

Disposal of assets: 'consideration'

FRENDO v SECRETARY TO DSS

Federal Court of Australia

Decided: 2 December 1987 by

Woodward J.

This was an appeal against the decision of the AAT in *Frendo* (1987) 38 SSR 483. The Tribunal had decided that payments of \$30 000 made by Frendo to each of her two children amounted to dispositions of property and should be included in her property for the assets test, and her invalid pension reduced accordingly.

The legislation

The question raised by this appeal was whether the payments had been made 'for no consideration, or inadequate consideration, in money or money's worth'. If no such consideration had been provided, the payments amounted to dispositions of property, as defined in s.6AC(10) of the *Social Security Act*.

'Consideration'?

Frendo had paid \$30 000 to her son to help him secure his future and to compensate him for his willingness to provide a home for Frendo and her husband, each of whom was in poor health.

She had paid the \$30 000 to her daughter in order to treat her children equally and to provide her with a dowry, which Frendo regarded as a matter of obligation within her (Maltese) community.

The AAT had decided, and Frendo did not challenge this finding, that neither Frendo nor her children had intended to create any legal rights or obligations. On behalf of Frendo, it was argued that the term 'consideration' did not refer to a legally enforceable agreement but included (to quote the *Shorter Oxford Dictionary*) 'a fact or circumstance taken . . . into account 1460' and 'something given in payment; a reward, remuneration; a compensation 1607'.

Woodward J. said that the difficulty with this approach was that these meanings had 'an archaic ring':

'In my view the immediate and natural effect of a reference in legislation to "consideration" is to direct the mind of the reader towards the law of contract where, for hundreds of years, the word has had a special meaning . . . [W]hen the word is used, as it is here, in the sense of a return or balancing factor for the diminishment of a person's assets, it is difficult to escape the conclusion that it is used in a technical, legal sense.'

(Judgment, p.6)

Woodward J. referred to the Second Reading Speech of the Minister when the assets test legislation had been introduced. The Minister had said that the legislation contained provisions to ensure that pensioners did not avoid the assets test by depriving themselves of assets 'without receiving adequate

value in return.' Woodward J. continued:

'Thus the Ministerial policy expressed in the words "without receiving adequate value in return" has been converted by the legislative draftsman into ". . . receives no consideration or inadequate consideration, in money or money's worth . . ." There are sound reasons why the draftsman would choose this term well known to the law. In the first place it should make for greater certainty of interpretation. Secondly, it comprehends in a single word both a present benefit and the promise of a future benefit. Thirdly, it covers both an act and a forbearance. Finally it underlines the requirement that the "adequate value" received must be "in return" for the disposal of assets - the concept of a bargain is highlighted.'

(Judgment, pp.7-8)

This meant that, unless a pensioner who disposed of property received consideration, of the type recognized by the law of contract, sufficient to establish a binding contract, the disposition would be caught by s.6AC(10) of the *Social Security Act*. In the present case, there had not been consideration in that sense - only a family arrangement.

Formal decision

The Federal Court dismissed the appeal.

Jurisdiction: 'decision under review'

SECRETARY TO DSS v RILEY

Federal Court of Australia

Decided: 12 November 1987 by

Northrop, Sheppard and Jenkinson JJ.

This was an appeal from the decision of the AAT in *Riley* (1987) 39 SSR 491, where the Tribunal had decided that the Secretary could not recover \$8681, paid to Riley by way of sickness benefit, following an award to Riley of workers' compensation.

The decision to recover the sickness benefit had been made by the Secretary under s.115D(2) of the *Social Security Act*. Riley appealed to the Secretary against that decision, under s.15 of the Act, and the appeal was referred to a Social Security Appeals Tribunal.

Before the SSAT, Riley argued that there were 'special circumstances' which would justify an exercise of the s.115E discretion not to recover the sickness benefit.

Following review by the SSAT, a delegate of the Secretary affirmed the decision, made under s.15D(2), to re-

cover the sickness benefit and decided that there were no 'special circumstances' to support an exercise of the s.115E discretion.

Riley then applied to the AAT for review of the Secretary's decision not to exercise that discretion.

The AAT did not review the Secretary's decision not to exercise the s.115E discretion. It took the view that the respondent had been qualified for invalid pension rather than sickness benefit during a substantial part of the period when he had been paid sickness benefit.

The AAT set aside the recovery decision and remitted the matter to the Secretary with a direction that the Secretary consider whether Riley had been qualified for sickness benefit during the period when he was paid sickness benefit; that the Secretary calculate the amount of sickness benefit paid during the period when Riley 'was arguably so qualified'; and that the Secretary supply the material on which the calculation was based to Riley and the AAT.

The Secretary then objected that the AAT lacked jurisdiction to set aside the decision to recover; and claimed that the material before the AAT had been sufficient to qualify the respondent for sickness benefit during the whole of the relevant period. The AAT subsequently directed that, in the absence of specific evidence to enable a more accurate calculation, the maximum amount of sickness benefit which the appellant could recover was \$1000.

The decision under review

The Federal Court allowed the Secretary's appeal, stressing that the AAT did not have the power to review Riley's eligibility for the sickness benefit payments which he had received.

To be the subject of a review under the *AAT Act*, a decision under the *Social Security Act* must satisfy the requirements of s.15A(1) or (2) of the *Social Security Act*. That is, unless the Secretary has given a certificate under s.15A(2), the decision must have been -