

■ The facts

Clayton owned a farming property, which had been farmed by his daughter and son since 1983. A mortgage had been executed over the property to secure sufficient funds for Clayton's children to continue the farming operations.

Clayton was the mortgagor under the mortgage, which contained provisions indicating that the mortgage was being executed for the purposes of covering loans made to his children. The children were described as 'the debtors' in the mortgage document, and their signatures appeared on the mortgage document.

■ The Court's decision

Davies J rejected an argument advanced on behalf of the DSS, that the only person who could be a party to a mortgage was the person who, by executing the mortgage, was granting an interest in the property.

Davies J said that a person could be a party to a mortgage, even though the person was not the owner of the land the subject of the mortgage. It was enough that Clayton's children had assumed a personal obligation under the mortgage document.

In any event, Davies J said, it appeared that the respondent's children had an interest, the right of occupancy, in the land the subject of the mortgage. Their signatures on the mortgage—

'ensured that whatever could be done in relation to the father's interest could also be done in relation to their interests, so that the bank could obtain vacant possession of the whole of the property if it saw fit to do so.'

(Reasons, p.6)

■ Formal decision

The Federal Court dismissed the appeal.

[P.H.]

Assets test: equitable interest

KINTOMINAS v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 2 August 1991 by Einfeld J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Kintominas* (1990) 57 SSR 775.

The AAT had decided that the rate of her age pension should be determined by including in her assets a piece of real property legally owned by Kintominas,

less an amount which her son had spent in improving the property. The AAT had rejected Kintominas' argument that her son had acquired an equitable entitlement to the whole property through an oral agreement between the two of them and through his expenditure on improvements.

■ Equitable interests in the AAT

In dealing with this issue, the AAT had said that it was not part of any administrative process to determine equities, which should be 'determined independently'.

In considering the appeal, Einfeld J observed that to require Kintominas and her son to engage in litigation so as to establish the nature and extent of any equitable interest 'would be a most unfortunate, costly and ultimately impractical way of dealing with their relationship'.

Einfeld J then proceeded to consider whether the evidence before the AAT supported the existence of an equitable interest held by the son in the property.

That evidence was that Kintominas had agreed with her son that he and his family could live in the subject property rent-free in return for paying outgoings and maintaining the property, that he would borrow \$35 000 to improve the property and that Kintominas would devise the property to her son in her will.

Einfeld J referred to *Dillwyn v Llewelyn* (1862) 4 De GF & J 517 and *Olsson v Dyson* (1969) 120 CLR 365, and said that, as Kintominas' conduct had given rise to expectations on the part of her son, on the basis of which he had expended money, equity would act to protect his actions from even accidental frustration by Kintominas.

Einfeld J said that the High Court's decision in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 supported the availability of equity 'to enforce a voluntary promise because to depart from the "basic assumption" of the transaction would be unconscionable'.

Although Brennan J had cautioned in *Waltons Stores* that this principle went 'no further than is necessary to prevent unconscionable conduct' and that limitation had been endorsed in *Commonwealth v Verwayen* (1990) 170 CLR 394, Einfeld J rejected the DSS argument that the principle should be confined to giving Kintominas' son a claim to have the property conveyed to him on his mother's death. Einfeld J said:

'However, as I read the cases, injecting equity in a minimalist way without doing

effective justice in the matter is not the corollary of the limitations [referred to by Brennan J]. If equity would enforce the promise to leave the property in the applicant's will, it would surely do no less in relation to Terry's rights during her life, as, for example, if Mrs Kintominas tried to sell the property and dispose of the proceeds. Merely to give Terry a charge, to the extent of his expenditure on the extensions, enforceable on his mother's death would not reflect the totality of his enforceable rights.'

(Reasons, p.22)

Einfeld J concluded that, despite Kintominas' legal ownership, the property was, on the concepts discussed in *Olsson v Dyson*, *Waltons Stores* and *Verwayen*, beneficially the property of her son. It was not necessary, the judge said, to decide whether Kintominas had created an express or constructive trust:

'A trust seems unlikely and in terms of the concepts provided for in the *Social Security Act*, estoppel is inappropriate. However categorised, my conclusion is that it is not property with a value in the applicant's hands capable of being converted into an assessable basis for reducing her pension. In that sense the AAT erred in law.'

(Reasons, p.24)

■ Formal decision

The AAT allowed the appeal.

[P.H.]

Income test: profits from farm

FISHER v SECRETARY TO DSS
(Federal Court of Australia)

Decided: 19 September 1991 by Heerey J.

This was an application under the *Administrative Decisions (Judicial Review) Act 1977* for review of a decision of the Secretary, calculating the level of unemployment benefit payable to Helen Fisher under s.122(4) of the *Social Security Act 1947*.

The Secretary made these calculations after the AAT had set aside an earlier decision of the Secretary and remitted the matter to the Secretary to calculate the unemployment benefits payable to Fisher. It was this subsequent decision of the Secretary which Fisher now sought to challenge in this application.

■ Does 'income' include increases in stock?

Fisher maintained that, in calculating her income from a farming business, the