

legal right to interest unless awarded it in curial proceedings, the exercise of discretion under s.115E in an appropriate case can substantially put a pensioner who does not commence court proceedings in the same position as one who does and thereby prevent an anomalous situation arising.'

(Reasons, p.12)

Beaumont J agreed with Hill J that s.115E provided a basis on which a payment could be made to Trimboli to compensate him for the unlawful retention of the money in question. (Woodward J also agreed that the fact that Trimboli had been deprived by the DSS of money to which he was entitled 'was a matter proper to be taken into account . . . in considering . . . s.115E of the *Social Security Act* . . .': Reasons, p.2.)

However, Beaumont J said that s.115E was not the only way in which the Secretary to the DSS could compensate Trimboli:

'[T]he statutory provisions in force in this State conferring power upon courts to award interest provide an alternative source of Parliamentary authorisation for such payment. This source is available notwithstanding that proceedings have not yet been instituted in a court for recovery of the amount in dispute.

This is not to say that the Secretary has any obligation to pay interest, or its equivalent. Nor is it to say that the Secretary ought to exercise his power to compromise any such claim in any particular way. But it is not correct to suggest that, by virtue of the *Auckland Harbour* principle, any such payment would be illegal unless and until court proceedings had been commenced.'

(Reasons, pp.5-6)

Formal decision

The Federal Court allowed the appeal, set aside the orders made by the AAT, and remitted the matter to the AAT 'to review the exercise of the discretion under s.115E . . . in accordance with the reasons for decision of this Court . . .'

[P.H.]

Invalid pension: granted from date of AAT decision

SECRETARY DEPARTMENT OF
SOCIAL SECURITY v GOUDGE

Federal Court of Australia

Decided: 5 May 1989 by Neaves J.

This was an appeal, under s.44 of the *Social Security Act*, against the decision

of the AAT in *Goudge* (1988) 43 SSR 553.

Goudge had asked the AAT to review a DSS decision that he was not permanently incapacitated for work and could not, therefore, qualify for invalid pension.

The AAT decided that Goudge had not been permanently incapacitated for work at the time when he lodged his claim for invalid pension (May 1985) but, because his condition had deteriorated, he was at least 85% permanently incapacitated for work at the date of the AAT hearing.

The AAT decided that Goudge was not entitled to invalid pension prior to the date of its decision (14 April 1988) but was qualified for invalid pension from that date.

The 3-month rule

In support of its appeal, the DSS argued that the former s.135TB(2) [later renumbered as s.159(2)] of the *Social Security Act* prevented the grant of a pension to a person who was not qualified at the date when the claim for that pension was lodged, unless the person became qualified within 3 months of lodging the claim.

Section 135TB(2) provided that a claim for pension or benefit, lodged at a time when a person was not qualified for the pension or benefit, should 'be deemed to have been lodged' on a later day, where the person became qualified for the pension on that later day and the later day occurred within 3 months of the day on which the claim was lodged.

This provision came into operation on 5 September 1985, some 3 months after Goudge had lodged his claim for invalid pension. However, by virtue of s.123(2) of the *Social Security and Repatriation Legislation Amendment Act* 1985, the newly enacted s.135TB(2) applied to Goudge's claim, even though that claim had been lodged before the section was inserted into the *Social Security Act*.

Neaves J referred to the decision of the AAT *Tiknaz* (1981) 5 SSR 45, where the Tribunal had said that an invalid pension could be granted to a claimant from a date substantially later than the date on which the person had lodged a claim for that pension, where the person had become qualified for invalid pension on that later date. The amendments to the *Social Security Act* introduced in September 1985 did not have the effect, Neaves J said, of limiting the grant of an invalid pension to a person who was qualified for the pension on the date of the lodgment of

the claim or within 3 months after that lodgment:

'Section 135TB(2), in the form which it then took, relevantly did no more than provide that, in the circumstances envisaged, a date other than the date on which a claim for invalid pension was lodged was to be treated as the date of lodgment.'

(Reasons, p.17)

Neaves J noted that, with effect from 1 July 1986, s.135TA(1A) [later renumbered as s.158(2)] was inserted in the *Social Security Act*. That sub-section declared that, subject to s.135TB(2), a claim should be deemed not to have been made by a person, if at the time of the making of the claim, a person was not qualified for the pension claimed. This provision, the AAT said -

'gave effect for the first time to a legislative intention that the grant of an invalid pension is to be made only if the claimant is qualified to receive the pension at the date of the lodgment of a claim for such pension or on a date within 3 months thereafter.'

(Reasons, p.18)

Clearly, the AAT said, this would be the position where a claim for a pension was lodged after the date on which s.135TA(1A) had commenced, namely 1 July 1986. However, where a claim had been lodged before that date, the rule expressed in that sub-section had no operation. This was because the legislation which inserted s.135TA(1A) had contained no provision providing that it was to apply to claims lodged before it came into operation and it should 'be read as having a prospective operation only': Reasons, p.19.

Neaves J expressed his conclusion as follows:

'It follows, in my opinion, that, as the respondent's claim was lodged prior to 1 July 1986, the Secretary, and consequently the Tribunal, was not precluded by the provisions of s.158 or s.159 from considering whether the respondent was qualified to receive an invalid pension at any time between the date of the lodgment of the claim and the date upon which the matter was determined.'

(Reasons, pp.19-20)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]