

Federal Court decision

Recovery of overpayment: bankruptcy

TAYLOR v SECRETARY TO DSS
Federal Court of Australia
Decided: 16 March 1988 by
 Lockhart, Beaumont and Wilcox JJ.

This was an appeal, under s.44 of the *AAT Act*, against the AAT's decision in *Taylor* (1987) 40 SSR 506. The AAT had affirmed a DSS decision to recover an overpayment of \$11,548 by deducting \$10 a fortnight from Taylor's widow's pension; and had rejected Taylor's argument that the recovery power was not available because she had been declared bankrupt.

The sequence of events

The initial decision, to recover an overpayment from Taylor by deductions from her pension, had been made on 22 August 1985. At that time s.140(2) of the *Social Security Act* gave the Secretary a discretion to recover an overpayment by deductions from the recipient's pension or benefit. Section 140(1) provided for recovery, by court proceedings, of an overpayment received through the recipient's default.

On 27 March 1986, Taylor became a bankrupt.

On 1 November 1985, s.140(2) [now numbered s.181(2)] was amended to make obligatory, rather than discretionary, the recovery of an overpayment through deductions from a current pension or benefit, unless the Secretary decided, under s.146(1) [now s.186(1)], to waive or write off the debt.

On 4 November 1986, following review by a SSAT, the Secretary affirmed the earlier decision to raise and recover the overpayment.

Taylor then applied to the AAT for review of the Secretary's decision.

The decision under review

The Court said that identifying the decision under review presented some difficulties. When the Secretary had 'affirmed' the earlier recovery decision in November 1986, that decision had ceased to operate because of the amend-

ments to s.140(2) a year earlier. The new s.140(2) made recovery obligatory and did not require a decision by the Secretary.

Lockhart and Wilcox JJ. said that the decision reviewed by the AAT should be treated as the Secretary's decision not to waive recovery of or write off the overpayment. This was based on 'a sensible and practical view', and 'a fair reading of what occurred': Lockhart J., p.12.

On the other hand, Beaumont J said that it was 'difficult to contend that there was a relevant administrative decision capable of review by the Tribunal'; but, because the issue before the Court was 'purely a legal question' and 'this legal question could, in any event, have been brought to this Court under s.39B of the *Judiciary Act*', the Court should proceed to deal with it.

Effect of bankruptcy

The Court said that bankruptcy converted a creditor's right to sue the debtor into a right to share in the distribution of the bankrupt's estate. During bankruptcy, the creditor was no longer able to enforce remedies against the person or property of the bankrupt:

'The right to sue is replaced by a right to share with other proved creditors equally and proportionately in the distribution of the estate of the bankrupt.'

(Lockhart J., p.17)

It followed that any right of the Commonwealth to sue Taylor to recover the overpayment under s.140(1) [now s.181(1)] would be converted, on her bankruptcy, into a right to prove and share in Taylor's estate.

However, it did not follow that the statutory power in the former s.140(2), converted into a 'statutory directive' from 1 November 1985, was affected by the bankruptcy. Just as a secured creditor of a bankrupt person could realise against the security (such as a mortgaged property) and prove in the bankruptcy for any balance of the debt, so the Commonwealth could recover its debt by using the provisions of s.140(2) [now s.181(2)]:

'By analogy with the secured creditor's position in bankruptcy, the Commonwealth is entitled to prove in the bankruptcy for a debt arising under the general law or s.181(1) or

recover any amount overpaid by withholdings pursuant to s.181(2) or prove in the bankruptcy for a debt and give credit for amounts recovered pursuant to the withholdings.'

(Lockhart J., p.19)

On this point, the Federal Court approved the AAT's decision and reasoning in *Stewart* (1985) 29 SSR 359.

Lockhart J. pointed out that the present s.181(2) did not permit recovery of the overpayment from property of the bankrupt which would be divisible amongst the bankrupt's creditors. This was because s.184(1) of the *Social Security Act* provided that a pension, benefit or allowance was 'absolutely inalienable, whether by way of . . . bankruptcy or otherwise.' If s.181(2) had allowed recovery against divisible property, it would have conflicted with the *Bankruptcy Act*.

Lockhart and Wilcox JJ. also considered the effect of s.58(3) of the *Bankruptcy Act*, which provided that a creditor could not, after a debtor had become bankrupt, enforce any remedy against the person or the property of the bankrupt in respect of a provable debt. This section, Lockhart J. said, did not affect the Secretary's power under the former s.140(2), or obligation under the present s.181(2), to make deductions from the applicant's pension. That deduction was not an enforcement of a remedy against Taylor's property:

'The entitlement of the applicant is not to the full amount of the widow's pension but to what remains after the statutory deduction has been made. The amount received after such deduction is her property, not the gross amount of the pension. Further, the deduction by the Commonwealth of overpayments under s.181(2) is what Jenkinson J. described in *Re Stewart* (supra) as "an administrative adjustment from particular statutory payments". It is not the enforcement of a remedy against the property of a bankrupt in respect of a provable debt.'

(Lockhart J., p.26)

Wilcox J. agreed with Lockhart J.; and Beaumont J. did not decide the point about s.58(3) of the *Bankruptcy Act*.

Formal decision

The Federal Court dismissed the appeal. [P.H.]

