

interests and to preserve his health. Rose's only income in Australia came from royalty payments of no more than \$15 a week. Although he was eligible for an age pension, the DSS had decided that the level of his income from the GDR retirement pension reduced the level of that pension to nil.

The definition of income

Section 3(1) of the *Social Security Act* defines 'income' as meaning —

'personal earnings, moneys, valuable consideration or profits, whether of a capital nature or not, earned, derived or received by that person for the person's own use or benefit by any means from any source whatsoever, within or outside Australia, and includes a periodical payment or benefit by way of gift or allowance . . .'

The Federal Court said that this definition was not ambiguous, so that there was no room for applying the principle of liberal interpretation of beneficial legislation. The payments received by Rose clearly fell within the definition of income because they were moneys received from a source outside Australia:

'The Legislature was concerned to ensure that it mattered not whether the source of derivation or receipt of the moneys was within or outside Australia because it is a definition which forms part of a scheme designed to exclude persons from qualifications for pensions under the Act who have access to other forms of "income" irrespective of the territorial location of the source.'

(Reasons, p.8)

The Court rejected an argument, advanced on behalf of Rose, that moneys would only fall within the definition of 'income' if the moneys could be described as 'realised', in the sense of being available for use, in Australia. The Court referred to the High Court decision in *Read v Commonwealth* (1988) 43 SSR 555 and accepted that the reasoning in that case led to the conclusion that 'until "profits" were realised they did not answer the description of "profits" . . . earned, derived or received' for the purposes of the s.3(1) definition of 'income'. However, the Court said, that conclusion did not assist Rose in this case: Rose's pension payments were moneys 'received' by him because they were 'realised' by him in the GDR. It was not, the Federal Court said, to the point that these moneys were received by Rose outside Australia.

The Federal Court concluded by commenting that, even if Rose had lived full-time in Australia and had been unable to use the benefit of his GDR pension, that pension would still have fallen within the definition of 'income' in s.3(1) of the *Social Security Act*:

'The construction and application of the definition of "income" do not depend on the

circumstance that an applicant for a pension may choose to live in Australia or another country or both countries.'

(Reasons, p.13)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]



Assets test: disposal of property

SECRETARY TO DSS v CUMMANE

(Federal Court of Australia)

Decided: 14 March 1990 by Gray J.

This was an appeal, under s.44 of the *AAT Act* 1975, from a decision of the AAT in *Cummane* (1988) 48 SSR 624.

The AAT had varied a DSS decision that a house formerly owned by Cummane should be treated as part of her assets for the purpose of the assets test.

Cummane had been the sole proprietor of the house until 1986, when she agreed to transfer title to her son, P, in return for P building an extension in which Cummane could live rent-free for the rest of her life.

The house was valued at \$140 000, and the DSS treated Cummane as having disposed of property without adequate consideration, and took the value of the house into account in setting the rate of her age pension.

On review, the AAT had decided that the value of Cummane's right to accommodation had to be taken into account, and that value deducted from the value of the house before applying the assets test.

The legislative provisions

The AAT had applied s.6AA(1)(a)(iv) [now numbered s.4(1)(a)(v)] of the *Social Security Act* (known as the 'granny flat' provision) in reaching its decision.

As the AAT understood that provision, it declared that a right to accommodation for life or a life interest in a principal home, acquired for valuable consideration, should be disregarded for purposes of the assets test.

However, the Federal Court pointed out that the AAT had relied on an out-

of-date version of s.6AA(1). An amendment made in October 1986 (and in force at the time of the decision under review) provided that the property listed in the subsection was *not* to be disregarded for the purposes of s.6AC.

Section 6AC [now numbered s.6] was the disposal of property provision. Section 6AC(2) required the value of property (over \$2000), disposed of after 1 June 1984, to be included in a person's assets.

Section 6AC(10) provided that any conduct which diminished the value of a person's property for no or inadequate consideration was a disposal of property. According to s.6AC(12), the value of a right or interest covered by s.6AA(1)(a)(iv) was not to be treated as consideration for the purpose of s.6AC(10).

The Federal Court's approach

The Court said the words inserted into s.6AA(1) in October 1986 made it clear that the value of a person's accommodation for life was not to be taken into account for the purposes of calculating the value of a person's assets; but was to be taken into account for the purpose of calculating the value of a person's dispositions of property:

'A person is not to be treated as having disposed of the entire value of a home if he or she has retained a right to live in that home. Such a right is not to be disregarded for that purpose. This view accords with the logic of the scheme of the assets test. To treat the value of a retained right of accommodation as an asset would be to fly in the face of the provision in s.6AA that such a right is to be disregarded for the purposes of calculating the value of a person's property.'

(Reasons, p.6)

The Federal Court said that s.6AC(12), which deemed the retention of a right to accommodation for life not to be consideration for a person diminishing the value of her property within s.6AC(10) was not relevant here:

'[Cummane] did not diminish the value of her house; she transferred the title in to her son. She did so, however, subject to her retention of a right. It is necessary to take into account that retained right, in order to determine the value of the property which she has disposed of. Even if sub-s.(12) were relevant, it would not be applicable in determining the value of the property disposed of. It would be necessary only to disregard the value of the retained right as consideration, not to disregard it in determining the value of the asset disposed of.'

(Reasons, p.7)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

