

CHAMBERS and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/10)

Decided: 11 June 1981 by R. K. Todd. Peter Murray Chambers had left school at the end of 1974 and worked in a variety of jobs until he was granted unemployment benefit from 16 October 1978 (at which stage, apparently, he was living in a metropolitan area—possibly Melbourne). Late in 1978 he returned to his parents' farm. On 9 June 1979, payment of

unemployment benefit was cancelled. Chambers applied to the AAT for review of this decision.

The AAT rejected the application and found that Chambers had not, during the relevant period, taken 'reasonable steps to obtain work': s.107(1)(c)(ii), *Social Services Act* (set out in *Thomson*, in this issue of the *Reporter*). The decision was based entirely on the facts of the case which were described by the AAT as 'inaction as a programme for seeking work' or 'pointless' or

'undertaken rather reluctantly and without any significant input on the part of the applicant'. The only matter of general significance was the AAT's observation that Chambers decision to return to the family farm should not count against him: it was 'perfectly justifiable, as justifiable as it would be for a young city dweller who, down on his luck, had decided to do the same thing [i.e. go home to his parents]': Reasons for Decision, para. 4.

Widow's pension: Cohabitation

TANG and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/11)

Decided: 5 June 1981 by R. K. Todd, L. G. Oxby and P. C. Wickens.

In 1972 Micheline Tang qualified (as 'a deserted wife') for and began to receive a widow's pension. (She was then aged 26 and had the custody of her four-year-old son.)

In November 1979 the DSS cancelled Tang's widow's pension on the ground that she 'was in a similar position to that of a married woman living with her husband'. This cancellation was based on the definition of 'widow' in s.59(1) of the *Social Services Act*:

'widow' includes—

- (a) . . .
- (b) a deserted wife;

. . . but does not include a woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him.

Tang appealed to an SSAT which recommended that the decision be affirmed; a delegate of the Director-General affirmed the decision; and Tang applied to the AAT for review of the decision.

The evidence on the cohabitation issue

At some time in 1974, Tang met a man, C, through a science fiction group to which they both belonged (known as the 'Science Fiction Fandom'). By mid-1977 Tang and C were sharing a flat. They then decided to purchase a house in equal shares ('to ease the escalating burden [of rent] on her fixed pension income'). Most of the deposit was contributed by C, but they agreed that repayments of the loan would be shared more or less equally. The property was purchased in C's name alone (because Tang believed that her status as a pensioner would make joint borrowing difficult). But C executed a deed of trust in which he declared that Tang and C were the beneficial owners, as joint tenants, of the house. The AAT found that both people clearly understood that, in the event of one of them dying, the survivor would take the whole property.

The other financial relationships showed a degree of independence: each had a separate bank account; each piece of furniture was owned by one person or the other; there was no systematic food shopping (each person buying what he or she required); and fuel and 'phone bills were paid alternately by C and Tang. Since the cancellation of the pension, C had supported Tang but both claimed that this had

created a debt. (Although the AAT believed there was little expectation of repayment.)

Domestic tasks (cooking, cleaning and washing) 'were done by whoever felt the need to perform them at the time'.

Tang and C went out socially together but also with others. They did not represent themselves as married and were not so regarded by others. (The AAT said that C's action in naming Tang and her son as dependants on a claim for unemployment benefits should not affect the weight of the evidence 'it should primarily be the actions of the applicant in this regard upon which we should focus our attention': Reasons for Decision, para. 11.)

Tang and C had a sexual relationship but told the Tribunal that they had open sexual relationships with other people. But the AAT found that there was a longstanding and primary sexual relationship between Tang and C: Reasons for Decision, para. 12.

The cohabitation rule

The AAT said that its decisions in *Waterford* (N80/87) and *Lambe* (S80/11) laid down some basic approaches to the meaning of the disqualification in s.59(1). However, the AAT was clearly influenced more by the approach in *Lambe* than by the approach in *Waterford*: see *Social Security Reporter* No. 1 (June 1981) pp.1, 5 for these two decisions. In particular, the AAT rejected the argument that the only relevant considerations were financial. Counsel for Tang had argued that the AAT should only find against her (that is, find that she was living with C 'as his wife on a *bona fide* domestic basis although not legally married to him') unless the AAT found that the man felt obliged to support the woman and that feeling was 'akin to a legal obligation'. The AAT said that this argument overstated the importance of the financial aspects of the relationship.

While agreeing, as we do, that the financial relations between the parties are of crucial importance, we do not see them as being so important as to exclude other factors. We come to this conclusion first, and most importantly, by interpretation of the words of the Act and secondly by reference to the general framework of Australian matrimonial law.

(Reasons for Decision, para. 15.)

The '*bona fide* domestic basis' was seen as referring 'to the actual relationship that exists between the parties in most aspects of their everyday lives'. Nothing in the Act suggested that it should be restricted to financial matters. Many sections of the Act do expressly refer to the financial

dependence or independence of claimants: if Parliament had intended only financial matters to be considered in s.59(1), 'then it would have so provided using the drafting style employed elsewhere'. Further, s.74 dealt separately with a pensioner's obligation to report changes in the pensioner's financial situation (sub-s.(1)) and a pensioner 'commencing to live with a man as his wife on a *bona fide* domestic basis although not legally married to him' (sub-s.(5)(a)(iii)). This separate listing indicated a distinction between the two: Reasons for Decision, para. 16.

Secondly, the *Family Law Act 1975* (Cth) declared that a husband was not liable to support his wife; rather, s.72 imposed a general obligation on each 'party to a marriage . . . to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately . . .' As the *Social Services Act* posted the question, 'is this woman living with a man as if she were his wife?', it was, according to the AAT,

untenable to argue that it is necessary to detect an obligation on the man to support his 'de facto' wife, when the law quite clearly states there is no such duty *per se* within marriage. To do so would be to apply, impliedly, a more stringent maintenance requirement upon *de facto* husbands than applies to *de jure* husbands. The Tribunal remains of the view that the correct approach is that taken previously in the decisions in *Re Waterford* and *Re Lambe*, namely the analysis of the full interpersonal relationship between the parties in the light of the marriage relationship.

(Reasons for Decision, para. 18.)

The argument for financial dependence

Counsel for Tang had strenuously argued that the disqualification should be based on considerations of financial dependence alone. He cited a decision of a single judge of the Ontario Supreme Court, *Re Proc* 53 DLR (3d) 512. In that case the judge had to decide whether Mrs Proc was the 'spouse' of Mr Moquin and so ineligible for support under the *Family Benefits Act* (Ontario). 'Spouse' was defined in the Act as including a person who, while not legally married to another person, 'lives with that person as if they were husband and wife'. Henry J, of the Ontario Supreme Court, said that this phrase should be read in the light of the overall purpose of the statute which was to provide support for those in need: 'That expression ought therefore to be applied by reference to the economic relationship of persons who are living together'.

But the AAT was not prepared to adopt a purposive approach to the interpretation clause in s.59(1):

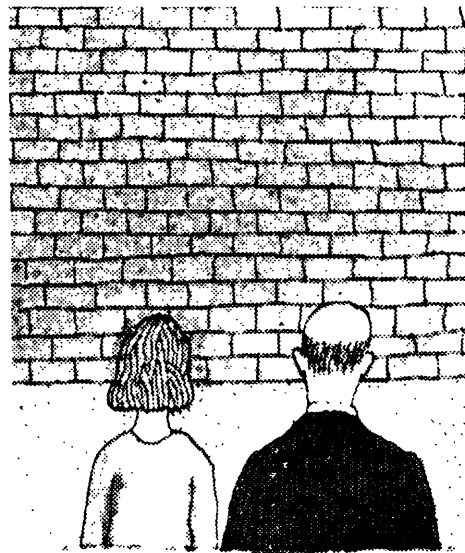
It is the view of the Tribunal that while this approach to statutory interpretation may well be applicable to the Act in appropriate circumstances, the present is not such a case. The condition precedent to the application of this approach is primarily ambiguity, with more than one equally plausible interpretation of the section being seemingly available . . . Shortly before the handing down of the decision herein a Bill for an Act to amend the *Acts Interpretation Act 1901* was introduced into the Parliament the provisions of which would reinforce this approach. But the rule does not apply simply because the proved facts when set against the relevant statutory provision do not offer an obvious and immediate answer to the question in issue. In the present case the relevant statutory expression has required careful consideration in order to elucidate its meaning, and could, we feel, no doubt have been drawn in a more helpful way, but that does not necessarily mean that it is ambiguous.

(Reasons for Decision, para. 27.)

The Tribunal's assessment

The AAT treated two elements of the relationship between Tang and C as showing that it was stable, permanent and similar to a marriage relationship. The first of these was the arrangement for the purchase of the house:

In the absence of the joint beneficial ownership of the home, the relationship may well be said to be akin to a stable 'group house', indeed some may well say that the joint ownership is a function of a very stable group house, but in our view the fact of joint tenancy puts paid to any reasonable argument that this is a mere group house. In our view, a decision that the property should vest absolutely in C in the event of the applicant predeceasing him, rather than in her son, indicates a deep longstanding relationship with



no legitimate expectation of termination. It cannot be an answer to this in the present context to point to the fact that the parties have not made a formal lifetime commitment to each other.

24. The fact of joint ownership of the home, especially it being joint tenancy, in our view colours the whole relationship. It connotes a very considerable degree of financial interdependence and its survivorship implications are even more telling than if the applicant made a will in C's favour.

(Reasons for Decision, paras 23-4.)

[It should be noted that in *Semple* (Q81/6); reported in *Social Security Reporter*, No. 1 (June 1981) p.6, but not referred to in this case, joint ownership of a house was also treated as critical.]

The second element was the day-to-day financial relationship which contained 'no procedure for systematically determining if the parties are bearing an equal burden [nor] any attempt to actually share the expenses':

The financial relationship in our view amounted to an effective pooling of resources to the extent that we conclude that the applicant and C in fact support each other.

(Reasons for Decision, para. 24.)

While Tang and C did not have an exclusive sexual relationship, this did not establish that they were not living as if they were married:

This aspect of the relationship again raises the varied 'standard' of marriage with which we attempt to compare the relationship under discussion. While without doubt this type of sexual freedom would be inconsistent with 'traditional' concepts of marriage current in former days, it would not be unreasonable in our view to say that it is not inconsistent with some modern forms of marriage.

(Reasons for Decision, para. 25.)

No doubt, the AAT said, the circumstances of Tang and C were unlike

the traditional situation of the bread winner husband the wife and mother at home, but it is not against this stereotype alone that relationships of the kind in question should be considered. Marriage has proved to be a flexible institution and its variants are numerous.

Nor should the parties' subjective opinion of their relationship be treated as of much significance. It was the objective factors at which the AAT should primarily look:

To overemphasize the subjective element is to beg the question, for while the applicant and C were adamant that they rejected marriage as an alternative for them, this in effect is the starting point of our enquiry and not its conclusion.

(Reasons for Decision, para. 26.)

The AAT therefore confirmed the decision of the delegate of the Director-General to cancel Tang's widow's pension.

Special benefit: applicant under 16

BEAMES and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V80/71)

Decided: 11 June 1981 by R. K. Todd. Shane Roy Beames was born in July 1965. He left school before his 15th birthday—in March 1980. Since leaving school he had worked occasionally in his father's bicycle repair shop but he had been unable to find any regular work. He had 'been most assiduous in attempting to find work' but 'generally he cannot even get to the interview stage'—'youth unemployment in his [Victorian provincial] city is high': Reasons for Decision para. 5.

During the whole of this period he lived at home with his parents and three siblings; and, for most of that period, his parents had supported him.

As he was under the age of 16 he was not eligible for unemployment benefit: s.107(1)(a), *Social Services Act*. He applied for special benefit but this application was rejected and, after an appeal to an SSAT, he applied to the AAT for review of the rejection.

Special benefit is payable under s.124 of the *Social Services Act*:

124. (1) Subject to sub-section (2), the Director-General may, in his discretion, grant

a special benefit under this Division to a person—

- (a) who is not in receipt of a pension under Part III or IV, a benefit under Part IVAAA, an allowance under Part VIIA of this Act or a service pension under the *Repatriation Act 1920*;
- (b) who is not a person to whom an unemployment benefit or a sickness benefit is payable; and
- (c) with respect to whom the Director-General is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).

[It should be noted that, in deciding on this application for review, the AAT 'stands in the shoes' of the Director-General: its responsibility is to decide the matter on its merits, re-exercising, as it thinks appropriate, any discretions vested in the original decision-maker. The AAT is not confined to deciding whether the Director-General's decision was defensible, reasonable or valid; rather, the AAT makes a new decision on the merits—the decision to grant or refuse special benefit is 'in its discretion'.]

Parental obligation to support children

The AAT referred to the legal obligations

of parents to maintain their children under the age of 18 years. Section 73 of the *Family Law Act 1975* (Cth) provides:

The parties to a marriage are liable, according to their respective financial resources, to maintain the children of the marriage who have not attained the age of 18 years.

The Tribunal continued:

It follows that where parents have the financial capacity to support a child, and do in fact provide that support, even if their resources are limited, there is little ground for considering that community resources should be used for the support of the child and for exercising the discretion accordingly. I say this bearing in mind that at least this can be said, that s.124 appears to be directed towards very fundamental levels of support. It is there to ensure 'a sufficient livelihood' to the person in question. The relevance of these considerations in this case is that the applicant's parents have been able to support him and have done so. He has had a sufficient livelihood. I do not say, and I do not think it would be a proper approach to say, that simply because someone has in fact managed to survive he should not receive benefit in respect of the straitened times that have passed albeit that during the time of need an exercise of the discretion to pay special benefit would have been appropriate. I am rather saying that in this particular case the parental