Income test: deductions from property income

SELIMOVSKI and SECRETARY TO DSS
(No. 4925)
Decided: 15 February 1989
by R.A. Balmford.

Quazim Selimovski claimed unemployment benefit on 19 December 1986. This claim was rejected and Selimovski applied to the AAT for review. By the time the AAT heard this application the benefits assets test [s.122(10)] had been introduced, commencing operation on 16 December 1987.

As it was not disputed that Selimovski would be precluded from receiving unemployment benefit because of the assets test, the AAT was only concerned with the period up until 16 December 1987. The sole issue determined by the AAT was whether the application of the income test prevented Selimovski being paid unemployment benefit during the period 19 December 1986 to 16 December 1987.

The facts

Selimovski was a retired dairy farmer. In June 1986 he and his wife sold their farm on vendor terms which required annual payments of capital of $15 000 and quarterly payments of 12% interest. Their tax returns revealed total principal and interest payments received of $18 000 in 1986/87 and $14 400 in 1987/88.

Mr and Mrs Selimovski also owned a block of flats which, after deduction of expenses, produced losses of $19 604 in 1986/87 and $40 065 in 1987/88. These losses were set off against the farm payments to produce overall losses and therefore no taxable income in each year. Selimovski submitted that accordingly he had no income for the purposes of the *Social Security Act*.

The legislation

The AAT referred to the benefit income test provisions in s.114(1) and (2) [now s.122(1) and (4)]. (However, it did not refer to s.122(8) which commenced operation on 1 July 1987 and which, until 16 December 1987, deemed the weekly receipt of amounts of income which were received by way of periodical payments made at intervals longer than one week.)

The word 'income' was defined in s.6(1) [now s.3(1)] to mean:

> '. . . personal earnings, moneys, valuable consideration or profits, whether of a capital nature or not, earned, derived or received by that person . . .'

(Subsection 3A(4) [now s.12L], which deems the weekly receipt of certain capital amounts, did not commence operation until 13 December 1987 and was also not referred to by the AAT.)

Deduction of expenses

The AAT applied the Federal Court decision in *Haldane-Stevenson* (1985) 26 *SSR* 323 and the AAT decisions in *Crosby* (1986) 30 *SSR* 375 and *Hunt* (1988) 15 ALD 310 in concluding that:

> 'expenses are to be deducted from income for the purposes of the Act where they are directly associated with that income, and not otherwise.'

(Reasons, para. 15)

The AAT then applied its previous decision in *Shafer* (1983) 16 *SSR* 159 and concluded that Selimovski was not carrying on a single business as a property investor because the flats and the sale of the farm were separate activities. Accordingly 'the expenses associated with the flats could not be set off against the income arising from the sale of the farm': Reasons, para. 19.

Calculation of amount of income

The AAT decided that all of the amounts received in respect of the farm were 'income', given the inclusion of the words 'whether of a capital nature or not' in the definition.

The appropriate amount to be taken into account was obtained by averaging the farm payments over the two taxation years. This was a purported application of the High Court's decision in *Harris* (1985) 24 *SSR* 294 and produced a 12-monthly income of in excess of $15 000 which, when reduced to a weekly rate, reduced the rate of benefit to nil.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Assets test: granny flat and disposal of real estate

CUMMANE and SECRETARY TO DSS
(No. 4751)
Decided: 18 November 1988
by B.M. Forrest, H.R. Trinick and D.M. Sutherland.

Maureen Cummane, a widow, sought review of a DSS decision to cancel her age pension because her assets exceeded the statutory limit. The issues were whether the values of 2 properties previously owned by Cummane (which she had sold to 2 of her sons) should be taken into account as part of her assets.

The legislation

Section 6AC(2) of the *Social Security Act* required the value of property in excess of $2000, disposed of on or after 1 June 1984, to be included in the value of the person's property when applying the assets test.

Section 6AC(10) included, as a disposal of property, the engaging in a course of conduct that diminished the value of property where the person received no or inadequate consideration. Section 6AC(12) deemed the value of a right or interest in a residence covered by s.6AA(1)(a)(iv) not to be consideration. [Section 6AC has been renumbered s.6.]

Section 6AA(1)(a) lists property, the value of which is to be disregarded for the purposes of the assets test. Section 6AA(1)(a)(iv), known as the 'granny flat' provision, applies to a right to accommodation for life or a life interest in a principal home that is a private residence which was acquired for valuable consideration. [This is now numbered s.4(1)(a)(v).]

The Torquay house

In November 1983, Cummane orally agreed to sell a house she owned in Torquay to her son James, who was to divide the purchase price evenly between Cummane and her other children. Nothing was put in writing until the transfer of land dated 25 June 1984.

The AAT held that the disposal of this property did not take place until 25 June 1984 an it was therefore caught by s.6AC. The earlier verbal agreement did not constitute a disposal because no enforceable rights were created, as s.126 of the *Instruments Act* 1958 (Vic.)