regulation 166 of Migration (1989) Regulations contained a transitional provision which had the effect of applying regulation 165 to 'maintenance guarantees' given before 1989 'in accordance with regulations that were in force', as if those maintenance guarantees were 'assurances of support'.

Was De Alwis' assurance of support a 'maintenance guarantee' ... 'given in accordance with regulations that were in force' when it was signed?

The document was headed 'Assurance of Support', although the Migration (1959) Regulations made no reference to this term which was not introduced until 1987.

The Department referred to the case of *Secretary to the Department of Social Security and Kratochvil* (1994) 82 *SSR* 1146:

> 'By virtue of sub-section 166(1) of those Regulations [the Migration 1989 Regulations] the provisions of Regulation 165 apply in relation to maintenance guarantees given before the commencement of the Regulations in accordance with regulations that were in force under any of the Acts repealed by the Act as if those maintenance guarantees were Assurances of Support. There are two problems with this section. Clearly the intention is that Regulation 165 is to have the effect of incorporating a previous maintenance guarantee, as they were called, but it says nothing about previous assurances of support. As already noted, in this case the Assurance of Support was given under the previous Regulation 22 of the Migration Regulations.
>
> We are satisfied, however, that because of the operation of the Migration Regulations there was in fact a debt due to the Commonwealth because of the payments made to the respondent's mother under the *Social Security Act 1947*. We think the intention of the Migration Regulations is clear and that there was no intention that an Assurance of Support given under Regulation 22 was somehow to be different to a maintenance guarantee as referred to in Regulation 166 of the Migration Regulations as they applied on or before 19 December 1991.'

The AAT considered this case but decided that:

> 'the precise definition in the Act and the precise terminology of the Regulations cannot simply be ignored. Regulation 166 of the Migration (1989) Regulations is quite specific in describing the maintenance guarantees to which reg 165 is to apply "as if those maintenance guarantees were assurances of support". The maintenance guarantees are those given "in accordance with regulations that were in force under any of the Acts repealed by" the Migration Act 1958. So far as the evidence before me establishes, the document signed by Mr De Alwis does not meet the description in reg 166. Neither does any debt which may arise under the document meet any of the descriptions in the definition of assurance of support debt in s.23 of the Act.'

(Reasons, para. 29)

**Conclusion**

The Tribunal concluded that as there was no evidence that the assurance of support signed by De Alwis was a maintenance guarantee in the form approved by the Minister under the Migration (1959) Regulations. Therefore regulation 166 did not apply and consequently neither did regulation 165.

The debt was not an assurance of support debt as defined in s.23, and not a debt under s.1227. Consequently, there was no debt that could be recovered by a garnishee notice under s.1230C.

**Formal decision**

The AAT varied the decision of the SSAT and substituted a new decision that there was no assurance of support debt under s.23 of the *Social Security Act 1991* and thus no debt due to the Commonwealth under s.1227.

Accordingly there was no debt which may be recovered by garnishee notice under s.1230C and s.1233 of the Act.

**[R.P.]**

# Federal Court decisions

## *Age pension: disposal of asset; constructive trust*

**AGNEW v SECRETARY TO THE DSS**
**(Federal Court of Australia)**

**Decided:** 23 June 1999 by O'Loughlin J.

The Agnews appealed to the Federal Court against the decision of the AAT that their assets exceeded the asset test limit for the payment of age pension.

**The facts**

Mr and Mrs Agnew lodged claims for age pension in May 1996, both of which were rejected. Prior to September 1995 Mr Agnew was the registered proprietor of a farm, Rosedene. Since the late 1970s the Agnews and their 3 sons had carried on the business of farming on Rosedene in partnership. By June 1995 the partnership owed a debt of $371,105. This debt was secured by registered mortgage over Rosedene and, in part, by personal guarantees of the Agnews.

The partnership was dissolved on 1 July 1995 on terms that allowed the Agnews to retire while the 3 sons continued to operate the farming business. The continuing partners assumed liability for all debts of the partnership and indemnified the Agnews in respect of those debts. In return, the Agnews' share of the partnership vested in the 3 sons. There would also be no adjustment to the partners' capital accounts. In June 1995 Mr Agnew's capital account was in debit for $51,768 and Mrs Agnew's in credit for $8314.

On 19 September 1995 the Agnews agreed to sell Rosedene to Rosedene Nominees Pty Ltd, a trustee company of the Rosedene Family Trust for $450,000. This was agreed by all to be a fair market value. The trust was created on the same date for the benefit of the 3 sons and their families. The trust company took over liability for the existing mortgage.

In evidence to the AAT Agnew stated he had intended giving Rosedene to his sons in 1980 but the cost of stamp duty had prevented this. In 1980 Agnew had given up farming and moved to the city. His sons had continued working on the farm. In the following years they expanded the farm and upgraded it. Agnew and his wife had not drawn any profit from the farm since they left in 1980, but according to the AAT they had derived some tax benefit. The expansion of the farm by the sons had been funded by the debt of $371,105. When the Agnews had left in 1980, the partnership had an overdraft of $6500. The mortgage had been entered into after the Agnews left the farm, and they had simply signed the papers. The farm had more than doubled in size under the management of the sons.

### The law

Section 1123(1) of the *Social Security Act 1991* (the Act) provides:

> **'Disposal of assets**
>
> 1123.(1) For the purposes of this Act, a person **disposes** of assets of the person 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 in money or money's worth for the destruction, disposal or diminution;
>
> (iii) the Secretary is satisfied that the person's purpose, or the dominant purpose, in engaging in that course of conduct was to obtain a social security advantage.'

According to s.1124, the value of the asset is calculated at either the value of the asset when it was transferred, or the value of the asset when transferred less the consideration.

### The AAT decision

The AAT found Mr Agnew and his son who gave evidence, to be witnesses of truth. However, the AAT was not prepared to accept Agnew's evidence he intended to give Rosedene to his 3 sons when he left the farm in 1980.

### Error of law

The Federal Court found that the AAT made an error of law when it found that Agnew was a witness of truth but then did not accept his evidence that he intended giving Rosedene to his sons in 1980. O'Loughlin J stated that 'the Tribunal was drawing a legal conclusion from its earlier findings of fact' rather than finding a fact: Reasons, para. 26.

It was argued by the DSS that the sons derived a benefit because they used their parent's land for over 15 years rent-free. Any detriment they suffered by not having the land transferred to them had been adequately compensated. The Court found that:

> 'If a constructive trust came into existence in 1980, the sons were then and thereafter entitled, in their capacity as the beneficial owners of the land, to the use and enjoyment of the land, freed of any restriction or obligation to pay their father rent.'

(Reasons, para. 27)

O'Loughlin J acknowledged that the benefits enjoyed by the sons and choices made by them, were not influenced by their father. However, that was not to say that there were no detriments. The sons would be denied the capital gain from the farm property derived from their work over the years expanding and upgrading the farming business. According to the Court, the findings of fact of the AAT, namely that Agnew was a witness of truth and that he intended to transfer the property to his sons in 1980 meant that there was a constructive trust.

### The value of the asset transferred

Although it was not necessary for the Court to address this issue, it did, to complete the appeal. The AAT had found that the value of the asset transferred was the value of Rosedene less the mortgage. In contrast, the SSAT had found that the value of the asset transferred was the value of Rosedene less moneys owed to the Agnews from the capital account. The Federal Court found that the SSAT had properly valued the asset. It pointed out that the debt was in fact a debt of the partnership and that if the lender had called in the debt, it would have to first approach the partners. If the Agnews had been found liable, they would have had a right to turn to their other partners for contribution towards payment of the debt. Although there was a mortgage over Rosedene, the debt was owed by the partnership.

### Formal decision

The Federal Court set aside the decision of the AAT and remitted the matter for further consideration by the AAT consistent with the Reasons.

**[C.H.]**

# *Newstart allowance, partner allowance — notice of a decision*

**AUSTIN v SECRETARY TO DFaCS (Federal Court of Australia)**

**Decided:** 8 July 1999 by Drummond J.

The Austins appealed against an AAT decision that their rate of newstart and partner allowances could only be increased from 3 February 1997 and not from an earlier date.

### The facts

The facts in this case were not in dispute. In 1993 Mr Austin was receiving newstart allowance. In early 1993 he made two enquiries as to whether he was being paid the correct rate of his allowance. After his second enquiry the DSS purportedly recalculated the rate of his entitlement on the basis of income of $140 a week. (Mr Austin was in fact receiving only $70 a week in income). Mr Austin was advised in a letter dated 18 May 1993 that he was to be paid newstart allowance at a certain rate.

Mrs Austin claimed partner allowance in August 1994 and was also paid the allowance at an incorrect rate. The DSS has conceded that throughout the period the Austins were underpaid benefits, and this was directly attributable to an error on the part of DSS.

On 1 May 1997 Mrs Austin lodged a claim for partner allowance in which she provided the correct details of Mr Austin's income. She also queried the rate at which Mr Austin had been paid newstart allowance. Mr Austin's newstart allowance had been cancelled on 24 February 1997.

On 13 June 1997 Mr Austin was advised that the DSS had re-assessed the rate of newstart allowance previously paid to him and an arrears payment would be made for the period 4 February 1997 to 24 February 1997. Mr Austin had not queried the rate of newstart allowance paid to him after 1993. He had been sent a letter on 4 February 1997 advising him of a change of rate. The DSS treated the decision of 4 February 1997 as a 'previous decision' and Mrs Austin's query on 1 May 1997 as a request for review. Both the SSAT and the AAT had affirmed the authorised review officer's decision not to pay further arrears.

### The law

Section 660K of the *Social Security Act 1991* (the Act) fixes the date from which a decision in favour of a person receiving newstart allowance takes effect. It provides:

> '**660K.(1)** The day on which a determination under section 660G or 660J (in this section called the '**favourable determination**') takes effect is worked out in accordance with this section.
>
> Notified decision — review sought within 3 months
>
> 660K.(2) If:
>
> (a) a decision (in this subsection called the '**previous decision**') is made in relation to a newstart allowance; and
>
> (b) a notice is given to the person to whom the allowance is payable advising the