

Tribunal had said that, 'in assessing the criteria of what constitutes a "home" a substantial degree of occupation is persuasive', while living away from the family home would cause it to no longer be the principal home. The Tribunal had also said that a principal home was the place where a person ordinarily ate, morning and night, and where the person slept.

On this interpretation, the AAT said, the unit, in which the applicant had not lived for 10 years, could not be regarded as the applicant's 'principal home'.

[P.H.]

Assets test: caveats lodged against property

KIRKMAN and SECRETARY TO DSS

(No. 5805)

Decided: 27 March 1990 by S.A. Forgie.

David Kirkman and his wife separated in 1985, when his wife remained living in the former matrimonial home, of which Kirkman was the registered proprietor. After the separation, Kirkman purchased a home unit but he decided not to live in the unit.

Kirkman's wife then lodged caveats on the titles to the house and the home unit, claiming equitable interests in the two properties. Kirkman was granted an invalid pension but, in September 1988, the DSS cancelled his pension because of the value of his assets. The DSS decided that the assets test should be applied to Kirkman as if he were 'an unmarried person', and that the full value of the house and the home unit should be treated as Kirkman's assets.

Kirkman asked the AAT to review that decision.

'Principal home'

The AAT found that Kirkman did not reside physically at either the house or the home unit, nor did he regard either place as his home. Consequently, on the approach adopted in *Dickeson* (1989) 52 SSR 684, neither could be considered as Kirkman's 'principal home', so that their value could not be disregarded when calculating the value of his assets under s.4(1)(a)(i) of the *Social Security Act*.

'Unmarried person'

The Tribunal noted that the definition of 'married person' in s.3(1) of the *Social Security Act* excluded 'a legally married person... who is living separately and apart from the spouse of the person on a permanent basis'.

As Kirkman was separated from his wife and no longer resided with her, the AAT said, he was not a 'married person' and, therefore, he was an 'unmarried person' for the purposes of the Act - in particular, for the purposes of the assets test. This meant that, although his house was used as a 'principal home' by his wife, the value of that house could not be excluded under s.4(1)(a)(ii).

Charge or encumbrance

The Tribunal noted that, when calculating the value of Kirkman's property, s.4(1)(b) of the *Social Security Act* provided that the value of property was to be reduced by the value of any 'charge or encumbrance' on particular property of a person.

The caveats lodged on the 2 pieces of property by Kirkman's wife, the AAT said, did not amount to a 'charge or encumbrance' on that property. A caveat, the AAT said, was -

'simply a protective device allowing the caveator an opportunity to take other action to establish his interest. It does not of itself create a "right to payment"... in the sense of a charge, or a claim or demand in the sense of an encumbrance... but merely holds the *status quo* as it were while the caveator takes, expeditiously, other steps to protect his interests.'

(Reasons, para. 19)

The AAT accepted that Kirkman felt that 'his hands are tied and that he cannot dispose of his house and his unit while the caveats exist'. Nevertheless, the *Social Security Act* did not allow the caveats to be taken into account to reduce the value of the 2 items of real property for the purposes of the assets test.

Severe financial hardship

The AAT then turned to the question whether Kirkman would suffer 'severe financial hardship' within s.7 of the *Social Security Act* if the value of the house and home unit were taken into account for the purposes of the assets test.

The Tribunal found that Kirkman's sole income was \$20 a week, that he was supported by his son, and that he was unable to pay rates due on the house and the home unit.

The Tribunal noted that Kirkman had assets but said it was unable to determine whether Kirkman could

realise those assets because the Tribunal had 'no evidence as to the state of the property settlement still to be resolved between [Kirkman] and his wife'; nor could the Tribunal decide whether the caveats might be removed, and if so, whether Kirkman's wife would take court proceedings to establish the claimed interests. The AAT concluded:

'Without this evidence, I cannot be satisfied whether Mr Kirkman is or is not suffering severe financial hardship within the meaning of s.7(1) of the Act. Unfortunately, the fact that he is suffering severe financial hardship in his day to day living while matters between him and his wife remain unresolved is not sufficient for the purpose of the Act.'

(Reasons, para. 27)

Formal decision

The AAT affirmed the Secretary's decisions that the whole value of Kirkman's former matrimonial home should be included in the value of his property, that this value could not be disregarded under s.4(1)(a)(ii) of the Act because Kirkman was not a 'married person', and that the caveat lodged by Kirkman's wife was not a charge or encumbrance and therefore could not reduce the value of the property.

The AAT adjourned further consideration of the question whether Kirkman would suffer severe financial hardship within s.7(1) of the Act.

[P.H.]

Compensation award: preclusion

BEAUMONT and SECRETARY TO DSS

(No. 5884)

Decided: 10 May 1990 by D.H. Byrnes.

Leonard Beaumont sustained an industrial injury in 1985. On 23 February 1989 Beaumont was awarded a lump sum payment of compensation, by consent, amounting to \$116 000. The payment included amounts for specific injuries, redemption of future medical expenses and a payment in consideration of Beaumont abandoning his common law rights against his employer.

Following this consent award, the DSS decided that Beaumont was precluded from receiving sickness benefit and invalid pension for 119