Benefits assets test: valuation and equitable interests

SECRETARY TO DSS and LANGTON

Decided: 20 October 1993 by S.A. Forgie, T.R. Gibson and J.D. Horrigan.

Margaret and Maree Langton were sisters-in-law, married respectively to brothers Michael and Alan Langton. Both Margaret and Maree applied for job search allowance (JSA) and were refused payment on the ground that their assets (or rather, the assets of their respective spouses) exceeded the allowable limit. In each case the SSAT had on 10 May 1993 set aside the decision and substituted decisions that the applicants were not precluded from payment. Since the issues were the same in each case, the appeals were heard together.

Michael and Alan were tenants in common in equal shares of a 2348 hectare rural property near Roma, Queensland, known as 'Ashmount', where they carried on a partnership engaged in primary industry. There were two houses on the property. Margaret and Michael lived in the original farmhouse ('Margaret's home'), which they had renovated with their own funds. Maree and Alan had paid for the purchase and erection of a kit home at Ashmount for their own accommodation ('Maree's home'), at a total cost of $30,000.

Legislation

A person is not entitled to payment of JSA if the person's assets exceed the applicable 'assets value limit': s.529(1). Where a person is a member of a couple, the value of the person's assets includes that of a partner who does not receive a pension or benefit: s.530(1).

Method of valuation

For the purpose of the assets test, it was necessary to value the interest of Margaret and Michael separately from that of Alan and Maree. Since the value of the claimant's principal home is excluded from the assets test: s.1118(1), it was necessary to place a value on each of the two homes. The value to be ascribed to each home included the surrounding curtilage (land used for domestic purposes not exceeding 2 hectares): s.11(5) and (6).

Sub-section 11(12) provides that where an asset is in co-ownership, the value of a person's asset means the value of the person's interest in the asset. Referring to the High Court's decision in *Spencer* v *Commonwealth of Australia* (1907) 5 CLR 418, the AAT said the the value was to be arrived at by asking what price an informed, prudent purchaser would have to offer to persuade a vendor who was willing but not overly anxious to sell. Referring to the remarks of Cockburn CJ in *The Queen* v *Brown* LR 2 QB 630 at 631, the AAT said that a valuation of land must take into account not only its present use but other potentially more advantageous uses to which it was suited. The AAT said that the essence of those authorities was expressed in the definition of market value adopted by the International Assets Valuations Standards Committee:

> 'Market value is the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction, after proper marketing, wherein the parties had each acted knowledgeably, prudently and without compulsion.'

(Reasons, para 33).

A valuer from the Australian Valuation Office (AVO) gave evidence that he valued the whole property at $328,000. Margaret's house was worth $55,000 and Maree's house $28,000, the latter figure assuming that a purchaser would value the kit home on the basis that it would be moved to another site.

The AAT followed the approach to the valuation of homes on farms adopted in *Reynolds and Secretary to DSS* (1986) 35 *SSR* 444. The principal home and curtilage were valued as if the property were capable of subdivision; that amount was deducted from the value of the property as a whole to arrive at the value of the property included in the assets test. The AVO's practice in cases of broad acre farms is to value the home and curtilage by reference to the value of a residential block in the nearest regional centre (which in this case was Roma). This method was not disputed by counsel for the Langtons, and was accepted by the AAT.

The value of each applicant's spouse's interest in the property was, for the purposes of the assets test, reduced by the value of the couple's interest in their 'principal home'. The DSS argued that as both houses were part of the land that Michael and Alan owned as tenants in common in equal shares, each brother had only a half interest in each home.

The Langtons argued that the full value of Maree's home should be deducted from Alan's interest, and the full value of Margaret's home should be deducted from Michael's interest. Their counsel argued that Maree and Alan were the owners of the kit home by virtue of a resulting trust, having paid all of the cost of acquisition of the home. He argued that Margaret and Michael beneficially owned Margaret's home under a constructive trust. The trust arose because Margaret and Michael had always lived in that home and the family always regarded it as theirs. They had paid for all improvements, with the knowledge and acquiescence of Maree and Alan, and it would be unconscionable for the latter couple to assert any beneficial interest in the house.

Co-ownership and compensation for improvements

The AAT wholly rejected the Langtons' submissions. The rights of Michael and Alan as co-owners were to an equal undivided share of the property as a whole, and did not correspond to any physical portion of the property. The rights and obligations of a co-owner to compensation for improvements are governed not by the law of trusts but by the principles of co-ownership laid down in cases such as *Squire* v *Rogers* (1979) 39 FLR 106 and *Brickwood v Young* (1905) 2 CLR 387. In the absence of an agreement, a co-owner who expends money-making capital improvements cannot force the other to contribute to the expenditure so long as the co-ownership continues. On partition, sale or distribution of the property the co-owner who made the improvements is entitled to an adjustment if the other co-owner would otherwise benefit unfairly from the improvements. That right is a proprietary equity attaching to the land from the date of the expenditure. The amount adjusted is the amount expended on improvements or the increment in the value of the land due to the improvements, whichever is the lesser.

Maree's home added only $28,000 to the value of Ashmount, although she and Alan spent more to erect it, so that the amount that would be taken into account for adjustment in her favour upon sale or partition would be $28,000. The AAT had no evidence about the value of the improvements made by Margaret and Michael to Margaret's house, and could make no allowance for it. Alan would have an

equitable charge entitling him to recoup $14,000 from Michael in the event of partition or sale, and the value of their assets should be adjusted accordingly.

Resulting and constructive trusts

The AAT rejected the argument that Maree and Alan held the beneficial interest entirely in Maree's home. Expenditure on improvements after the property has been acquired do not give rise to resulting trusts: *Calverley v Green* (1984) 155 CLR 242 sets out the circumstances in which these trusts arise.

Nor did a constructive trust arise in favour of Margaret and Michael based on their improvements to Margaret's home. Under the principles discussed in *Muschinski v Dodds* (1985) 160 CLR 583 and in *Butler v Craine* (1986) VR 274 per Marks J, there was no element of unconscionable or inequitable retention or assertion of legal title against them, for their improvements gave rise to an equity that entitled them to adjustment only upon termination of the co-ownership.

Two homes

Although the equal shares of the co-owners did not correspond to any discrete physical portion of the property, co-owners can apply to the court for physical partition of the property. In the circumstances of the case the AAT decided that the interest of each couple in the property for the purposes of the assets test should be reached by considering the position as if on a partition of Ashmount. On partition it was likely that Michael would get Margaret's home and Alan would get Maree's home, and the remaining land would be divided equally between them. Therefore the total value of Maree's home should be deducted from her assets, and the total value of Margaret's home should be deducted from Margaret's assets.

Formal decision

The AAT set aside the decision under review and substituted decisions requiring the DSS to reassess the applicants' entitlements to JSA in accordance with specific findings of the AAT as to the value of each applicant's assets.

[P.O'C.]

Rent assistance: homeowner

REYES and SECRETARY TO DSS

Decided: 23 December 1993 by B.M. Forrest.

Reyes was in receipt of sole parent pension (SPP) from October 1991 following his separation from his wife. Reyes and his wife were living separately in the former matrimonial home. He sought review of a decision of the SSAT affirming a decision of the DSS that his rate of pension was not to include an additional amount by way of rent assistance because he was a 'homeowner'.

Legislation

Reyes was not qualifed for rent assistance if he was an 'ineligible homeowner': s.1066-D1 (a). An 'ineligible homeowner, except for certain categories not relevant to the case, is any 'homeowner': s.13(1). A person who is not a member of a couple is a homeowner if the person has a right or interest in the person's principal home *and* that right or interest gives the person reasonable security of tenure: s.11(4). A right or interest is deemed to give reasonable security of tenure unless the Secretary is satisfied that it does not: s.11(8).

There were two main issues: did Reyes have a 'right or interest' in the former matrimonial home (which was accepted as being his 'principal home'), and secondly, did the interest give him reasonable security of tenure?

'Right or interest'

The expression 'right or interest' was undefined and the AAT took it to mean a right or interest in real property. Reyes' counsel argued that he was not a homeowner, that he no longer had any equitable interest in the property.

Reyes and his wife had caused an agreement under s.86 of the *Family Law Act* 1975 to be registered at court on 15 December 1992. Under the agreement the husband agreed to transfer to the wife his entire interest in the jointly owned matrimonial home, which was to be sold after three years and half the net proceeds of sale (to a specified maximum) were to be paid to Reyes. The agreement added that Reyes would be entitled to lodge a caveat over the title after transfer in order to secure his entitlement to a share of the proceeds. Until the sale he was entitled to live in the property and pay rent to the wife of $260 a fortnight.

The home was transferred to the wife by transfer dated 24 December 1992 and registered on 16 February 1993. Reyes had not lodged a caveat.

At the hearing Reyes relied upon a written agreement between him and his wife dated 1 September 1991 in which Reyes stated he no longer had an interest in the property. This document had not been produced or referred to prior to the hearing, and Reyes had maintained on forms completed by him after that date that he was a joint owner of the home. The AAT did not accept that there was an enforceable agreement made between Reyes and his wife on or about that date. As he remained on title, he was a homeowner after 1 September 1991.

Counsel for Reyes argued that the effect of the transfer made pursuant to the registered agreement was to transfer all his beneficial interest in the home to his wife, retaining only a personal right to receive a share of the proceeds. The AAT held that the right was proprietary and not merely personal, referring to a number of cases including *Cooper v Critchley* [1955] 1 Ch 431 which held that an agreement to assign a share in the proceeds to arise from the sale of land held upon trust constitutes an interest in land. The terms of the registered agreement supported the finding that Reyes' right was intended to be proprietary in nature, since it specifically acknowledged his right to register a caveat. The AAT did not find it necessary to decide whether the right was indeed capable of supporting a caveat.

The AAT concluded that

> 'Notwithstanding the transfer of title to the home, for the purposes of the Act, the applicant by force of the registered agreement and the consideration expressed in the consequential transfer of land, retained a right or interest in the home.'

The AAT mentioned the possibility that Reyes might as a tenant have a 'right or interest' in the land which gave him reasonable security of tenure, but found it unnecessary to determine the question.

Reasonable security of tenure

The AAT decided that the proprietory right that Reyes retained after the transfer did not give him reasonable security of tenure in the home. Any security of tenure that Reyes enjoyed was provided independently of that right. Therefore Reyes was not a homeowner following the transfer of title to his wife.