Federal Court decisions

Compensation award: the incapacity component

SECRETARY TO DSS v BANKS
(Federal Court of Australia)
Decided: 19 June 1990 by Von Dousa J.

This was an appeal, under s.44 of the *Social Security Act*, from a decision of the AAT, handed down on 30 November 1989. The AAT had decided that, when applying the 50% formula under s.152(2)(c)(i) of the *Social Security Act*, so as to identify 'the compensation part of a lump sum payment by way of compensation' made by consent on or after 9 February 1988, any amount included in the award for redemption of future medical expenses should be excluded before performing the calculation.

The legislation

Section 152(2)(c)(i) of the *Social Security Act* prescribes a formula for determining the part of a lump sum payment of compensation which is to be taken as 'the compensation part' of that payment, for the purpose of calculating the pension preclusion period imposed by s.153(1) of the *Social Security Act*.

Section 152(2)(c)(i) declares that, where a compensation award is made by consent or as a settlement on or after 9 February 1988, then 50% of the award shall be taken as 'the compensation part' of the lump sum payment.

No warrant for excluding future medical expenses

The Federal Court noted that the formula in s.152(2)(c)(i) had been inserted in the *Social Security Act* by the *Social Security Amendment Act* 1988. It had replaced the previous s.152(2)(c), which had defined 'the compensation part' of a lump sum payment as that part which, in the opinion of the Secretary, was 'in respect of an incapacity for work'.

The Court said that the former provision had caused difficulties where the settlement of a compensation claim had been set out in a document which 'inappropriately or misleadingly described the nature of the payment or its component parts'.

The Court said that it was justified in looking at the Second Reading speech on the Bill which introduced the present s.152(2)(c)(i) 'to identify the mischief which it was intended to rectify': Reasons, p.10. After referring to the responsible Minister's Second Reading speech, the Court said:

> 'The mischief is clearly identified as the abuse of the earlier provisions which had come about through settlements being manipulated to obscure the economic loss component in the compensation payment.'

(Reasons, p.11)

The Court concluded that, where a payment of compensation was made as a settlement of a claim and the claim was, in whole or in part, in respect of an incapacity for work then —

> 'the total amount paid, which comprises the "lump sum", becomes subject to the arbitrary formula of sub-para. (i) [which] will apply to the total amount paid in settlement . . . even though the lump sum clearly includes amounts for heads of loss which are unrelated to incapacity for work, for example, pain and suffering, for disfigurement, or for future medical expenses in relation to disease or injuries [or] a component for property damage.'

(Reasons, p.15)

The Federal Court observed that the 'wide language' of s.152(2)(c)(i) recognised that the mischief would not be remedied 'unless every component part of the lump sum payment made in settlement of a claim which has the prescribed characteristics is brought to account':

> 'The scope for manipulation by inflating some heads of loss and diminishing or excluding others, without altering the total amount of the lump sum, would otherwise remain. The prescribed percentage (50%) of the lump sum payment made in settlement of the claim which by s.152(2)(c)(i) is deemed to be the "compensation part of the lump sum payment by way of compensation" should be viewed as a broad attempt to balance the interests of the recipient of the payment with the competing interests of others in the community whose needs must be met as far as possible from a finite budget allocation for social security measures. The paragraph seeks to eliminate double-dipping in a practical way which operates effectively in a straightforward manner. In the very nature of an arbitrary provision, sub-para. (i) could possibly entail a degree of unfairness in a particular case, but the present case is not an example. Here, by the terms of the order, almost all of the lump sum was paid in respect of incapacity for work, actual or potential, yet only 50% of the lump sum is treated as the compensation part of the lump sum for the purposes of calculating the exclusion period.'

(Reasons, p.16)

Formal decision

The Federal Court allowed the appeal, set aside the decision of the AAT and restored the decision of the Secretary.

[P.H.]

Assets test: declaration of trust

SECRETARY TO DSS v JAMES
(Federal Court of Australia)
Decided: 11 May 1990 by Lee, J.

This was an appeal under s.44 of the *AAT Act*, from a decision of the AAT directing the Secretary to exclude the value of certain property when applying the assets test to James: see *James* (1989) 49 *SSR* 635.

The property in question was a home unit, registered in the name of James but occupied by James' daughter and granddaughter. James' daughter suffered from brain damage and epileptic fits and required constant medication.

James had told the AAT that the unit had been purchased to give her daughter and grand-daughter some degree of independence and yet be close enough for James (who lived in a unit next door) to supervise her daughter's medication. James said that she had not registered the unit in her daughter's name in order to safeguard her daughter, who might be subject to undue influence from other people.

James had also told the AAT that she had left instructions in her will that the unit was to be kept for her daughter to live in and then passed on to her granddaughter on her daughter's death.

The AAT had accepted that James had intended, at the time when she purchased the unit, that she would hold it in trust for her daughter; and her discussions with accountants, lawyers and family members at that time amounted to an oral declaration of a trust.

The AAT had also found sufficient written confirmation of this trust for the purposes of s.34(1)(b) of the *Property Law Act* 1969 (WA) in 2 documents which

James had lodged with the DSS: in each of these documents, James had written that the unit had been purchased for her daughter and grand-daughter.

Sufficient evidence of oral declaration

The Federal Court first concluded that there had been sufficient evidence before the AAT from which the AAT could find that James had declared a 'present irrevocable trust'. The Court said that the evidence might have raised competing inferences, but the Tribunal's determination was an available conclusion. The Court commented:

> 'On the material before it, it was possible for the Tribunal to conclude that the respondent had declared that she held the property on trust for her daughter as to a life interest — in respect of which the daughter was to make a contribution to outgoings — and thereafter for her grand-daughter in remainder and that the instructions in her will to her executors confirmed that declaration and did not create the trust.'

(Reasons, pp. 10-11)

The effect of the Property Law Act

Section 34(1) of the *Property Law Act* 1969 (WA) provides, in para. (a), that no interest in land can be created or disposed of except in writing signed by the person creating or conveying the interest or by will or by operation of law; and, in para. (b), that a declaration of trust respecting any land 'shall be manifested and proved by writing signed by a person who is able to declare the trust or by his will'.

The Secretary argued that s.34(1)(a) prevented the creation of any equitable interest in land unless that interest was created in writing or by will or by operation of law. However, the Court said that, in its view —

> 'the proper construction of paras. 34(1)(a) and 34(1)(b) does not require a declaration of a trust in land to be treated as a special class of equitable interest only capable of being created in writing and further, to be manifested and proved by writing signed by the declarant. Paragraph 34(1)(b) would be either an odd exception, or otiose if para. 34(1)(a) were to be construed as including the declarations of trust in respect of land specifically provided for in para. 34(1)(b).'

(Reasons, p.16)

Accordingly, it was not necessary for the equitable interest to be created by writing; but it was necessary for it to be 'manifested and proved by writing' signed by James. The Court said that this requirement, stated in para. 34(1)(b), could be satisfied by a combination of documents capable of being read together:

> 'Any informal writing may stand as evidence of the existence of a trust, including correspondence from third parties, a telegram, an affidavit or an answer to interrogatories. The date of creation of the writing is not material. It may come into existence after the declaration of the trust.'

(Reasons, pp.16-17)

The Federal Court noted that the AAT had found the necessary writing in a letter from James to the DSS in 1983 and a further document attached to her application for pension in December 1987.

The Court said that, in addition, the evidence could have been found in James' application for review of the DSS decision, where James had written that she had provided the unit as a home for her daughter, the deeds having been left in James' name to protect her daughter. In combination, the Court said —

> 'those documents may have provided writing to confirm an intention to create a trust, to identify the daughter and grand-daughter as objects of the trust, to identify the home unit as the property subject to the trust, and to state the terms of the trust to be a life estate for the daughter with the remainder to the grand-daughter.'

(Reasons, p.17)

However, the Federal Court pointed out that the AAT had resorted to oral evidence to augment, rather than clarify, the writing upon which James relied to satisfy the requirements of s.34(1)(b) of the *Property Law Act*. This oral evidence 'supplied elements that were missing in that writing'. By relying on that oral evidence, the AAT had misunderstood the requirements of s.34(1)(b) of the *Property Law Act* and had 'erred in law in its finding that the requirements of the paragraph were satisfied'.

Accordingly, the matter should be returned to the AAT for further hearing and determination on this issue. The AAT should receive such further evidence as it saw fit in order to decide whether s.34(1)(b) of the *Property Law Act* has been satisfied. That evidence could include James' will and any other writing which she might have prepared relating to her daughter's and grand-daughter's interests in the unit.

Formal decision

The Federal Court allowed the appeal and remitted the present matter to the AAT for further determination according to law, the AAT to receive such further evidence as to it seemed fit.

Carer's pension: providing care in the same home

KINSEY v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 5 June 1990 by Gray J.

This was an appeal, under s.44 of the *Administrative Appeals Tribunal Act*, from the decision in the AAT *Kinsey* (1989) 51 *SSR* 673.

The AAT had affirmed a DSS decision to cancel Kinsey's carer's pension because Kinsey was no longer providing care to her severely handicapped adult daughter in the same home.

Until May 1988, Kinsey's daughter (who suffered from a severe mental illness) had lived with her husband and child in Kinsey's house, where Kinsey provided daily care for her. In May 1988, Kinsey's daughter, the daughter's husband and her child moved into a unit on an adjacent block of land, which was on a separate title from Kinsey's house.

Kinsey continued to provide care for her daughter and her daughter's child as well as for her own husband (who was also disabled) dividing her time between her own house and her daughter's unit.

The DSS had then decided that Kinsey could no longer qualify for carer's pension because she was not providing care to her daughter 'in a home of the person and of the other person', as required by s.39(1) of the *Social Security Act*. The AAT had affirmed that decision, on the basis that Kinsey's house and her daughter's flat could not constitute the one home.

More than one 'home'

The Federal Court said that 'it would be necessary to stretch the meaning of the expression "home" to include such a situation' as that involved in the present case:

> 'The concept of a home is a nebulous one to some extent but is difficult to apply to two separate dwellings, each with its own facilities complete, owned and occupied by separate family groups, simply because there is ease of access between them and one person performs household duties, sleeps and eats in both.'

(Reasons, p.8)

But the Court decided that the AAT had made an error of law in failing to consider whether Kinsey had two homes, her own home and her daughter's unit, and provided care to her daughter in the latter 'home':