Formal decision

The AAT affirmed the decision under review.

[Editor's note: It should be noted that the original investment in this matter was made prior to 1 January 1988 and the subsequent transfer to the government securities portfolio occurred after that date. This raises the issue of the difference in the way such investments are treated under the Act. The AAT did not address this issue and did not indicate whether the investment was to be treated as a pre or post 1 January 1988 investment.

For a discussion of related issues, see the Annotated Social Security Act 1991, Federation Press, 1992, para [1075.02].]

[A.A.]

Assets test: valuation of land

TORV and SECRETARY TO DSS

(No. P91/339)

Decided: 18 June 1992 by M.D. Allen, C.A. Woodley, and D.D. Coffey.

This was an appeal against the valuation of a farm upon which a dwelling house was situated. The valuation was conducted for the purpose of an age pension. The land consisted of 2 titles, Portion 117 being 22.66 hectares and Portion 116 being 16.196 hectares. The Australian Valuation Office valued the property on the basis of its 'highest and best use as 2 individual home sites'. They purported to have considered a number of comparative sales in the area to arrive at a valuation of $227 000. From this figure the valuer subtracted the independent valuation of the applicant's dwelling house and curtilage of 2 hectares (s.11(5) of the *Social Security Act* 1991 and its 1947 equivalent). The valuation of the house and 2 hectare curtilage was $127 000, leaving a nett asset for age pension purposes of $100 000.

The facts

The AAT found as a fact that the land consisted of only approximately 2 hectares of arable land and the remainder was 'eroded bush, best described as brown snake and rock wallaby country'. The Tribunal found that sub-division was unlikely to be approved by the local Council for various reasons.

The Tribunal heard evidence by a local real estate agent to the effect that the land was unimproved and that its roughness precluded it being sold as a rural home site. The real estate agent was of the opinion that it was likely to sell, if at all, as a 'bush block'. The Tribunal accepted the agent's opinion that the applicant would have had considerable difficulty in selling the land at the time of the application.

The Tribunal heard evidence that the comparative sales relied on by the valuer were of improved blocks and of blocks that were substantially bigger than the applicant's. It was found that there were no true comparative sales to the applicant's block by which it was possible to estimate the value of the applicant's property.

The issue

The issue was the appropriate method of valuing the applicant's land, particularly in the absence of any true comparative sales.

The legislation

As the applicant's original application for a pension was lodged prior to the commencement of the 1991 Act, the AAT determined that the appropriate law to apply was that contained in the 1947 Act. The Tribunal did not refer to the provisions of the 1947 Act and determined the matter by reference to general valuation principles.

The AAT's decision

The AAT approved of the overall approach of valuing the whole of the land inclusive of the dwelling house and 2 hectares curtilage, and then deducting the value of the house and 2 hectares curtilage (*Reynolds* (1987) 35 *SSR* 444 was cited).

In relation to the lack of comparable sales the Tribunal observed:

- One of the sales alleged to be a comparative sale was a mortgagee sale. This fact alone did not entirely dismiss it from consideration although its difference in size and zoning rendered it non-comparable.
- It was difficult to draw conclusions as to the value of unimproved blocks from comparable sales of improved blocks.
- In the absence of any true comparable sales, less reliable comparisons between properties of different sizes and degrees of improvement would have to be relied on with appropriate adjustments.
- The evidence of the local real estate agent with his knowledge of local conditions, even though he was not a qualified valuer, was useful.

Formal decision

The AAT determined that the value of the applicant's property was $205 000 and that the value of the land curtilage was $126 000 and remitted the matter to the DSS to re-determine the applicant's pension.

[A.A.]

Overpayment: marriage-like relationship

SECRETARY TO DSS and MOORE

(No. 8098)

Decided: 9 July 1992 by J.A. Kiosoglous.

The DSS decided to cancel the sole parent's pension being paid to Moore because she was living in a marriage-like relationship. Subsequently DSS raised an overpayment of $8360.60 of sole parent's pension paid between 10 March 1990 and 14 March 1991.

The SSAT set aside this decision, substituting a decision that no marriage-like relationship existed. The DSS requested that the AAT review this decision.

The facts

Moore rented a house from the South Australian Housing Trust (SAHT) from 29 October 1988. Her son Scott was born on 20 April 1990 and she was paid sole parent's pension from 10 May 1990. At some point after Moore rented the house but before she became pregnant, Mr Dennis Webber moved in.

The issues

The AAT set out the issues it must address as:

(a) whether Moore was living in a marriage-like relationship during the relevant period and thus not a 'single person';

(b) whether there was a recoverable debt;

(c) whether all or part of the debt should be waived.

The law

The substantive law relevant in this matter was set out in the 1947 Act.

However the 1991 Act would apply to the question of waiver.

The AAT referred to the indicia of a marriage-like relationship set out in s.3A of the 1947 Act. These are:

(a) the financial aspects of the relationship;
(b) the nature of the household;
(c) the social aspects of the relationship;
(d) any sexual relationship; and
(e) the nature of people's commitment to each other.

The evidence

Financial aspects: Moore had asked Webber to move in with her to help pay the rent and to share expenses.

Accounts were in Moore's name but all expenses, apart from those associated with Scott , were shared. They had no joint bank accounts, joint liabilities or joint property.

Webber allowed his car to be used as collateral when Moore borrowed money.

The household: Webber told the AAT that he did not provide care or support for Scott. He and Moore had separate bedrooms and their own personal possessions. Occasionally they shared a meal, they did their own washing and ironing although Moore did most of the housework.

Social aspects: Moore and Webber strongly denied that they had ever held themselves out as married. They were good friends who led separate lives socially.

In contrast, evidence was led by the DSS indicating that Webber had congratulated Moore on the birth of their son Scott. Moore and Webber denied this.

A manager from SAHT gave evidence that Moore had stated to her that Webber was her boyfriend. Moore was recorded as Webber's *de facto* on his application for superannuation and was the beneficiary under that policy.

The midwife present during the delivery of Scott said that Webber was introduced as Moore's *de facto* and was to be present at the birth.

In reply Moore stated that she told SAHT that Webber was her boyfriend to obtain a house, she was Webber's beneficiary because they were friends, and the midwife had misunderstood her. Webber was present at Scott's birth.

Sexual relationship: Both Moore and Webber denied any sexual relationship although neither could remember exactly when Webber had moved in with Moore.

Commitment: Webber moved out after Moore's pension was cancelled but moved back in January 1992, as he had nowhere else to live. Moore described their relationship as being mutually supportive but not boyfriend/girlfriend. Neither was their relationship exclusive.

The AAT's conclusion

The AAT concluded that the financial aspects of the relationship indicated a level of trust and sharing greater than mere friendship. Webber had children from a previous marriage who could have been named as beneficiaries in his superannuation policy.

Moore did most of the housework and the shopping. Webber was a father-like figure for Scott. With respect to Webber being named as Moore's boyfriend in the application to SAHT, the AAT stated:

> 'both the respondent and D [Webber] are prepared to present their circumstances in whatever light will best gain them advantage and accordingly the Tribunal finds that their credibility is damaged.'

(Reasons, p.11)

The AAT did not make a finding with regard to any sexual relationship, and stated that this was not the determinative issue. There was compelling evidence that Moore and Webber gave emotional support and companionship to each other which went beyond mere friendship. There was also a degree of permanence about the relationship. The weight of evidence supported the submission that Moore lived in a marriage-like relationship with Webber.

Moore had received an amount of money to which she had no entitlement and this money became a debt recoverable pursuant to s.246 of the 1947 Act.

Waiver

The AAT referred to the waiver provisions set out in s.1237 of the 1991 Act. Following the reasoning of *Riddell* (1992) 68 *SSR* 977, the AAT applied the Ministerial directions of 8 July 1991. Only para. (g) of those directions could be applicable in this matter. A debt could be waived in special circumstances where those circumstances were extremely unusual, uncommon or exceptional. After Moore's expenses were subtracted from her income there was a balance of $27.70. It would take 5 years to pay the debt at this rate. The AAT referred to the relevant cases in the area and concluded that special circumstances did not apply.

Formal decision

The AAT set aside the decision under review and substituted a decision that Moore was living in a marriage-like relationship and thus had a debt to the Commonwealth of $8360.60.

[C.H.]

Overpayment: marriage-like relationship

RIDLEY AND SECRETARY TO DSS

(No. 8099)

Decided: 13 July 1992 by T. E. Barnett

The SSAT had affirmed a decision of the DSS dated 7 September 1990 to raise and recover an overpayment of $46 339 paid as widows' pension and supporting parent's benefit to the applicant during the period from 16 July 1981 to 6 August 1987. The SSAT had found that Ridley was during this period 'living with a man on a bona fide domestic basis although not legally married to him' and was therefore not a 'supporting parent' as defined by s. 83AAA(1) *Social Security Act* 1947 and its successor provisions. Ridley sought review of the SSAT's decision.

The facts

Ridley had become pregnant at the age of 15 years and married at 16. On 3 July 1980 she was granted widow's pension. In January 1981 Ridley, then known as Denise Bennett, moved fron Cowra, NSW to Perth with the three children of her 11 year marriage to escape harassment by her former husband. She came to Perth to work as a live-in assistant to Mr Ray Ridley and his sick wife at their home in Dianella. There she met their son Robert Ridley who lived in a converted garage on the premises. Robert Ridley was a self-confessed 'drifter' and heavy drinker who was employed as a greenkeeper at a country club.

The live-in help arrangement proved unsatisfactory, and after a few weeks Ridley moved to a rented home at Wanneroo. Several weeks later she and Robert Ridley commenced a casual sexual relationship. He continued to live at the home of his parents. He stayed at Ridley's home one or two

nights per week primarily for his own convenience, as the house was close to his place of employment, where he also drank after work. Ridley incorrectly stated to the DSS that she was paying lodging of $40 per week to R. W. Ridley of the same address.

In July 1981 Ridley and Robert Ridley entered into a contract to purchase jointly a property at Wanneroo. Ridley's parents were willing to contribute the deposit, but she could not service a loan. Robert Ridley had no savings, but was eligible for a loan from Defence Service Homes Corporation. As a condition of providing the deposit, Ridley's parents required that her name be on the title. In order to obtain the loan in their joint names, they made a statement on the loan application that they had been in a de facto marriage relationship for three years and resided in the same house.

It was agreed that Ridley and her children would live in the home, and that Robert Ridley would continue the previous arrangement of sleeping there one or two nights per week as it suited him. Ridley made all the mortgage payments and she and Mr Ridley shared equally the water and land rates. Ridley continued to claim rent allowance from the DSS although she was no longer paying rent.

Ridley became pregant to Mr Ridley. She gave birth to a son Gavin in April 1982. Mr Ridley was not at all interested in the baby. Sexual relations ceased during the pregnancy but Mr Ridley continued to stay as before, for his own convenience.

After Mr Ridley's mother died in January 1983, he agreed with his father that a self-contained dwelling be erected at the rear of the Wanneroo property for the joint occupation of the two Ridley men. Mr Ridley senior provided the funds for the construction.

Following the visit of a Field Officer, Ridley's benefit was suspended on 7 August 1987. On 5 July 1988 the DSS advised Ridley that an overpayment had been raised in an amount later fixed at $46 339. Ridley appealed to the SSAT, denying that she and Ridley had been living on a basis similar to that of a married couple. She withdrew her appeal in view of a pending prosecution.

Following suspension of her benefit, Ridley decided to sell the property and return to live with her parents in Cowra. To prevent the sale of his home, Mr Ridley agreed that they would live as a married couple and that he would support her. They took up residence together in the main house in October 1987, and married in January 1988.

In July 1989, after a trial, Ridley was convicted of offences under the Act and on 14 August 1989 she was sentenced to 18 months imprisonment and ordered to pay reparation to the Commonwealth in the sum of $40 405. The Director of Public Prosecutions did not pursue recovery of the moneys due under the reparation order. Following her release from prison, Ridley recommenced her appeal to the SSAT, expressly denying that she and Mr Ridley had been living in a de facto relationship.

Evaluation of evidence

The AAT accepted the truth of the evidence given by Ridley, which was corroborated on some aspects by her 19 year old son and her mother. She was able to account for the evidence against her in a way which was reasonably credible and consistent.

The DSS case relied on circumstantial evidence. Ridley had at all times when interviewed by a DSS officer denied that she was living with Ridley in a de facto relationship. There was no evidence of shared finances, shared family life or that Mr Ridley ever placed his possessions in Ridley's house. Although Ridley had made false representations to the Department concerning her living arrangements, the purpose was not necessarily to hide the existence of a de facto relationship. She may have wished merely to avoid the risk that the DSS might wrongly form that conclusion.

The AAT could not be reasonably satisfied that Ridley ever lived with Mr Ridley as his de facto wife during the relevant period.

Jurisdiction

The AAT rejected a submission by the DSS that it lacked jurisdiction to review the matter, or that it should not do so, in view of the previous decision of a criminal court to convict the applicant. In finding that it had jurisdiction, the AAT followed previous decisions in *Re Secretary, DSS and Pomersbach* (1992) 65 *SSR* 912; *Re Secretary, DSS and Mariot* (1992) 66 *SSR* 937; and *Re WVC and Secretary, DSS* (1992) 67 *SSR* 951. The reparation order was not affected by the AAT's decision. The AAT's decision replaced the original executive decision of the Secretary.

Formal decision

The AAT set aside both the decisions of the delegate and the SSAT affirming the delegate's decision, found that Ridley was during the period from 16 July 1981 to 6 August 1987 not living with a man as his de facto wife and referred the matter back to the Secretary to calculate Ridley's entitlements.

[PO'C]

Overpayment: married person

ARMIJO and SECRETARY TO DSS

(No. 8120)

Decided: 24 July 1992 by M.D. Allen and J. Kalowski.

The supporting parent's benefit being paid to Lusvenia Armijo was cancelled on 24 September 1986 on the basis that she was married. On 17 July 1987, the DSS raised an overpayment of $24 657.10 for the period 23 September 1982 to 24 July 1986, which Armijo was requested to repay.

Armijo requested review of that decision, which was affirmed by an Authorised Review Officer on 16 March 1988.

On review, the SSAT affirmed that decision and a further decision of DSS on 3 April 1992 not to waive the overpayment.

Armijo then requested review by the AAT of both decisions.

The facts

Armijo arrived in Australia in 1974, pregnant with her son Jason. Shortly afterwards she and two other women moved into a house which was occupied by her second cousin, M, and his brother. After the birth of her son, Armijo was paid supporting parent's benefit. She returned to work in 1981 and the benefit was cancelled. After losing her job in 1982, Armijo was paid the supporting parent's benefit again.

In the meantime Armijo, M and 3 other persons had bought a house in Randwick as tenants in common in equal shares. In 1981 Armijo and M bought a property in Paddington as joint tenants. The purchase was financed by a mortgage. Armijo and M