

### Legislation

Section 54 of the *Veterans' Entitlements Act* 1986 provides that a pension reduction amount is applicable to a person who is eligible to receive a service pension when the value of the property of that person exceeds by not less than \$250 the threshold amount specified by the section (the assets test).

The Act does not provide any guidance on the way of valuing assets for the purposes of calculating the pension reduction amount.

### Decision

The AAT noted that a debt is property which must be valued for the purposes of the assets test. In valuing the present debt, the AAT accepted King's argument that account must be taken of the capacity of the debtor to pay the debt. A passage from Hill on *Stamp Duties* was adopted, in which it was said:

'A debt repayable on demand will normally be valued on its face value and regard will not be had to the financial incapacity of the creditor to meet the debt. See *Faddern v Deputy Federal Commissioner of Taxation* (1945) 70 CLR 555. It is, however, considered that where the creditor is clearly insolvent the insolvency will be taken into account in valuing the debt . . .'

The AAT said that it was necessary to look behind the original transaction, i.e. to lift the corporate veil of D Pty Ltd, to see the true nature of the transaction.

In this case, the true nature of the transaction was that the money always belonged to King and that D Pty Ltd and the family trust were mere vehicles of convenience. The losses sustained by the trust were in fact King's losses at all material times. Therefore it was artificial to consider that D Pty Ltd really owed the applicant a debt constituted by the losses sustained since the original loan.

### Formal decision

The AAT remitted the matter to the respondent to determine the value of the property of the applicant having regard to the AAT's Reasons.

[A.A.]

[*Editorial comment*: In terms of the method of valuing debts, this decision is consistent with the AAT's decision in *Lenthall* (1987) 41 SSR 524. In relation to the AAT's decision to 'lift the corporate veil' and look at the true nature of the transaction, some support for this is found in *Gowans and Repatriation Commission* (1988) 42 SSR 535. However, this must be contrasted with the

decision of the AAT in *Eimberts and Repatriation Commission* (1988) 16 ALD 19, in which the Tribunal specifically declined to adopt this approach in relation to family companies: A.A.]



## Assets test: secret trust?

### SECRETARY TO DSS and MACRIDES

(No. Q90/35)

Decided: 6 June 1991 by D.P. Breen.

This was an application for review of a decision of the SSAT that Macrides' 50% interest in certain property at Darwin was held on trust only, and should not be included in her assets.

### The facts

Macrides and her sister were bequeathed a 50% share each as tenants in common in real estate in Darwin in their mother's will. The Secretary included this property in Macrides' assets for assets testing purposes and included the rent from the property in her income for income testing purposes.

Macrides maintained that the property and rent from the property were only held by her as trustee for her adult children. She said an oral secret trust had been created by her mother, not referred to in her mother's will, in favour of Macrides' children.

Macrides' mother died in 1968 and, since that time, Macrides had remained the registered proprietor as tenant in common without reference to the trust. Macrides had included the rent from the property in her tax returns for each year after her mother's death and claimed depreciation on the property in each of her annual tax returns.

'Property' is not defined in the 1947 *Social Security Act* save to include property situated outside Australia.

The issue for the Tribunal was whether Macrides held the property as a mere trustee or whether she held a 50% beneficial interest in the property. In the event of being a mere trustee a further issue for the Tribunal was the effect of property holding as a mere trustee for assets and income testing purposes.

The DSS argued that the Tribunal had no power to take account of equitable interests such as trusts and must not

look beyond the legal interest which even a trustee possesses. The Secretary relied on *Miller* (1987) 38 SSR 474, *Christian* (1987) 39 SSR 492, *Kintominas* (1990) 57 SSR 775 and *Wachtel and Repatriation Commission* 11 ALN 213.

After considering these cases, the AAT rejected the argument and held that the common general meaning of the word 'property' required consideration of where the equitable interest lay. The AAT decided that if Macrides was a mere trustee then the value of the property and rents should be excluded from her assets and income for pension purposes.

On the issue of whether the secret trust existed, after referring to *Blackwell* [1929] AC 318 and *Voges v Monaghan* (1954) 94 CLR 231, the AAT summarised the law as follows:

- (1) It must be shown that the intention of the testator was that the property should be applied in accordance with the alleged specified secret trust.
- (2) This intention must have been communicated to the alleged trustee before the testator's death.
- (3) The alleged trustee must have either expressly agreed to apply the property in the manner alleged or subsequently acquiesced in the existence of the trust.

On the evidence before it, the AAT did not accept Macrides' assertions that her mother had created a secret trust and noted that Macrides' actions over the years were inconsistent with the alleged secret trust. The AAT decided Macrides was the beneficial owner of 50% share of the property.

### Formal decision

The decision of the SSAT was set aside and the matter remitted to the Secretary to determine Macrides' entitlement having regard to a 50% beneficial interest in the property.

[*Comment*: It is notable that, in this case, the DSS again unsuccessfully argued that the Tribunal is precluded from deciding the existence of trusts in relation to property. This argument has been run and rejected on a number of occasions now, although these authorities were not cited by the AAT in its decision in this case. The matter is discussed at (1990) 57 SSR 780.]

[A.A.]