

property of the person to be disregarded if it cannot be sold or realised or used as security for borrowing and if severe financial hardship would occur if it were not so disregarded. Sub-section 6AD(1)(b)

also gives the Secretary a discretion to disregard the application of s.6AC

But s.6AD(1) only applied to cases where the rate of pension was calculated according to the assets test. As the applicants' pension was

calculated according to the income test the section could not assist them.

Formal decision

The Tribunal affirmed the decision under review.

'Deprivation of income'

FISICARO and SECRETARY TO DSS
(No. N86/120)

Decided: 10 November 1986 by R. A. Hayes

The applicants had applied for age pension and wife's pension. They had been refused on the basis that they had deprived themselves of income in order to qualify for the pensions. They applied to the AAT for review of the decision.

The facts

In July 1984 the applicants transferred three rental properties to their children. They did not dispute that they did so in order to deprive themselves of income so as to qualify for a pension. They only took issue with the interpretation of the relevant provision in the *Social Security Act*.

The legislation

Section 47(1) of the Act provided until 21 September 1984:

'If, in the opinion of the Secretary, a claimant or a pensioner has directly or indirectly deprived

himself of income in order to qualify for, or obtain, a pension, or in order to obtain a pension at a higher rate than that for which he would otherwise have been eligible, the amount of the income of which the Secretary considers the claimant or pensioner has so deprived himself shall be deemed to be income of the claimant or pensioner.'

This provision was repealed in 1984 but the amending provision provided that where under s.47 'an amount was deemed to be income of a person in respect of a deprivation of income of a person that took place before 1 June 1984, that amount shall, on and after 21 March 1985, continue to be deemed income of the person'.

The issue

The issue for the Tribunal to decide was whether the deprivation of income should be taken into account when assessing the rate of payment in the pension year of deprivation only. It was argued by the applicants that for the deprivation to have effect beyond

the year in which it occurred it would have to be of a continuing nature such as a family trust.

The Tribunal saw no problem in the present case. Where a person deprived him/herself of property which produced income it would be possible to say what he/she might expect to receive in income over a number of years. While there might be some dispute as to the precise figure it was up to the secretary to make some judgment about it.

While the section was punitive in its effect it only punished those who were aware of what they were doing and knew of the risks involved. To only assess the deprived income in the pension year that the deprivation occurred would undermine the effect of s.47(1) and encourage persons to give their income producing assets to a trusted family member and after a year obtain a full pension.

Formal decision

The AAT affirmed the decision under review.

Assets test: annual rate of income

BUTLER and SECRETARY TO DSS
(No. S85/94)

Decided: 8 October 1986 by R. A. Layton, J. D. Horrigan and D. B. Williams

The applicant's age pension was cancelled after the introduction of the assets test. She applied to the AAT for review of that decision.

The applicant's husband was the registered lessee of a farm property valued at \$412,100. Sub-section 6(3)(a) of the *Social Security Act* provides that the property of a married person shall be 50% of the total value of their property. The DSS accepted that the hardship provisions applied to the applicant but by the operation of sub-s.6AD(3) a nil rate of pension was payable.

The legislation

Sub-section 6AD(3) provides:

'Where the Secretary is of the opinion that the annual rate of a pension, benefit or allowance applicable to a person under sub-section (2) should, having regard to the annual rate of income that could reasonably be expected to be

derived from, or produced with the use of, property of the person or the person's spouse that is property referred to in paragraph (1)(c), be reduced, the Secretary may direct that the annual rate of pension, benefit or allowance payable to the person be reduced by such amount per annum as the Secretary determines in writing.'

The issues before the AAT were the correct interpretation of sub-s. 6AD(3) and the annual rate of income that could reasonably be expected to be derived from the use of the farm.

The background

The son of the applicant had taken over the farm and since 1981 he had received all the income from the farm. He paid \$100 per week to his parents as rent. The applicant still lived on the farm with her husband. The applicant had few assets jointly owned with her husband. There was furniture valued at \$2,000 and a car of the same value.

Annual rate of income: objective or subjective test?

The DSS argued that the rate of income that could reasonably be

expected to be derived from the farm should be judged objectively and not subjectively. The applicant argued for a subjective interpretation that took into account her particular circumstances. The Tribunal decided on a subjective interpretation.

'...in considering the word 'reasonably', the individual circumstances of each case must be considered. Such an interpretation is consistent with the intent of the hardship provisions contained in s.6AD in the context of the Act. The hardship provisions are aimed at giving relief to persons who would otherwise be excluded from pension benefits. It is not a section which caters for a general class of persons, but rather a section which caters for individual exceptions; discretionary elements are uppermost...'

(Reasons, para.59)

Thus all of the circumstances of the use of the property must be considered to determine the annual rate of income that could reasonably be expected to be derived from the property. Factors such as the present use of the