

the obligation to repay the allowance where 'special circumstances' exist.

Did 'special circumstances' exist?

The applicant argued that special circumstances existed that should release her from the liability. The principles which governed the exercise of the discretion to waive recovery of sickness benefit under s.115(4A) were held in *Izard* (1984) 22 SSR 255 to be relevant to the exercise of the discretion contained in s.135R(1B).

Referring then to the discussion of those principles in *Ivovic* (1981) 3 SSR 25 the Tribunal asked whether imposition of the liability would be 'unjust, unreasonable or otherwise inappropriate'.

It was argued by the applicant that it should be taken into account that the rehabilitation she underwent did not prepare her for work but was directed to enabling her to cope with everyday life. She had little chance of ever obtaining employment and at only 18 years of age her only asset was the compensation payment she had received.

The AAT noted that the applicant and her legal advisers were aware of the demand the DSS had made with respect to the cost of training prior to the settlement of her common law claim. The Tribunal was also aware that her settlement was much lower than the assessment of her damages by her legal advisers but was accepted because of the concern that her contributory negligence might have on any award.

The AAT in rejecting the claim that special circumstances existed which would justify her release from the liability commented:

'...Although the sum received by the applicant may not adequately compensate her for her injuries and loss of enjoyment of life, it is nonetheless a considerable sum and was accepted following sound legal advice. The applicant cannot be said to be suffering from severe financial hardship. She lives with her parents and has to date few financial needs. Were the applicant to choose to live independently

from her parents sufficient funds are available in court for her to establish herself alone or with a friend in suitable accommodation.' (Reasons, para 13)

The Tribunal also remarked on the effect of the reduction in the settlement for her contributory negligence. Such an occurrence was not of itself 'special circumstances' although it assists in deciding whether it would be unjust, unreasonable or inappropriate in enforcing the liability.

The applicant had received a substantial amount of compensation. Public moneys had been expended. This was a paramount consideration in determining whether recovery should be waived. To make the applicant pay for her own rehabilitation would not be unreasonable nor impose financial hardship.

Formal decision

The AAT affirmed the decision under review.

Assets test: valuation

BENNETT and SECRETARY TO DSS
(No. N86/520)

Decided: 11 December 1986 by B. J. McMahon, M. S. McLelland and J. H. McClintock

Robert Bennett had his age pension cancelled on 7 March 1986 because of the value of his assets. He applied to the AAT for review of that decision.

The assets in question were two blocks of land which flanked both sides of the block of land on which the house in which he resided was situated.

The legislation

Section 6AA(1) of the *Social Security Act* provides that in calculating the property of a person their interest in their principal home shall be disregarded. Sub-section (3)(a) defines principal home to include the private land adjacent to the house up to a total area of 2 hectares. Sub-section (4) then read:

'Where the area of private land adjacent to a dwelling-house exceeds substantially the average area of private land adjacent to other dwelling-houses in the same

locality, so much only of the first-mentioned area as the Secretary determines in writing not to be in excess of the average area shall be taken into account for the purposes of paragraph (3)(a).'

That sub-section was subsequently repealed. As a result the applicant again qualified for the full pension having satisfied the other sub-sections. The issue for the Tribunal was whether his pension was properly cancelled pursuant to sub-s.(4) prior to its restoration.

Did the two blocks exceed the average?

The total area of land did not exceed 2 hectares. The only issue was whether the land adjacent to the applicant's house exceeded the average for other houses in the same locality.

The Tribunal required the DSS to demonstrate that the determination under sub-s.(4) was based upon adequate evidence [*McDonald* (1984) 18 SSR 188]. The DSS called no evidence at the hearing and relied on two valuations supplied by the Taxation Office. Those valuations

deduced a value for the applicant's land based upon sale prices of comparable land in the area. The valuations contained no description of the area in general and no statement that the land adjacent to the applicant's land substantially exceeds the average area of land adjacent to other houses in the area. There was no evidence to support the case for cancellation.

The applicant on the other hand made a statement at the hearing that there were several houses near his which stood on large blocks of land. The AAT accepted the truth of his statement which the DSS had no means of contradicting.

Formal decision

The AAT set aside the decision and remitted the decision to the DSS with the direction that payment of the applicant's pension be made on the basis that at all relevant times the private land adjacent to his dwelling did not exceed substantially the average area of private land adjacent to other dwelling houses in the same locality.

Assets test: date of deprivation

WOLFGANG and SECRETARY TO DSS
(No. N85/352)

Decided: 7 July 1986 by C. J. Bannon

Mr Wolfgang had applied for a pension but apparently was refused

after the application of the assets test. In particular it had been decided that he had deprived himself of property in order to qualify for the pension and so s.6AC operated which allowed the DSS to include that property for the purposes of the assets test. [The

legislation is set out in *Gibbons*, this issue.] He applied to the AAT for review of that decision.

The facts

The applicant decided to sell his dairy farming, cattle and wheat growing

property to his nephew and his nephew's wife to ease his financial problems. A contract was executed on 30 March 1984. The sale was completed on 12 June 1984. In March the applicant told his accountants that the proceeds of the sale were to be paid to his son. The sale realised almost \$85,000 after payment of expenses.

The issue

The assets test provisions came into effect on 1 June 1984. The question for the Tribunal was whether the

applicant had deprived himself of the property before that date in which case the property would not be included when assessing his rate of pension. The legal issue was whether the instruction to his accountants and solicitors in March 1984 was effective as a disposition at that time. He claimed that there was a voluntary assignment without consideration to his son at that time.

As there was no compliance with the legal forms with respect to the assignment until after the 1 June, the AAT had to turn to equitable

principles to determine whether in equity there was an effective assignment in March.

Drawing upon the equitable rule that there was no equity to complete an imperfect gift the Tribunal concluded that there was no effective assignment of the property until after 1 June 1984. Thus the assets test provisions applied to the applicant.

Formal decision

The Tribunal affirmed the decision under review.

'Disposition of income'

GIBBONS and SECRETARY TO DSS (No. S85/208)

Decided: 7 November 1986 by R. A. Layton

The applicants sought review of a DSS decision to reduce the rate of their pension after the application of the income test. The applicants objected to the DSS taking into account the value of interest payments received from a mortgage after they had discharged the mortgage in favour of their son for no consideration.

The legislation

Section 6AC of the *Social Security Act* provides for circumstances where property or income disposed of on or after 1 June 1984 is still to be considered the property or income of the person.

Section 6AC(1) provides that where a married person in receipt of a pension (or whose spouse is a pensioner) disposes of property exceeding \$4,000, 50% of the amount in excess of \$4,000 shall be included in the value of the property of the person and 50% in the value of the property of the spouse.

Section 6AC(4) provides that where a married person disposes of income, 50% of the amount of that disposition shall be included in the income of the person and 50% in the income of the person's spouse.

Section 6AC(10) sets out the circumstances in which a person is deemed to have disposed of property. A disposition occurs where the person engages in conduct that diminishes the value of the property where the person receives no consideration or inadequate consideration for the property, or, where the Secretary is satisfied that such conduct was engaged in to obtain a pension, benefit or allowance under the Act. Section 6AC(11) contains similar provisions with respect to income.

Section 6AC(8) deals with situations where a disposition of property also involves a disposition of income. In those circumstances the amount that is

calculated in the income of the person is to be discounted by the amount which is attributable to that part of the amount of the disposition of property that is not included in the value of the property of the person under s.6AC(1).

The facts

The applicants owned a farming property which had been taken over by their son. It was agreed that the son should purchase the property and a contract of sale was entered into for that purpose. A mortgage agreement was also entered into to finance \$74,000 of the purchase price. Only \$50,000 of that sum bore interest (at 8% per annum). This gave the applicants a payment of \$4,000 each year which was equivalent to the sum paid to them by their son previously for their assistance in the running of the farm.

In 1985 the applicants informed the DSS that they had gifted the \$50,000 owing to them on the mortgage to their son. This meant that they were no longer in receipt of the \$4,000 payment. The DSS decided that there had been a disposition of income under s.6AC and that the income to be maintained under s.6AC(4) was 8% of \$46,000 after deducting the allowable gift of \$4,000 under s.6AC(1).

The applicants considered that they should be entitled to the full pension. They were no longer in receipt of \$4,000 per annum and argued that s.6AC(4) should not apply to them.

Was there a disposition?

The Tribunal took the view that the mortgage debt was 'property' and the interest payable under that mortgage was 'income'. It also found that the amount gifted was \$50,000 and not \$74,000. The \$24,000 had been foregone at the time the agreement was entered into by the applicants and their son and so was not caught by s.6AC.

The AAT concluded that there had been a disposition of property (the

mortgage) as well as a disposition of income (the interest). The mortgage had been discharged for no consideration and so could easily be regarded as a disposition of property under s.6AC(10). But the AAT considered the argument that the interest payments were not specified in the agreement as being payable on any particular date and so if they had then no right to income on the date they discharged the mortgage then there was no disposition of income. In these circumstances the mortgage was only a right to future income. If the principal was paid or gifted then this future right dissolved and there was no future interest to be disposed.

To disregard the disposition of income would result in the increase of the applicants' pension. The Tribunal did not accept this argument. It was found that:

'A discharging of a mortgage would constitute engaging in a course of conduct, and the direct effect of that course of conduct was to diminish, completely, the rate of income which they were previously receiving' [see s.6AC(11)]

(Reasons, para.35)

To hold otherwise

'... would create a loophole in the legislation so that a person could, by a course of conduct, deprive themselves of an asset which had been income producing without that same course of conduct also constituting a disposal of income. This would leave the pension to be reassessed only on the basis of a disposal of property which could, in some circumstances, lead to either an increase in their pension or, indeed, the granting of a pension where previously they had not been entitled.'

(Reasons, para.36)

Severe financial hardship?

The Tribunal then considered whether the hardship provisions contained in s.6AD(1) of the Act applied to the applicants. That sub-section allows the