

- 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 applica-

tions 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 than \$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.