

The SSAT affirmed the DSS decision. Kidner appealed to the AAT.

Constructive trust?

Kidner argued that the properties in question should be excluded from the value of his assets for the purpose of the assets test because Kidner held the properties on a constructive trust for his sons.

The AAT referred to the Federal Court decision in *Kintominas* (1991) 23 ALD 573; 63 SSR 891 and said that it was bound to take account of equitable principles, including those relating to constructive trusts.

A constructive trust could create or dispose of an interest in land, notwithstanding a lack of writing: *Property Law Act 1974* (Qld), s.11(2). But did the evidence establish the elements of a constructive trust? Those elements were:

- a common intention between the parties concerning ownership of the beneficial interest in the property;
- a detriment to the claimant of the beneficial interest; and
- the fact that it would be a fraud on the claimant for the other party to deny the claimant's beneficial interest.

The AAT said that, in *Kintominas v Secretary*, DSS, Einfeld J had held that equity would intervene to protect the interest of a pensioner's son who had improved a property in the expectation of owning the property. But, the AAT said, 'Significantly, at no time did Einfeld J find that the arrangement between Mrs Kintominas and her son Terry constituted a constructive trust': Reasons, para. 24.

The AAT said that the present case had similarities to the cases of *Wachtel v Repatriation Commission* (1986) 11 ALN N213 and *Dineen v Secretary*, DSS (1988) 17 ALD 91; 48 SSR 628. In the present case, just as in those cases, although Kidner had acted in relation to the properties in accordance with the wishes of his sons, there was nothing which would make it unconscionable for Kidner to deny the trust.

The expenditure of Kidner's sons on the property had been undertaken to improve their income-producing capacity and that did not create the type of detriment required to invoke the equitable doctrine. The AAT's decision in *Rogers* (1987) 14 ALD 178; 41 SSR 517 reinforced this approach.

The AAT concluded –

'that the equitable doctrine of constructive trusts cannot extend to cases where one party incurs expenditure for business purposes and the parties purport to transfer property by sale but fail to lawfully complete the transaction.'

(Reasons, para. 34)

It followed that Kidner remained the legal and beneficial owner of the relevant property, which should be included in his assets.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Assets test: deposits in Pyramid Building Society

SECRETARY TO DSS and
MIDDENDORP
(No. 8791)

Decided: 22 June 1993 by R.A. Balmford, G.F. Brewer and B.H. Pascoe.

Adrianus Middendorp had deposits of some \$353,376 in the Pyramid Building Society when the Society closed its doors in mid-1990. The Society was placed in liquidation in December 1990.

Middendorp received an initial payment of 25c in the dollar on his deposits from the liquidator of the Society.

In May 1992, Middendorp lodged a claim for age pension. The DSS rejected his claim on the basis that the value of his assets, including his claim against the liquidator of Pyramid, exceeded the assets test limit.

On review, the SSAT set aside that decision, adopting a lower valuation for Middendorp's Pyramid deposits. The DSS appealed to the AAT.

The issue

The single question before the AAT was the proper value to be attributed to Middendorp's Pyramid deposits. That question depended on the amount and timing of any distribution of funds to be made by the liquidator.

The SSAT had assumed that the liquidator would pay depositors only 40

cents in the dollar; and, as Middendorp had already received 25 cents in the dollar, his deposits were worth only 15 cents in the dollar, less a discount to allow for the delay in receiving that amount.

However, the DSS presented the AAT with an estimate, prepared by the liquidator, of the probable payments to creditors of the Society. This estimate was said to be 'based on a number of economic and legal assumptions that may or may not prove correct'.

According to the liquidator, a number of payments would be made at 12-monthly intervals, coming to some 51 to 53 cents in the dollar by some time after June 1995. The DSS was prepared to assume that the last payment would be made on 30 June 2010, and that earlier payments would be made on 30 June 1994 and 30 June 1995.

On those assumptions, the DSS proposed that the payment expected on 30 June 1994 (\$10,601) be taken at a discount value of 0.8404; the payment due on 30 June 1995 (\$42,405) be discounted at 0.7746; and the payment due on 30 June 2010 be discounted at 0.2276. On this basis, Middendorp's interest in the Society would be valued at \$52,211 at the date of his claim.

The AAT accepted the liquidator's estimates of expected payments and generally endorsed the DSS's approach. But the AAT decided that, in discounting the future expected distributions, 'a discount rate including a premium for risk should be adopted', because of the uncertainty associated with the winding up of the Society.

Whereas the DSS had used a discount factor of 8.5%, the AAT adopted a factor of 12.75%. The result was that Middendorp's interest in the Pyramid Building Society was valued at \$41,456 as at the date of his claim. That amount, when added to Middendorp's other assets, meant that he was eligible for a part pension.

Formal decision

The AAT set aside the decision of the SSAT and remitted the matter to the Secretary with a direction that, as at 14 May 1992, the value of Middendorp's investment in the Pyramid Building Society was \$41,456.

[P.H.]