which may result in the enlargement of breasts, and adopts certain secondary sex characteristics. But such a person has not harmonized her anatomical sex and her social sex; they are not in conformity. She still has the genitals of a man. I realize that there are cases (and such is such a case) where a person has not undergone such surgery for legitimate reasons, including its cost or medical or psychological reasons which render them unfit for the operation. Nevertheless the interests of society and the individual must be balanced in the determination of the ordinary meaning of the words with which this case is concerned and the application of the facts to those meanings. The requirement of reassignment surgery also has the benefit of society acknowledging that an irreversible medical decision has been made, confirming the person's psychological attitude.

Negative attitudes towards transsexuals are based fundamentally on religious and moral views and assumptions which are slowly changing in modern society. There is an increasing awareness today of the importance of the right to privacy, and growing tolerance of a person's identity. But where the psychological sex and the anatomical sex of a person do not conform to each other it seems to me that the sex of a person must be determined by the anatomical sex...

I reach this conclusion with regret. A transsexual who genuinely regards himself or herself as having achieved the new sex must find life extremely difficult. Judicial opinions in this area of the law must be liberal and understanding, guided by the signposts of what is in the best interests of society and the transsexual. They do not conflict in the case of the post-operative transsexual, but in my opinion the conflict still exists in the case of the pre-operative transsexual.

Society would in my view regard an anatomical male as male regardless of the feminine appearance of the person or the inner beliefs and convictions of that person. There are, I think, dangers in a male capable, or giving the appearance of being capable, of procreation being classified by the law as a female, but this is plainly not the case after sex reassignment surgery has been performed. The individual is no longer procreatively of his original sex.'

(Reasons, pp. 47-9)

Formal decision

The Federal Court allowed the appeal, set aside the AAT's decision and remitted the matter to the AAT for determination according to law.

[P.H.]

Compensation preclusion: lump sum or periodic payment?

Re BLUNN and CLEAVER

(Federal Court of Australia)

Decided: 26 November 1993 by Sheppard, Neaves and Burchett JJ.

Bruce Cleaver received payments of sickness and unemployment benefits between October 1989 and November 1990. In February 1992, a decision was made under the *Commonwealth Employees' Rehabilitation and Compensation Act* 1988 that Cleaver was entitled to weekly compensation from his employer for certain periods between September 1989 and November 1990, totalling $22,950.40.

The DSS then notified Cleaver's employer under s.1174 of the *Social Security Act* 1991 that Cleaver had received payments of social security benefit of $7614.18 during the period for which he was entitled to compensation; and required the employer to pay that amount to the DSS.

Cleaver's employer paid that amount to the DSS and the balance to Cleaver. The DSS subsequently amended the notice so as to claim $4644.65, and refunded the balance to Cleaver.

The SSAT then decided that the DSS could not recover the amount of $4644.65 from Cleaver's compensation entitlements. The DSS applied to the AAT for review of the SSAT's decision.

The AAT referred a question of law to the Federal Court under s.45 of the *AAT Act*: was the compensation payment made to Cleaver properly characterised as 'periodic compensation payments' or 'compensation in the form of a lump sum' under Part 3.14 of the *Social Security Act* 1991?

Periodic payments of compensation

On behalf of Cleaver, it was argued that the character of the payment in question should be determined by looking at the manner in which the payment was received by Cleaver. On the other hand, the DSS contended that its character depended on the nature of the payment and the circumstances which gave rise to the entitlement to payment.

The Full Court considered the history of the compensation preclusion provisions and the passage of the 1991 'plain English' Act. The Court said that the perceived legislative intention in Part 3.14 of the 1991 Act was to prevent 'double dipping'. In the light of that intention, all the provisions in Part 3.14 should operate according to the nature of the entitlement to the compensation payment rather than to the manner in which the payment was, in fact, made.

The Act appeared, on its face, to distinguish between a payment 'in the form of a lump sum' and 'a series of periodic compensation payments'. Considered without reference to the context, those references might appear to favour Cleaver's argument, the Full Court said. But the context and purpose served by the provisions in Part 3.14, and the consistency and fairness of their operation, were better guides to their meaning than a bare appeal to the literal sense of the words used:

> 'The language of the provisions does not so clearly and unambiguously support the construction contended for by [Cleaver] as to require us to construe the legislation in that way. We see nothing incongruous in treating a person who receives a single payment which is made up of weekly amounts of compensation in respect of a number of consecutive weeks as being the recipient of a series of periodic compensation payments.'

(Reasons, p.33)

The alternative construction contended for by Cleaver would lead to arbitrary and capricious results, the Court said. It was prepared to adopt the approach for which the DSS argued.

'Plain English'?

The Court concluded its judgment by criticising the drafting of the 1991 Act. While the aim of making legislation shorter, simpler and more easily intelligible would provide a good reason for expressing that legislation in 'plain English', the Court said that the aim should not have priority over the first requirement of legislation – the clear expression of what Parliament intended. The Court continued:

> '...the increasingly complex society in which we all live very often demands that legislation be expressed in a complex form. That is the factor which will so often operate to prevent simplicity in legislative drafting. The area of social services legislation is a complex one as the terms of the previous legislation and judicial decisions on it have demonstrated. That is what the draftsman of this legislation may have sought to overcome. Regrettably, the replacement consists of a maze of provisions made the more complex by prolix definitions, provisos and exceptions. Both those who

claim entitlements and those responsible for its administration will not always find it easy to discover whether or not a benefit is payable. It may be expected that the Administrative Appeals Tribunal and the courts will continue to be troubled by difficult problems of construction which will be thrown up by a variety of factual circumstances which, in an increasingly complex community, will not be few.'

(Reasons, p. 37)

Formal decision

The Federal Court answered the question of law referred to it by the AAT by declaring that the compensation payment of $22,950.40 was a number or series of periodic compensation payments for the purpose of Part 3.14 of the *Social Security Act* 1991.

[P.H.]

Assets test: equitable interests in pensioner's property

KIDNER v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 7 December 1993 by Drummond J.

This was an appeal, under s.44 of the *AAT Act* 1975, from the decision of the AAT in *Kidner* (1993) 75 *SSR* 1083.

The AAT had affirmed a DSS decision that age pension was not payable to Kidner, because the value of his assets was too high. The AAT had rejected a submission from Kidner that several areas of land, registered in Kidner's name, were held by him subject to a constructive trust in favour of his three sons.

Kidner had given evidence that, in 1982, he made an oral agreement with his sons. Under the agreement, the sons would take over Kidner's business and buy the properties. The sons then took over the business and improved the properties, but the agreed purchase price for the properties remained unpaid and the properties remained in Kidner's name.

The AAT had decided that there was no constructive trust over the properties because there was nothing which would make it unconscionable for Kidner to deny such a trust.

On appeal, Drummond J held that the AAT had committed two errors of law.

Part performance

First, the AAT had failed to consider whether Kidner held the properties subject to his sons' interests based on part performance of the oral contract of sale.

Drummond J said that an oral agreement for the sale of land partly performed by the purchaser conferred on the purchaser an equitable interest in the land from the moment when sufficient acts of part performance had occurred to entitle the purchaser to specific performance of the agreement, unless the purchaser had done anything which would justify denial of specific performance.

This proposition, Drummond J said, was supported by a number of decisions dealing with the enforceability of oral contracts for the sale of land: *Regent v Millett* (1976) 133 CLR 679; *JC Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282; *Legione v Hateley* (1983) 152 CLR 406; *Bunny Industries Ltd v FSW Enterprises Pty Ltd* [1982] Qd R 711; and *Australian & New Zealand Banking Group Ltd v Widin* (1990) 26 FCR 21.

In the present case, the AAT had failed to consider the question whether the 1982 arrangement between Kidner and his sons amounted to an oral agreement to sell the properties, an agreement that was now enforceable because the agreement was partly performed. The AAT's failure to consider that question was an error of law: *Dennis Wilcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267.

It was not as if, Drummond J said, the AAT's failure to deal with the question could not have affected its decision. The AAT had apparently decided that there was a real oral agreement between Kidner and his sons but had not gone on to consider the effect which part performance would have on the sons' ability to enforce that agreement.

It followed, Drummond J said, that the question whether there had been an oral agreement made in 1982 and Kidner had become bound to that agreement because it was partly performed by his sons must be remitted to the AAT for determination.

Constructive trust

Drummond J went on to hold that the AAT had committed an error in deciding that a constructive trust could only be found if Kidner had asserted a legal title to the properties unfettered by his sons' claims.

It was not necessary before such a trust could arise, Drummond J held, that there be a common intention between Kidner and his sons that the sons should be entitled to a beneficial interest in Kidner's property because of their actions in improving the property; and he referred to the High Court's decision in *Baumgartner v Baumgartner* (1987) 164 CLR 137.

A constructive trust could arise, Drummond J said, if Kidner and his sons had agreed on the sale of the properties to the sons and the sons had then acted to improve and maintain the properties, so that it would then be unconscionable for Kidner to deny the sons' claim to a beneficial interest in those properties.

Alternatively, a constructive trust could arise if there was a looser arrangement, under which Kidner gave the sons the use of the properties and, to his knowledge, they expended substantial sums in improving the properties so that it would be unconscionable for Kidner to deny the sons' claim to an interest in the properties.

Formal decision

The Federal Court set aside the decision of the AAT and remitted the matter to the AAT for decision according to law.

[P.H.]

[Editor's note: An oral contract for sale of the properties, if enforceable under the equitable doctrine of part performance, gives rise to two interests. First, the vendor holds the property as constructive trustee for the purchaser who becomes the owner in equity; second, the vendor has a lien over the property as security for the balance of the purchase monies. The lien, being a proprietary interest, would on ordinary principles be included in the vendor's assets. The judgement makes no mention of the lien, possibly because the amount owing to Kidner might not cause his assets to exceed the relevant allowable assets limit. The reason for the omission is unclear from the judgement.]

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The Full Federal Court has reversed the AAT's decision in Raizenberg (1992) 71 SSR 1023, holding that a congenitally disabled child can be treated as having become incapacitated for work at the time of her birth; that incapacity for work can occur before a person is of legal working age; and that such a child who migrated to Australia and then turned 16 cannot claim to have become permanently incapacitated for work while an Australian resident: Secretary to DSS v Raizenberg (17 December 1993; Wilcox, Einfeld and Beazley JJ). A full note will be included in the April issue of the Reporter.