Federal Court

Assurance of support

HASSAN v SECRETARY TO THE DFaCS
(Federal Court of Australia)

Decided: 10 December 1999 by Sundberg J.

Hassan appealed against an AAT decision that he owed an assurance of support debt of $20,241.14 comprised of special benefit paid to his mother between 18 January 1989 and 19 December 1991.

The facts

Hassan's mother arrived in Australia in November 1985, and in January 1986 Hassan signed an assurance of support under Part 4 of the Migration Regulations. In January 1989 Hassan's mother applied for special benefit.

In her claim the mother stated that Hassan could no longer support her because he was now unemployed and he had a wife and five children. None of the other members of her family would support her and she needed special food and medication because she was now old and sick.

The SSAT decided that the balance of the debt owed by Hassan should be waived pursuant to s.1237 of the *Social Security Act 1991*.

The law

In January 1986 the *Migration Act 1958* allowed for the making of regulations in relation to maintenance guarantees. The Migration Regulations at that time allowed for a maintenance guarantee to be given in such form and for such periods as determined by the Minister. Regulation 22 provided that where a maintenance guarantee had been given for a period and the person had also been provided with funds from the Commonwealth, an amount equal to the value of the maintenance provided by the Commonwealth was a debt due to the Commonwealth by the person who gave the maintenance guarantee.

A special benefit was included in those payments to maintain a person. In 1987 the *Migration Act* was amended so that assurances of support were substituted for maintenance guarantees. The Migration Regulations were similarly amended. The transitional provisions stated that a maintenance guarantee continued in force after the commencement of the provisions providing for an assurance of support. The Migration Regulations were replaced in 1989 and a new Part dealing with assurances of support was inserted. The Regulations pertaining to assurances of support were very similar to the original Regulations. In 1991 a further amendment was made so that if an assurance of support had been in effect for up to two years by 20 December 1991, it ceased on that date. Assurance of support was defined to include a maintenance guarantee that was given prior to December 1989.

The Court found that the affect of these amendments was that the document signed by Hassan in January 1986 was a maintenance guarantee and it remained in effect as an assurance of support until December 1991.

Section 1227 provides that an assurance of support debt is a debt due to the Commonwealth under the *Social Security Act*. Section 1237AAD provides that:

> **1237AAD.** The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:
>
> (a) the debt did not result wholly or partly from the debtor or another person knowingly:
>
> (i) making a false statement or false representation: or
>
> (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
>
> (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
>
> (c) it is more appropriate to waive than to write off the debt or part of the debt.

The AAT's decision

It had been argued before the AAT that an assurance of support was not a maintenance guarantee for the purposes of the *Migration Act* and thus the regulation was invalid. The AAT declined to decide whether a particular regulation under the Migration Regulations was valid. It defined the issue it had to address as whether the debt should be waived or written off.

Hassan had given evidence to the AAT that the statement provided by his mother to the DSS had been false. According to the AAT the discretion in s.1237AAD could only be exercised if the debt did not result from the debtor or another person knowingly making a false statement. Hassan's mother had made a false statement and as a result a debt had been incurred. Therefore the discretion in s.1237AAD could not be exercised.

Validity of the Migration Regulations

It was argued before the Court that a guarantee is a binding promise by one person to be answerable for the debt of another if that other person defaults. Assurances of support do not make a person answerable for the obligation of another. The person who provided the assurance has a primary obligation not a conditional one. The Court was referred to a number of cases concerning whether the AAT has the power to decide the validity of statutes and subordinate legislation. Sundberg J found that it was not necessary for it to decide this question.

Instead he looked at the ordinary meaning of the word 'guarantee' and found it to be a promise to do something. The Court noted that the meaning of a word will always be influenced by the context in which the word appears.

> The expression 'maintenance guarantee' in s.67(1)(c) before the amendment is not ambiguous simply because the word 'guarantee' has more than one meaning. For the reasons I have given, the context makes clear that a maintenance guarantee is simply a promise to maintain someone. Further, care must be exercised to ensure that the words of the later statute have not been inserted to remove possible doubts as to the meaning of the earlier provision.

(Reasons, para. 16)

Assurance of support

It was argued that the assurance of support was not a guarantee and therefore it was not effective. This argument had been put to the AAT but had not been dealt with. Sundberg J found that this was an error of law, but as there was no substance to the argument there was no reason to remit the matter back to the AAT to decide.

The debt

It was also argued before the Court that it was incorrect of the AAT to have decided that there was a debt and that this was not in issue. Sundberg J found that the AAT's statements in this regard may have been imprecise. Nonetheless, when it was decided by the AAT that it could not look at the validity of the legislation, no further argument was put to it concerning whether or not there was a debt. The AAT may have overstated the matter but this was not an error of law.

'Knowingly'

It was argued that there was no evidence that the statement made by Hassan's mother had been made 'knowingly' as required by s.1237AAD. Sundberg J observed that the AAT had accepted Hassan's evidence that his mother's statement was false. That is, the information provided by Hassan's mother was not true. According to the Court it must then follow that Hassan's mother knew they were untrue. An interpreter had read the statement to her in Arabic and then she had signed the statement with a cross. There is no evidence that the statement had been made by anybody else and that the mother was not aware that it was false.

The AAT failed to deal with whether or not the statement had been made knowingly. The Court found that in the circumstances this was not an error of law.

Natural justice

It was argued that because Hassan had answered some questions in English before the AAT rather than using an interpreter, he had been denied natural justice. The Court found that only a small portion of the evidence had been given in English and there was a reason for doing so. Nothing that Hassan had said had harmed his case.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

Assets test: constructive trust

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

Decided: 4 February 2000 by Drummond, Sundberg and Marshall JJ.

The Agnews appealed to the Full Court of the Federal Court against the decision of O'Loughlin J at first instance. O'Loughlin J had remitted the matter back to the AAT to decide whether there was a constructive trust given that the AAT had found that Agnew was a witness of truth and that he intended giving his farm to his sons in 1980.

The facts

The facts are set out in the summary of this case in the (1999) 3(10) *SSR* 158. Briefly, the Agnews' claims for age pension were rejected in May 1996. Prior to September 1995 Mr Agnew was the registered proprietor of a farm, Rosedene. Since the late 1970s the Agnews and their three sons had carried on the business of farming on Rosedene in partnership. By June 1995 the partnership owed a debt of $371,105 secured by registered mortgage over Rosedene and the Agnews' personal guarantees. The partnership was dissolved in July 1995, allowing the Agnews to retire and the three sons to continue the farming business. The partners assumed liability for all debts of the partnership and indemnified the Agnews. In return the Agnews' share of the partnership vested in the three sons. In September 1995 the Agnews agreed to sell Rosedene to Rosedene Nominees Pty Ltd, a trustee company of the Rosedene family trust, for $450,000. He then waived payment of the purchase price. 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 and improving it.

The DSS argued that the Agnews had disposed of their property, Rosedene, without receiving adequate remuneration.

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 assets is 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 was not prepared to accept Mr Agnew's evidence that he intended to give Rosedene to his three sons when he left the farm in 1980 and thus a constructive trust existed. This was in spite of the fact that the AAT found Agnew to be a witness of truth.

The Federal Court

O'Loughlin J had found an error of law when the AAT had accepted that Agnew was a witness of truth but then did not accept his evidence that he intended giving the farm to his sons in 1980. The DSS argued that the sons had derived a benefit because they had used the farm for over 15 years, rent free. The detriment they suffered by not having the land transferred to them had been adequately compensated. O'Loughlin J found that if a constructive trust had come into existence in 1980 then the sons were entitled, as the beneficial owners of the land, to the use and enjoyment of the land free of any restriction or obligation to their father to pay rent. It was not true to say that the sons had not suffered a detriment. 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.

O'Loughlin J also found that the AAT had incorrectly valued the asset. It had valued the asset as Rosedene less the mortgage. The SSAT had found that the asset was Rosedene, less moneys owed to the Agnews from the capital account. The mortgage was a debt of the partnership, even though there was a mortgage over Rosedene. If the lender had called in the debt he would first have had to approach the partners.

The Full Court

The DSS argued that the Agnews' entitlement to pensions had to be considered at the time they made their claim. At that time, Mr Agnew had disposed of Rosedene and given the proceeds to his sons. He had thus diminished his assets by $450,000, and this was within five years of the Agnews' claims for pension. The fact that there was a constructive trust was irrelevant.