

## Sale on vendor's terms: deemed income

GORDON and SECRETARY TO DSS

(No. 8012)

**Decided:** 12 June 1992 by S.A. Forgie. Darcy Gordon agreed to sell an item of land on 28 December 1990. The sale price was \$120 000, payable in 24 monthly instalments, with the payments to be secured by a registered first mortgage to Gordon. No interest was payable on the outstanding purchase price.

On 31 January 1991, the purchasers of the property executed a mortgage, which described the outstanding purchase price on the property as a loan advanced by Gordon to the purchasers.

On 13 March 1991, the DSS decided that the rate of unemployment benefit being paid to Gordon should be reduced on the basis that he was deemed to be receiving income by way of interest on the loan made to the purchasers of the property, pursuant to s. 4C of the *Social Security Act 1947*.

On appeal, the SSAT affirmed the DSS decision. Gordon then applied to the AAT for review of the SSAT decision.

### The legislation

Section 4C of the *Social Security Act 1947* allowed the Secretary to treat a loan made by a person after 21 August 1990 as generating interest (and therefore income in the hands of the lender) at the rate of 10%.

Section 4C(2) provided that there would be a loan for the purpose of the section 'if, but not only if, the person has debentures, bonds or other securities'.

### A loan?

The AAT decided that, in determining whether there was a loan, it should look behind the terms of the mortgage executed by the purchasers; and that, as there had been no contribution of money by Gordon to the purchasers of the property in consideration of their promising to repay that money, there had not been any loan from Gordon to the purchasers in the ordinary sense of that word.

Nor was there a loan from Gordon to the purchasers in the extended sense of that term within s. 4C(2). The mortgage executed by the purchasers did not fall

within the term 'other securities': this term was to be read *ejusdem generis* with the terms 'debentures' and 'bonds' — that is, as referring to financial and investment products. Although a mortgage was a security for the payment of money, it was not one of the 'other securities' referred to in s. 4C(2).

It followed that Gordon could not be deemed to have received interest (at the prescribed rate of 10%) on the balance of the moneys outstanding on the payment of the purchase price for the property.

### Formal decision

The AAT set aside the SSAT's decision and substituted a decision that the terms of the contract of sale between Gordon and the purchasers of the property did not constitute a loan within s. 4C of the *Social Security Act 1947*.

The AAT remitted the matter to the Secretary to calculate the arrears of unemployment benefit payable to Gordon.

[P.H.]



## Dependent child

HO and SECRETARY TO DSS

(No. 7994)

**Decided:** 1 June 1992 by B.M. Forrest, J. Brassil and W. McLean.

Michael Seng Pang Ho applied to the AAT for review of an SSAT decision affirming DSS decisions made in July 1991 to cancel Ho's sole parent pension and raise an overpayment from 15 June 1991.

### The legislation

The AAT applied the provisions of the *Social Security Act 1991*. The term 'dependent child' is defined in s.5(2) to require that the adult have the right to have and to make decisions about the daily care and control of the child and that the child be in the adult's care and control.

### The facts

Ho and his wife separated in November 1990. They had 2 children and by agreement their daughter lived with the applicant and their son lived with his wife.

The applicant was granted sole parent pension from November 1990. The back of the grant letter contained a notice under s.163 of the *Social Security Act 1947* requiring the notification within 14 days of, among other things, his child leaving his care and control.

Each child spent extended periods of up to a week with the other parent. In mid-June 1991 the daughter decided to stay with her mother for some time. During that time Ho continued to be responsible for her lunch while she attended school. After 'almost a month' the daughter rang Ho and told him she intended remaining with her mother and would pick up her clothes from his flat. Ho agreed to this.

On 12 July 1991 the applicant's wife applied for pension for the daughter, stating that the daughter had been living with her since 15 June, and payment was made from 18 July. Ho's sole parent pension was cancelled on 22 July, so there was one 'double payment' made in respect of the daughter. The DSS also sought recovery from Ho of the 3 pension payments he had received since 15 June.

Ho maintained that he had told the DSS of his daughter's move a day or so after her 'phone call. However, the DSS had no record of this and acted against him on the basis of his wife's application.

### Date when ceased to be a 'dependent child'

The AAT was not satisfied that the daughter had ceased to be a dependent child of Ho when she went to live with her mother in June 1991 because at that stage no decision had been made that it was to be a permanent arrangement. Accordingly the mid-June move did not have to be notified to the DSS and Ho was entitled to the 20 June pension payment. The AAT commented:

'To say that short periods of residence with another parent change [the daughter's] status and impose an obligation to notify the department is in our view, not the meaning of the language of the legislation.'

(Reasons, p.7) . . .

' . . . The concept "care and control" is not, in our view, limited to a physical presence to enable it [to] be said that the child is in the care and control of an adult.'

(Reasons, p.8)

However, the AAT said that:

' . . . it seems safe to draw an inference that it had become apparent by early July that a decision had been made that [the