

Assets test: value of loans and shares

BENTHAM and SECRETARY TO THE DFaCS
(No. 2001/1018)

Decided: 15 November 2001 by
M.D. Allen and C.M. Prime.

Background

Mr and Mrs Benthams' claims for age pension were rejected on the basis that their assets exceeded the allowable limit. Their assets included cash, shares in public companies and loans to Bentham Investments Pty Ltd and Gunita and Grouting Pty Ltd.

Findings

The first issue considered was the value of the loans made by the Benthams to the two companies. It was argued that it was unlikely that the loans would be repaid. The Tribunal considered s.1122 of the Social Security Act 1991 (the Act) which provides:

1122. If a person lends an amount after 27 October 1986, the value of the assets of the person for the purposes of this Act includes so much of that amount as remains unpaid but does not include any amount payable by way of interest under the loan.

The Tribunal said:

... the legislature has now stated unequivocally that loans are to be taken into account having regard to so much of the amount of the loan as remains unpaid and it is not permissible for the Secretary or this Tribunal upon review to enter into any calculations as to whether the loan is in fact repayable at its full book value.

In regard to the valuation of shares in the company Bentham Investments Pty Ltd, the Tribunal concluded that the only appropriate method of valuation was the net asset backing method. The Tribunal gave two reasons for the use of this method.

...in the Federal Court in *Repatriation Commission and Harrison* 78 FCR 442 at page 450 his Honour, Tamberlin J stated:

The respondents submit that the attribution of a nil value must be accepted as correct because if the shares were sold then on a winding up basis the price received for the shares would be cancelled by the assumed collection of the debts and their financial position would not be advanced.

However, section 41F(1) is concerned with the value of the shares and not with the ultimate financial effect which would result as a practical matter if the value of the shares were realised by the respondent.

Also, one must take into account that this is a matter concerning the value of assets for age pension purposes. In the case of shares

in a private company members are restricted in the manner they may dispose of their shares. The shares cannot be traded on an open market such as the stock exchange and on one argument they have no current market value.

The Tribunal also described the method of valuation as follows:

The net asset backing method can be said to represent what a person might expect to receive should the company be wound up, its debts paid and any surplus distributed amongst the members. The net asset backing of a private company share is arrived by dividing the net company assets figure by the number of shares issued which carry rights to distribution of the company's assets on wind up. Affecting the value of the shares in Bentham Investments Pty Ltd was the value of the company's principle asset, a block of land. The value of that particular piece of real estate was said by the applicants on 14 January 2000 to be \$650,000.

It was argued by Mr and Mrs Bentham that the valuation should take into account that if the land was sold then they would be liable for capital gains tax. The Tribunal found this to be a contingent liability and distinguished between the value of land and proceeds of sale in the hands of the vendors.

The Tribunal referred to *Pemberton and Repatriation Commission*, 12 AAR 53 which in turn referred to the decision of his Honour Stark J in *Elders Trustee and Executor Company Limited and Deputy Federal Commissioner of Taxation*, 51 CLR 694 where his Honour said at page 697:

It is the value of the property that must be assessed. The price it will fetch if sold in the open market is one test of value. The price that a purchaser will give for it. Brokerage would normally be reflected in this price in the case of bonds and shares sold on a stock exchange but the amount that is produced to the seller or that comes home to the seller after deducting the costs of realisation is not the value of the property but the result to him of its sale.

A final matter raised by Mr and Mrs Bentham was that the intent of the Social Security Act required that the law be applied beneficially.

The Tribunal noted:

We would only say that to apply the law beneficially does not mean that in a case where there is no ambiguity the plain words of the statute can be ignored or read so as to give what the Tribunal might think is an interpretation more consistent with the intent behind the Act.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Assets test: unrealisable asset

MAHER and SECRETARY TO THE DFaCS
(No. 2001/1041)

Decided: 6 December 2001 by
M.D. Allen.

Background

Mr and Mrs Maher claimed newstart mature age allowance and age pension respectively. These claims were rejected because of the application of the assets test.

Following the retrenchment of Mr Maher, he and his wife started a property development business. They borrowed funds which were secured over their residential property at Portview Place. A new building was constructed at 2 Murchison Street, Sylvania — this was the only activity of the property development company.

Mr and Mrs Maher left Australia for a period of time. During this time, both properties were tenanted. There was then a fire at Portview Place and this property was ultimately sold and the proceeds used to pay out the mortgages over Portview Place and Murchison Street.

Mr and Mrs Maher then loaned the company funds to enable it to pay its debts. The asset which prevented payment of benefits was this unsecured loan to the company. The value of the loan as stated in the company's most current financial statements was \$574,589.

The issue

The issues in this appeal were:

- what was the value of the loan; and
- could the loan be treated as an unrealisable asset for the purposes of the hardship provisions in s.1129 of the *Social Security Act 1991* (the Act)?

The law

The Tribunal found that under s.1122 of the Act the value of the loan was the amount referred to in the company's most recent financial statements. The Tribunal then went on to consider the hardship provisions contained in s.1129.

One of the criteria of this section is that 'the person or the person's partner has an unrealisable asset'.

The Tribunal referred to s.11(13) as follows:

For the purposes of the application of this Act to a social security pension ... an asset of the person is also an unrealisable asset if: (a) the person could not reasonably be ex-

pected 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 Department conceded that it would be unreasonable to expect the loan to be used as security for borrowing. However, it was proposed that Mr and Mrs Maher could realise the only asset of the company, that is, the home in which they had been residing for some years and had been treating as their family home.

The Tribunal then considered whether Mr and Mrs Maher could be expected to sell the family home. The Tribunal found that this was a 'reasonably broad test' and referred to the case of *Repatriation Commission v Hall* 15 ALD 84, where the Full Court of the Federal Court said:

In determining, for the purposes of the assets test, whether a person could reasonably be expected to sell or realise a property, it was not appropriate to confine consideration to the personal financial circumstances of the pensioner or claimant for a

pension. All matters which bear upon the reasonableness of a decision to sell or realise a property should be taken into account. These include personal and social factors as well as financial and economic factors and the public or community interest as well as the interests of the claimant.

And at page 86:

It was, in our opinion, open to the Tribunal to find 'severe financial hardship' on the evidence before it. We do not read this expression as requiring proof of destitution.

Mrs Maher had given evidence concerning her state of health, their severe and longstanding financial situation and the impact that selling the family home would have on her and her husband. The Tribunal also noted that they had received 'particularly bad advice' in relation to the sale of Portview Place.

Considering all the circumstances, the Tribunal concluded that it was appropriate to apply s.1129 and to pay age pension to Mrs Maher. (The same provision could not be applied to Mr Maher because of the effect of s.1131.)

The Tribunal also considered whether subsection 2 allowed the pension to be backdated.

1129.(2) A decision under s.(1) takes effect:

- (a) on the day on which the request under paragraph (1)(d) was lodged with the Department; or
- (b) if the Secretary so decides in the special circumstances of the case — on a day not more than 6 months before the day referred to in paragraph (a).

The Tribunal found that there were special circumstances in this case and therefore age pension could be backdated to 22 August 2000.

Formal decision

The AAT affirmed the decision in the case of Mr Maher and in the case of Mrs Maher the decision under review was set aside and the Tribunal substituted its decision that she was entitled to the payment of age pension, as and from 22 August 2000.

[R.P.]

Federal Court

Actual means test: reduction in liquid assets of partnership

SECRETARY TO THE DFACS v GREEN
(Federal Court of Australia)

Decided: 25 January 2002 by Kiefel J.

The Secretary to the DFACS appealed against the decision of the AAT that certain sums received by Green's parents from two partnerships should be excluded from the actual means test.

The facts

Green lodged a claim for youth allowance on 28 April 1999. Included with his claim were forms completed by his parents in relation to the actual means test. In a document titled 'Market Value of Assets' two partnerships were identified — Townsville Auto Parts and Banks Bros Properties. Both Mr and Mrs Green were partners of Townsville and Mrs Green only was a partner of Banks Bros. In the Cash Flow Statement it was recorded that \$8000 (later amended to \$743) was paid from the partnership interest in Bank Bros and \$12,106 from the partnership interest in Townsville.

Centrelink included these amounts in the family's actual means, as did the SSAT. The AAT decided that the actual means of the family should be reduced by the above amounts.

The law

Section 1067G-G1 of the *Social Security Act 1991* (the Act) sets out the method for determining the effect of the actual means test on a person's rate of payment. In particular s.1067G-G3 provides that the actual means of a family are to be worked out according to the Regulations, which set out the amounts to be included and excluded. Regulation 14 provides that the actual means of a family for a tax year is the total spending and savings in that year. Regulation 15 specifies the spendings and savings that are to be excluded and includes spending or savings from any liquidation of assets (reg.15(2)(h)).

The AAT decision

The AAT found that the liquid assets of the Townsville partnership were reduced by \$12,106 which was used by the family for living expenses, and the liquid assets of Banks Bros were similarly reduced. The AAT:

appears to have accepted that the amounts from the two partnerships were assets of the parents which were realised and thereby reduced the assets of the partnership.

(Reasons, para. 11)

The Federal Court

The Secretary argued that these amounts should be regarded as business related. The regulations are concerned with personal expenditure and savings and regulation 15(2)(h) should be read in this light. To determine this question it was first necessary for Keifel J to consider the status of the money in the partnerships' accounts. The cash flow statement was of little assistance. Green's father in a letter of May 1999 had described the moneys as coming from a reduction in partnership capital and current accounts. The Court referred to the description of the capital of a partnership outlined in a partnership text as *the aggregate of the contributions made by the partners*. Partners are entitled to a return of their capital contribution on the dissolution of the partnership so a partner's equity in a partnership can be viewed as an asset capable of being realised at a future date.

Green's father also referred to moneys coming from current accounts.