Federal Court decisions

Special benefit: AUSTUDY payments to spouse

SECRETARY TO DSS v LE-YEN THANH LE
(Federal Court of Australia)
Decided: 15 March 1991 by Olney J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Le* 20 ALD 199. The Tribunal had decided that s.136(1)(a) of the *Social Security Act* did not prevent Le, a married woman, from receiving special benefit during the period when her husband was being paid an AUSTUDY allowance; and had affirmed a decision of the SSAT, which in turn had set aside a DSS decision refusing to grant her special benefit.

The legislation

Section 136(1) of the *Social Security Act* provides that—

> 'a benefit is not payable to a person . . . in respect of any period during which -
>
> (a) a payment in respect of the person has been or may be made under a prescribed educational scheme . . .'

According to s.136(3), 'the AUSTUDY scheme' is a prescribed educational scheme. After referring to the *Student Assistance Act* and the *Student Assistance Regulations*, Olney J noted that the AUSTUDY scheme was established under that legislation.

The *Student Assistance Act* provided, in general terms, for the grant of benefits to a person who was a full-time student and the payment of a living allowance to that person 'in respect of the person and any dependants of the person'.

The Student Assistance Regulations (replaced since 1 January 1991 by the AUSTUDY Regulations) provided that, where living allowance was payable to a grantee and the grantee had a spouse dependent on the grantee, the rate of living allowance was to be increased by $42.70 per week: reg.41(5).

Olney J concluded, from the language used in the *Student Assistance Act* and the Regulations, that this additional allowance was payable to a grantee in respect of the dependent spouse of the grantee. It followed that s.136(1)(a) of the *Social Security Act* prevented payment of benefit to a person where such an additional allowance was being paid to the person's spouse under the AUSTUDY scheme.

Olney J cautioned that this conclusion had 'no necessary application to any of the other prescribed educational schemes'; and he expressed no opinion 'as to whether the same conclusion would be open upon the proper construction of the *Student Assistance Act* and the AUSTUDY Regulations as they now apply'.

Formal decision

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

[P.H.]

Compensation payment: 'special circumstances'

SECRETARY TO DSS v HULLS
(Federal Court of Australia)
Decided: 28 February 1991 by O'Loughlin J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Hulls* (1990) 57 *SSR* 766.

The AAT had decided that, in calculating the period for which Hulls was precluded from receiving pension because of his receipt of a lump sum compensation payment, it would exclude the amount of some $11 966, representing legal costs included in the settlement. The AAT had excluded this amount by exercising the discretion, conferred by s.156 of the *Social Security Act*, to treat all or part of a compensation payment as not having been received, because of the 'special circumstances of the case'.

The 50% formula

O'Loughlin J observed that, as Hulls had received his compensation settlement after 9 February 1988, s.152(2)(c) of the *Social Security Act* required 50% of the settlement to be used as the basis for calculating the preclusion period.

This 50% formula, O'Loughlin J said, was to be applied to the whole of any compensation settlement where any part of that settlement was a payment in respect of an incapacity for work, as referred to in s.152(2)(a). (On this point, O'Loughlin J agreed with the observations of Von Doussa J in *a' Beckett* (1990) 57 *SSR* 779.)

Moreover, O'Loughlin J said, that 50% formula had been intended to provide a simple solution to the problem of 'double-counting' of elements in a compensation settlement by allowing half the settlement to be excluded from the calculation of any preclusion period:

> 'This provision has the hall marks of simplicity and certainty, leaving s.156 and its reference to "special circumstances" to remedy those particular cases where the application of the arbitrary rule would create injustice.'

(Reasons, pp. 22-3)

Error of law

O'Loughlin J decided that the AAT had made an error of law, because it had failed 'to take into account a material consideration . . . the significant fact that the 'compensation part' of a lump sum payment was only 50% of the lump sum' and had 'failed to appreciate why there was an arbitrary formula in the legislation': Reasons, p. 24. This error of law provided the basis for an appeal under s.44 of the *AAT Act*.

O'Loughlin J also found an error of law in the AAT's conclusion that it could use s.156 to excise the legal costs from the compensation settlement simply because the parties themselves had not separately identified and excised those costs. This was not to say that there would never be cases where s.156 could be used with respect to legal costs: 'The particular facts of a case might make them — or the amount of them — a special circumstance': Reasons p. 25.

'Special circumstances'

Having concluded that the Tribunal had made an error of law, O'Loughlin J reviewed the question whether this was a case in which 'special circumstances' might justify excising the legal costs.

There was, O'Loughlin J decided, nothing unusual or out of the ordinary in the fact that the settlement received by the respondent had included an amount on account of legal costs:

'It is a commonplace for such claims to be settled on the basis of a global sum with the plaintiff meeting his liability for his legal costs.'

(Reasons, p. 27)

In the course of his judgment, O'Loughlin J remarked that it was Hulls' 'good fortune' that the present appeal had not raised the issue whether a second amount should have been excised from the settlement before applying the 50% formula. This amount, of some $25 191, represented expenses paid on Hulls' behalf by his former employer and paid out of the settlement to the employer by way of refund.

O'Loughlin J observed:

'The presence of the 50% rule and the extended meaning given to the word "receipt" in s.152(2)(b) (so that payments received by a person extend to payments to third parties on his behalf or at his direction) have led me to the conclusion that such payments should not have been excised and would not automatically constitute "special circumstances".'

(Reasons, p. 28-9)

Formal decision

The Federal Court set aside the Tribunal's decision and reinstated the decision of the delegate of the Secretary that Hulls was precluded from receiving pension from April 1988 to February 1989.

[P.H.]

Background

Managed investments and the 10% rule

In the December 1990 *Reporter*, (1990) 58 *SSR* 795, I wrote that s.4C (introduced by the *Social Security and Veterans' Affairs Act (No. 2)* 1990) had the effect of subjecting 'managed investments' of Division 2, Part 1 of the Act, made after 21 August 1990, to the deemed 10% rule of s.4C. Mr Volker, Secretary to the DSS, has denied that this is the case: (1991) 59 *SSR* 816; and in so doing has asserted that s.4C has no operation to the managed investments of Division 2, Part 1 of the Act.

For present purposes the issue needs to be resolved by specific reference to the terms of the legislation rather than by general assertions.

Section 4C(2) defines loans in the following terms:

'for the purposes of this section there is a loan by a person if, but not only if, the person has debentures, bonds or other securities'.

There is no definition of a 'debenture' or 'bond' in the Act and so, subject to what follows, these terms must take their ordinary meaning. The term 'other securities' will need to be interpreted by reference to the class established by debentures and bonds, but must extend beyond the scope of debentures and bonds if it is not to be a superfluous term.

The other point to note about the definition is that it does not limit the definition of a loan to these securities, but is merely an inclusive definition.

If it is then assumed for the moment that 'bonds, debentures and other securities' is broad enough to catch certain types of managed investments in Division 2 of Part 1 of the Act, the issue then arises as to whether s.4C or the specific managed investment provisions of Division 2 of Part 1 should govern the assessment of income from these managed investments. This is clearly resolved by s.4C(9) which says 'where this section applies, Division 2 of Part 1 does not apply'.

Thus if managed investments of Division 2 of Part 1 answer the broad description of a 'loan', including 'bonds, debentures or other securities', then s.4C applies with its deemed 10% rule.

The next issue then is whether managed investments in Division 2 of Part 1 (and particularly 'the accruing return investments' and 'market linked investments') can cover 'debentures, bonds or other securities'.

'Accruing return investments' are defined in s.3 as meaning —

'an arrangement by a person that consists of or includes an investment of money, being an investment:

(a) that produces:

(i) a fixed rate or quantifiable rate of return, whether or not that rate varies from time to time; or

(ii) a rate of return that may be reasonably approximated; and

(b) the value of which from time to time is unlikely to decrease as a result of market changes;'

This definition is a functional one related to the degree of security of the investment. There is no *prima facie* reason why a 'debenture, bond or other security' could not produce a stable return within the definition of 'an accruing return investment'.

The Department's brochure entitled 'Managed Investments' (AGPS, 1989) contains the following description of accruing return investments (my emphasis):

- capital guaranteed and capital stable:
- friendly society *bonds*
- insurance *bonds*
- approved deposit funds; and
- deferred annuities;
- cash management trusts;
- mortgaged trusts; and
- most *bonds* trusts.'

It can be seen that it is specifically envisaged by the Department in this brochure that certain types of bonds are accruing return investments. There also is no reason why the 'other securities' part of s.4C(2) would not catch mortgage trusts etc.

'Market linked investments' are defined in s.3(1) as meaning (again, my emphasis):

'(a) an investment in:

(i) an approved deposit fund; or

(ii) a deferred annuity; or

(iii) a public unit trust; or

(iv) an insurance *bond* or

(b) an investment with a friendly society; or

(c) an eligible investment other than an investment referred to in paragraph (a) or (b); or

(ca) a superannuation benefit vested in a person held in a superannuation fund (unless a superannuation pension funded by that benefit is presently payable to the person);

not being;

(d) an accruing return investment; or

(e) an investment consisting of the acquisition of real property, stock or shares;'

The definition specifically mentions insurance bonds. Paragraph (e) of the definition specifically excludes certain types of investments from the definition. It does not exclude 'debentures, bonds and other securities'. A reading of the gazettals under ss.12B(2), 12F(6) and 12F(7) also indicates many bond investments are market linked investments.

Sometimes managed investments are by way of unit trusts or the like, where