Family allowance: claim for arrears

SECRETARY TO DSS and THOMAS

(No 7224)

Decided: 5 August 1991 by H.E. Hallowes.

The DSS and Anne Thomas both applied for review of a decision of the SSAT, that Thomas could be paid an increased rate of family allowance from 30 September 1989.

The DSS maintained that the earliest date from which the rate could be increased was 2 November 1989, while Thomas argued that she should be paid the higher rate from 29 December 1988. The applications were heard together.

Background

Thomas had been in receipt of family allowance when she was advised in July 1987 that, from November of that year, an income test was to be introduced. In February 1988, Thomas advised the DSS that her combined taxable income for 1986/1987 was $54 816 and she was paid for 1988 on the basis of that income.

On 28 November 1988, she provided an estimate of combined income for the 1987/1988 year of $60 280. A few weeks later, the DSS told her that she would be paid at well below the maximum rate and advised her that she could seek review of the decision to pay at that rate.

On 29 December 1989, Thomas provided a further estimate of income for 1988/1989. However, on 2 November 1989 she provided actual figures for her 1987/1988 income which showed that the combined taxable income was less than she had estimated and would have allowed payment of family allowance at the maximum rate, had the figure been known.

On that basis, the rate of payment was recalculated on 29 December 1989, with effect from 2 November 1989, the date Thomas notified her actual income. A file note indicated that Thomas' husband told the DSS on 29 December 1989 that they intended to appeal against the decision not to pay arrears before 2 November 1989.

The AAT noted that Thomas sought review only of the determination of 29 December 1989 to increase the rate of family allowance from 2 November 1989 but did not seek review of any of the earlier decisions, including the decision to reduce her rate. The issue thus became the date from which the increase in rate could take effect.

The legislation

The AAT noted that, at the time of the decision, the *Social Security Act* 1947 had been repealed and replaced with the *Social Security Act* 1991. By s.15 of the transitional provisions set out in the *Social Security (Rewrite) Transition Act* 1991, an application to the AAT lodged but not determined prior to 1 July 1991 is to be treated as if it were an application under s.1283(1) of the 1991 Act. And, by s.15(3), where the date of effect of the decision is prior to 1 July 1991, the decision has effect for the period to 30 June 1991 as if it were a decision under the 1947 Act.

Although the AAT referred to various provisions of the 1991 Act, the matter was dealt with under the 1947 Act.

Section 168(3) and (4) of the 1947 Act dealt with the date of effect of decisions to increase rates of payment.

Section 168(4)(a) provided that, where review was sought within 3 months of notice of a decision or where no notice of a decision was provided, a determination to increase the rate took effect from the date of the original decision.

Section 168(4)(b) provided that, where review was sought after that time, the date of effect was the date on which review was sought; while s.168(4)(c) provided that where a determination to increase the rate followed a person having advised the DSS of a change in circumstances, the decision took effect from the date of advice. Finally, s.168(4)(d) provided that, in any other case, the decision took effect from the date of the determination, or from such other earlier or later date as was set, not being more than 3 months prior to the date of the determination.

The AAT's decision

In this case, the date of advice was 2 November 1989 but Thomas argued that, since the information provided on that day showed that she would have been entitled to rec eive the full rate for the period, the decision should take effect from 29 December 1988.

The AAT found that Thomas had sought review within 3 months of the date of the determination. However, the AAT pointed out that 'whether or not paragraphs (a), (b) or (c) apply to the circumstances of this case, there is no joy for the applicant'. This was because s.168(4) 'precludes an increase in the rate of family allowance other than under sub-section (4)': Reasons, para. 20.

Since the decision under review took effect from 2 November 1989, the AAT decided that no arrears could be paid for any period prior to the date of the determination. Accordingly, the higher rate was payable only from that date.

Formal decision

The AAT set aside the decision of the SSAT and substituted for it a decision that Thomas be paid an increased rate of family allowance from 2 November 1989.

[R.G.]

Federal Court decisions

Valuation of assets: 'excluded security'

SECRETARY TO DSS v CLAYTON

(Federal Court of Australia)

Decided: 17 May 1991 by Davies J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Clayton* (1991) 61 *SSR* 853.

The AAT had decided that the value of Clayton's assets should be reduced by the value of a mortgage over the property, so as to moderate the impact of the assets test on the rate of Clayton's age pension.

The legislation

At the time of the AAT's decision, s.4(1)(a) of the *Social Security Act* 1947 provided that the value of a person's property should be reduced for the purpose of the assets test by the value of a charge or encumbrance, not being an 'excluded security', on the person's property.

According to s.4(10)(a), an 'excluded security' was a 'charge or encumbrance ... given for the benefit of a person who is not a party, or the spouse of a party, to the charge or encumbrance'.

The facts

Clayton owned a farming property, which had been farmed by his daughter and son since 1983. A mortgage had been executed over the property to secure sufficient funds for Clayton's children to continue the farming operations.

Clayton was the mortgagor under the mortgage, which contained provisions indicating that the mortgage was being executed for the purposes of covering loans made to his children. The children were described as 'the debtors' in the mortgage document, and their signatures appeared on the mortgage document.

The Court's decision

Davies J rejected an argument advanced on behalf of the DSS, that the only person who could be a party to a mortgage was the person who, by executing the mortgage, was granting an interest in the property.

Davies J said that a person could be a party to a mortgage, even though the person was not the owner of the land the subject of the mortgage. It was enough that Clayton's children had assumed a personal obligation under the mortgage document.

In any event, Davies J said, it appeared that the respondent's children had an interest, the right of occupancy, in the land the subject of the mortgage. Their signatures on the mortgage—

> 'ensured that whatever could be done in relation to the father's interest could also be done in relation to their interests, so that the bank could obtain vacant possession of the whole of the property if it saw fit to do so.'

(Reasons, p.6)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

Assets test: equitable interest

KINTOMINAS v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 2 August 1991 by Einfeld J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Kintominas* (1990) 57 *SSR* 775.

The AAT had decided that the rate of her age pension should be determined by including in her assets a piece of real property legally owned by Kintominas, less an amount which her son had spent in improving the property. The AAT had rejected Kintominas' argument that her son had acquired an equitable entitlement to the whole property through an oral agreement between the two of them and through his expenditure on improvements.

Equitable interests in the AAT

In dealing with this issue, the AAT had said that it was not part of any administrative process to determine equities, which should be 'determined independently'.

In considering the appeal, Einfeld J observed that to require Kintominas and her son to engage in litigation so as to establish the nature and extent of any equitable interest 'would be a most unfortunate, costly and ultimately impractical way of dealing with their relationship'.

Einfeld J then proceeded to consider whether the evidence before the AAT supported the existence of an equitable interest held by the son in the property.

That evidence was that Kintominas had agreed with her son that he and his family could live in the subject property rent-free in return for paying outgoings and maintaining the property, that he would borrow $35 000 to improve the property and that Kintominas would devise the property to her son in her will.

Einfeld J referred to *Dillwyn v LLewelyn* (1862) 4 De GF & J 517 and *Olsson v Dyson* (1969) 120 CLR 365, and said that, as Kintominas' conduct had given rise to expectations on the part of her son, on the basis of which he had expended money, equity would act to protect his actions from even accidental frustration by Kintominas.

Einfeld J said that the High Court's decision in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 supported the availability of equity 'to enforce a voluntary promise because to depart from the "basic assumption" of the transaction would be unconscionable'.

Although Brennan J had cautioned in *Waltons Stores* that this principle went 'no further than is necessary to prevent unconscionable conduct' and that limitation had been endorsed in *Commonwealth v Verwayen* (1990) 170 CLR 394, Einfeld J rejected the DSS argument that the principle should be confined to giving Kintominas' son a claim to have the property conveyed to him on his mother's death. Einfeld J said:

> 'However, as I read the cases, injecting equity in a minimalist way without doing effective justice in the matter is not the corollary of the limitations [referred to by Brennan J]. If equity would enforce the promise to leave the property in the applicant's will, it would surely do no less in relation to Terry's rights during her life, as, for example, if Mrs Kintominas tried to sell the property and dispose of the proceeds. Merely to give Terry a charge, to the extent of his expenditure on the extensions, enforceable on his mother's death would not reflect the totality of his enforceable rights.'

(Reasons, p.22)

Einfeld J concluded that, despite Kintominas' legal ownership, the property was, on the concepts discussed in *Olsson v Dyson*, *Waltons Stores* and *Verwayen*, beneficially the property of her son. It was not necessary, the judge said, to decide whether Kintominas had created an express or constructive trust:

> 'A trust seems unlikely and in terms of the concepts provided for in the *Social Security Act*, estoppel is inappropriate. However categorised, my conclusion is that it is not property with a value in the applicant's hands capable of being converted into an assessable basis for reducing her pension. In that sense the AAT erred in law.'

(Reasons, p.24)

Formal decision

The AAT allowed the appeal.

[P.H.]

Income test: profits from farm

FISHER v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 19 September 1991 by Heerey J.

This was an application under the *Administrative Decisions (Judicial Review) Act* 1977 for review of a decision of the Secretary, calculating the level of unemployment benefit payable to Helen Fisher under s.122(4) of the *Social Security Act* 1947.

The Secretary made these calculations after the AAT had set aside an earlier decision of the Secretary and remitted the matter to the Secretary to calculate the unemployment benefits payable to Fisher. It was this subsequent decision of the Secretary which Fisher now sought to challenge in this application.

Does 'income' include increases in stock?

Fisher maintained that, in calculating her income from a farming business, the