

was not until March 1987 that Gallifuoco returned to Australia.

An 'absent resident'

The AAT noted that Gallifuoco had acquired more than 8 years' continuous residence in Australia from 1970 to 1979; and said that the central question was whether she had been an 'absent resident' for the first 18 months or so after her departure from Australia in June 1979. If she had, then she would have accumulated the 10 years' continuous residence required by s.60(1)(f).

The AAT said that the applicant did not acquire a domicile of choice in Australia during the first period of her residence here, between September 1960 and May 1963 but had retained her domicile of origin in Italy. However, she had acquired a domicile of choice in Australia following her return here in December 1970. The AAT continued:

'The latter finding means that the respondent bears the onus of establishing that during the first 18 months of the second stay in Italy, that is, from 27 June 1979 to around 27 January 1979, the applicant abandoned her domicile of choice (Australia) and reverted to her domicile of origin (Italy).

(Reasons, para. 15)

The AAT concluded that the DSS had not discharged this onus. Amongst the factors which the DSS had not been able to counter was the fact that the Gallifuoco family had kept its family home in Australia until forced to sell it; that the arrangement of marriages for the 2 daughters was a 'passing purpose'; the need of Gallifuoco to stay in Italy for some time following her husband's death; and the fact that she did eventually return to Australia.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Gallifuoco was entitled to the widow's pension.

[P.H.]

Assets test: loan to family trust

MANTOVANI and SECRETARY TO DSS

(No.V87/296)

Decided: 21 April 1988 by H.E. Hallows.

Teresa Mantovani was granted a widow's pension following the death of her husband in 1974. In 1986, the DSS decided to cancel her pension because of the value of her assets. She asked the AAT to review that decision.

Transactions relating to the property

Mantovani had become the sole pro-

prietor of two areas of land on her husband's death. On legal advice, Mantovani transferred title over the land to a family company, to hold in trust for her 4 sons and their families, in 1977 and 1981.

Each transfer was recorded as made for consideration; and a debt of \$141 900, from the company to Mantovani was recorded in the company's accounts. At the time of these transfers, the *Gift Duty Act 1971* (Vic) obliged a person making a gift to lodge a return under the Act and to pay a gift duty. No return was lodged by Mantovani.

The two areas of land returned income to the company, which was used to repay bank loans made to the company and to distribute benefits to M's sons and their families. In the financial year ending 30 June 1986, the company had distributed \$10 767 to the beneficiaries of the trust.

In a letter to the DSS in February 1986, the company's accountant had described the \$141 900 as an interest free loan from Mantovani to the company. However, a directors' resolution was entered in the company's records on 23 April 1986 'that the balance sheet of the Mantovani Family Trust be amended as at 1 July 1985, to correctly record the \$141 900 transfer of funds from Mrs Theresa Mantovani to trust as a gift'.

The legislation

At the time of the decision under review, s.28(2) [now s.33(12)] of the *Social Security Act*, read with s.6AE [now s.8], provided that the annual rate of a pension was to be calculated by reference to the value of the pensioner's property.

Section 6AD [now s.7] provided that the value of a person's property was to exclude any property which the person could not (or could not reasonably be expected to) sell, realise, or use as security for borrowing, if the Secretary was satisfied that the person would suffer severe financial hardship if the value of the property were taken into account.

Sale, not gift, of property

The AAT decided that the evidence established that Mantovani had sold the land to the family company for a total of \$141 900; and that the company had not paid purchase price. The resolution of directors made on 23 April 1986 did not affect this position:

'I am satisfied that although purporting to amend a record, this document cannot retrospectively change the facts as they were at an earlier date. If by resolution this could be done many families could now avoid the assets test by retrospectively making over assets to others although their actions would attract the provisions of s.6AC [dealing with dispositions of property - now s.6].'

(Reasons p.16)

The AAT decided that Mantovani had advanced to the company, by way of loan, the \$141 900 payable to her by the company for the land. It remained a debt owed to her, 'whether or not she wishes to be paid interest on the loan or repaid the capital': Reasons, p.17.

That debt amounted to a chose in action and was, therefore, property of Mantovani within s.6AE of the *Social Security Act*. It should be taken into account pursuant to that section and s.28(2) for the purpose of assessing the rate of pension payable to Mantovani.

Financial hardship?

The AAT then considered whether the property should be excluded from the assets test under s.6AD [now s.7]. Although it was not reasonable to expect Mantovani to sell the debt owing to her or to use it as security for borrowing, it was reasonable to expect her to realise the debt in order to provide for her own support.

This was a case in which the observations of the Tribunal in *Henry* (1986) 32 SSR 403 were relevant. There the AAT had said that it was 'not . . . reasonable that the community should support [the applicants] so that the trust is able to maintain the whole of the [property] while it appreciates in capital value to the ultimate benefit of the four children'.

Accordingly, Mantovani could not take advantage of the provisions of s.6AD of the *Act*; and the rate of pension payable to the applicant should be calculated by reference to the value of the debt.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

