Assets test: loans as an unrealisable asset

JURIC-KACUNIC and SECRETARY TO THE DFaCS (No. 2003/15)

Decided: 10 January 2003 by N. Bell.

Background

Juric-Kacunic claimed disability support pension. His claim was rejected because of the application of the assets test.

In May 1999 he loaned Vaupotic $304,500. The loan had not been repaid and Juric-Kacunic claimed that Vaupotic was broke and consequently he was not pursuing legal action.

The Centrelink delegate included the loan amount as an assessable asset and rejected his claim for disability support pension on this basis. This decision was affirmed by the Social Security Appeals Tribunal.

The issue

The key issue in this appeal was whether the loan could 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 evidence

Juric-Kacunic told the Tribunal that he had spoken to a solicitor about getting his money back. He was told that recovery of a loan could be difficult in the absence of a written loan agreement. The solicitor said that advice from a barrister in relation to the viability of the claim should be obtained before any further action. The estimated cost of advice was approximately $2500. The estimated cost of proceedings was $10,000.

Juric-Kacunic said that he had sufficient funds to obtain the advice but because there was 'no guarantee of winning' he took no further steps to investigate his legal position. He also said that he had recently given $37,000 to his sister-in-law in Croatia so she could purchase a vehicle to transport her mother to doctor's appointments.

Juric-Kacunic said that his sole funds were now $1000. His argument to the Tribunal was that the loan could not be recovered.

The law

The Tribunal found that the loan was clearly an asset as defined in ss.9 and 11 of the Act.

The Tribunal then went on to consider the hardship provisions contained in s.1129.

The Tribunal found that Juric-Kacunic had taken no steps beyond some initial advice to investigate the recoverability of the loan. In light of the fact that he had given a significant amount of his savings to his sister-in-law but had chosen not to pay the relatively small cost of obtaining advice concerning the likelihood of success, Juric-Kacunic had not pursued his legal rights in relation to the loan.

The Tribunal referred to paragraph 4.6.5.110 of the 'Guide to the Social Security Law' which deals with the assessment of failed financial investments-loans.

> **4.6.5.110 Assessing Failed Financial Investments-Loans**
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> ...
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> **How to assess a failed loan**
>
> If a person lends money, the asset value of the loan is the balance outstanding. This applies whether or not the loan is performing to the terms of the loan agreement. The asset value does not include any interest payable on the loan.
>
> Loans may be secured against assets such as property. The value of the asset the loan is secured against does NOT affect the asset value of the loan.
>
> There are 2 areas where the Act has special rules to help people who have a failed loan, where for social security purposes the loan still exists:
>
> the hardship rules allow the value of the loan to be disregarded, and
>
> the loan can be exempt from deeming.
>
> There are special requirements to be met before these rules can be applied.
>
> **When a loan no longer exists**
>
> Legally, a loan ceases to exist at the time it is repaid, or when the debtor is formally released from the loan. A debtor is released from a loan contract under a bankruptcy or where the loan is forgiven.
>
> For social security purposes, there are some other situations where a loan is also treated as no longer existing. Loans that no longer exist are sometimes referred to as irrecoverable loans. Although there is no longer a loan, there may be another type of asset such as a debt.
>
> A loan no longer exists for social security purposes when:
>
> it is repaid, OR
>
> the borrower is bankrupt, OR
>
> the borrower enters a debt agreement under Part 9 or 10 of the Bankruptcy Act 1966 (Cwlth), OR
>
> the lender forgives the loan usually via a deed or gift of release (see explanation 1), OR
>
> the lender takes a loan contract to court to have it enforced and obtains a court order to allow collection of the money (see explanation 2), OR
>
> the lender takes a loan contract to court to have it enforced and is unsuccessful in court (see explanation 3), OR
>
> the lender seizes the asset against which the loan is secured (see explanation 4), OR
>
> property against which the loan is secured is sold and the proceeds used to repay some or all of the loan, OR
>
> the company that borrowed the money is wound up (see exception), OR
>
> the period specified in the Statute of Limitations has elapsed since the date of the loan, or last repayment, or demand to repay (whichever is the later) so the loan is not legally able to be recovered (see explanation 5), OR
>
> Explanation 1: Deprivation rules apply where a loan is forgiven
>
> Explanation 2: The debtor is required to pay because of the court order rather than the loan contract. The amount owing is now a debt.
>
> Explanation 3: There is no longer an amount owing.
>
> Explanation 4: The property is now an asset of the lender.
>
> Exception: If the lender has a right to enforce the loan contract against the directors of the company on a personal basis the loan will still exist.
>
> Explanation 5: The deprivation rules MAY apply if the lender could have taken action before the period specified in the Statute of Limitations but chose not to do so.

The Tribunal found that the guidelines relating to situations where a loan no longer exists did not apply in this case as Juric-Kacunic had not taken legal action to recover the debt. The Tribunal also concluded that there was no evidence suggesting fraud or that the loan amounted to a financial investment which had failed.

Formal decision

The AAT affirmed the decision under review.

[R.P.]