AAT's decision contained no error of law.

Formal decision
The Federal Court dismissed the appeal with costs.

SECRETARY TO DSS v. BARNES
(Federal Court of Australia)
Decided: 14 May 1987 by Forster, Northrop and Burchett JJ.

This was an appeal against the AAT's decision in *Barnes* (9 February 1987).

The AAT had been asked to decide whether a farming property previously owned by Mrs Barnes should be treated as part of her property for the purpose of the assets test. She had transferred the property to her son, for no consideration, in September 1984. The AAT had concluded that Mrs Barnes should not be treated as still owning that property.

The legislation
Section 6AC of the *Social Security Act* provided that a person was to be treated as the owner of property where she had disposed of that property after 1 June 1984 without adequate consideration - unless the disposition had been 'part of a course of conduct under which the person ceases employment or ceases to engage in a business or profession . . .': s.6AC(10).

'Ceasing to engage in a business'
The AAT had decided that Mrs Barnes' transfer of property was not a 'disposition of property' because she had withdrawn from a long-standing share-farming arrangement with her son at the time of the transfer.

The Federal Court, in a judgment delivered by Burchett J., dismissed the appeal. It noted that there had been a share-farming agreement between Mrs Barnes and her son from about 1964; that Mrs Barnes (now aged 93) had played an active part in the work of the farm; that the level of her involvement had reduced over the years; and that she had finally withdrawn from the agreement and the work of the farm at the time she transferred the farm to her son.

On the basis of that evidence, Burchett J. said, it was open to the AAT to decide that Mrs Barnes' transfer of the farm was 'a course of conduct under which [she] cease[d] . . . to engage in a business' within s.6AC(10):

> 'The section looks to a process of disengagement from employment, business or profession. The process will often be preceded by some slowing down of the activity involved, and the legislature should not be understood to have ignored that obvious feature of common human experience. But it is not necessary to attempt to define the limits of the legislative phrase, which is expressed in broad terms. The evidence here indicates that, right up to the transfer, there was a series of share farming arrangements, involving the carrying on of a farming business with the participation of [Mrs Barnes], and the incurring by her of the appropriate obligations, and of course, the receipt by her of the appropriate payments under the agreements. If her activity grew less, that is not necessarily inconsistent with her continuing to be engaged in the business.'

(Judgment, p.5)

Formal decision
The Federal Court dismissed the appeal with costs.

[Each of these Federal Court decisions has prompted the Government to move to amend the *Social Security Act*.

Barnes: According to an announcement which accompanied the 1987 Budget, the current exemption, from the disposition provisions, of a transfer which accompanies a decision to cease business, allows 'an unintended avoidance of the income or assets test'. From 13 November 1987 -

> 'the exclusion clauses in the present s.6(10) and (11) of the *Social Security Act* [formerly s.6AC(10) and (11)] will be deleted to ensure that assets and income disposed of without adequate consideration will be included in the value of the person's assets and income.'

Copping: According to the same announcement, the intention of the deemed income provision in the former s.6AD(3) 'was that, where disregarded property had the potential to produce income, its commercially potential income would be deemed to be received'; but 'appeal bodies have determined the deemed income . . . on the basis of subjective factors and the user's capacity to pay a lease price, rather than its commercial potential.' From 13 November 1987 -

> 'Pensioners seeking to have their property or business disregarded under the assets test hardship provisions will be deemed to have income of 2.5 per cent of the value of the property, or the market rental value, whichever is the higher.']

Background

SENTENCING WELFARE OFFENDERS

The legacy of the Australia Card debate (debacle?) may be that we have firmly implanted in the collective consciousness of the community the notion that welfare and tax 'cheats' are tantamount to enemies of society. While that notion dominates thinking it is then very easy to justify the harsh treatment of those who fail to pay their share or those who take more than their share.

Of course, few would deny that any person who fraudulently obtains a financial advantage by manipulating the welfare or tax system should go unpunished. But what is the appropriate punishment? In a climate created by the above thinking the danger may be that the community will over-react and demand penalties which are out of proportion to the offence, or which fail to take into account mitigating factors.

Welfare cases
In the case of welfare recipients who fraudulently obtain benefits there are obvious problems when cosidering penalties. A fine may be absurd when imposed on a person without any means to pay. A jail sentence may in reality mean that the community must then provide support to a family now deprived of its main income source.

Other factors that must be considered are the motivations for the fraud. A person who defrauds the welfare system to, in their eyes, provide an adequate standard of living for their children, may not be seen to be as blameworthy as the person who fraudulently claims benefits to finance an overseas holiday.

Difficulties for Courts
Such factors to be taken into account must present great difficulty for Courts when sentencing persons for welfare fraud. One only has to consider the disparities in sentence at different levels of the system to observe just that.

In Giannakopoulos v. Helm (County Court of Victoria, 20 May 1987) the appellant appealed against his conviction and sentence in the Magistrates Court on 14 charges of making false statements to the DSS and on 2 charges of obtaining benefits not payable to the sum of $5,238.84. The magistrate had sentenced Mr Giannakopoulos to one months imprisonment on each charge. Six months imprisonment was suspended leaving an effective sentence of ten months.

The appellant was a Greek migrant who had purchased a lease of a Greek tavern in August 1983. The lease expired in April 1984. During that time the tavern was running at a loss.

The appellant was receiving no income and he was losing between $250 and $1300 per week.

Customers told the appellant that he was entitled to unemployment benefits. He had little command of English and knew nothing about the unemployment benefit scheme. On the basis of what the customers said he assumed that the benefits were in the form of government assistance in order that his family (he had a wife and two sons) could survive.

There was also some evidence that this economic plight was exacerbated by emotional instability within the family and poor health.

The County Court judge recognised the appellant's attempts to establish his own business. He was trying to better himself and his family. The judge also appreciated that often such attempts to establish a business fail and that when that does occur the community should not punish too severely those who make a real attempt to produce their own income.

The County Court convicted the appellant but varied the sentence. He was placed on a $500 good behaviour bond for a period of two years and released on bail under s.20 of the Crimes Act (Cth) 1914.

Comment

This case illustrates well the difficulty faced by courts when sentencing those convicted of welfare fraud. When the court at first instance has decided that a prison term is the appropriate penalty and the appeal court decides that a bond is to be the sentence, then serious questions must be asked as to the weight to be given to various factors in the sentencing of welfare offenders.

B.S.

[The summary of Giannakopoulos v. Helm was provided by Springvale Legal Service]

COMPENSATION AWARDS AND SOCIAL SECURITY PAYMENTS

The past 12 months have seen a series of dramatic changes to the legislation dealing with the interaction between social security payments and compensation and damages awards. First, the *Social Security Act* was amended to reverse the effect of the Federal Court's decision in *Siviero* (1986), so as to increase the chance of a person losing entitlement to sickness benefit for a substantial period following a lump sum compensation or damages award. Then the sickness benefit recovery and disentitlement provisions were extended to invalid pension, unemployment benefit and special benefit.

The provisions now dealing with this relationship are set out in Part XVII of the *Social Security Act*. They are complex, give the DSS substantial power to deny income support to incapacitated people who are receiving compensation or have received a lump sum award, and place a heavy burden on solicitors and other advisers - a burden which, it seems, few advisers are equipped to discharge.

A problem has emerged over the past few months - a problem which reflects the failure of advisers to come to grips with the new legislation. It appears that incapacitated people who have received damages or compensation awards have been advised to invest the money in a new home. But when they approach the DSS for income support - typically, invalid pension - they find that their claims are being rejected because the legislation insists that they use their awards to support themselves (for a period which is calculated by dividing the award by the current male average weekly earnings). But the only way in which they can now support themselves is to sell their newly acquired homes (few of which can be described as mansions).

The provision of better advice (that is, accurate advice) by solicitors would, at least, prevent this problem from getting out of hand. But what is the resolution to the immediate problem of the incapacitated people now denied income support and faced with the need to sell their homes just to support themselves and their families?

One solution may lie in s.156 (previously s.115E and, later, s.135SF) of the *Social Security Act*, which allows the Secretary to disregard all or part of a compensation award 'if the Secretary considers it appropriate to do so in the special circumstances of the case'.

In *Ivovic* (1981) 3 *SSR* 25, the AAT, while refusing to lay down criteria to be applied in every case where this discretion might be involved, canvassed a range of factors which it considered relevant. These included advice received from the applicant's solicitor and the applicant's own knowledge of her or his legal position. In that case the AAT found that the applicant had known of his liability to repay sickness benefit payments to the DSS before he had committed himself to buying a house with his compensation moneys; and decided that there were no 'special circumstances' to warrant disregarding his receipt of compensation. But what of those people who do not appreciate their legal position - who are, in many cases, misled as to that position because of inadequate or wrong legal advice?

Over recent years, it has been acknowledged that not all solicitors working in the compensation area have a clear and detailed understanding of the *Social Security Act*: see, for example, G. Moon, 'Compensation and social security: do lawyers understand?' (1985) 10 *Legal Service Bulletin* 181.

The recent spate of changes to the legislation must have exacerbated this problem. Although the DSS has distributed details of the changes to various professional journals, very little of this has been published. For example, a note sent to the journals, detailing the May 1987 changes has appeared in the South Australian *Law Society Bulletin* (June 1987, p.138), the Queensland's Law Society's *Proctor* (May 1987) and (in an abbreviated form) in the Victorian *Law Institute Journal* (June 1987, p.548). The last was a substantially edited version, which omitted the clear warning, set out in the first publication, that -

> 'It is important that people do not spend any of their compensation award without recognising it will be their only financial means of support for a specific period of time.'

The shorter statement was, however, better than nothing - which is what the NSW *Law Society Journal* has offered solicitors in that State.

It is hardly surprising that solicitors may not have fully digested the impact of the 1986 and 1987 changes; and, without some expert guidance through the complexities, how are their clients to understand their entitlements and obligations?

The policy objective pursued in the new compensation provisions was to ensure that the social security system would not be used by those whose need for income support arose from injuries for which they were entitled to compensation. That is, the objective was to prevent 'double dipping' or double compensation. But, in pursuing that objective, there is a real risk that other objectives of the *Social Security Act* might be sacrificed. Although this is said to be a time of financial restraint, the AAT's observations in *Guven* (1983) 17 *SSR* 173 are relevant:

> '[The DSS] must, of course, ensure that the taxpayer's money is spent properly, and in accordance with the provisions of the Act. But where the Act gives a discretion, that discretion must be exercised in the manner described by Dixon CJ [in *Klein* v. *Domus Pty Ltd* (1963) 109 CLR 467, 473] i.e. in accordance with the purpose of the enactment . . . In general, the specific purpose of social welfare legislation is to help the needy, not to protect the revenue.'

In promoting that purpose, certain policies are clear throughout the Act. One is that a pensioner (or a beneficiary) should not be forced to sell her or his 'principal home' to provide income support: this is spelt out in s.4(1)(a)(i) and (ii), which excludes a