

one source of income to be off set against the yield from other sources. In truth, a 'negative yield' is no more than a demonstration of the lack of a source of income. The loss sustained by the failure of that source to provide an excess of income over the expenditure incurred in that activity has no relevance to any other source of income.

(Reasons, pp. 351-2)

The Tribunal accepted this authority and concluded that the losses could not be offset against the profit from the other properties. The Tribunal concluded that the losses would be treated as nil income for the purpose of the income test.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Income test and life insurance bonus

SECRETARY TO THE DFaCS and BENTON
(No. 2004/942)

Decided: 10 September 2004 by
A.R. Horton.

Background

Benton took out an AMP endowment policy in 1985. She paid approximately \$8000 in premiums. The policy matured in September 2002 and she received approximately \$13,000.

Centrelink decided that the difference (approximately \$5000) should be treated as assessable income over a period of 12 months from when the policy matured.

Benton appealed the decision to the SSAT which set aside the decision. The SSAT decided that the difference between the maturity payment and premiums paid by Benton before 27 July 1997 should not be treated as income; however the bonuses that accrued after this date should be taken into account in assessing income.

Departmental policy changed in July 1997. Before this date, bonuses derived from insurance policies were not assessed as income. After this date policy was changed to state that the difference between the maturity payment and the purchase price paid by the investor should be assessed as income for 12 months.

Legislation

The relevant sections of the *Social Security Act 1991* considered by the Tribunal were s.8 and s.1073:

8. **income**, in relation to a person, means:
- an income amount earned, derived or received by the person for the person's own use or benefit; or
 - a periodical payment by way of gift or allowance; or
 - a periodical benefit by way of gift or allowance;

but does not include an amount that is excluded under subsection (4), (5) or (8);

...

income amount means:

- valuable consideration; or
- personal earnings; or
- moneys; or
- profits;

(whether of a capital nature or not);

...

(11) An amount received by a person is an exempt lump sum if:

- the amount is not a periodic amount (within the meaning of subsection 10(1A)); and
- the amount is not a leave payment within the meaning of points 1067G-H20, 1067L-D16 and 1068-G7AR; and
- the amount is not income from remunerative work undertaken by the person; and
- 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.

1073(1). Subject to points 1067G-H5 to 1067G-H20 (inclusive), 1067L-D4 to 1067L-D16 (inclusive), 1068-G7AA to 1068-G7AR (inclusive), 1068A-E2 to 1068A-E12 (inclusive) and 1068B-D7 to 1068B-D18 (inclusive), if a person receives, whether before or after the commencement of this section, an amount that:

- is not income within the meaning of Division 1B or 1C of this Part; and
- is not:
 - income in the form of periodic payments; or
 - ordinary income from remunerative work undertaken by the person; or
 - an exempt lump sum.

The person is, for the purposes of this Act, 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.

Submissions

The Department argued that the bonuses earned by Benton were income as they were moneys received by her in September 2002. They further argued that the bonuses did not fall under the 'exempt lump sum' definition as they did not conform to the amounts referred to in s.8(11)(a).

It was argued on behalf of Benton that the approach taken in the case of *Varcoe and Secretary, Department of Family and Community Services* [2000] AATA 1002 should be adopted.

It was argued that the approach of the SSAT was correct in using this case as authority that the amounts derived prior to policy change in July 1997 should be treated as an exempt lump sum.

It was submitted that the Department's narrow interpretation of s.8(11) was unfounded and that s.15AD(a) of the *Acts Interpretation Act 1901* was authority for the proposition that where an Act includes an example it should not be taken to be exhaustive.

It was also argued that to treat the return on Benton's investment over a period of seven years as income in one year was unfair and inequitable.

Findings

The Tribunal considered a number of cases which dealt with similar issues.

The Tribunal found that Benton's circumstances differed from the circumstances in these previous cases in that her benefit commenced in 1992 and she had restricted her employment in order to care for her husband. Consequently her ability to maximise superannuation in later life was limited.

The Tribunal found that s.8(11) was specific and that all parts of the subsection must be met.

The Department had argued that the bonuses received by Benton were not similar to the examples outlined in the footnote to this subsection. It was therefore argued that the amount was not an 'unexpected and not anticipated amount' as that term was used in the case of *Davies and Secretary, Department of Family and Community Services* [2002] AATA 904.

The Tribunal accepted that the examples referred to in the footnote resulted from policy considerations. However, it decided that, in principle, the bonus payments met the criteria under s.8(11) as the payment was not a periodic amount, a leave payment, or income from remunerative work.

The Tribunal therefore found that the amount of bonus should be treated as an exempt lump sum prior to July 1997.

The Tribunal then considered the position after this date. It found that Benton was not aware of the change in policy. If she had been, she may have had the opportunity to review her financial situation. However, her awareness of the policy was not relevant and she was bound by this policy. Consequently the amount of bonus which accrued after July 1997 was to be treated as income under s.1073.

The formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Age pension: assets; constructive trust

BONNICI and SECRETARY TO THE DFaCS
(No. 2004/658)

Decided: 28 May 2004 by M.Allen.

Background

Bonnici's husband died in 1966 intestate. Bonnici was appointed administrator of the estate and under the then intestacy rules, the estate was apportioned as one-third to Bonnici and two-thirds to Bonnici's three children. At the time of his death, Bonnici's husband had a number of other properties which were ultimately sold and the proceeds pooled to purchase the property at Therry Street. The evidence of Bonnici's son was that he contributed some of his own funds to the renovations of that property.

On 31 August 1999, Bonnici vacated her residence at Therry Street to enter a Nursing Home. In August 2001, she transferred to a new Home. At all relevant times, she held as sole proprietor in fee simple an unencumbered title to the property at Therry Street. On 26 September 2002, Bonnici's age pension was cancelled on the grounds that the Therry Street property was not regarded as an asset for a period of two years from 31 August 1999, but thereafter became an assessable asset for pension purposes. Bonnici did not dispute that the Therry Street property was valued at \$550,000.

The issue

The AAT needed to determine whether the value of Bonnici's assets was to include the full value of the Therry Street property, or a lesser proportion on the basis that a trust or constructive trust existed.

The law

Section 1064 of the *Social Security Act 1991* ('the Act') provides that the value of a person's assets is to be taken into account for pension purposes. Section 11 of the Act defines an asset as 'property or money, including property or money outside Australia'. Section 11(2) provides that a reference to the value of a particular asset, if owned jointly or in common with another person or person, is a reference to the value of the person's interest in the asset.

Discussion

The AAT referred to *Kidna v Secretary Department of Social Security* (1993) 31 ALD 63:

Indeed, this was the respondent's position as I appertain it that as the applicant held the fee simple as sole proprietor, the Tribunal should not look beyond that and any equitable interest should not be taken into account. It is perhaps a subset of that submission, that if the applicant wished to assert equitable interests, either she or her children should approach the courts for such a declaration. However, as was pointed out by, Drummond J in *Kidna* ...

It would obviously be administratively convenient for the respondent ... to have regard only to assets the legal title to which was vested in the pension claimant ... In ordinary parlance a person's assets would not be regarded as including property of which that person was the bare legal owner, when the beneficial interest was vested in another ... To bring into account in applying the assets tests, only the value of the beneficial interest which a person has in property of which he or she is the legal owner.

The AAT accepted that the Bonnicis' solicitor in relation to the Therry Street property gave no advice about setting up a trust or the holding of the property in any other name or names. The AAT accepted, however, that at all times, it was understood amongst the Bonnici family that the mother held the property for what amounted to a life interest and that upon death, it would revert to the three children.

The AAT concluded that although Bonnici argued a resulting trust had been established, the better view was that a constructive trust existed. The AAT commented that 'I say this because ... the monies from the estate of Mr Bonnici were pooled together and ended up as the

purchase and renovation monies for the Therry Street property' (Reasons, para. 5).

The AAT referred further to *Kidna and Ford and Lee Principles of the Law of Trusts* and concluded that the situation was akin to the children deferring payment of their two-third share in the estate of the late Mr Bonnici so that monies were pooled and a house provided for the mother on the understanding that upon her death the house would revert to them. The AAT concluded that a constructive trust existed such that Bonnici's interest in Therry Street was one-third of its value only.

Formal decision

The AAT set aside the decision and remitted the matter to Centrelink with the direction that Bonnici's interest in Therry Street amounted to one-third of its total value.

[S.L.]

Age pension rate: overseas absence exceeding 26 weeks

DAGHER and SECRETARY TO THE DFaCS
(No. 2004/990)

Decided: 18 August 2004 by J.Kelly.

Background

Dagher was born in 1922 and first arrived in Australia in 1973. He was granted age pension in 1987. On 20 March 1998, Dagher left Australia for Lebanon and returned on 11 February 2001. On 7 March 2002, he left again for Lebanon. On 16 November 2002, his rate of age pension was reduced as Centrelink proportionalised Dagher's rate by multiplying the rate payable by 176 three hundredths in accordance with the portability rules.

The law

Section 1220A of the Act provides as follows:

Proportionality-age pension rate

1220A. A person's rate of age pension is to be calculated using the Pension Portability Rate Calculator at the end of section 1221 if:

- (a) the person has been continuously absent from Australia, throughout a period (the *period of absence*) of more than 26 weeks; and
- (b) either: