

Background

Equitable interests in the AAT

The decision of the AAT in *Kintominas* (noted on p 775 of this issue) raises an important issue in relation to the assets testing of aged pensions and the Tribunal's power to make findings on the existence of an equitable interest for the purpose of valuing a pensioner's assets.

The case concerned an age pensioner who owned a non-exempt house in which her son and his family resided rent free.

The son expended a sizeable sum of money on renovation on the express understanding with his mother that the house would be left to him in her will. The issue for the Tribunal was whether the sums expended by the son gave rise to an equitable charge over the house, which by operation of s.4(1)(b) of the *Social Security Act* would be deducted from the value of the house as an asset.

The AAT did find an equitable charge existed but said that the finding was only made because the matter was conceded by the Department. The Tribunal went on to say:

'Otherwise, I would incline to the view that it is no part of the function of the respondent to determine the nature of an equitable interest in these circumstances or to predict the type of equitable relief that would be ordered by a court when considering the value of assets of an applicant for pension. If outstanding equities are alleged, then it is a matter for the parties to have them determined independently. Were it not for the admissions made by the respondent, I would be of the view that the applicant would not be entitled to have the value of the equitable charge deducted from the value of the non-exempt asset when considering the overall value of her means.'

At para.32, the Tribunal appears to have softened this approach a little and said:

'In the absence of any written agreement, or any formalisation of claims and entitlements, [the administrator] must adopt a robust commonsense approach, not subordinated to subtleties and competing theories of equity.'

Allowing for a possible exception where equitable interests are expressly created in a formal way, the Tribunal appears to be saying that:

- (i) it is not the role of the Tribunal to consider the existence of equitable interests in the course of valuing a pensioner's assets; and
- (ii) if an equitable interest is alleged, then the pensioner should begin proceedings in the appropriate court for an appropriate declaration (i.e. in a State Supreme Court for a declaration of the existence of the equitable interest).

This view can be criticised on at least three points.

First, the decision appears to ignore the existence of the two Federal Court decisions in *Dineen* (1989) 48 SSR 628 and *James* (1990) 56 SSR 762, where the Federal Court upheld Tribunal decisions as to the existence of equitable interests in pensioners' assets for valuation purposes.

Secondly, the finding of equitable interests in these circumstances is no different in principle to any other mixed question of fact and law which the Tribunal is called upon to decide in the ordinary course of its deliberations. It is trite law that the Tribunal must decide all issues of law before it which are necessary for the purpose of reaching a

decision. Of course, this does not mean that those decisions on points of law are determinative of the parties' rights for purposes other than the proceedings before the Tribunal.

It is submitted that the fact that the decisions to be made in the present instance were based in equity rather than law is now irrelevant with the fusion of law and equity.

In any event, the AAT's reasons for not wishing to engage the issues of equitable interest were not founded on any status of equitable rights but rather on the degree of difficulty and subtlety involved in such matters. It is respectfully submitted that difficulty is not an adequate basis for refraining from making decisions when the welfare of a pensioner is at stake.

The third ground of criticism of the AAT's view is the Tribunal's suggestion that pensioners should have equitable interests determined by the appropriate courts. It will in very many cases be economically impractical to expect a pensioner to bring equity proceedings in the Supreme Court. In any event, part of the rationale for the Tribunal was for it to be a cost-effective expeditious avenue for review of the Secretary's decisions.

For each of the above reasons, it is submitted that the views expressed in *Kintominas* in relation to the Tribunal's lack of power to find equitable interest should not be followed.

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