The law

Section 17(2) of the *Social Security Act 1991* defines compensation to include a payment in settlement of a claim for damages, whether in the form of a lump sum or series of payments, where the payment is made wholly or partly in respect of lost earnings or lost capacity to earn. Section 17(3) defines the compensation part of a lump sum as 50% of the lump sum payment.

Section 1171 provides that if a person receives two or more lump sums in relation to the same event giving rise to entitlement to compensation, the person is taken to receive one lump sum. Section 1184K permits some or all of a compensation payment to be treated as not having been made in 'special circumstances'.

Discussion

The AAT observed that 'lump sum' was not defined in the Act and commented:

> ... I was not, at first, attracted to the submission that the term 'lump sum compensation payment' connoted the total sum paid under the Award pursuant to the settlement ... Including agreed amounts for costs in lump sum compensation payments will have some unfortunate consequences. If a claim is settled at an early stage the costs will be small and the impact on the lump sum preclusion period slight. However, if the respondent resists the same claim until the last minute so that substantial costs are incurred by the applicant and those costs are agreed to and agreed to be paid then, even though the actual amount of compensation is identical, the preclusion period will be longer ... I was candidly informed on behalf of the Department that if a settlement is reached inclusive of costs, whether those costs are separately identified or not, the practice has been for the total figure to be treated as the lump sum compensation payment. However, if a matter is settled on the basis that costs are to be paid subsequently, after being assessed, then the preclusion period is calculated without reference to the costs because to do so would result in hardship because the lump sum cannot be released until the preclusion period is calculated. This is a most capricious result ...

(Reasons, para. 15)

The AAT considered relevant authorities, including *Secretary, Department of Social Security v Banks* (1990) 23 FCR 416, *Secretary, Department of Social Security v Hulls* (1991) 22 ALD 570, and *Secretary, Department of Social Security v Cunneen* (1997) 78 FCR 576. The AAT stated:

> Two things should be said about the observations of Foster J and O'Loughlin J following the remarks of von Doussa J. First, it is apparent that the underlying object of the legislation was to neutralise the advantage of obscuring the economic loss components of workers compensation settlements. That obscuring effect could be achieved by loading provisions for costs as well as by loading provisions for non-economic loss. The latter would be easier to achieve than the former ... Secondly, the whole amount of the payment is to be included not because it is characterised as compensation but because it is paid in a lump sum ...

(Reasons, para. 18)

The AAT observed that the question was not whether a component of a payment was or was not compensation but whether the component was to be treated as part of the payment. The AAT observed that in *Banks* and *Cunneen*, the court was looking at what was 'a lump sum' rather than what was 'compensation'. The AAT stated:

> I have set out above the observations made by von Doussa J, agreed in by Foster J, as to what is 'a lump sum'. I must say that when I first came to this matter I had in mind the Oxford English Dictionary meaning of lump sum, namely 'a sum which covers or includes a number of items' where the noun 'lump' has its primary sense of 'a compact mass of no particular shape; a shapeless piece or mass', the essence of the lump sum being a total amount known to be made up of components where those components are not identified. If this is the meaning of 'lump sum' in the legislation then there was no lump sum in the present case ...

(Reasons, para. 20)

The AAT, although expressing concern about the correctness of the case law, recognised that the meaning given to the phrase 'lump sum' accorded with the purpose of the legislation. The AAT, in reference to the authorities, concluded that 'I am not prepared to depart from that construction and I prefer in comity with them to follow it' (Reasons, para. 22).

The AAT further concluded that in accordance with s.1171 of the Act, there was only one lump sum which included legal costs.

The AAT went on to consider s.1184K:

> I have referred above to the anomaly which arises from the way in which the respondent treats settlements which provide for costs to be subsequently assessed. It excludes the costs from the calculation of the lump sum preclusion period. It does this because of the hardship that would result from delay. In adopting this approach the respondent must be exercising a discretion relating to the application of the Act. It is presumably the discretion conferred by s.1184K. If hardship is a basis for the exercise of such a discretion it seems to me that unfairness must also be a basis for the exercise of that discretion. Section 1184K is not confined to hardship. Moreover, being treated unequally can be a hardship. Where the costs agreed in a settlement are a genuine assessment of those costs it seems to me that there is an unfairness arising out of the different way in which applicants are treated. I do not see any reason why in a case in which an agreed sum of costs is a genuine assessment of those costs the applicant should not be treated in the same way as an applicant who is a party to a settlement where costs are to be subsequently agreed or assessed ...

The AAT commented that it thought it appropriate that the respondent 'should reconsider the way in which it makes the preclusion period calculation and to do so taking into account the unfairness that seems to me to result ...' (Reasons, para. 28).

Formal decision

The AAT remitted the matter to the Department for reconsideration in accordance with the recommendation that consideration be given to whether, by parity with its practice not to include legal costs where such costs are not agreed at settlement, a decision ought be made in the present and all similar cases whether costs should be taken into account in calculating the lump sum preclusion period.

[S.L.]

Age pension assets test: land valuation; whether part of home leased to a tenant is part of the 'principal home'

DEMOVICH and SECRETARY TO THE DFaCS
(No. 2004/647)

Decided: 24 June 2004 by R. Purvis.

Background

Demovich was in receipt of age pension (AP) and was the owner of a property at Guilford and also of his home at Summer Hill, the rear portion of which he occasionally rented out to boarders. This rear portion was fully self-contained, though accessible from the main part of the house via an internal door which could be bolted from either side but was rarely locked. The rear portion had a separate electricity meter and the tenant paid these accounts, in addition to rent.

The Australian Valuation Office (AVO) in October 2002 valued the Guilford property at $310,000 and the rear portion of the Summer hill property at $95,000 (later in the same month adjusted to $100,000). When the mortgage

repayments due on the Guilford property ($64,479) and his financial assets were taken into account, these valuations meant Demovich's total assets exceeded the allowable limit at which the AP was payable at that time ($290,500), and so payment of the AP was cancelled from October 2002.

Further AVO valuations (in March and May 2003) confirmed the valuation of the Guilford property at $310,000, being $275,000 for the land itself and $35,000 for improvements. The NSW Valuer-General in October 2002 had valued the land at Guilford at $184,000.

The issues

There were two issues for consideration:

- the appropriate valuation of the Guilford property
- whether the tenanted portion of the Summer Hill should be included as part of Demovich's principal residence and so excluded from consideration as an asset for pension purposes.

The law

The *Social Security Act 1991* ('the Act') requires that in determining the value of a person's assets for pension purposes, the value of the person's principal home should be disregarded. In particular, s.1118(1) of the Act provides:

> **1118.(1)** In calculating the value of a person's assets for the purposes of this Act ...disregard the following:
>
> (a) if the person is not a member of a couple — the value of any right or interest of the person in the person's principal home that:
>
> (i) is a right or interest that gives the person reasonable security of tenure in the home ...

The Term 'principal home' is itself defined in s.11(5) of the Act as follows:

> 11.(5) A reference in this Act to the principal home of a person includes a reference to:
>
> (a) if the principal home is a dwelling-house — the private land adjacent to the dwelling-house to the extent that the private land, together with the area of the ground floor of the dwelling-house, does not exceed 2 hectares; or
>
> (b) if the principal home is a flat or home unit — a garage or storeroom that is used primarily for private or domestic purposes in association with the flat or home unit.

Thus, in this matter, in relation to the Summer Hill property, the question was whether the rented portion of that home was to be considered as part of Demovich's principal home (and so, excluded from his overall assets) or counted as an asset for pension purposes.

Discussion

Evidence was given to the Tribunal that in reaching its valuations the AVO attempted to 'ascertain the market value of the property, that is, the price the property would fetch in an arm's length transaction' (Reasons, para. 14). It was thus a 'market-value' estimate completed specifically for the purpose of asset valuation under the Act. On the other hand, the NSW Valuer-General valuation was based on a variety of considerations, including industry knowledge and local sales, but was not necessarily the price which would be obtained upon a sale. The Tribunal concluded that the best identifiable reason for differences in the two valuations was the purpose for which each was undertaken, and that the AVO valuation — as specifically completed for the purposes of the Act — was to be preferred for pension purposes.

The further issue for consideration was whether the rear rented portion of Demovich's Summer Hill home was to be considered as an assessable asset, or as part of his 'principal home', the value of which is excluded from asset calculations. The Tribunal noted the Department Guidelines in relation to the meaning of 'Principal Home', and distinguished the situation with the Summer Hill property from that in *Ovari v Secretary, Department of Employment, Education, Training and Youth Affairs* [1999] FCA 416 where there had been no clear delineation, boundary or section of the property in question which was used exclusively for business purposes. In *Ovari* it had been concluded that '... once a property has been found to be the principal home of the relevant person, then no right or interest which that person has is to be included in that person's assets for the purposes of the assets test. It is not to the point that business activities may be conducted from the home.' However, in contrast to *Ovari,* the Tribunal noted that in determining whether all or part of a home is the 'principal home' other factors to be considered include whether the property is occupied or intended to be occupied as a residence, whether a clearly identifiable portion of the property is used solely for business purposes, and whether a portion of the property has been separately let.

Noting these factors, the Tribunal concluded that it was not the indivisibility of the property title (as was the case with the Summer Hill house) that was the key consideration, but rather the use to which the property was put. The correct process involved '... identifying what part of the Applicant's property ... is indeed his or her principal home, and then a discounting of that part from an accounting of assets' (Reasons, para. 42). In Demovich's situation, that meant the value of the rear tenanted portion of the Summer Hill property was to be included in his assets, so taking his total assets above the allowable asset limit for pension purposes.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]