

Administrative Appeals Tribunal decisions

Disability support pension: constructive trust and disposal of assets

SECRETARY TO THE DSS and EVANS
(No. 11799)

Decided: 23 April 1997 by W.G. McLean.

Evans applied for the disability support pension in 1993. In 1995, the DSS rejected the claim due to the application of the assets test. The SSAT reviewed the decision in April 1996 and remitted the matter to the DSS with a direction that Evans did not dispose of assets. The SSAT stated that this decision took effect from the date of application for review by Evans. The DSS and Evans both applied to the AAT for review of the SSAT decision.

Facts

Evans had been the proprietor of a shoe retailing business in country Victoria, including a principal office, a warehouse and three retail outlets, held through a variety of companies and trusts and subject to various mortgages. In 1988, Evans wished to cease his involvement in the business because of ill-health resulting from Parkinson's disease, matrimonial problems, and difficulties with the operation of the business.

About June 1989, Evans agreed to transfer all his properties and business to his two sons. In September 1989, an accountant gave advice about the proposed restructure of the business and property transfers. In the process, his sons bought a home for Evans and sold one of the retail outlets.

The evidence was that the 1989 agreement concerning the transfer of the properties and business was delayed until 1992 because there was inadequate liquidity to pay the related stamp duty costs. The sons managed to continue to trade the business and returned it to viability. In June 1992, the following three properties were sold by Evans:

- the principal office and retail outlet in Echuca to the business company for \$260,000 on a deposit of \$100;
- the warehouse in Echuca to one son for \$150,000 on a deposit of \$100; and

- the house in Wharparilla to the other son for \$200,000 on a deposit of \$100.

In October 1992, Evans forgave the debts for the remaining purchase prices of these properties.

The substantive issue was whether Evans had disposed of the properties and if so, when this had occurred.

The legislation

Section 1124A of the *Social Security Act 1991* (the Act) requires that in determining whether a pension is payable to a person who has disposed of assets, the person's assets for the period of 5 years from the day of the disposition shall include the value of the assets disposed of, or the amount by which the assets disposed of exceeds the asset disposal limit, whichever is the lesser amount.

Section 1123(1) of the Act states that a person *disposes* of assets if:

- (a) the person engages in a course of conduct that directly or indirectly:
 - (i) destroys all or some of the person's assets; or
 - (ii) disposes of all or some of the person's assets; or
 - (iii) diminishes the value of all or some of the person's assets; and
- (b) one of the following subparagraphs is satisfied:
 - (i) the person receives no consideration in money or money's worth for the destruction, disposal or diminution;
 - (ii) the person receives inadequate consideration ...
 - (iii) ...the person's purpose, or the dominant purpose, in engaging in that course of conduct was to obtain a social security advantage.

Section 1124 of the Act provides that when assets are disposed of, the amount of the disposition is the value of the assets less the amount of consideration received.

The disposal of assets and constructive trust

The AAT found that under the agreement between Evans and his sons, a constructive trust of the properties was established by Evans in 1989. The AAT cited *Muschinski v Dodds* (1985) 160 CLR 583 (Deane J at 620) and *Kidner v DSS* (1993) 31 ALD 63 (Drummond J at 75) regarding constructive trusts. It found that it would have been unconscionable for Evans to assert any legal rights over the properties which were the subject of the

agreement and which he subsequently formally transferred to them in 1992 as beneficiaries of the constructive trust. The beneficiaries' equitable rights were established in 1989 and their subsequent acts and the costs incurred in relation to the business and the properties progressively reduced Evans' ability to treat the properties as if they were his own.

Consequently, the AAT found that there had been a disposal of the assets in 1989 by way of the constructive trust. The AAT also found that the purpose of the disposal of the assets was not to gain a social security advantage, notwithstanding that the consideration given was inadequate.

Formal decision

The AAT varied the decision of the SSAT and remitted the matter to the DSS with a direction that the disposal of assets by Evans occurred in 1989 as the result of a constructive trust. The decision took effect from 12 April 1996, the day Evans appealed to the SSAT.

[M.S.]

Sickness allowance: whether money received by applicant ordinary income

SHARPE and SECRETARY TO THE DSS
(No. 11844)

Decided: 9 May 1997 by K.L. Beddoe.

The DSS raised an overpayment against Sharpe of \$1179.36 being sickness allowance paid to him in respect of the period February to June 1994. The SSAT set aside the decision and remitted the matter to the Secretary to the DSS with directions that the overpayment be recalculated using Sharpe's taxable income for the 1993-94 financial year with the recovery period to commence on the date of first payment of sickness allowance, namely 23 February 1994. This resulted in a debt of \$4277.97. Sharpe applied to the AAT for review.