

should not be obliged, because of the *Social Security Act* income test, to use part of that pension for the support of her present husband.

The AAT noted that several payments were expressly excluded from the definition of 'income', in s.3(1) of the *Social Security Act*. These included compensation payments for the loss of, or damage to, items of property, and several specified payments under the *Veterans' Entitlements Act*, but not a war widow's pension under that Act.

The war widow's pension, the AAT said, fell within the standard definition of 'income' in s.3(1) of the *Social Security Act*: it amounted to 'moneys received by her for her own use or benefit . . . received periodically': Reasons, para.6. The pension was not excluded from the definition; and neither the DSS nor the AAT had a discretion to treat that pension as anything but 'income' of the couple and to reduce their pensions accordingly.

[B.W.]

Assets test: 'deemed income'

AVERY and SECRETARY TO DSS
(No. W87/246)

Decided: 24 June 1986 by C.J. Bannon, N. Marinovich and K.J. Taylor.

Rabone Avery was granted an age pension, and his wife was granted a wife's pension, in 1981. Following the introduction of the assets test in March 1985, the rate of their pensions was reduced because of the value of their farming property. The DSS decided that the property's value should be excluded from the assets test, but that a 'deemed income' of 2.5% of the property's value should be deducted from the pensions payable to Mr and Mrs Avery, under s.6AD(3) of the *Social Security Act*.

Avery asked the AAT to review those decisions; but the AAT treated the decision to reduce Avery's age pension as the decision under review, because that was the only decision which had been reviewed by an SSAT.

The legislation

At the time of the decision under review, s.6AD(3) of the *Social Security Act* [now s.7(4)] provided that, where property was disregarded for the purposes of the assets test, the annual rate of pension payable to the person should be reduced by the amount of income 'that could reasonably be

expected to be derived' from the disregarded property.

The evidence

The property in question was a farm of some 360 acres. Mr and Mrs Avery had worked it in partnership with their sons, W and I, until 1981, when they retired from the partnership. Mr and Mrs Avery bought a house in a nearby town, and moved off the farm, which was then taken over by the partnership between W and I. The partnership met all loan repayments and rates on the Averys' farming property and town house, but paid no rent for the farm. The partnership had returned a net profit of \$30 023 in 1986-87. W and I each drew \$200 a week from the partnership, from which each of them supported a wife and 2 children.

'Deemed income' - nil

The DSS had conceded that the financial hardship provisions of the former s.6AD(1) applied to the Averys, it being unreasonable to expect them to sell their farming property.

The AAT said it was not reasonable to treat 2.5% of the value of the property as 'notional income' of the Averys; 'the only reasonable rental for the rural properties would be small', the AAT said, and it 'should be disregarded in the circumstances of this case': Reasons, p.6. Nor was it reasonable to treat the mortgage repayments on their town house (about \$8000 a year) as their 'notional income'. The AAT commented:

'The sons and their families are living in conditions inferior to those of city workers, although with a prospect of some modest inheritance. The parents are living in conditions of hardship in their declining years, which do not benefit Australian citizens who have raised a family and worked the land.'

(Reasons, p.6)

The AAT noted that s.6AD(3) had been amended, as s.7(4), from 13 November 1987. The Tribunal agreed with the approach taken in *Sharpe* (1988) 43 SSR 542, that the present matter should be decided under the unamended legislation, because the decision under review and the application for review had been made before the amendment. If the DSS wished, it could now review the rate of pension payable to the Averys and apply the new s.7(4). In the meantime, the AAT said, the Averys should receive their pensions without deduction.

Formal decision

The AAT set aside the decision under review and decided that Avery should be paid age pension at the maximum married rate.

[P.H.]

Assets test: disposal of property

HALL and SECRETARY TO DSS
(No. S87/118)

Decided: 24 June by R.A. Layton.

Iala Hall was granted an age pension in March 1984, at the age of 69. When the assets test was introduced in March 1985, the DSS cancelled her age pension because of 'deemed income' from her property. In March 1986 Hall decided to transfer the major item of her property, a farm of 517 acres, to one of her sons, R; and she again applied for an age pension. (This transfer was registered in August 1986.) The DSS rejected her application.

Hall asked the AAT to review the DSS decisions.

March 1985 to August 1986

The AAT said that Hall's situation had to be considered in two periods: first, from March 1985, the date of cancellation of Hall's pension, to August 1986, the date of the transfer of the farm property; and, second, from August 1986 to the date of the Tribunal's decision. Her position should be determined by applying the *Social Security Act* as it existed in March 1986, as had been decided in *Sharpe* (1988) 43 SSR 542.

In the first period, the AAT said, Hall met all the requirements of s.6AD(1) in relation to her farm property. Because her sons, R and D, were farming the property, she could not be expected to sell or realise it; and because the property was already encumbered, she could not be expected to use it as security for borrowing. Hall would have suffered 'severe financial hardship' because her 'available realizable assets', including a beach shack valued at \$5000, amounted to \$5297.

Moreover, there was no income which Hall could reasonably have derived from her property because the partnership between her sons was over-committed financially and had no available funds to pay rent. The partnership had recorded substantial losses in the years 1984-85 and 1985-86; and it now had liabilities of \$473 220 and assets of \$185 172. The AAT noted that the partnership was leasing land from other relatives at a commercial rent; but said that this was affected by different factors:

'The difference being the close relationship which exists between parents and their children as distinct from other relatives and also the reality that the sons could not afford to pay a commercial rate or, indeed, any payment for the use of their mother's land which was essential to the overall viability of the farm.'