Rent assistance: retirement village resident, meaning of 'rent'

SECRETARY TO THE DSS v MONTGOMERY
(Federal Court of Australia)

Decided: 24 February 1997 by Nicholson J.

Background

Montgomery and her husband began residing in a retirement village unit in August 1994 under a licence agreement with the Australian Pensioners' League which granted them 'exclusive licence ...to occupy and use' the unit. The licence required them to pay ongoing operating costs of $27 a week and an 'ingoing sum' of $69,000. Upon determination of the licence the League covenanted to repay to the resident an amount calculated in accordance with a formula which subtracted from the ingoing sum, a 'yearly sum' of $4700 multiplied by the number of years of residence.

When her husband moved to a nursing home in early 1995, Montgomery was granted age pension on the basis that she was a member of an illness-separated couple. On 24 July 1995 she applied for rent assistance. The application was rejected on the basis that the $27 a week paid in maintenance fees was below the 'rent threshold rate' of $32.20 a week. The DSS regarded the annual fee of $4700 as an annual reduction of the initial entry fee, which was maintained as an asset. The AAT subsequently affirmed a decision of the SSAT which set aside the decision of the DSS, and substituted a new decision that Montgomery was entitled to rent assistance. The AAT regarded the 'yearly sum' of $4700 as an amount payable as a condition of occupancy, by way of annual deductions from the 'ingoing sum' of $69,000. It therefore considered that the 'yearly sum' was rent within the definition set out in s.13(2) of the *Social Security Act 1991*. The DSS appealed to the Federal Court on the basis that this amounted to an error of law.

The legislation

The relevant part of s.13(2) provides:

> '13.(2) Amounts are rent in relation to the person if:
>
> (a) the amounts are payable by the person:
>
> (i) as a condition of occupancy of premises, or of a part of premises, occupied by the person as the person's principal home; or
>
> (ii) for services provided in a retirement village that is the person's principal home ...
>
> and
>
> (b) either:
>
> (i) the amounts are payable every 3 months or more frequently; or
>
> (ii) the amounts are payable at regular intervals (greater than 3 months) and the Secretary is satisfied that the amounts should be treated as rent for the purposes of this Act.

Were the annual deductions amounts that were 'payable'?

The Court agreed with a submission made by the DSS that the annual deductions were not 'payable' as required by s.13(2)(a).

The Court noted firstly, that no annual deductions were in fact made under the licence agreement. The formula set out in the agreement only applied upon the determination of the licence. The League had the right to deal with the whole of the ingoing sum as it saw fit, subject to its obligation upon determination to make payment to the resident in accordance with the formula. Therefore, it was difficult to see how it could be said that there were annual deductions which fell to be considered as amounts 'payable'. However, in argument before the Court, it was accepted by both parties that the matter should proceed on the basis that there were such annual deductions from the ingoing sum.

The issue before the Court was, therefore, whether such annual deductions properly fell within the word 'payable'. The court concluded that they did not, because the ingoing sum was an amount that had already been paid by Montgomery to the League. When the annual deduction was made, the League was in fact dealing with its own funds. Nothing passed from the resident to the League to constitute a payment and there was no obligation on the resident. Montgomery's obligation had been discharged upon payment of the ingoing sum. The use of the word 'payable' posits that there is payment yet to be made. It was the resident to whom a sum was in fact payable upon the determination of the licence.

The Court distinguished the decision of *Secretary to the DSS v Knight* (1996) 2(8) *SSR* 117, in which Knight paid an entry contribution of $30,000, by way of a lump payment of $15,000, followed by regular monthly instalments over 10 years. In that case the Federal Court concluded that there was a nexus between the ongoing obligation to make monthly payments and occupancy of the retirement village premises and the monthly payments were properly characterised as rent. However, in Montgomery's case, there was no ongoing obligation to make periodic payments and there was no nexus between the annual deduction and ongoing occupancy. The AAT therefore, erred in concluding that the assumed annual deduction could constitute an amount that was 'payable' within s.13(2) of the Act.

Formal decision

The appeal was allowed. The decision of the AAT was set aside and substituted with a decision that the decision of the authorised review officer of the DSS be affirmed.

[A.T.]

Newstart allowance: Case Management Activity Agreement

SECRETARY TO THE DEETYA v O'CONNELL
(Federal Court of Australia)

Decided: 15 May 1997 by Mansfield J.

O'Connell was sent two letters requiring her to attend an interview at which a Case Management Activity Agreement (CMAA) was to be completed. She failed to attend either interview and the AAT found that she had unreasonably delayed entering into a CMAA. However, the DSS had not issued to O'Connell a notice under s.44 of the *Employment Services Act 1994* (the Act). In those circumstances the SSAT had concluded that there could be no failure on O'Connell's part to have entered into a CMAA. On appeal, however, the AAT directed that the DEETYA comply with ss.44(3) and (4) of the Act and, upon compliance, the decision to terminate O'Connell's newstart allowance for unreasonably delaying entering into a CMAA would be upheld.

The issue and legislation

The DEETYA appealed the decision on the basis that it was entitled to cancel the newstart allowance under s.45 of the Act rather than having to act under s.44. The relevant provisions are as follows:

> '44.(1) This section applies if:
>
> (a) a person has been given notice under subsection 38(5) of a requirement to enter into a Case Management Activity Agreement; and

(b) the Employment Secretary is satisfied that the person is unreasonably delaying entering into the agreement.

44.(2) The Employment Secretary may be so satisfied:

(a) because of the person's failure to:

(i) attend the negotiation of the agreement; or

(ii) respond to correspondence about the agreement; or

(iii) agree to terms of the agreement proposed by the case manager; or

(b) for any other reason.

44.(3) The Employment Secretary may give the person a written notice stating that the person is being taken to have failed to enter into the agreement. If such a notice is given, the person is taken to have failed to have entered into the agreement.

44.(4) A notice under subsection (3) must:

(a) set out the reasons for the decision to give the notice; and

(b) include a statement describing the rights of the person to apply for a review of the decision.

45.(5) The person is not qualified for a job search allowance, a newstart allowance or a youth training allowance in respect of a period unless (in addition to meeting any other requirements set out in the *Social Security Act 1991* or Part 8 of the *Student and Youth Assistance Act 1973*, as the case may be):

(a) when the person is required under section 38 to enter into a Case Management Activity Agreement in relation to the period, the person enters into that agreement; ...'

The relationship between ss.44 and 45(5)

It was argued that the cancellation effected under s.660I of the *Social Security Act 1991* could occur because under s.45(5)(a) of the Act O'Connell was not at the time qualified for a newstart allowance as she had not then entered into a CMAA having been required to do so under s.38. Section 45(5) did not require the decision maker to consider whether O'Connell had unreasonably delayed entering into a CMAA under s.44(5).

The Court rejected these submissions considering that the structure of the legislative provisions is such that the appropriate procedure to identify the consequences of failing to enter into a CMAA, is to be found in s.44 of the Act, rather than s.45.

Formal decision

The appeal was dismissed.

[A.T.]

Newstart allowance: Case Management Activity Agreement

SECRETARY TO THE DEETYA v FERGUSON
(Federal Court of Australia)

Decided: 24 July 1997 by Mansfield J.

Background

Ferguson's newstart allowance had been cancelled because an officer of the DEETYA had determined that he had breached a term of his Case Management Activity Agreement (CMAA), requiring him 'to attend ...my Case Manager when asked'. This decision was affirmed by an authorised review officer and the SSAT, but set aside by the AAT.

Facts

Ferguson had received a letter from his case manager which required him to attend an interview to review his CMAA. He placed the letter under a magnet on his refrigerator door, so that he would not forget the interview. Nevertheless, at the time of the interview he had departed for Western Australia in an effort to seek work, and had forgotten the interview.

The legislation

The issues before the court involved the operation of s.45(5) and (6) of the *Employment Services Act 1984* and how it intercepts with provisions of the *Social Security Act 1991*. The relevant parts of s.45(5) and (6) provide:

45.(5) The person is not qualified for a job search allowance, a newstart allowance ... in respect of a period unless (in addition to meeting any other requirements set out in the *Social Security Act 1991* ...) ...

(b) while the agreement is in force, the person satisfies the Employment Secretary that the person is taking reasonable steps to comply with the terms of the agreement; and ...

45.(6) For the purposes of paragraph (5)(b), a person is taking reasonable steps to comply with the terms of a Case Management Activity Agreement unless the person has failed to comply with the terms of the agreement and:

(a) the main reason for failing to comply involved a matter that was within the person's control; or

(b) the circumstances that prevented the person from complying were reasonably foreseeable by the person.

The relationship between s.45(5) and (6)

The AAT took the view that forgetting was not a matter within Ferguson's control, nor reasonably foreseeable by him. The Court considered that, in reaching its conclusion, the AAT had taken an approach which was misconceived. It had been assumed by the AAT that, as there had been a breach of the agreement in failing to attend the interview, unless Ferguson fell within either s.45(6)(a) or (b) then there had been a failure to take reasonable steps to comply with the agreement.

The Court did not consider that if a person fails to comply with the terms of a CMAA and that failure was within their control or the circumstances were reasonably foreseeable, that it necessarily followed that the person could not satisfy the Secretary that he or she was taking reasonable steps to comply with the terms of the agreement.

> 'Section 45(6) of the *[Employment Services Act]* is not expressed to be a definition of the circumstances in which there will be the taking of reasonable steps to comply with the terms of the agreement ... only if a person falls under s.45(6) will the operation of s.45(5)(b) arise and then the quality of the conduct of the ... person in receipt of newstart allowance, will need to be considered in relation to it.'

(Reasons, p.13)

The Court took the view that the correct approach was to firstly consider whether there had been a failure to comply with the terms of the CMAA. Not every failure to attend an interview would amount to a failure to comply. Reasonable notice of the interview had to be given, and the requirement to attend had to be construed having regard to other obligations arising under the agreement, for example, whether the document required the person to attend a training course at the same time as the scheduled interview.

Once there was a failure to comply with the terms of the agreement, such failure must fall within one or other or both of the subclauses of s.45(6)(a) and (b) before the question under s.45(5)(b) arises, that is whether the person is taking reasonable steps to comply.

The concept of 'control'

The concept of control under s.45(6)(a) is one of fact, intended to mean something which the person could have done something about. The proper approach to a consideration of the subclause was to:

> 'put the question in an affirmative way, that is to require that the reason for failure to comply with the terms of the agreement be positively shown to have been within the person's control, rather than requiring possi-

bly the lesser matter to be made out that the reason was not within the person's control'. (Reasons, p.16.)

The Court considered that to forget an appointment was something that was within a person's control.

The meaning of 'reasonably foreseeable'

The term 'reasonably foreseeable' requires an objective assessment of the relevant facts in relation to a particular person with that person's health, knowledge and background. The Court said that the AAT had erred in concluding that as Ferguson had forgotten the appointment it was not reasonably foreseeable by him. This did not involve an objective assessment of the circumstances which prevented him from complying. It was reasonably foreseeable that he may forget, that is why he had placed the letter on his refrigerator door. It was also reasonably foreseeable that, in going to Western Australia, Ferguson would be unable to attend the interview.

When is a person taking reasonable steps to comply?

Just because there is a failure to comply which is within a person's control and/or is reasonably foreseeable by them, it does not necessarily follow that the person is not taking reasonable steps to comply. Section 45(5)(b) poses a wider question as to the conduct of the person in relation to the CMAA, which does not confine itself to the particular failure. Whether the person is taking reasonable steps depends on the person's attitude to performance of the terms of the agreement, attendances on other occasions, attempts to seek work and the range of information. That decision was not addressed by the AAT in Ferguson's case. Thus the Court remitted the matter to the AAT to determine whether Ferguson was taking reasonable steps to comply with the terms of his CMAA, as required by s.45(5)(b).

The relationship between the *Employment Services Act* and the *Social Security Act*

The Court noted that the consequences of a person not being qualified for newstart allowance because of the operation of s.45 of the *Employment Services Act 1994*, are set out at ss.608, 626 and 630C of the *Social Security Act 1991*. Those sections provide that the allowance will not be payable for an activity test deferment period and set out the length of such a period. Although s.630B provides for the implementation of an activity test deferment period by way of written notice from the Secretary, that process was not followed in this case. Instead the benefit was cancelled under s.660I of the *Social Security Act*. The Court observed, without having to decide the matter, that the structure of the provisions seems to contemplate a period of non-entitlement to payment by way of suspension, rather than total loss of benefit by way of cancellation.

Formal decision

The appeal was allowed and the application remitted to the AAT for further consideration in accordance with the Court's reasons.

[A.T.]

SSAT decisions

Age pension: valuation of assets — granny flat interest

A and Secretary to the DSS

Decided: 30 May 1997

A owned farming property consisting of two allotments (hereafter referred to as 1 and 2). His principal home was located on allotment 2. In 1994, A transferred his interest in allotment 1 to his son, by way of a transfer in which the consideration was expressed to be A's desire to transfer the property to his son. Evidence was given however, that A's son had worked for many years on the farm for no wages, and that he had been unwilling to continue working the farm without some guarantee of ownership in the farm's assets. A gave evidence that the transfer occurred because, without his son, the farm would have to be sold and the underlying consideration was the wages his son had forgone over the years.

Allotment 2 was transferred to A's son and his son's wife as trustees of a family trust in 1996, by way of agreement entered into on 18 January 1996. The agreement was subject to A being granted a right to reside in the farmhouse for life. The purchase price of $87,000 was based on the presupposition that the value of the granny flat interest was $172,000. This initial agreement was subsequently rescinded and replaced by another agreement entered into on 10 April 1996. A made an application for age pension on 23 January 1996.

The 1994 transaction

In relation to the transfer of allotment 1, the SSAT felt unable to give a value to the potential claim by A's son for unpaid wages. Any claim prior to May 1988 would have been statute barred. As there was insufficient information about the amount involved after that date, it could not find that there had been adequate consideration for the transfer. It considered that such information needed to be obtained, and if the value of the allotment exceeded the value of the potential claim for unpaid wages after May 1988 the excess amount should be maintained as a disposal of an asset.

When must payability of a pension be assessed?

In relation to the 1996 transaction, the first issue which the SSAT considered was at what point A's eligibility for age pension should be assessed, given the changes which had occurred in relation to the contractual arrangements relating to allotment 2. The SSAT noted that the *Social Security Act 1991* allows for a person's provisional commencement date to be up to 3 months after the date on which they lodge a claim for age pension if they qualify for the pension within that period. There is no similar provision relating to payability however, and the SSAT concluded that it had to consider whether age pension was payable to A as at the date he made his claim and not some later date. On that date the contract of 18 January 1996 was on foot, it had not yet been rescinded, and the effect of the contract entered into on 10 April 1996 could not be taken into account.

When did the 1996 transaction take effect?

The DSS argued that the land in question remained the asset of A until its transfer to the trustees of the family trust was registered. The evidence showed that this process was still in train. A argued that the land became an asset of the family trust on the signing of the agreement.

The SSAT accepted that it is the equitable or beneficial interest rather than the legal interest, which should be considered under the assets test. The beneficial