CASE SUMMARY

Court of Appeal confirms High Court order that backdating of child support liability was invalid

Decision date: 30 November 2022

CSUM 22/06

CASE

Commissioner of Inland Revenue v Lindsay [2022] NZCA 585

LEGISLATIVE REFERENCES

Child Support Act 1991 (as it applied in October 2003), ss 4, 14, 17, 18, 19

Judicial Review Procedure Act 2016, s 16.

LEGAL TERMS

Judicial review; Child support; Proof of paternity; Backdated child support liability; Court's discretion in granting judicial review; Increased costs.

Summary

This was an appeal by the Commissioner of Inland Revenue (the Commissioner) of the High Court decision which upheld Mr Lindsay's judicial review, making a declaration that the child support assessment dated 23 November 2017 was invalid to the extent that it imposed backdated liability to 2003. The Commissioner also appealed the High Court's 10% uplift award of costs.

A cross appeal of the High Court decision to only award Mr Lindsay a 10% uplift in costs was undertaken by Mr Lindsay.

The Court of Appeal dismissed the Commissioner's substantive appeal and upheld the High Court's declaration that the child support assessment which backdated Mr Lindsay's liability to 2003 was invalid. However, the Court of Appeal allowed the Commissioner's costs appeal and set aside the 10% uplift awarded by the High Court.

Mr Lindsay's cross appeal asking for an increase in uplift from 10% was dismissed.

Impact

The outcome of this case turns on its facts, however, the decision is significant being an appeal of a New Zealand Court's first consideration of the interpretation of s 19 of the Child Support Act 1991 (**the Act**). However, the case will have limited precedential effect as s 19 of the Act has been further amended by the Child Support Amendment Act 2021. This amendment provides that child support only be backdated on receipt of a declaration of parentage if the custodial parent applied for the order within limited timeframes.

Facts

Mr Lindsay and Ms Jones began a sexual relationship in approximately 2000 which continued until the end of 2002.

Ms Jones advised Mr Lindsay in March 2003 that she was pregnant with his child, and she gave birth to their son in September 2003. She applied for child support in October 2003, but it was declined on the basis the application did not provide proof of paternity or proof of birth.

In 2016, Mr Lindsay was served with paternity proceedings by Ms Jones. He defended the proceedings on the basis that he could not be sure that he was the father but agreed to do DNA testing. This testing established he was the father, and a paternity order was made by consent by the Family Court on 26 October 2017. Ms Jones applied for child support at this time.

On 27 November 2017 the Commissioner determined that Mr Lindsay was obliged to provide child support and his liability was backdated to 2003, the time when Ms Jones first made an application for child support. The backdated amount owing by Mr Lindsay was around $90,000.

Issues

The issues for consideration by the Court of Appeal were:

- Whether the High Court erred in making a declaration that the child support assessment dated 23 November 2017 made by the Commissioner was invalid to the extent it imposed backdated liability to 2003. Specifically –
  - i) Was the Judge correct to find s 19 only applied to a live child support applications and that the 2003 application was no longer live as at 2017.
  - ii) Was the Judge correct to find s 19 did not apply because 'unable to accept' in s 19 differs in meaning to 'refuse to accept' used elsewhere in part 1 of the Act.
- Should the Judge have exercised his discretion not to grant relief on the basis Mr Lindsay had not properly exercised his right of objection under the Act?
- Was the costs awarded appropriate in all the circumstances?

Whether the High Court erred in making the declaration the child support assessment was invalid.

Was the 2003 application live?

The Court of Appeal considered the conclusion that the 2003 application was no longer live as of 2017 was well supported by the evidence. Firstly, it considered the 2003 application was largely pro forma in nature, likely prompted by the requirement in s 9 of the Act which required the recipient of a social welfare benefit to apply for a child support formula assessment. There was no incentive for Ms Jones to pursue the application as any child support payments would be retained by the state.

Secondly, from 2006, any child support payments would have gone directly to Ms Jones as she was no longer in receipt of a benefit. She was aware that if the non-custodial parent did not pay child support, then she would not be paid child support. Ms Jones did not take any further steps to obtain child support for a further 10 years.

Finally, when Ms Jones contacted the Commissioner in 2016, neither she nor the Inland Revenue officer she spoke to considered the 2003 application was still live. Ms Jones was advised to file another application which she did in 2017.

Does section 19 only apply to live applications?

The Court of Appeal's view was that when s 19 is considered purposively and in light of the statutory context it must be limited to applications that are live.

Section 19 provides an exception to the default position in s 17(2) which provides for liability for child support to commence when an application is 'properly made' ie: when all relevant information has been provided. The Court of Appeal acknowledged that the exception in s 19 allowing child support to be backdated to when the application was made following the provision of all relevant information reflects a recognition that it can be difficult to obtain proof of parentage and without the exception it could incentivise liable parents to delay or frustrate attempts to establish proof of parentage. However, the facts did not fall within the scope of

this s 19 purpose as the delays were not due to Mr Lindsay but due to Ms Jones who elected not to take steps to prove paternity and as such the 2003 application became defunct.

The scheme of the Act does not envisage custodial parents seeking backdated payment of child support many years after the costs are incurred. The objects of the Act include ensuring the level of financial support is determined according to the parents' financial capacity. This capacity is assessed on an annual basis based on the liable parents' income of the previous year. The scheme of the Act enables carers to receive ongoing financial support when needed and allows liable parents to manage their affairs in real time.

The Court of Appeal agreed with the High Court that Mr Lindsay's right to procedural fairness would be cut across if liability was backdated 14 years in reliance on the 2003 application, which Mr Lindsay was not notified of and which the Court considered abandoned by 2006 (at the latest). In addition, the penalties arising as a consequence of backdating liability for many years were severe; the Court of Appeal considered this outcome to be draconian and unjust which further supported a view that Parliament could not have intended the literal application of s 19 in this case.

Was the High Court correct to find the term 'unable to accept' in s 19 differed to 'refuse to accept'?

While it was not strictly necessary to consider this issue due to the finding s 19 only applied to live applications, the Court of Appeal made several observations including:

- The statutory framework does not support the view that 'unable to accept' creates a third category of applications that are neither accepted or refused but 'put on hold'.
- The statutory scheme is binary and envisages two outcomes – acceptance or refusal.
- The scheme of the Act does not require the Commissioner to have an intermediate 'unable to accept' option to put an application on hold pending further information – this is provided for in the binary framework.

In addition, the Court of Appeal found the High Court erred in finding the Commissioner had refused the 2003 application as the evidence did not support the conclusion that Ms Jones had advised in that application that she did not intend to pursue paternity proceedings. She was simply confirming paternity action had not yet been taken at the time of making the 2003 application.

Should the Hight Court have declined to grant relief?

The Court of Appeal agreed with the High Court that Mr Lindsay's judicial review application was not an abuse of process. Therefore, the decision to reject the Commissioner' submission that the High Court should have declined to grant relief was correct. The prospect of Mr Lindsay obtaining legal advice and lodging a properly informed objection following the notices of assessment in November 2017 within the statutory timeframe was negligible. By the end

of December 2017, he had lost the ability to object to the assessments as of right. At the time his objection was rejected for lateness Mr Lindsay understood judicial review was the only option available to him and the issues were suitable for that procedure.

Was the costs award appropriate?

The Court of Appeal agreed with the High Court that the high threshold required for indemnity costs was not met in this case. There was nothing to suggest the Commissioner had acted otherwise than in good faith in exercising his statutory role.

However, the Court of Appeal disagreed with the High Court increasing costs pursuant to the High Court Rules. There was nothing here to suggest Mr Lindsay was motivated to bring proceedings in the public interest. He was solely concerned (appropriately) with challenging his own child support liability. They accepted the Commissioner did not run the case as a matter of principle but that he defended it on the basis he had correctly applied the law and the assessments were valid.

About this document

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