "unknown sources" in Ms F's spending, and says that Ms F has given clear credible evidence that *all* her spending over and above benefit income was borrowed money. For example, Ms Joychild says that the Authority has omitted to mention Ms F's loans from finance companies.

[92] As noted by Mr Fong, these submissions stray into questions of fact that I have no jurisdiction to consider on this appeal. It is not for me to reconsider the financial evidence before the Authority. The only question of law arguably raised by Ms Joychild's submissions on this point is whether the Authority was correct in approving the Ministry's methodology, namely quantifying Ms F's income by reference to her spending in excess of her known sources of income. I see no error of law in this approach. The Authority expressly noted that the Ministry found it necessary to adopt this method because Ms F operated a number of different bank accounts; her personal and business spending were mixed; and she received multiple deposits into her accounts from unknown sources. The Ministry was entitled to infer that Ms F's spending in excess of known income was funded by undisclosed income. That is a logical approach and, as Mr Fong points out, any such inference was rebuttable in the sense that it was open to challenge by Ms F, who was entitled to lead evidence showing that her excess spending was funded by loans.

[93] Ms F did present her own analysis of her spending to the Authority, and the Authority recorded:[47]

> There is no detailed transparent explanation of her spending figures or why her spending figures differ from Mr Hodgson's.

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47 At [34].

The Authority plainly preferred the evidence of the Ministry's financial analyst Mr Hodgson, and its preference for the evidence of a competing expert is not a matter for this Court to review on an appeal on questions of law.

[94] I accordingly find no error of law in relation to the money received from unknown sources.

Bank loans

[95] The Authority found that Ms F had borrowed funds from her bank on the security of her house and used those sums to meet living expenses. It concluded that although the bank loans met each element of the definition of income, the Act did not envisage beneficiaries borrowing money on the security of their home to meet living expenses. It therefore held that bank loans were not "income" for the purposes of the Act.

[96] Mr Fong submits that the bank loans meet each limb of the definition of "income" in s 3 of the Act, and should have been treated as such. Referring to the case law, he contends that *Director-General v K* does not stand for the sweeping proposition that all loans do not constitute income under the Act. The loan in that case concerned unsecured borrowing. He draws a distinction between *Director-General v K* and *McElroy v Director-General of Social Welfare* on that basis, and says that Ms F's bank loans are comparable to *McElroy* in that Ms F too was using the bank loans as a mechanism for releasing capital prior to the sale of her property.

[97] However, as Ms Joychild points out, *McElroy* can be distinguished from the present case on the grounds that there, the farm was the appellant's business base and his drawings for personal use were his income, whether derived from trading profit or capital. He essentially operated a revolving credit account with his bank and stock and station agent, where funds would come in from time to time when he made a profit from his farm, and he would regularly draw down on those funds to meet his living costs. That was not the case here. Ms F did not operate anything resembling a revolving credit account; she simply borrowed funds against the security of her house, funds which she was regularly required to repay.

[98] I therefore return to the proposition in *Director-General v K*, namely that the bank loans did not truly add to Ms F's resources as she was required to repay the funds she received. For the reasons expressed earlier it is contrary to the purpose of the Act, which informs the interpretation of the definition of "income", to treat the bank loans as income.

[99] Although I would not have expressed my reasoning in the same way as the Authority on this point, I too have concluded that the bank loans are not within the s 3(1) definition of "income" and therefore there is no error of law in the Authority's conclusion.

[100] I note that although not expressly raised in the questions of law on appeal, Ms Joychild addressed Ms F's credit card expenditure in her submissions. Bank borrowings by use of a credit card have the same essential characteristics as a bank loan, in that credit card expenditure is to be repaid. Credit card spending is therefore a loan and is not properly treated as income for the purposes of the Act. The Authority erred in law in treating Ms F's credit card expenditure as income.

Result

[101] I answer the questions posed in the case stated as follows:

(a) Did the Authority err in law in its interpretation and application of what constituted income for the purposes of the Social Security Act 1964 in finding that money received by Ms F from her mother or other unknown sources constituted income?

(i) Yes (regarding the money Ms F received from her mother).

(ii) Yes (regarding F's credit card expenditure).

(iii) No (regarding the money Ms F received from other unknown sources).

(b) Did the Authority err in law by misapplying s 3(1) of the Act in finding Ms F's spending from bank loans borrowed on the security of her home to meet living expenses was not "income"?

(i) No.

Name suppression

[102] Ms F has applied for name suppression on this appeal, on the grounds that it involves highly personal details. She notes that the Authority hearing was held in closed court with name suppression on release of the decision. The Ministry was neutral regarding Ms F's application for name suppression.

[103] I consider that in the circumstances of this case, the purpose of open justice can be served without publishing Ms F's name and identifying details.[48] I accept that the decision includes personal information as to Ms F's financial position and receipt of various benefits, and therefore make an order suppressing publication of Ms F's name and identifying details.

Costs

[104] While both parties have had a measure of success on this appeal, Ms F's success is more significant than the Ministry and she is entitled to costs on a 2B basis. If the parties cannot agree as to costs, they may each file brief memoranda of no more than five pages (excluding schedules). Ms F may file a memorandum within 10 working days of release of this judgment, and the Ministry may file a memorandum in response within 15 working days of the release of this judgment.

Paul Davison J

[48] See *A v Chief Executive of the Ministry of Social Development* HC Timaru CIV-2011-485-1556, 11 May 2012 at [41].