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

person of the making of the previous decision; and

(c) the person applies to the Secretary under section 1240, within 3 months after the notice is given, for review of the previous decision; and

(d) a favourable determination is made as a result of the application for review;

the determination takes effect on the day on which the previous decision took effect.'

According to s.660G, the rate of newstart allowance is to be increased if the Secretary is satisfied that it should be.

Notice of the decision

Mr Austin had to lodge fortnightly forms to continue to receive newstart allowance. Each of these forms contained a statement of the amount of newstart allowance paid to him in the preceding fortnight. He had also received a number of letters concerning his payments. It was argued by both parties that each fortnightly payment represented a decision as to the rate of newstart allowance to be paid to Mr Austin. It was also argued that these were notices of decision.

The Federal Court referred to *Secretary to the DSS and Sting* (1996) 39 ALD 721 where the AAT considered whether notice of a decision relating to the rate of payment had been given. The AAT had found that a letter sent to the person stating that he had been paid newstart allowance at a particular rate, and that the amount calculated had been paid into his account for a particular period, was notice. In *McAllan and Secretary to the DSS* (1998) 51 ALD 792, the AAT had reached a different conclusion. In that decision it was decided that for there to be sufficient notice there had to be enough information for the person to understand the main reason for the decision and to decide whether or not to seek review.

Drummond J rejected the argument that the fortnightly forms constituted a decision. The Court found the scheme of the Act to be:

'Section 660K operates only when 1 or other of 2 kinds of decision have been made... Both involved recognition that a person has not been receiving in the past his or her entitlements to newstart allowance and both provide for redress for that situation ... Where an injustice of the kind correctable under either s.660G or s.660J results from a decision made in the past, s.660K(2) to (4) fix how far back the s.660G and s.660J determinations themselves can go in redressing the old wrong, by reference to whether notice was given to the person of that old erroneous decision and whether (and if so, when) that person sought its review.'

(Reasons, para.28)

According to the Court, the giving of a notice fixes the date from when favourable decisions can run. Drummond J went on to state that 'good notice':

'Must be identifiable as a communication to the benefit recipient that a decision has been made to pay him or her newstart allowance at a particular rate.'

(Reasons, para. 30)

The Court went on to consider the various definitions of 'notice' in judicial dictionaries and in cases outside the social security jurisdiction. They indicated that the notice must be a direct and definite statement which must be formal and deliberate. The notice must be brought clearly to the attention of the person. It is not enough simply to notify the recipient of the amount of newstart allowance to be paid. It is for this reason that the fortnightly forms could not be considered notices. They do not contain a clear statement that the decision has been made as to the rate of a particular payment, and it is not intended by the DFaCS that it be a notice of a decision.

Drummond J found that *Sting* was correct in stating that for there to be notice, the person must be advised that there has been a decision concerning the rate of newstart allowance, and what that rate is. However, *Sting* was not correct when it stated that a particular amount payable was necessarily advice about the rate of payment. There will only be notice of decision:

'Where the recipient is advised of payment of an amount that is the result of applying the Rate Calculator referred to in s.1068 to his circumstances, without adjustments not provided for by that Calculator.'

(Reasons, para. 41)

With respect to the various letters sent to Mr Austin over the years, the Federal Court found that these would only be notices if they set out the rate at which Mr Austin was entitled to be paid newstart allowance when the letters were sent. Providing the amounts have been arrived at by applying the rate calculator and had not been adjusted for other liabilities, such as for tax, these will be notices advising Mr Austin of the making of a previous decision. However, each letter can only be a notice of the making of the decision fixing the rate of newstart allowance for the period the decision remained operative. Because copies of certain letters were not before the Court, Drummond J was unable to say whether they constituted sufficient notice. The Court was not satisfied, however, that the decision of 18 May 1993 was ever given to Mr Austin. Two letters before the Court constituted notices but had only limited effect. Therefore, there was:

'Nothing to suggest that any notices were given which would prevent Mr Austin obtaining effective redress by reason of the review he requested on 1 May 1997 or 12 June 1997 or 22 July 1997 for all underpayments of newstart allowance made in the whole of the period from 18 May 1993 to 25 February 1997.'

(Reasons, para. 49).

The Federal Court found that Mrs Austin was in a similar position.

Formal decision

The decision of the AAT was set aside and the case was remitted to the AAT for re-determination in accordance with the following directions:

'1. The AAT is to determine whether any notices within s.660K(2) or (3) was ever given of any decisions made between 17 May 1993 and 26 February 1997 to fix the rate of newstart allowance paid to Mr Austin in that period.

2. The AAT is to determine any amount of arrears payable to Mr Austin.

3. The decision of the AAT with respect to Mrs Austin was set aside.

4. The hearing of Mrs Austin's appeal is to be adjourned to a date to be fixed.'

[C.H.]