'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

pensioners' funds are merged with the funds of other investors and hence it is not possible to say whether a particular pensioner has invested in a 'debenture, bond or other security'. But this is not always the case. Sometimes the pensioner invests direct, through a financial adviser, in a particular investment in a portfolio of investments. In these cases a pensioner may be investing directly in a 'debenture, bond or other security' and hence be caught by s.4C.

Even if one still entertained any doubts as to the application of s.4C to managed investments, the matter is put beyond doubt by the admissions made by Senator Richardson, the Minister for Social Security, before the Senate Standing Committee on Community Affairs on Friday, 19 October 1990. The Minister was asked to comment on my views given to the Committee, in relation to, *inter alia*, s.4C's application to managed investments. The Minister had Mr Butel, a senior departmental officer, present with him and asked Mr Butel to respond on his behalf. The Minister then adopted the answers given by Mr Butel.

Mr Butel said:

> 'If a managed investment was taken out prior to the Budget announcement about the deeming provisions, it is subject to the conditions that are currently in the *Social Security Act*. In other words, the deeming provisions do not apply to investments taken out prior to that date. If the investment is taken out subsequent to that date, then it is an investment of the sort that the provision [s.4C] seeks to cover. In other words, we would expect the pensioner to achieve 10% on his investment, whether it was in a managed investment or in some other place. The provision that is in the Bill at the moment seeks to give effect to that and we believe that it does. So there is no ambiguity or conflict with policy. I think the earlier witness's [the present writer] confusion was that one set of rules would apply universally to managed investments in the past and in the future, but that is not the case. The existing rules apply to pre-budget investments and the new provision will apply to post-budget investments of this type. That is what is intended; that is what the Bill seeks to do and we believe does.'

It is clear both from the wording of the legislation and from Senator Richardson's statement that managed investments made directly in bonds, debentures or other securities after 21 August 1990 may be caught by s.4C if they produce a return of less than 10%. Therefore my policy criticisms, developed in my earlier article, are applicable.

By way of response to Mr Volker's allegation that the writer had not consulted with the Department, this is simply untrue.

Notwithstanding the above, I note Mr Volker's undertakings that the Department, irrespective of its powers under the Act, will not seek to apply s.4C to managed investments even though this is not consistent with Senator Richardson's statements. This, of course, may lead to some dispute over whether any particular investment producing less than a 10% return is in fact a managed investment or not.

**ALAN ANFORTH**

[*Alan Anforth is a NSW solicitor.*]

# SSAT — Back to basics

There may be some readers who are not familiar with the jurisdiction, powers and procedures of the Social Security Appeals Tribunal (SSAT), and it is always useful to repeat them.

## Jurisdiction

Any person who is affected by a decision of an officer under the *Social Security Act* 1947 may apply to the Tribunal for review of the decision although there are certain administrative decisions that it cannot review such as the forms approved by the Secretary (s.177). 'A decision' is interpreted in the same manner as defined under the *Administrative Appeals Tribunal Act* and includes the refusal of an officer to make a decision.

The sorts of decisions the Tribunal reviews might include, for example, whether or not one is entitled to invalid pension, sickness benefit, unemployment benefit, sole parent's pension, family allowance or supplement; whether an overpayment exists and whether recovery should be pursued or the debt waived.

## How to appeal

The legislation makes it as easy as possible for one to appeal.

Written applications can be sent or delivered to an office of the Tribunal or an office of the Department of Social Security. Applications do not have to be in any particular form. Applications can also be made orally by going in person to an office of the Tribunal or simply by telephoning the Tribunal (s.179). This variety of methods ensures that access to the appeal system is made simple, especially for those who have difficulty with language and mobility.

## What can the Tribunal do?

When someone has applied to the Tribunal for review of a decision the Tribunal has either to affirm the decision, vary the decision, or set the decision aside and substitute a new decision or send the matter back to the Secretary for reconsideration in accordance with any directions or recommendations of the Tribunal (s.182).

The Tribunal's role is, as they say, 'to step into the shoes of the decision maker' and on the information before the Tribunal apply the law to the facts and make the correct and preferable decision.

## The hearings

For each hearing a Tribunal is generally constituted with three members with different expertise. One member is a lawyer, another has welfare expertise and another a detailed knowledge of Department of Social Security practices. In cases involving a medical question, a medical practitioner is added as a fourth member.

The principles of natural justice are an important part of the operations of the Tribunal. Hearings are structured to ensure that applicants have every opportunity to present their case and respond to all adverse evidence. They may, if they wish, be represented by a legal practitioner, lay advocate or other person of their choice. Interpreters are provided free of charge by the Tribunal for those who need one.

The Department is not represented at the hearing. It is required to prepare a submission on the matter in writing and this is given to the applicant prior to the hearing.

## The decision

In carrying out its functions the Tribunal is required to provide a review process that is 'fair, just, economical, informal and quick' (s.176).

After the Tribunal has heard an applicant, the matter is discussed and generally a decision is made on the same day. The legislation then requires that a written decision with reasons be delivered to the applicant and the Department within 14 days. In hardship cases the whole process can be fast-tracked. This emphasis on a speedy process is one of the strengths of the Tribunal, especially as it recognises the difficult circumstances in which applicants so often come to the Tribunal.

*[This note was prepared by the National Convenor of the SSAT, Anne Coghlan.]*