argued that she had not disposed of property: she had merely carried out the terms of the agreement or of a constructive trust consistent with the terms of the agreement or of an obligation enforceable by virtue of the doctrine of promissory estoppel.

Each of these arguments was disputed by counsel for the DSS.

The AAT's reasoning

The AAT found that each of Mrs Tokolyi's 2 sons had an expectation of receiving roughly one third each of the proceeds of the sale of the 2 properties. The Tribunal also found that the legal scenario presented on behalf of Mrs Tokolyi was unnecessary since, even if the discussions took place as submitted, no agreement was needed to carry into effect the parties' wishes. As a result of Mr Tokolyi's death, his widow became sole owner by right of survivorship of all 3 properties and she was then free to deal with them as she chose, including in accordance with what she and her family had agreed.

Turning to the will, the AAT found that no-one had released or surrendered any rights under the will, which was administered by solicitors. Nor did the Tribunal accept that any consideration had passed from the sons since the will conferred no rights upon them which could be surrendered. The evidence of their participation in the work of the properties was not significant and there was no evidence of any other consideration.

After considering the recent decision of the High Court in *Corin v Patton* (1990) 64 ALJR 256, the AAT held that the joint tenancy had not been severed so as to prevent Mrs Tokolyi taking the properties as surviving tenant. There was no evidence of any intention to do so; nor was it necessary to do so in order to carry out the family's intentions. As to the argument that the sons' conduct constituted part performance such that a court would order specific performance of the remainder of the agreement, the AAT noted that the only conduct referable to any agreement were statements made by the sons when seeking business finance that each son's assets included a share of a family trust to the value of approximately $150 000.

The AAT noted that s.53(1) of the *Property Law Act* 1958 (Vic.) provides that no interest in land can be created or disposed of except in writing, and a declaration of trust respecting any land must be manifested in writing. However, resulting, implied or constructive trusts are exempted by s.53(2). Accordingly, the Tribunal considered whether there was a constructive trust.

After considering the High Court decisions in *Baumgartner v Baumgartner* (1987) 164 CLR 137 and *Muschinski v Dodds* (1985) 160 CLR 583, the AAT held that there was no action on the part of Mrs Tokolyi's sons which would have rendered it unconscionable for her not to sell the 2 farm properties or not to dispose of the proceeds as had been discussed. Although the AAT found that the sons had an expectation of receiving a share of the proceeds of the sale, there was no evidence that either acted to his detriment in reliance on that expectation.

The tribunal also rejected the argument based on promissory estoppel, again finding that there was no evidence of any detrimental reliance on the part of the sons (see *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 and *Kintominas v Secretary to DSS* (1991) 63 *SSR* 891; 103 ALR 82).

The AAT concluded, after referring to further evidence from Mrs Tokolyi that she considered the agreement made binding on her, that –

> 'Had the family members intended to enter into a legally binding agreement, they could have sought legal advice to ensure that this was achieved.'
>
> (Reasons, para. 42).

A further argument made on behalf of Mrs Tokolyi and rejected by the AAT was that the purpose of s.6(10)(a) was only to catch sham agreements entered into for the purpose of avoiding the assets test. It was held that purpose, while relevant to paragraph (b), was irrelevant to paragraph (a). On this basis, the AAT held that the amounts of $227 772 paid to the 2 sons were property disposed of by Mrs Tokolyi for no consideration and accordingly should be included in the value of her assets.

On the issue of the $80 000 amount paid to Leslie, the AAT found that it was intended as a loan, not a gift and accordingly, it also formed part of the property within s.4(11) of the 1947 Act.

Finally, the AAT considered the investment in Pyramid Building Society and decided that prior to 24 June 1990, its face value should be taken into account and after that date, it should be assessed at the discounted value of the Victorian Government Security Bonds.

As to the hardship provisions, the AAT held that this issue was not before the Tribunal as no application had been made under s.7 and the matter had not been considered by either the primary decision maker or the SSAT.

Formal decision

Although the AAT agreed in substance with the decision under review, because there were variations in detail between the findings of the SSAT and of the AAT, the AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration in accordance with the reasons for decision.

[R.G.]

Assets test: resulting trust, problems of proof

ARONOVITCH and SECRETARY TO DSS

(No. 7557)

Decided: 6 December 1991 by J.R. Dwyer, P.J. Burns and L.S. Rodopoulos.

Aronovitch was the sole registered proprietor of a Bentleigh property, which was not her principal home. The value of that property, if included in her assets, would preclude payment of sickness benefits to her under the benefits assets test.

Aronovitch said that the property was owned beneficially by her mother, Mrs Rubel, who lived in Israel. She said that the property had been bought by her and her husband on behalf of her mother with $17 000 funds provided by Rubel and brought into Australia by a friend, Mr Rothstein, who was no longer alive. Under a 1979 Family Court approved agreement between Aronovitch and her husband, the property was transferred from their joint names to Aronovitch as sole proprietor.

On various occasions, including in the Family Court agreement, Aronovitch had referred to the Bentleigh property as hers without indicating that she held it on trust for her mother. Her evidence concerning how the money was brought into Australia by Mr Rothstein, and on other details,

was unsatisfactory and the AAT concluded that it was unsafe to rely on her evidence unless it was corroborated.

Corroboration?

Aronovitch produced a copy of her mother's will (the details of which were suppressed from publication) and the Family Court agreement. The AAT found these to be unhelpful, since they were consistent with Aronovitch's evidence but could also be explained in other ways.

Aronovitch produced supporting evidence as follows:

- a statutory declaration from her mother Mrs Rubel, confirming that Rubel had sent $17 000 via a friend to Aronovitch to buy her a house in Australia, and that she authorised her daughter to keep the rental income from the property;
- statutory declaration by Aronovitch's accountant stating that on several occasions since 1980 Aronovitch had told him that the property was her mother's, and had sought his advice concerning transferring the title to her mother's name;
- oral evidence from a Mrs S. who had met Rubel some years ago, who told her that she owned a house in Australia; and
- similar evidence to Mrs S's from Mr Z. contained in a statutory declaration.

The advocate for DSS had not challenged any of that evidence and did not require Aronovitch's accountant to attend the hearing for cross-examination. Applying the decision of the Federal Court in *Repatriation Commission v Maley* (15 October 1991), the AAT said that there being no reason advanced by the DSS advocate nor apparent to the Tribunal why that evidence should be rejected, the evidence was accepted.

A resulting trust

The AAT was satisfied that Rubel provided the purchase price for the Bentleigh property on the express understanding it was to be her property. Under equitable principles, this gave rise to a resulting trust in favour of Rubel. A resulting trust need not be manifested and proved by some writing s.53(1) and (2) *Property Law Act* 1958 (Vic.). Although there may be no resulting trust where a parent gives money to a child for the purchase of property, the presumption of advancement (i.e. that a gift was intended) was rebutted in the present case by evidence that Rubel did not intend to make a gift of the Bentleigh property to her daughter.

Formal decision

The AAT set aside the decision of the SSAT that the value of Aronovitch's assets was sufficient to preclude the payment of sickness benefit to her. The AAT remitted the matter to the Secretary for consideration in accordance with a direction that the value of her assets be reduced by the value of the property at Bentleigh.

[P.O'C.]

Deprivation of assets

COPLEY and SECRETARY TO DSS

(No.7697)

Decided: 24 January 1992 by P.W.Johnston.

On 26 May 1987 payment of Mr Copley's age pension was suspended 'pending enquiries' into deprivation of his assets and income. His pension was cancelled on 17 June 1988 because of 'no contact or reply to corres.'. Mr Copley applied to the AAT for review after his appeal to the SSAT was rejected.

The legislation

Deprivation of assets was controlled by s.6AC (later renumbered s.6) of the *Social Security Act* 1947.

By virtue of s.6AC(9) that section did not apply (a) to a disposition that took place more than 5 years before the person became qualified to receive a pension, or (b) to a later disposal that was before the time when the Secretary was satisfied that the person 'could reasonably have expected that [s/he] would become qualified . . . to receive such a pension . . . '

Section 6AC(11) defined a disposal to include where the person 'receives no consideration, or inadequate consideration, in money or money's worth'.

The facts

Mr Copley was born in 1918. He received invalid pension from 1978 and age pension from October 1986.

After his wife died in March 1985, Mr Copley, in accordance with an undertaking he had made to her, disposed of her assets and set up a trust in her name from which considerable amounts of income were distributed to various charities. The DSS was advised of this disposal in November 1986 but Mr Copley refused to give details of the charities or amounts. Subsequently, in April 1987, the DSS cancelled then reinstated Mr Copley's pension at a reduced rate.

In May 1987 the DSS once again sought details of the disposals of Mr Copley's assets but without success, as he felt that the Department was 'prying'. Consequently, on 26 May 1987 his pension was suspended 'pending enquiries'.

Mr Copley appealed to the SSAT in October 1987 but this was not determined until August 1988 when his appeal was rejected. In the meantime Mr Copley worked in Indonesia with a Christian mission but had maintained contact with the SSAT. Despite this, on 17 June 1988, before the SSAT heard the appeal, the DSS cancelled Mr Copley's pension because of 'no contact or reply to corres.'.

At the AAT hearing Mr Copley contended that in giving away his income to charity, he received 'adequate consideration' as he had obtained 'God's grace'. However he maintained his position of not providing details of the charitable distributions. The AAT found that Mr Copley had 'very strong convictions grounded in his Christian faith' which made him 'a very difficult person to deal with and understand'.

Mr Copley also told the AAT that, at the time when he disposed of his assets, he believed that he would die shortly and hence had no reasonable expectation of ever needing to claim a pension.

Cancellation set aside . . .

The AAT concluded that the grounds for cancelling Mr Copley's pension on 17 June 1988 could not be sustained having regard to the fact that he maintained contact with the SSAT in relation to his appeal which he was still pursuing. It was also considered relevant that this decision to cancel was not conveyed to Mr Copley.

And suspension affirmed . . .

The AAT found that Mr Copley 'did *unreasonably refuse* to supply information properly required of him under the Act': Reasons, para.21.

As far as the substantive issue of disposition was concerned, the AAT said that 'it is not enough for the Applicant to say that by disposing of