Whether a loan?

Clarke sought to make a distinction between a loan and a debt. He argued that the payment of $140,000 could not be regarded as a loan to Forkids because Mrs Clarke had agreed to the payment in order to avoid repossession of the Benalla property. He agreed that Forkids owed a debt to Mrs Clarke but this was not a loan because it was not documented, there was no agreement as to payment of interest or method of repayment. Clarke also submitted that the payment was not a gift.

Clarke suggested the payment be categorised as a payment made for the purposes of acquiring a suitable residence. There was no intention to artificially obtain a pension and the moneys were not paid voluntarily but under duress from the Bank.

The DSS submitted that the payment was either a loan or a gift and ss.1122 and 1123 of the *Act* caused the payment to be taken into account when calculating the rate of pension. The DSS argued that the payment of $140,000 was an interest free loan to the Trust. Although the origin of the moneys was Mrs Clarke's property, the moneys obtained were joint assets for the purposes of the Act. The payment of the moneys disposed or diminished the combined assets.

The AAT was satisfied that the payment by Mrs Clarke to the Bank was a loan and should be taken into account in calculating entitlement to rate of pension. The Tribunal found that there was an implied agreement to pay the amount. The fact that the method or occasion of payment and the absence of an interest rate is not material. The Tribunal referred to *Gordon and Secretary, Department of Social Security* (1992) 27 ALD 381.

The AAT relied on the fact that Forkids liability to Mrs Clarke is recorded in an assets and liability statement dated April 1996. These records were prepared by Clarke who was an accountant. The payment was clearly not a gift as gifts do not incur liability for repayment. 'The distinction drawn by Mr Clarke between loans and debts is artificial. A loan, at least in this case, is a debt': Reasons, para. 15.

> 'For the purposes of s.1123 the sum of $140,000 constitutes an 'asset' which has been "disposed" or "diminished" and for the purposes of sub-paragraph (b), there has been no consideration or inadequate consideration in moneys worth for the disposal or diminution of assets.'

(Reasons, para. 16)

The AAT did not accept that the payment could be categorised 'for the purpose of acquiring a suitable residence' either as a fact nor as a proposition in law. The Tribunal also disregarded as irrelevant the submission that the Trust did not have the capacity to repay the loan.

Formal decision

The Tribunal affirmed the decision under review

[M.A.N.]

Newstart allowance and additional parenting allowance: assets test, property of partner

SCHOKHOFF and SECRETARY TO THE DSS (No. 11877)

Decided: 19 May 1997 by S.A. Forgie.

Schokhoff sought review of two decisions:

- a decision of the SSAT which affirmed the DSS decision to raise and recover a debt. The amount of the debt was varied at the hearing so that an amount of $11,675 of newstart allowance (NSA) paid between 23 March 1993 and 30 May 1994 was sought to be recovered.
- a decision of the SSAT which varied a DSS decision to cancel additional parenting allowance and to raise and recover a debt of $2782.80, being additional parenting allowance paid from 5 July 1995 to 21 December 1996.

The DSS conceded that this debt was not recoverable. Therefore, the only dispute at the AAT was whether additional parenting allowance was correctly cancelled.

The issue

The central issue to both decisions was whether a house and land situated in Ireland ('the Irish property') was an asset of Mrs Schokhoff. Mrs Schokhoff's father left the Irish property to her in his will. He died and probate of his will was granted. Before his death he executed an indenture with the aim of transferring his beneficial interest in the Irish property to Mrs Schokhoff. Schokhoff submitted that the indenture was not a valid transfer. It was not in dispute, however, that some time after her father's death, Mrs Schokhoff had sold the Irish property. Schokhoff submitted that his wife had transferred the proceeds of the sale to her father's estate, as required, because of family difficulties over the terms of her father's will.

The asset: the Irish property

The AAT found that Mrs Schokhoff's father had validly transferred his beneficial interest to her under the indenture. In the alternative, it found that she had inherited the Irish property under the will. The AAT said that the value of the Irish property could not be disregarded for the purpose of calculating Mrs Schokhoff's assets, contrary to Schokhoff's submission. He had sought to rely on s.1118(1)(b) or s.1118(1)(j) of the *Social Security Act 1991*.

The disposal of the asset

The AAT also held that the proceeds of sale equivalent to $96,000 were available to Mrs Schokhoff, and were part of her assets. If she had transferred the money to others, the AAT said that s.1126 of the Act applied, which meant that she had disposed of assets above 'the disposal limit' of $10,000. Therefore $86,000 must be regarded as part of the Schokhoffs' joint assets for 5 years after disposal, and that meant at all times relevant to the decisions under review.

The AAT concluded that, although Schokhoff qualified for NSA, it was not payable to him under s.608(1)(6) of the Act because the value of his assets exceeded his 'assets value limit' as set out in s.611(2), as the value of Mrs Schokhoff's assets, had by virtue of s.112(1), to be taken into account.

The AAT found that Schokhoff had omitted to declare the Irish property as part of his assets. Therefore, there was a debt of $11,635.18 due to the Commonwealth under s.1224 of the Act.

Additionally, as NSA was not payable to Schokhoff, it had been correctly cancelled under s.660I.

As to additional parenting allowance, he did not satisfy the assets test because his assets were above the value limit of $167,500 applicable at the time, as assessed under s.1068 A-B. This meant that additional parenting allowance was not payable, and it had been correctly cancelled.

The formal decision

The AAT decided in relation the first decision:

- to vary the SSAT decision so that the debt was reduced to that amount paid between 23 March 1993 and 3 May 1994; and

- to affirm the SSAT decision to recover this debt.

In relation to the second decision the AAT decided:

- to vary the SSAT decision to that there was no additional parenting allowance debt; and
- to affirm the SSAT decision to cancel payment of additional parenting allowance.

[G.H.]

Disability support pension: hardship provisions, unrealisable assets

McCORMACK AND McCORMACK and SECRETARY TO THE DSS (No. 12076)

Decided: 31 July 1997 by W.H. Eyre.

The issue

The sole issue for consideration by the AAT was whether a property 'Walwa' owned by Mr and Mrs McCormack was an 'unrealisable asset' for the purpose of disability support pension (DSP), and additional parenting allowance respectively.

Background

The McCormacks had operated a successful sheep stud business in the ACT for many years. In 1986 the McCormacks sold other properties they owned and purchased 'Walwa' which was then debt free. Subsequently another property purchased in 1990 had to be sold at considerable loss after falls in the wool price and drought. Mr McCormack had to cease work in 1992 due to spinal cord damage. In 1993 Ovine Johne's disease was confirmed on the Walwa property causing the cessation of stud activity, and forcing the slaughter of many sheep and, in turn, considerable loss in annual farm income compared to previous levels.

Walwa subsequently was used as security for a term loan and overdraft from Westpac, the total of which was $1.72 million in May 1997, and in addition to which $155,000 was owed to Elders. The amounts borrowed from Westpac had increased even after the respective applications by the McCormacks had been lodged. The Australian Valuation Office (AVO) had, in July 1996, valued Walwa at $2.8 million including $300,000 for the house and curtilage. Mr McCormack gave evidence to the AAT that he did not believe the property could be sold, and would in any case fetch no more that $1.5 to $2 million.

The law

The financial hardship rules contained in s.1131 of the *Social Security Act 1991* (the Act) allow access to a social security benefit to a person who would otherwise be unable to receive the benefit due to the application of the assets test, where 'the person or the person's partner has an unrealisable asset'. If unrealisable, the value of the asset is to be discounted in determining whether a social security benefit is payable. The term 'unrealisable asset' is defined in s.11 of the Act which provides:

> '(12) An asset of a person is an unrealisable asset if:
>
> (a) the person cannot sell or realise the asset; and
>
> (b) the person cannot use the asset as a security for borrowing.
>
> (13) For the purpose of the application of this Act to a social security pension, an asset of a person is also an unrealisable asset if:
>
> (a) the person could not reasonably be expected to sell or realise the asset; and
>
> (b) the person could not reasonably be expected to use the asset as a security for borrowing.'

The AAT was required to consider the application of s.11(12) and (13) in relation to Walwa.

Hardship

The AAT accepted that in the absence of other evidence, the AVO valuation should be accepted as the true market value of Walwa. It found that at the dates of the respective applications by the McCormacks, the net value of Walwa was well above the appropriate asset test limits for parenting allowance and DSP purposes.

The AAT considered whether the notion of 'reasonableness' should be implied into s.11(12) of the Act, concluding that the difference between s.11(12) and (13) is explicable in that:

> 'subsection (13) allows for factors more particular to the person to be taken into account ... whereas subsection (12) contemplates that only factors relating to the asset itself are to be considered in determining whether the person can sell it or use it as security for borrowing.'

(Reasons, para. 17)

The AAT added that:

> 'where the circumstances which pertain are so far beyond what one might reasonably expect when trying to sell the asset or to borrow against it that they can be seen as very unfair to the asset owner or unconscionable so far as the potential purchaser or lender is concerned, [then] it can properly be said, the asset is "unrealisable" within subsection (12).'

(Reasons, para. 17)

Noting the value of the Walwa property, and the existing loan arrangement with Westpac, the AAT concluded that Walwa is not an 'unrealisable asset' as it was able to be used as security for borrowing. The evidence of this lay in the fact that borrowing through Westpac against that security, had continued. The AAT commented that the purpose of borrowing (in this case to meet, in essence, the day-to-day living expenses of the McCormacks) may be relevant to whether a person should reasonably be expected to use the asset as security, but added that:

> 'Regard must however be had to the whole purpose of an assets test and its basis that those who may meet income criteria ... but have assets should be required to use those assets for their support before taxpayer funded assistance is to be made available.'

(Reasons, para. 37)

Formal decision

The AAT affirmed the decisions under review.

[P.A.S.]

Overpayment of DSP; recipient in gaol; waiver of debt

SECRETARY TO THE DSS AND PERKICH (No. 12148)

Decided: 22 August 1997 by J Dwyer.

Perkich received disability support pension (DSP) during a period of imprisonment in 1994. He had told prison authorities when he was gaoled that he was on a pension but he did not tell the DSS. His bank account was accessed by another person during his imprisonment. The recovery of the debt raised by the DSS largely had been effected by the date of the AAT hearing. At the previous levels of review (authorised review officer and SSAT) the existence of the debt and the decision to recover it, had been affirmed.