

(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