Act to justify treating all or part of Woolrich's compensation payment as having not been made. In particular, at issue was whether the application of the '50% rule' had produced an unfair or unintended consequence. For Woolrich it was argued that the SSAT decision was correct.

Referring to *SDSS v Banks* (1990) 56 *SSR* 762, *SDSS v a'Beckett* (1990) 57 *SSR* 779, *SDSS v Hulls* (1991) 60 *SSR* 834 and *SDSS v Cuneen* (1997) 3(3) *SSR* 36, the AAT took the view that an argument based on what may or may not be specified in a statement of claim is without merit as it is a significant departure from the intentions of the statutory process. A consent award may or may not reflect issues nominated in the statement of claim. The AAT added that cases where special circumstances were found because the arbitrary 50% of the settlement amount was perceived to be at such significant variance with what was detailed as economic loss in consent orders, are not consistent with the statutory intent of the legislation. Advocates for such a position are placing a significant emphasis on the proper construction of a consent order, while at the same time jeopardising the integrity of a statutory process which balances both individual social need and a community's responsibility to ensure equity and probity of resource distribution to meet those needs.

The AAT noted that the consent order in this matter was silent as to the elements of the lump sum payment. That distinguished it from *SDSS v Beel* (1995) 38 ALD 726 and *Re SDSS & Caruso* (1996) AAT 11243 where the consent orders contained details of the economic loss component and special circumstances were found to exist.

The AAT referred to *Re Beadle & DGSS* (1984) 20 *SSR* 210 for the meaning of the phrase 'special circumstances', and to *Re Green & SDSS* (1990) 21 ALD 772 for a framework against which claims for special circumstances could be considered. It held that even if the outcome of the arbitrary 50% rule was unfair its consequence — that Woolrich had to repay some $5000 more — had to be assessed against her other circumstances to decide whether or not special circumstances existed. It found that Woolrich was not in financial hardship, and noted that her medical conditions did not prevent her from engaging in employment or overseas travel. Based on those considerations it concluded that Woolrich's circumstances were not unusual, uncommon or exceptional and did not constitute special circumstances.

Formal decision

The AAT set aside the SSAT's decision and reinstated the original decision that Woolrich was subject to recovery of $5261.80 from her compensation settlement.

[K.deH.]

Age pension income test: whether life insurance payout an 'exempt lump sum'?

VARCOE and SECRETARY TO THE DFaCS (No. 2000/1002)

Decided: 15 November 2000 by J.Dwyer.

Background

In 1956 Varcoe took out two life insurance policies. He later changed them to endowment policies to mature at age 65. The policies matured on 30 July 1999 and had a combined value of $18,117.60. Mr Varcoe had paid $3,386.68 in contributions over the 43 years he had maintained the policies. Centrelink treated the balance of $14,730.00 as payment of income over a 12-month period. As a result Varcoe received a substantially reduced rate of age pension.

The issue

Whether the *Social Security Act 1991* (the Act) requires that the amount of $14,730.00, being the total figure payable when the insurance policies matured, less premiums paid, be included as income for age pension purposes. The question for the Tribunal was whether the amount is 'an exempt lump sum' as defined in s.8(11) of the Act.

The legislation

Section 1073(1) of the Act states if a person receives an amount that:

> is not income within the meaning of Division 1B or 1C of this Part; and
>
> (b) is not:
>
> (i) income in the form of periodic payments; or
>
> (ii) ordinary income from remunerative work undertaken by the person; or
>
> (iii) an exempt lump sum.
>
> the person is ... taken to receive one fifty-second of that amount as ordinary income of the person during each week in the 12 months commencing on the day on which the person becomes entitled to receive that amount.

Section 8 of the Act contains the following income test definitions:

> **'income'**, in relation to a person, means:
>
> (a) an income amount earned, derived or received by the person for the person's own use or benefit; or
>
> (b) a periodical payment by way of gift or allowance; or
>
> (c) a periodical benefit by way of gift or allowance;
>
> but does not include an amount that is excluded under subsection (4), (5), (7A) or (8);
>
> **'income amount'** means:
>
> (a) valuable consideration; or
>
> (b) personal earnings; or
>
> (c) moneys; or
>
> (d) profits;
>
> **(whether of a capital nature or not)**;
>
> ...
>
> **8(11)**An amount received by a person is an **exempt lump sum** if:
>
> (a) the amount is not a periodic amount (within the meaning of subsection 10(1A)); and
>
> (b) the amount is not a leave payment within the meaning of points 1067G-H20, 1067L-D16 and 1068-G7AR; and
>
> (c) the amount is not income from remunerative work undertaken by the person; and
>
> (d) the amount is an amount, or class of amounts, determined by the Secretary to be an exempt lump sum.
>
> Note: Some examples of the kinds of lump sums that the Secretary may determine to be exempt lump sums include a lottery win or other windfall, a legacy or bequest, or a gift ... if it is a one-off gift.

The definition of ***'income'*** in the Act treats a lump sum amount as income unless the amount is ***'an exempt lump sum'***.

Determination of exempt lump sum

There are four criteria in s.8(11), which have to be satisfied before an amount is 'an exempt lump sum'. The Tribunal found no issue arose in relation to paragraphs 8(11)(a)(b) and (c). As to paragraph 8(11)(d), the Tribunal noted that officers within Centrelink appear to have acted on the basis that the amount of $3386.68 was 'an exempt lump sum', although there was no formal determination by the Secretary to that effect.

The Tribunal also noted that there was no determination by the Secretary relating to amounts received on maturity of an endowment or life insurance policy but that the possibility of individual determinations applying to insurance lump sums was provided for.

The Tribunal addressed whether it had power to make a determination pursuant to s.8(11) and concluded it did.

Insurance policies as exempt lump sum

Varcoe argued it was unfair that the whole of his accumulated bonuses over the 43 years he maintained his policies should be treated under s.1073 of the Act as 'ordinary income' during his first 12 months in receipt of age pension. He pointed out that these bonuses had been earned over 43 years, not just at maturity on his 65th birthday and that until 21 July 1997 they would not have been treated as income for social security purposes.

He also argued that superannuation lump sum payments are treated in a different and far more beneficial manner than insurance and endowment policy payments. He submitted that he was discriminated against and disadvantaged by this differential treatment imposed on him because he had made provision for his retirement by way of an endowment policy, rather than by way of superannuation, which was not available to him in 1956.

The Tribunal confirmed that superannuation amounts are treated as an 'exempt lump sum' within the meaning of that term in s.8(11) of the Act and that this is an informal arrangement. The Tribunal recommended that:

> It seems that as a matter of good administration there should be a formal determination under s.8(11)(d) as to superannuation lump sums, or else an amendment to the legislation to ensure that the legislation and the practice are in conformity with each other.

(Reasons, para. 18)

Varcoe produced extracts from 1996 Department of Social Security Manuals showing that at that time bonuses on insurance policies were not assessed as income either during the term of the policy or on maturity. That policy changed from 21 July 1997. Varcoe pointed out that there was no general notification to the community prior to 21 July 1997, or even to Centrelink recipients who had notified Centrelink that they were holders of life insurance or endowment policies, that bonuses on such policies were in future to be less favourably treated. Had there been such notice at that time, he could have taken steps, such as selling, surrendering or extending one policy, so as to reduce the impact of the payment, on maturity, on his pension entitlements.

Varcoe relied on the High Court decision of *Perre v Apland Pty Ltd* [1999] HCA 36, 12 August 1999 A27/1998, as authority for the view that DFaCS owed a duty of care to holders of insurance policies to advise them of the changes to the treatment of insurance policy bonuses at a time when they could reduce the disadvantageous impact of such changes on them.

The Tribunal noted that the question whether the Commonwealth of Australia is subject to such a duty of care is not a matter the Tribunal could decide. The Tribunal must apply the Act and has no jurisdiction to award damages for a breach of a duty of care whether or not one exists.

The Department relied on a decision of *Truscott and Secretary, Department of Social Security* (unreported 24 October 1989). In that decision a different sort of investment was treated as income over 12 months. The Tribunal noted that the decision recognised that it was advisable that people who would be disadvantaged by changes in legislation or in policy be notified in advance of those changes. The Tribunal distinguished the decision in *Truscott* on three grounds (para. 32).

The Tribunal sought actuarial advice about whether the maturity value of $18,117.60 was in fact more than Varcoe would have received if he had simply banked those amounts in a savings bank each year for 43 years.

The Tribunal found that it was unfair, unjust and inequitable to treat all the return on Varcoe's investment over the period of 43 years, excluding only the actual premiums paid, as income received in one year for the following reasons:

- Varcoe was only in receipt of social security payments for three and a half of the 43 years during which his investments were maturing;
- the approach required by Centrelink of its officers makes no allowance for inflation; the $78.76 paid as a premium in 1956 would be worth much more than that in 'real money' terms today;
- Varcoe could have arranged for his policies to mature prior to 21 July 1997, had he had reasonable advance warning of the proposed change in the practice of applying s.1073 of the Act;
- there is a stark inequality in the treatment of lump sum superannuation payments and lump sum payments on maturity of age insurance policies;
- no reason has been advanced why those who took steps many years ago to make provision for their families or for their retirement by way of life/age insurance policy should be penalised for their saving when the policies mature at age 65. Had the money simply been banked in an interest bearing account, the accrued interest over the years 1956–1998 would have been treated as an asset for the assets test and subject to the deeming rules, but would not have been treated as income in the year 30 July 1999–30 July 2000;
- to treat all bonuses accrued from 1956 to 1999 as income received in 1999 gives 41 years of retrospective effect to a policy change which came in to operation in 1997.

(Reasons, para. 36)

The Tribunal decided to exercise the power in s.8(11)(d) of the Act to determine that part of the proceeds were an exempt lump sum. The Tribunal found on the basis of the actuary's advice that Varcoe's investments over the years would have realised a sum of $40,786, if no discount was given in respect of tax and risk costs. Thus he did not derive any profits.

The Tribunal noted that Varcoe in July 1999 had been in receipt of social security payments for three and a half years and that this may suggest that bonuses accumulated over three and a half years should be treated as income for 12 months from July 1999. But the Tribunal saw a further inequity in that.

> The bonuses accrued prior to 21 July 1997, at the time they accrued, had no effect on either current or future income test calculations. They were not assessed as income either during the term of the policy or on maturity. There are strict rules on when legislation is given a retrospective effect. It seems that an unadvertised change in policy should not lightly be given a retrospective effect. I consider that only bonuses accrued after 21 July 1997 should be treated as income under s.1073 so as to affect Mr Varcoe's entitlements after 31 July 1999.

(Reasons, para. 39)

The Tribunal determined that the whole return on maturity (the sum of $16,066.56), except the bonuses accrued from 21 July 1997 to 31 July 1999 was an exempt lump sum.

Formal decision

The Tribunal set aside the decision under review and in substitution determined under s.8(11)(d) of the *Social Security Act 1991* that the sum of $16,066.56 was an 'exempt lump sum', and that accordingly only the sum of $2051.04 was to be treated as income under s.1073(1) of the Act for the 12 months from 31 July 1999.

[M.A.N.]

Sole parent pension: shared care and financial circumstances

HOLMES and SECRETARY TO THE DFaCS and PASSMORE (No. 2000/735)

Decided: 9 November 2000 by G.Ettinger.

Background

Holmes applied for sole parent pension (SPP) in December 1997 and was rejected. This decision was before the Tribunal in October 1999. The Tribunal set aside the decision under review and found that Holmes was eligible for parenting payment single (PPS) from the next payment day, based on his 'necessitous financial circumstances'. That decision was appealed to the Federal Court.

In April 2000 the Court found that the Tribunal's:

> first (and perhaps only) task was to examine the question as to whether the rejection of the claim for benefit in December 1997 was the correct decision on the merits of the case. Unfortunately, it directed attention to quite a different issue on quite different material. Whilst there is some ability to look at subsequent events, this is only to see what light they throw on the actual question to be decided.

(Reasons, para. 3)

The Court also found there was no error of law in taking into account the financial circumstances of the respective parents in the granting of SPP to a person with a minority share of the care and control of the children.

The matter was remitted back to the Tribunal.

The issue

Whether Holmes, who shared care of their four dependent children with his former wife, Passmore, was eligible for SPP (as it then was), at the time of his claim in December 1997, and for the period to June 1999 (the relevant period).

The legislation

The relevant legislation is the *Social Security Act 1991* (the Act) as it applied in December 1997, in particular sections 5, 249, 250, 251. Section 251(1) provides that a young person can be an SPP child of only one person at a time. Subsection (2) states:

> If the Secretary is satisfied that, but for this section, a young person would be an SPP child of 2 or more persons, the Secretary is to:
>
> (a) make a written determination that the Secretary is satisfied that that is the case; and
>
> (b) specify in the determination the person whose SPP child the young person is to be; and
>
> (c) give each person a copy of the determination.

Factors to consider

The Tribunal adopted the Court's approach that:

> the appeal which was on foot to the Social Security Appeals Tribunal was preserved by the operation of s.8 of the *Acts Interpretation Act 1901* (Cth) as was the right to review the result of any such appeal in the Administrative Appeals Tribunal. If the appeal ultimately succeeded, then any decision would operate as and from December 1997.

(Reasons, para. 40).

The Tribunal had to look at all the circumstances of the shared care and surrounding factual matters to decide whether Holmes was qualified for SPP at the time of his application in December 1997. The Tribunal noted the Court's decision that there was no error in law in considering the financial circumstances of the parties when exercising the discretion under s.251.

The Court said:

> This is a discretion constrained only by the purposes of the Act and the provisions of it relating to Sole Parent Pensions (*O'Sullivan v Farrer* (1989) 168 CLR 210 at 216). The section does not oblige the decision maker to take any particular matter into account, and only prohibits taking into account those matters which are not relevant to the purposes of the Act. Within those very broad limits it is a matter for the exercise of discretion by the decision-maker which cannot be controlled by a court dealing with errors of law ... Thus it is that one decision-maker might prefer the apparent objectivity of deciding on the basis of hours of custody, another might also take into account qualitative factors and yet another might also take into account the financial circumstances of the parties. If there is any relevant government policy guidance, then appropriate regard should be paid to it.

(Reasons, para. 40)

The Department referred to the *Guide to Social Security Law* and submitted that where the ratio of care was 45:55, the Department was able to accept each person's level of care to be equal. Then the Department would take into account other circumstances including financial circumstances.

Care arrangements

When Holmes and Passmore separated they came to a shared care agreement in relation to their four children. The Tribunal accepted that the agreement consisted of a 40/60 arrangement in that Holmes had the children for eight nights out of 21 plus one further day. There were variations to this arrangement by agreement. Holmes spent additional time with his children outside of his normal residency time to do such things as take the boys to soccer and organise orthodontic treatment. Passmore also attended to events outside her strict times such as netball and Nippers. Major decisions as to the children's long-term care and control were reached jointly.

The Tribunal accepted Passmore's submission that anything Holmes did with the children outside of his residency weeks would be balanced by things she did outside hers and thus, during the relevant time, the 60/40 shared custody arrangement was accurate.

The Tribunal also accepted Passmore's submission that she was always available as the primary carer if Holmes wanted to change arrangements regarding the children's care, and that the formal arrangement was that she cared for the children 60% of the time during the relevant period. Passmore had the predominant caring responsibilities, both physically and financially.

Financial considerations

The Tribunal referred to *Guyder* (1998) 49 ALD 13 and *Lowe* (1999) 92 FCR 26 and noted that in contrast to these cases, where the care was found to be shared equally, in the present case it was agreed that the care of the children between Holmes and Passmore was shared on a 40/60 basis. The Tribunal was satisfied that this was so even when extra time spent with various children by each, for specific activities outside of the formal contact time, was taken into account. Therefore, the Tribunal found that Passmore spent more time and expense in connection with the care of the children than Holmes.

Nonetheless, the Tribunal did consider the financial situation of the parties at the relevant time in 1997/98. The Tribunal noted that at the time of the claim