

What was clear, however, was that the Tribunal was heavily influenced by its view that Preston had available to her two options, either of which was capable of relieving her financial difficulties and which therefore would protect her from 'severe financial hardship' should the FTB debt not be waived. The options to which the Tribunal referred were taking in a boarder or selling her home and moving to cheaper accommodation. It was noted, however, that the Tribunal did not refer to any evidence on which it based this finding or describe the process of reasoning by which it arrived at this conclusion.

Although there was evidence before the AAT that Preston had clear legal title to a three-bedroom house, the possibility that others had an interest could not be excluded. There was no evidence before the AAT as to the availability of cheaper accommodation. As a result the Court considered that the AAT had concluded that these options to alleviate Preston's financial position were open, without any evidence or other material to justify that conclusion. In doing so the Tribunal made an error of law that vitiated its finding of that material fact.

#### Failure to give adequate reasons

Alternately the AAT's reasons in respect of the options it found were available to Preston were criticised for failing to set out the basis of its finding and its reasoning processes. In particular the AAT did not explain the chain of reasoning that led it to conclude that the options would alleviate the financial position of Preston, so payment of the debt would not cause severe financial hardship.

It was submitted for Preston that it was impossible to discern the reasoning process by which the Tribunal reached the conclusion that Preston would not suffer severe financial hardship. The AAT found that Preston's income was only sufficient to cover her 'essential' living costs but was not sufficient to cover house or household equipment repairs nor would it extend to the repayment of any of her debts. It was argued that the Tribunal did not explain what it had included in essential living costs. The Tribunal noted Preston's evidence that she could not afford to pay for heating in winter and often could not afford to buy food but did not comment on that evidence or explain how this position was consistent with its ultimate conclusion.

The Court referred to the decision in *Brackenreg v Comcare Australia* (1995) 56 FCR 335 where Sheppard J stated:

The findings made in respect of [the applicant's] activities obviously played an important part in the reasoning process of the Tribunal. In my opinion the Tribunal was obliged to indicate quite clearly how it was that it made those findings notwithstanding the evidence given by [the applicant] about her difficulties ... An informed reader might be forgiven for thinking that the Tribunal had overlooked the detail of the evidence and in this way misapplied it or misunderstood it. Then there needs to be brought into account the other obligation, that is the obligation to refer to the evidence upon which material findings of fact were based.

Thus the Court concluded that the AAT's finding that options existed whereby Preston might alleviate her financial position was a material finding made by the Tribunal and carried with it an obligation to refer to the evidence on which that finding was based. The Tribunal's conclusion that Preston could pay the FBT debt without severe financial hardship was based on that finding but the Tribunal did not explain the reasoning processes by which it came to that conclusion. The Tribunal did not explain how it was treating key aspects of Preston's evidence. Therefore the Tribunal's reasons did not comply with the requirements of s.43(2B) of the *AAT Act* and should be set aside.

#### Formal decision

The decision of the AAT was set aside and the matter remitted to the AAT for reconsideration in accordance with the Court's reasons. No order was made as to costs.

[A.T.]

## Age pension assets test: meaning of 'home owner'; whether effective gift of shares

**DART v SECRETARY TO THE DFACS**

(Federal Magistrates Court of Australia)

**Decided:** 6 August 2004

Dart lodged an appeal against a decision of the AAT made on 13 December 2002, which affirmed the decision to refuse his application for an age pension on the basis that he did not satisfy the assets test provided for in the *Social Security Act 1991* ('the Act').

#### Background

Dart applied for an age pension on 18 July 2001, and was refused on the basis of an assessment of his assets at the time of application, being \$299,502 as follows:

Bank of Queensland savings	\$1,131.00
Trumps Pty Ltd shares	\$7.00
Fastcombe Pty Ltd shares	\$7.00
Loan to Trumps Pty Ltd	\$44,171.00
Shares in Sobrante Pty Ltd	\$105,562.00
Gifts of Shares in Sobrante P/L	\$148,624.00

He was determined to be a home owner for the purposes of the Act. As a result, at the relevant time and pursuant to s.1064 of the Act, a person without a partner was permitted to own up to \$141,000 in assets and receive a full pension. If he was not a home owner, he would be entitled to receive the full age pension provided his assets did not exceed \$242,000. Part pension entitlements arose for asset levels above these figures, cutting out at \$277,000 (home owner) and \$378,000 (non home owner).

Dart resided in a home at Corinda registered in the name of Fastcombe Pty Ltd as Trustee for the Dart Security Trust. Dart was not a beneficiary under the Trust, but was one of three directors and the majority shareholder in Fastcombe. On that basis the AAT found he controlled the Trust and this was conceded by Dart. The Trust held a number of property assets purchased over previous years. Sobrante Pty Ltd was a company which received distributions of profit from the Dart Security Trust.

Dart had been involved in the business of selling edible nuts and dried fruit, with the trading operations being conducted by the Trumps Trust. Dart was not a beneficiary of the Trumps Trust, but he was one of three directors and the major shareholder in Trumps Pty Ltd, the Trustee of that Trust.

Dart argued, among other things, that the AAT had erred in finding that he was a home owner for the purposes of the Act; in finding that he had not taken all effective steps to effect the gift of shares to his children by May 1996; and in failing to determine the proper basis on which the shares in Sobrante Pty Ltd should be valued.

#### Was Dart a home owner?

Section 1118 of the Act says that the family home may be disregarded for the purposes of the assets test:

**1118(1)** in calculating the value of a person's assets for the purpose of this Act ... disregard the following:

a) if a 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 ...

'Home Owner' is defined in s.11(4) of the Act in almost identical terms. Section 11(4) provides:

For the purposes of this Act:

- a) a person who is not a member of a couple is a home owner if:
- i) the person has a right or interest in the principal home; and
- ii) the person's right or interest in the home gives the person reasonable security of tenure in the home ...

Subsection 11(8) of the Act creates a presumption which may be rebutted, that a person with a right or interest in the principal home has a reasonable security of tenure. That section provides:

If a person has a right or interest in the person's principal home, the person is taken to have a right or interest that gives the person reasonable security of tenure in the home unless the secretary is satisfied that the right does not give the person reasonable security in the home.

The AAT found that Dart had a lease, as opposed to a mere licence and that he controlled the landlord company. While he was under an obligation to act in the best interests of the landlord company and that company was itself under an obligation to act in the interests of the beneficiaries, it was unlikely the occupancy would ever be under threat. As a result the AAT was satisfied that Dart had a right or interest in the home owned by Fastcombe which gave him reasonable security of tenure.

Dart argued that he was not a beneficiary of Dart Security Trust and paid a commercial rent. He had no written lease and there was 'a genuine commercial letting at arm's length'. This point was emphasised because the SSAT in its reasons stated:

Under s.1118(1) of the Act, if a person has a right or interest in accommodation that provides reasonable security of tenure, **other than a genuine letting at arm's length**, then the occupant is a home owner for Centrelink assets test purposes [emphasis added].

The Court pointed out that:

... section 1118(1) of the Act does not include the words described in the SSAT decision. That is not the test posed by the legislation. The proper test is the one identified and analysed by the Member in the AAT decision. It is clear that the legislative definition must be applied to the facts and circumstances of every particular case.

Clearly if the applicant for a pension was the registered proprietor of the home, there

would be no dispute the person 'was a home owner for the purposes of the Act.' Similarly if an applicant has a lease or tenancy reduced to writing with a landlord who has no connection whatsoever with the tenant, it would be easy to discern that the applicant was not a home owner. This person who has the benefit of a tenancy or lease does not, have the type of 'reasonable security of tenure' akin to home ownership.

Between those obvious parameters lies a range of fact situations some of which are possibly designed to escape the obvious purpose of the assets test so far as it relates to determining whether the applicant in question is a home owner or not.

The definition of a 'home owner' for the purposes of the Act does not require in my view, a strict identification of the type of legal or equitable interest or right. It is a definition to be used to classify applicants into two distinct groups — home owners or non home owners. Understandably, to enable a home owner and a non home owner to receive the same rate of full pension, the non home owner is entitled to have greater assets. No enquiry as to the value of a person's home is undertaken.

Accordingly, the definition is directed to ascertaining if a person has the benefit of a right or interest in a home which provides reasonable security of tenure — not actual ownership. For example, while the appellant says he is paying an agreed monthly rental, there is no apparent legal obligation enforceable on him to do so — save for the Trustees' obligation to properly manage the assets of the Trust. Critically the Member found it is unlikely the applicant's occupancy would ever be under threat. Such a finding was open to the learned Member ... where the applicant found the home; has resided in it exclusively since acquisition; and controls the Trustee of Dart Security Trust which owns the property, I am satisfied that was open to the AAT to find the Appellant has a right or interest in the property giving him reasonable security of tenure.

(Reasons, paras 20-25)

#### Date of gifting of shares

At the time of the application, Dart had perfected gifts of shares in Sobrante Pty Ltd to his children. The issue was whether the gift had been completed in June 1997 when share transfers and Deeds of Gift were executed. The date was relevant as s.1124A of the Act provides that assets disposed of in the five years preceding the application must be included in the value of the person's assets. Dart argued that the gift of shares to his children took effect at the time he announced his intention in writing to make a gift in May 1996, although the formal paperwork was delayed until June 1997 because of errors by his accountants.

The AAT had referred to the High Court decision in *Corin v Patton* (1990) 169 CLR 540, and s.200 of the *Property Law Act 1974* (Qld), and said that:

Whether one applies the reasoning in CORIN (SSAT'S approach) or s.200 of the Property Law Act, the result is the same in this case. Mr Dart did not execute the transfers until 24 June 1997. The execution of the documents was an essential task that no one else could complete on his behalf. It follows the gift did not take effect until 24 June 1997 when he did the remaining thing that only he could do.

The Court concurred with this approach.

#### Value of shares

The evidence before the AAT was that as at 30 June 1996, the Balance Sheet for Sobrante Pty Ltd revealed net assets of \$205,787.57. There were 70 ordinary shares (with no voting rights) and 20 'Z' class shares (voting only — no dividend rights). For the purpose of assessing the value of the shares 'gifted' to the children in June 1997 a share value of \$2286.52 was determined, being the net asset backing of the Company divided by 90. On this basis, the 'gift' of 65 shares in June 1997 was calculated to amount to \$148,624.35.

Dart contested this assessment on the basis that the voting shares had less value than the non-voting, but dividend earning shares. The AAT said:

There are important differences between the shares given to Mr Dart's children and those held by Mr Dart. Those differences suggest the different classes of share will be valued differently. Mr Dart says the 'Z' class shares only have a nominal value, but that is not true. Those shares give Mr Dart control of the company, and control is valuable.

The Court concluded that these findings were open to the Tribunal on the evidence available to it. It considered that Dart's 20 'Z' class shares at the time of his application for a pension could have been valued in the same manner as the ordinary shares based on the AAT's findings regarding parity of value between all classes of shares.

#### Formal decision

None of the grounds of appeal were made out. It followed that at the relevant date, the assets of Dart exceeded those permitted to be entitled to receive a full age pension. The appeal was dismissed.

[A.T.]