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.

Payment of rent

A further qualifying condition for payment of rent assistance is that the person pays, or is liable to pay, rent: s.1066-D1(b). The evidence was inconclusive as to whether Reyes had in fact paid rent since the registered agreement, but he could qualify on the alternate ground that he was liable to pay rent under the terms of the registered agreement.

Formal decision

The AAT set aside the decision and substituted a decision that the applicant qualified for rent assistance from 10 December 1992.

[P.O'C.]

Disability support pension: cancellation

PALIOGIANNIS and SECRETARY TO DSS

(No. 9091)

Decided: 1 November 1993 by J.R. Dwyer, D.L. Elsum and B.H. Pascoe.

Mr Paliogiannis had been granted an invalid pension in May 1988. After disability support pension (DSP) was introduced in November 1991, Mr Paliogiannis' entitlement was reviewed and DSS decided to cancel his pension. P asked the AAT to review the decision which had been affirmed by the SSAT.

The issues

The two issues in this case were:

- whether P had a continuing inability to work as defined in s.94(2); and
- whether the principles in *McDonald v Director-General of Social Security* (1984) 18 *SSR* 188 relating to the cancellation of invalid pension are applicable across the change to DSP.

The DSS's concession that P had an impairment of 20% under the Impairment Tables was accepted, with reservations, by the AAT.

Continuing inability to work

This issue required consideration of whether P's impairment was of itself sufficient to prevent him doing his usual work; and work for which he was currently skilled for at least two years (s.94(2)). To decide the question the AAT said it needed to know: what P's impairment was; how it affected his work capacity; what his his usual work was; and for what work he was currently skilled.

The AAT was satisfied that P had limited movement of his neck and back but, due to matters being unresolved by evidence, found it impossible to state definitively what impairments P suffered from as it seemed possible there might also be impairments from joint pain, problems with his hands, possible organic brain damage and psychological, intellectual and psychiatric matters.

The AAT stated that without first knowing the extent of the impairment it was not possible to to decide the effects of the impairment, but was able to say that he was unable to do heavy lifting and lacked the mental skills to work as a ticket seller or mail sorter. As P was aged 55, the AAT was able to consider whether educational or vocational training was likely to equip him to do work having regard to the likely availability of work in his locally accessible labour market (s.94(4)) and decided it was not.

On the evidence of his work history, which included work for friends which had not been on a full-time basis since the 1970s, the AAT was not satisfied that P ever worked for award wages for more than 30 hours a week (s.94(5)), and could not make findings concerning his usual work. It found that the only work for which he may have been currently skilled was as a presser and his neck and back impairments prevented him doing that work.

Application of McDonald's case

The AAT referred to cl.33 of Schedule 1A of the *Social Security Act* 1991 in rejecting the DSS submission that because there were significant differences between the qualifications for invalid pension and DSP it could not be assumed that a person who was granted invalid pension qualifies for DSP. Clause 33, a transitional provision, stated that if a determination granting a claim for invalid pension was in force immediately before 12 November 1991, the determination has effect from 12 November 1991 as if it were a determination granting a claim for DSP. P had been in receipt of DSP since 12 November 1991 so *McDonald* applied. The AAT stated that s.146 of the 1991 Act, like s.46 of the *Social Security Act* 1947 considered by the Federal Court in *McDonald*, makes it clear that DSP is only to be cancelled (under that section) if the Secretary is satisfied that it is being paid to a person to whom it is not payable. As the evidence in this case left the AAT unsatisfied on many points, it could not be satisfied that DSP was not payable to P, particularly if the evidence raised a real possibility that there might be other relevant conditions which have not yet been fully investigated.

Formal decision

The decision under review was set aside and the matter remitted to the Secretary for reconsideration in accordance with the direction that P continued to be entitled to payment of DSP.

[B.W.]

Disability support pension: continuing inability to work

GRIGORIAN and SECRETARY TO DSS

(No. 9194)

Decided: 20 December 1993 by G. Ettinger, H.D. Browne, and D.D. Coffey.

Grigorian sought review of the SSAT decision cancelling payment of the disability support pension (DSP) to Grigorian.

The legislation

Section 94(1) sets out the qualifications for DSP as:

> 'A person is qualified for disability support pension if:
>
> (a) the person has a physical, intellectual or psychiatric impairment; and
>
> (b) the person's impairment is 20% or more under the Impairment Tables; and
>
> (c) the person has a continuing inability to work ...'

The facts

Grigorian was born in Iran in 1941. He attended a tertiary college for Armenian studies and then worked as a teacher. He migrated to Australia in 1971 and worked for 16 years as a storeman and cleaner and occasionally as a part-time salesman. In 1985 Grigorian was injured at work. His injury affected his neck, back and arms. He eventually lost his job when his employer went into liquidation.

Grigorian applied for and was granted the invalid pension in 1990. In June 1992 he applied to the DSS for his pension to be paid overseas for a short period. The DSS then reviewed his