Administrative Appeals Tribunal decisions

Age pension: deprivation of assets

SECRETARY TO DSS and EDWARDS (No. 8768)

Decided: 11 June 1993 by D.W. Muller.

Cecil Edwards applied for the age pension on 25 June 1992 when he was 75 years of age. On 3 August 1992 he was advised that he was granted the pension at a reduced rate because the DSS considered that he had deprived himself of the sum of $81,000 by disposing of that amount, without any or adequate consideration, to his son Phillip Edwards.

After deducting the allowable 'disposal limit' of $10,000 the amount of $71,000 of this sum was treated as part of Cecil Edward's assets and his income was calculated having regard to a deemed rate of interest on that amount. The SSAT set aside the decision and the Secretary appealed to the AAT.

Circumstances of the payment

The $81,000 was paid from the proceeds of Cecil Edwards' sugar cane farm in the Mackay area of Queensland, which he sold for $235,000 in March 1992. Phillip Edwards had worked on the farm for 35 years, as a farm labourer and from 1977 as the farm manager. During those years he was paid award wages but worked long hours for no additional pay, pursuant to an arrangement with his father that he would work for reduced wages in return for an eventual share in the ownership of the farm.

Ownership of the farm was not transferred to Phillip prior to the sale because there was a prospect that Phillip would be subject to a claim by way of matrimonial proceedings, and because a deterioration in his health made it unlikely that he would be able to continue to work as a cane farmer.

The payment to Phillip of $81,000 was based upon a calculation by an accountant of the amount reasonably required to compensate Phillip for the unpaid work done by him over the years. The settlement was embodied in a deed executed by Cecil and Phillip dated 1 June 1992, in which Phillip agreed to accept the sum in consideration for unrecompensed work on the farm.

Legislation

The issue was whether the payment of $81,000 in June 1992 constituted a disposal of an asset within s.1123 of the *Social Security Act* 1991. A person is taken to dispose of assets if the person directly or indirectly diminishes the value of the person's property for no consideration, inadequate consideration or for the dominant purpose of obtaining a social security advantage.

It was not suggested by the DSS that Cecil Edwards gave the $81,000 to his son for the purpose of obtaining a social security advantage, but only that he received no consideration or no adequate consideration for the payment.

Other farming family cases distinguished

The AAT considered three cases involving transactions within farming families, namely *McClelland and Secretary to DSS* (1988) 44 *SSR* 567, *Wachtel and Repatriation Commission* (1986) 11 ALN N213 and *Follone and Secretary to DSS* (1987) 11 ALD 477. In each of these cases the transactions were held to involve the disposal of assets for no consideration or no adequate consideration. The AAT found that the present case was distinguishable from each of them. *McClelland* involved a partnership rather than an employer-employee relationship. In *Wachtel* an initial employment relationship was superseded by a partnership, with the eventual property transfer being by way of unconditional gift. *Follone* was of little assistance as it was determined on questions of sufficiency of evidence and credibility.

The AAT concluded:

> 'The one factor which sets Mr Edward's case apart from those quoted above is that at all times during Phillip's time on the farm he was an employee of his father. He was never a partner. Both Cecil and Phillip knew that Phillip was receiving far less than award wages and that the balance would be redressed at some point in time. Cecil paid the $81,000 to Phillip for various reasons including the following:
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> (a) he owed at least that amount to Phillip (and much more in my view) for wages underpaid over the years;
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> (b) he did not entirely trust his daughter-in-law and he wanted to extract from Phillip a legally binding promise that Phillip would not in the future attempt to sue him for a large amount in relation to back wages; and
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> (c) he wanted to be satisfied that Phillip would not challenge his will on his death.
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> To these ends he had the deed prepared . . . In my view Cecil Edwards has received consideration which is by no means inadequate in return for the payment of the $81,000.'

Formal decision

The AAT affirmed the decision under review.

[P. O'C.]

[Editor's note: The AAT did not indicate precisely what was the consideration for the payment: the provision of inadequately paid labour by Phillip, or the surrender by Phillip of any rights that he might have had to sue his father or his father's estate for further recompense for the services. In either case, it was necessary to consider whether Phillip had any legally enforceable rights against his father arising from his work on the farm.

In *Frendo v Secretary to DSS* (1987) 41 *SSR* 527 Woodward J held that the word 'consideration', as used in the assets test provisions of the 1947 Act, bore its technical legal meaning of a forbearance or promise sufficient to establish the existence of a binding contract. A mere expectation or understanding within a family will not suffice if there is no intention to create a legally enforceable agreement. In *Edwards* a deed was executed, indicating that legal relations were intended, but this occurred some months after the farm was sold and Phillip had ceased to provide services to his father.

As Woodward J said in *Frendo*, the consideration received by the pensioner must consist of an immediate benefit or an enforceable future right. A past benefit is not good consideration because it does not form part of an agreement comprising an exchange of promises. Thus in *Tokolyi and Secretary to DSS* (1992) 66 *SSR* 930 a transfer of property in recompense for past services was held to be a disposition for inadequate consideration.

These principles were not discussed in *Edwards*. The DSS has not appealed the decision.]

Assets test: valuation of shares in private company

BROWN and SECRETARY TO DSS (No. 8886)

Decided: 14 August 1993 by B.M. Forrest, B.W. Davis and B.H. Pascoe.

The AAT affirmed a decision of the SSAT which had in turn affirmed a decision of a delegate of the Secretary to reject Brown's claim for job search allowance (JSA).

The claim was rejected on the ground that the value of Brown's assets exceeded the then applicable limit of $157,500 for payment of JSA. The sole issue in the application was the valuation of shares held by Brown in W Coogan & Co Pty Ltd, a small retail home furnishing company in which all shares were held by

descendents of the founder and a few employees.

Method of valuation of shares

The DSS valued Brown's shares at $119,075, based upon a written opinion from the company's auditors as to the fair value of each class of share. The auditors had taken the view that an appropriate basis of calculation was to have regard to the earning and dividend paying capacity of the company and to capitalise at an earning rate equal to that which would be expected by an investor in such a company. The auditors' calculations were provided to the AAT.

Brown argued that the restrictions on transfer imposed by the company's Articles of Association meant that there was no ready market for the shares, and that the best price that he had been offered by a member of the company willing to purchase them was $49,135. He submitted that the value of the shares should by ascertained primarily by reference to the dividends paid by the company. Based on the dividend yield in recent years, it was said that the value of the shareholding was unlikely to exceed $50,000.

Brown challenged the auditors' method of valuing the shares on several grounds. Firstly, the procedure for share transfers set out in the Articles of Association had never been followed in practice. The directors had resisted allowing shareholding to be transferred. Secondly, the auditor's valuation assumed a reasonable percentage of profits to be paid out as dividends as either 60% or 80%, but the policy of the company was to pay out only about 10% of profits as dividends in order to retain funds required for expansion. Thirdly, the auditors' valuation related to the company as a whole, not to a small parcel of shares.

The auditors' valuation allowed a 15% discount for non negotiability of shares, a standard allowance for valuation of shares in private companies. The auditors took the view that the company's policy of retaining 90% of profit for reserves was excessive and it was reasonable to anticipate higher dividends in the future.

The AAT accepted the auditors' valuation in preference to that proposed by Brown. Referring to the judgment of Williams J in *Abrahams v the Federal Commissioner of Taxation* (1945) 70 CLR 23 at 29-30, the AAT said that in assessing the value of the shares in a company, the concept of a willing but not anxious buyer and seller should be the basis adopted.

The AAT rejected all Brown's objections to the auditors' valuation. The restriction on transfer of shares without approval of the directors was not unusual in a private company. It was appropriate to assess the share value by reference to the company's earnings rather than its recent dividend payments, particularly as the company had high asset backing for the shares. As to Brown's third objection, the auditors' valuation had related specifically to a small minority shareholding and did not require further adjustment on that score.

[P.O'C.]

AAT's power to stay DSS decisions

TREWIN and SECRETARY TO DSS
(No. Q93/547)

Decided: 26 October 1993 by S.A. Forgie.

In August 1993, Jennylee Trewin applied to the AAT for review of a decision of the SSAT. The SSAT had affirmed a decision of the DSS that Trewin had been overpaid unemployment benefits of $19,350.79 during a period when she was undertaking full time study. The DSS was deducting $39 a fortnight from Trewin's current benefits in order to recover the overpayment.

On 9 September 1993, Trewin applied to the AAT for an order staying the implementation of the decision under review.

The legislation

Section 41(2) of the *AAT Act* 1975 gives the AAT the power, where an application for review has been lodged, to make an order staying 'the operation or implementation of the decision to which the relevant proceeding relates'.

The social security review jurisdiction of the AAT depends on s.1283(1) of the *Social Security Act* 1991, which allows an application to be made to the AAT, for review of a decision of the SSAT which has affirmed, varied or set aside a decision of a delegate of the Secretary.

The narrow view of section 41(2)

Several earlier decisions of the AAT had taken the view that, because the AAT reviews decisions of the SSAT and not decisions of the Secretary's delegates, any stay order under s.41(2) could only affect the SSAT's decision and would leave the delegate's decision undisturbed. That view was taken in *Hawat* 28 ALD 1805; *Beigman* (1992) 71 *SSR* 1028; and other cases.

A wider review of the stay power

In the present case, the AAT referred to s.1283(2) of the *Social Security Act* 1991, which declared that, for the purpose of an application to the AAT under s.1283(1), the decision made by the SSAT is taken to be:

> '(a) where the SSAT affirms a decision, the decision as affirmed by the SSAT;
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> (b) where the SSAT varies a decision, the decision as varied by the SSAT;
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> (c) where the SSAT sets aside a decision and makes a new decision, the new decision; and
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> (d) where the SSAT sets aside a decision and remits the matter to the secretary with directions or recommendations, the directions or recommendations of the SSAT.'

The AAT said:

> 'It seems to me that the clear emphasis of s.1283(2) is upon the operative decision, i.e. the decision as affirmed, the decision as varied, the new decision or the SSAT's directions or recommendations. In doing so, it is my view that it ensures that this Tribunal can review the decision which actually affects the rights and liabilities of the person affected by the decision and not simply the decision to affirm, vary or set aside the earlier decision.'

(Reasons, para. 10)

The AAT noted that the pattern employed in s.1283(2) was also used in s.1247(1A), which defined the decision to be reviewed by the SSAT following review by an authorised review officer; so that, where the SSAT was asked under s.1247(1) to review a decision of an authorised review officer, the SSAT would review the decision which actually affected the rights and liabilities of the applicant and would not confine its review to the merits of the authorised review officer's decision to affirm the primary decision: Reasons, para. 14.

The AAT then referred to its earlier decision in *Gee* (1981) 3 ALD 132; 5 *SSR* 49, which (the AAT said) established that the affirmation of a decision simply left the original decision in place, so that in administrative review proceedings the original decision, rather than the affirmation, remained operative and was the subject of the review. That approach, the AAT said, was also consistent with the decision of Davies J (then President of the AAT) in *RC* (1981) 3 ALD 33; 4 *SSR* 36, and the decision of a previous President, Brennan J, in *Seaton and Minister for the ACT* (1978) 1 ALD 141.

Should the power be exercised?

Having decided that it could stay the operation of the original decision that Trewin had been overpaid, the AAT turned to the question whether this was