Formal decision

The Tribunal set aside the decision under review and substituted the decision that Catto met the definition of 'farmer' in the Act and that he had been a farmer for at least two years before the date of his claim, and therefore met the requirements for FFRG.

[P.A.S.]

Rent assistance: ineligible homeowner

CROKER and SECRETARY TO THE DFaCS (No. 2001/321)

Decided: 20 April 2001 by H. Hallowes.

Background

Croker lived in a property owned by a company that was also the trustee of the R.A. Croker Family Trust. He lived in a flat with other buildings on the site including the home of his estranged wife. He transferred his share in the company to his estranged wife on 14 July 1999 for a consideration of $1. His estranged wife became the sole director of the company. Croker claimed that he rented the property from the company. Under the trust deed, Croker was a beneficiary, the guardian and appointer.

The issues

The issue was whether Mr Croker was eligible for rent assistance from 14 July 1999, the date on which he resigned as a director of Crolok Tools and Dies Pty Ltd (the company).

Legislation

Section 1064-D1 of the *Social Security Act 1991* (the Act) provides that:

> An additional amount to help cover the cost of rent is to be added to a person's maximum basic rate if:
>
> (a) the person is not an ineligible homeowner; and
>
> ...

Pursuant to s.13(1) of the Act, an 'ineligible homeowner means a homeowner ...' and s.11(4) and (8) of the Act provide:

> **11(4)** For the purposes of this Act:
>
> (a) a person who is not a member of a couple is a **homeowner** if:
>
> (i) the person has a right or interest in the person's principal home; and
>
> the person's right or interest in the home gives the person reasonable security of tenure in the home; and
>
> ...
>
> **11(8)** If a person has a right or interest in the person's principal home, the person is to be 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 or interest does not give the person reasonable security of tenure in the home.

Ineligible homeowner

Croker submitted that he had never acted as appointor in his life and had no intention of doing so in the future. He paid rent to his estranged wife every four weeks.

The Department contended that as Croker was an appointor under the trust, he could exercise sufficient powers to give him reasonable security of tenure over the property. The Department referred to the case of Re *Johnston and Repatriation Commission* AAT 508, 31 May 1994, a number of other relevant Tribunal decisions and the decision of the Family Court *In The Marriage of David Latimer Shaw and Ramona Shaw* (1989) FLC 92-030

The Department argued that Croker had considerable indirect influence over any decision of the trustee (the company of which his estranged wife was the sole director), although he was precluded from appointing himself as trustee or any company which he controlled. In acting as an appointor, Croker was obliged to consider the beneficiaries, so in effect he had to consider himself and, in deciding to transfer his interest in the company to his estranged wife for $1, he must have felt confident that she would not act against his interests.

The Tribunal found that Croker was a homeowner because he had an interest in his principal home, which gave him reasonable security of tenure. The Tribunal did not foresee that he would have to leave the property where he had lived for a long time.

> He was prepared to give up his directorship of the company, and to part with his interest in the company for only $1. The Tribunal is satisfied that he has confidence that the company will act in his interests, but, if it appears that that situation will not continue, the Tribunal is satisfied that Mr Croker is astute enough to act quickly and to exercise his power as appointor.

(Reasons, para. 13)

Formal decision

The decision under review was affirmed.

[M.A.N.]

Lump sum preclusion: special circumstances; unfairness or injustice

SECRETARY TO THE DFaCS and HOOPER (No. 2001/243)

Decided: 27 March 2001 by R.P. Handley.

Background

Hooper suffered work injuries between April 1985 and January 1997 when she stopped work. In July 1998 she was awarded compensation of $735,306. The economic loss component of this amount was $477,935 and $123,764 was repaid to GIO for periodic workers compensation payments made before the court order.

In October 1998 Hooper claimed age pension. Centrelink decided that she was precluded from receiving payments between 6 July 1998 and 20 January 2015.

The preclusion period was calculated on the basis of $354,220 (the economic loss component of the settlement less the amount repaid to GIO). This amount was divided by the divisor at the time of settlement ($410) and the period commenced on the day after the weekly workers compensation payments ceased (6 July 1998).

This decision was reviewed by the Social Security Appeals Tribunal (SSAT), which decided that special circumstances applied in this case to reduce the preclusion period to end on 30 June 2006.

The arguments

The submission presented by the Department was that the SSAT had mistakenly reduced the period by 'undertaking a balancing exercise to achieve a fair and equitable result'.

The Department conceded that Hooper's financial situation was straitened, but was not exceptional. Equally, her health was not exceptional. Hooper had unencumbered assets (house and car), she had money in a bank account and would receive further money after the settlement of costs from past legal proceedings.

The submissions presented on behalf of Hooper were that:

- There had been no 'double dipping'.

- The length of the preclusion period, a further 14 years, was exceptional in itself.
- If Hooper's claim had been resolved before 20 March 1997, her age pension would not have been affected by these provisions as age pension was only included as a compensation affected payment from this date. An arbitration hearing had made an award in her favour in February 1997, but the insurer had appealed, thus extending the litigation.
- The expenditure by Hooper was modest and appropriate and it was unknown both when and how much the claim for legal costs would amount to.
- Hooper had attempted to find out the impact of compensation payments and had been told that these payments would not affect her age pension.

It was submitted that these factors should be taken into account as special circumstances and that only $40,000, the amount awarded by the court in relation to future loss of income, should be used in calculating the preclusion period.

Special circumstances

The Tribunal considered the various submissions. It accepted that there was no 'double dipping' and that Hooper's expenditure had been reasonable. The Tribunal accepted that she had approximately $34,500 in the bank and the expectation of compensation for the costs of her litigation.

The Tribunal also accepted that Hooper's health meant that she was unable to work and would not be able to work again. She had a number of expenses as a result of her health.

The Tribunal accepted that the litigation was protracted and that she had been told by Centrelink that the compensation would not affect her age pension (the Tribunal found that the advice was probably not incorrect).

In conclusion, the Tribunal found that these circumstances were not, by themselves, sufficient to justify exercising the discretion under s.1184. However, the Tribunal also considered whether the application of the preclusion period resulted in 'unfairness or injustice'.

The Tribunal noted that the strict application of the recovery provisions would preclude payment of age pension to Hooper until she was over 82 years of age. The Tribunal decided to adopt the approach outlined by Merkel J in *Kertland v Secretary, Department of Family and Community Services* (1999) 57 ALD 600 'to address the unfairness arising from the imposition of a preclusion period until 20 January 2015'.

The Tribunal found that the appropriate outcome was for the preclusion period to end on 29 August 2002, the date after which there would be no element of 'double dipping' (i.e. the date after which Hooper did not receive any compensation under the court order).

Formal decision

The Tribunal set aside the decision under review and substituted a new decision that, given the special circumstances of the case, the portion of the compensation awarded to Hooper should be treated as not having been made under s.1184 as would allow the preclusion period to end on 29 August 2002.

[R.P.]

Lump sum preclusion: special circumstances; compensation divisor

ALLAN and SECRETARY TO THE DFaCS (No. 2001/271)

Decided: 4 April 2001 by H.E. Hallowes.

Background

Allan was paid weekly compensation payments until 13 March 1998. On 3 March 1998 he was awarded compensation of $250,000.

In November 1999 Allan claimed disability support pension. Centrelink decided that he was precluded from receiving payments between 14 March 1998 and 20 January 2004. Allan reclaimed disability support pension on 22 May 2000. He was again advised that he would be precluded from receiving payments until 20 January 2004.

The preclusion period was calculated on the basis of the divisor at the time of settlement ($403.20) and the period commenced on the day after the weekly workers compensation payments ceased (13 March 1998).

This decision was affirmed by the Social Security Appeals Tribunal.

The issues

The Tribunal considered two issues:

1. the date used for assessing the compensation divisor; and
2. whether there were special circumstances under s.1184 of the *Social Security Act 1991* to justify disregarding all or part of the compensation payment.

Compensation divisor

The preclusion period was calculated by Centrelink using the compensation divisor at the time of settlement. The Tribunal noted that the legislation did not specify when the calculation of the preclusion period was to be determined, although s.1165(5) provided for the beginning and end of the preclusion period. The Tribunal referred to the case of *Stephens and Secretary to DFaCS* (2001) AATA 108. It noted that in Allan's case, as with Stephens, the compensation divisor used was one of the lowest and that this had a direct effect on the length of the preclusion period. It also noted that the effect of the GST on cost of living was one of the special circumstances considered in *Stephens'* case.

The Tribunal made no conclusion about the appropriate date for applying the compensation divisor, preferring to focus on the issue of special circumstances as occurred in *Stephens*.

Special circumstances

The Tribunal considered the expenditure of the lump sum by Allan. It had been submitted that Allan had spent his money recklessly — some $307,000 being spent between 13 March 1998 and 17 November 1999. Information provided by Allan showed that he had spent his money by purchasing a house and land for $145,000; a car for $10,000; legal fees of $25,000; accumulated debts of $30,000; and various other expenses of $40,000.

Evidence was provided that Allan had sold his property for $147,000 of which he would net $59,000. It had been submitted that this was sufficient money to enable Allan to support himself until October 2003.

The Tribunal noted the poor prospects in relation to Allan's health and his drug addiction which was a consequence of his treatment. It concluded:

> His addiction is a factor which makes Allan's circumstances uncommon. Having lost his home, the decision under review provides that he must find food and shelter through his own resources, including the funds he has following the sale of his house and land, to survive until 20 February 2004. It is important that he be given some hope for the future.

(Reasons, para. 22)