Administrative Appeals Tribunal decisions

Age pension: assets test

FITZGERALD and SECRETARY TO DSS

(No. 8379)

Decided: 13 November 1992 by J.A. Kiosoglous, B.C. Lock and R.G. Elmslie.

This was an application to the AAT to review a decision related to the assessment of Fitzgerald's assets in relation to payment of the age pension.

There were three issues for consideration. The first issue was whether a mortgage should be treated as an excluded security under s.4(1)(b) and ss.4(10)(a) and (b) of the *Social Security Act* 1947. The second matter concerned a gift of $200 000 by the applicant to his sons and whether this should be treated as a disposal of property under s.6(10) of the Act. The final issue concerned the date that this disposition took place.

The mortgage

In calculating Fitzgerald's assets, the DSS did not reduce the value of his property by the amount of a mortgage over it to the Department of Agriculture, because it was a 'collateral security' and therefore an 'excluded security' under s.4(1)(b) of the Act. That section provided:

> 'where a charge or encumbrance, not being an excluded security, exists on particular property of a person, not being property the value of which is disregarded under paragraph (a), the value of that property shall be reduced by the value of that charge or encumbrance'.

Section 4(10) defined an 'excluded security' for the purposes of s.4(1)(b) as a collateral security or 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 South Australian Department of Agriculture provided information which led the DSS to conclude that the mortgage was a collateral security. The overdraft of Fitzgerald and his wife had risen to an unmanageable sum, and to reduce this overdraft the Department provided a loan of $50 000 at a lower interest rate than that of the bank. This loan was secured by a mortgage dated 24 August 1989 over real estate owned by Fitzgerald.

Fitzgerald's son owned separate land, and on 24 August 1989 he too executed a mortgage over his land in favour of the Department of Agriculture as further support for the $50 000 loan to his father.

The issue to be decided was which of these mortgages was the primary mortgage and which was the collateral mortgage. Alternatively, both may be primary or collateral. The Tribunal looked to the surrounding events to assist in determining this matter.

On 1 July 1988 Fitzgerald, his wife and their two sons were in partnership as farmers. The farm was registered in the name of Fitzgerald alone. On the same date the partnership's account was overdrawn to the extent of $43 554. This overdraft was secured by way of a mortgage over the farm. By 30 June 1989 the overdraft had risen to $79 972.68. Fitzgerald and his wife retired on 1 July 1989. The capital accounts of Fitzgerald and his wife were overdrawn by $405 919 on this date. On dissolution of the partnership the assets were revalued upward by $70 000 and the overdraft in Fitzgerald's and his wife's capital account was reduced by that figure.

On 31 May 1989 an application was made by all members of the partnership to the Department of Agriculture for an advance of $150 000 to reduce the overdraft. The amount of $50 000 which was provided as the result of this application had not been received at the time of the dissolution of the partnership but became available on 24 August 1989. On a date between 12 July 1989 and 24 August 1989 Fitzgerald, his wife and the two sons signed an acceptance of the offer of the loan. This made them legally liable for the debt.

Collateral security

The Act does not define the term 'collateral security'. The Tribunal referred to Fisher and Lightwood's *Law of Mortgage* tenth edition at p.16 which explained the term as follows:

> 'Collateral or additional security may be given by the principal mortgagor himself or by a third party. The most common example of the first type of collateral security is a mortgage of a policy on the life of the principal mortgagor which is additional to and is to secure the same debt as that secured by the principal mortgage. Examples of the second type of collateral security are a guarantee by a third party for the repayment of the principal mortgage debt and a mortgage of land or other property by a third party to secure either a principal debt or his liability under a guarantee'.

The AAT noted that this definition recognised two types of collateral security and s.4(1)(a) referred to the second type. The purpose of s.4(1) was to calculate the correct value of a person's assets under the Act prior to determining their eligibility for a payment. The reason for excluding 'collateral securities' was to ensure that a person did not reduce their assets by supporting some other person's debts.

In the first type of collateral security referred to in the above definition, the person providing the security would be a party to the charge or encumbrance. Thus although in strict terms this would be a collateral security, the circumstances would take it outside the notion of 'excluded security' referred to in s.4(10)(b). In addition the AAT referred to the beneficial nature of the legislation and the need to resolve any ambiguity in the legislation in favour of the claimant.

Was the mortgage a collateral security?

The mortgage was provided to support the debt of Fitzgerald and the other members of the former partnership. Although Fitzgerald had left the partnership, he remained personally liable for the debt. Thus it was not a security to secure the debts of others, but instead was security to secure the debt of Fitzgerald and the others. It was not therefore a collateral security within the meaning of s.4(10)(a) of the Act and was not an excluded security under that section. The amount of the mortgage could thus be offset against the value of Fitzgerald's assets.

Deprivation of assets

The DSS had denied payment of age pension to Fitzgerald because he and his wife had disposed of assets of $200 000 (see s.6). Section 6(10) provides:

> 'For the purposes of this section, a person shall be taken to have disposed of property of the person if the person engages in a course of conduct that diminishes, directly or indirectly, the value of the property of the person where -
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> (a) the person receives no consideration, or inadequate consideration, in money or moneys' worth; or

(b) . . . and the amount of that disposition of property shall be taken to be an amount equal to the amount of the diminution in the value of that property reduced by the consideration (if any) received by the person in respect of that disposition'.

The facts were simple. On 29 June 1988 Fitzgerald and his wife each drew a cheque for $100 000 on the partnership account in favour of their sons. Each son then deposited a personal cheque for $100 000 in the partnership bank account. The effect of these transactions was to reduce the capital account of Fitzgerald and his wife by $100 000 each, and to increase the capital accounts of their sons by the same amount. Fitzgerald said the purpose of these payments was to avoid death duties which he thought were to be reintroduced in South Australia.

The Tribunal found that the disposition of property was a disposition under s.6(10)(a) of the Act, that is, Fitzgerald and his wife had disposed of $200 000 and had received no consideration. The transaction was not illegal. However:

> 'The applicant was prepared to adjust his capital account in the partnership to defeat some perceived imposition of death duties. He cannot now complain if the effect of his action is to increase the size of his disposition of property under s.6(10) of the Act to more than it would have been had he not done so. He cannot have it both ways and is hoisted on his own petard.'

(Reasons, para. 32)

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS for reconsideration in accordance with the directions that:

(1) the mortgage of $50 000 is not an excluded security and its value should be deducted from the assets of Fitzgerald;

(2) the sum of $200 000 given to the applicant's sons on 29 June 1988 was a disposition of property within the meaning of s.6(10) of the Act;

(3) the disposition took place on 29 June 1988.

[B.S.]

Age pension: disposal of asset

BATT and SECRETARY TO DSS

(No. 8389)

Decided: 24 November 1992 by J. Handley.

Batt asked the AAT to review a DSS decision to reduce his age pension.

The facts

In October 1992 Batt and his wife separated. On the day of separation, their home, valued at $150 000, which was in their joint names, was transferred into the name of Batt's wife alone. Batt received no consideration for the transfer of his interest.

When Batt notified the DSS of the disposition of the property, it deemed that he had earned income on the transfer and reduced his rate of pension accordingly.

The legislation

Part 3.12 of the *Social Security Act* 1991 identifies those assets which are to be disregarded when calculating the rate of pension. However, s.1123 does not define those assets which, although disposed of, are to be included in the calculation. In s.11(1) 'assets' are defined as 'property' but this latter term is not defined.

Disposal of an asset?

The issue for the tribunal was whether Batt had disposed of an asset so as to bring into operation the provisions of the legislation which prevent people from reducing their assets to qualify for the pension.

Batt had received no financial benefit from the transfer of the property, as he had transferred the property: 'in consideration for his affection for her and in recognition of his former marriage to her': Reasons, para.3.

His wife's pension was not affected by the transfer as the house remained her principal residence and so was exempt from the assets test.

On this analysis it might be considered harsh to treat the disposal in a way which deemed Batt to have earned income from the transfer of his interest in the property. But the AAT commented that: 'legislation however does sometimes produce harsh or unfair consequences': Reasons, para.3.

The Tribunal adopted a literal approach to the terms of the Act and found that Batt had 'property' in the former matrimonial home in that he had a: 'a definable right or interest which was identifiable by other parties': Reasons, para.3.

The AAT cited *National Provincial Bank Ltd v Ainsworth* [1965] AC 1775 in support of this definition.

As a consequence the applicant had disposed of an asset which brought into operation s.1123(1) of the Act.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Newstart allowance: notification of a requirement

WAN and SECRETARY TO DSS

(No. 8402)

Decided: 1 December 1992 by P.W. Johnston.

On 31 October 1991 Wan, who was unemployed and receiving Newstart allowance, attended an office of the Commonwealth Employment Service (CES) and signed a Newstart Agreement. In that Agreement he agreed to attend a Job Club information session at 10 a.m. on 19 November 1991.

On 20 November 1991 he contacted CES to explain that he had missed the session as he was engaged in pursuing another job. His explanation was accepted and not treated as a breach of the Agreement. He made another arrangement with CES, which was recorded in a file note signed by him, to attend a Joblink information session at 10 a.m. on 27 November 1991. He was not given a copy of the note. He was given a referral form to take away which did not state the date and time of the session that he was to attend.

Wan left Perth in search of work, and on his return contacted the DSS on 3 December. He learned that he had missed the Joblink information session. On 12 December 1991 the CES notified the DSS of his non-attendance and in consequence of that report a DSS officer determined to cancel his