

Assets test: definition of homeowner

STANILAND and SECRETARY TO DSS

(No. 12104)

Decided: 11 August 1997 by K.L. Beddoe.

Background

Staniland applied for job search allowance (JSA) in December 1995. The DSS rejected his claim on the basis that the combined value of Staniland's and his spouse's assets exceeded the limit allowed by the assets test for homeowners. The SSAT decided Staniland's eligibility for JSA on the basis that he and his spouse were not homeowners. The DSS appealed this decision. Staniland also appealed the DSS assessment of the amount of benefit paid.

Mr and Mrs Staniland, their children and grandchildren were the beneficiaries of a discretionary trust established in June 1979. The trustee conducted orchard activities.

The issues

The issues were whether Mr Staniland was a homeowner for the purposes of the assets test; and how the value of Mr Staniland's assets were calculated.

The legislation

Section 529 of the *Social Security Act 1991* sets out the assets test for job search allowance. In the assets value table in s.529(3) the assets value limit varies depending on whether the person or partner is a homeowner.

Section 11(4)(b) of the Act defines a 'homeowner' as a person who is a member of a couple if the person, or the person's partner has a right or interest in one residence that is the principal home of both of them, and the right or interest gives reasonable security of tenure in the home. 'Principal home' is defined in s.11(5). The value of a particular asset is defined in s.11(2) and (3) to include the value of the person's interest in the asset.

'Homeowner'

The home was owned by the trustee for the benefit of the beneficiaries of the trust.

The AAT concluded that Staniland was 'the controlling mind of the trust with the power of appointment and removal of trustees and the ultimate power to alter, add to or revoke the trust deed': Reasons, para. 9.

The Tribunal was satisfied that Staniland, as a named beneficiary, had an interest in the property and had in the circumstances reasonable security of tenure. Alternatively, the AAT relied on *Robertson and Repatriation Commission* (1994) 34 ALD 615, to find that more likely than not the Stanilands had an unpaid vendor's lien in relation to the property for an amount which the AAT was unable to ascertain but which was reflected in the loan account. Consequently the AAT decided Staniland was a 'homeowner'.

Details of trust

The relevant financial accounts for the trust were those for the year ended 30 June 1996, and the AAT based its findings on those accounts (although it had access to earlier years accounts). The Tribunal noted that the trust disclosed an extraordinary profit due to the receipt of \$67,200 described as 'rents received'. The amount of \$67,200 was charged to the loan account of the Stanilands, and partly explained their loan account reducing from \$230,916 at 30 June 1995 to \$127,301 at 30 June 1996. Staniland gave evidence that \$67,200 was rent calculated to be due to the trust for occupancy of the residence owned by the trust backdated to 1980.

The subject property was purchased in May 1980 with funds provided by the Stanilands. It was unclear whether the property was originally purchased by the trustee or by the Stanilands in their own right, and subsequently transferred to the trust. The AAT inferred that the net purchase price to the trust was financed by a loan to the trust by the Stanilands and that loan is still reflected in their loan account with the trust. The Tribunal did not have sufficient information available to determine the amount of the cost of acquisition by the trust applicable to the house and curtilage which is reflected in the loan account. Recognising the limitations of material before the Tribunal it decided 'a just result will be achieved by reducing the value of the loan account by an offset for the rental arrears treated as income derived by the trust in the year ended 30 June 1996': Reasons, para. 18.

Formal decision

The AAT decided:

- to set aside the decision under review;
- that Staniland was a homeowner (as was his wife) for the purposes of the Act; and
- that the loan account in the name of the Stanilands should be notionally adjusted so as to offset the amount of the rental arrears owing by Staniland and his wife as at the date of application for

the purposes of the assets test. The amount of \$67,200 is to be treated as the arrears to 30 June 1996, and is to be reduced by \$3380 (\$130 x 26) to calculate the offset at date of application.

[M.A.N.]

Sole parent pension: member of a couple; effect of domestic violence on waiver and write-off

WILLIAMS and SECRETARY TO THE DSS
(No. 11793A)

Decided: 2 July 1997 by T.E. Barnett and Y. Haslam.

The issue

This matter concerned an overpayment of \$18,071.80 of supporting and sole parent pension (SPP) for the period September 1988 to August 1990. The DSS contended the overpayment had arisen because Williams had co-habited with Morrison during the period in question. Williams claimed that her relationship with Morrison was not a de facto marriage, and that in any case, there were by virtue of his lack of support for her and her child Candice, and his extreme violence, special circumstances sufficient to justify waiver of any debt that might be found to exist.

Background

The assertion that Williams and Morrison had entered a de facto relationship was supported by considerable and often inconsistent documentary evidence, including title deeds and loan application forms relative to the property jointly purchased by them in May 1989, statutory and other signed documents referring to Williams and Morrison as each other's 'spouse', affidavits variously indicating the commencement of the relationship between Williams and Morrison, and the evidence during the criminal prosecution of Williams of several witnesses supporting the existence of the relationship. Williams was convicted in November 1993 of multiple counts of knowingly obtain-

ing installments of SPP. She was sentenced to 18 months imprisonment, and a reparation order for \$17,922.20 was made. The debt was reviewed and affirmed (with minor variation to the amount of the debt) by an Authorised Review Officer and the SSAT in November 1988.

The evidence of Williams, who is Aboriginal, was that she was abused physically, sexually, emotionally and racially by the father of her child, prior to meeting Morrison. She and he initially formed a 'boyfriend-girlfriend' relationship, but later sought to purchase a house, which Williams was able to finance through an ATSI loan only if she and Morrison had lived at the one address. Hence the variation in the documentary and her own evidence as to the date their cohabitation commenced. After moving to the jointly-purchased property, Williams expected to cease drawing SPP because Morrison would include her in his unemployment pension as his spouse — however he did not do so and further refused to support her or her child or to meet the mortgage repayments or other costs associated with the house.

Williams sought employment as a stripper, notifying the DSS of this in July 1989. Subsequently Candice's paternal grandmother initiated custody proceedings in the Family Court owing to her concerns about Candice's care, in the course of which allegations of sexual abuse of Candice by Morrison were made. Williams left Morrison and the SPP was restored. Shortly after the Family Court proceedings in May 1991 which granted her custody of Candice, Williams and Morrison resumed cohabitation, but separated finally in March 1993 after Williams was charged with the criminal offenses.

The law

Section 4(3) of the *Social Security Act 1991* sets out the factors which must be taken into consideration when determining whether a particular relationship can be categorised as marriage-like. The relevant waiver provisions are contained in s.1237AA of the Act which requires that debts be waived where the debtor has been convicted of an offence and 'the court indicated in sentencing . . . that it imposed a longer custodial sentence on the debtor because he or she was unable or unwilling to repay the debt . . .' Section 1237AAD provides that waiver must occur where the debt did not arise from a false statement or failure to comply with a provision of the Act, and 'there are special circumstances (other than financial hardship alone) that make it desirable to waive . . .' and where it is more

appropriate to waive than write-off the debt. Section 1236 allows a debt to be written off in whole or in part.

Member of a couple

After reviewing the documentary and oral evidence, and the several requirements of s.3 of the Act, the AAT found that there was evidence to support the existence of a marriage-like relationship between Williams and Morrison for the period from June 1989 (the date of her change of address) until the separation at the time of the sexual abuse allegations, and again for the period of resumed cohabitation after the Family Court proceedings (although this latter period was irrelevant to the debt in question). The AAT accepted that there was a great deal of unhappiness in the relationship at these times, but concluded:

'[t]he Tribunal accepts the fact that the applicant may have accepted . . . a very unsatisfactory and sometimes almost intolerable relationship because she was psychologically dependent upon Morrison and was suffering the effects of domestic violence. This does not mean however, that the "marriage aspect" of the relationship had ceased.'

(Reasons, para. 38)

The AAT, therefore, concluded that amounts of SPP paid to Williams were a debt.

Waiver/write-off

The AAT accepted that Williams' principal motivation in claiming SPP to which, it was admitted, she knew she was not entitled, was her fear that she would be unable to support herself and her child. Referring to s.1237AA the AAT concluded that the sentencing magistrate had taken into account Williams' inability to pay a substantial fine, but not her inability or unwillingness to repay the debt by instalments, a conclusion reflected by the imposition of the reparation order. The AAT concluded that waiver on the basis of s.2337A was not permitted.

Referring to the s.1237AA provisions, the AAT concluded that it was precluded from waiving the debt because Williams had knowingly made false statements to the DSS and had knowingly failed to comply with the provisions of the Act. As to write-off, the AAT noted Williams' depressive illness, her most basic assets, and that her modest expenditures to support herself and (now) 2 children exceeded her only income source, being social security payments, and concluded that:

' . . . having this debt hanging over her for many years into the future will dampen any . . . incentive [to find an independent source of income] and is likely to worsen her depressive condition and adversely affect her ability to raise her children effectively.'

(Reasons, para. 52)

Formal decision

The AAT decided to set aside the decision under review and substitute its decision that:

- SPP payments to Williams between 2 June 1989 and 2 August 1990 were an overpayment;
- the DSS is to recover this debt; and
- the balance of the debt owing is to be written off.

[P.A.S.]

Widow B pension: member of a couple; waiver and write-off

SECRETARY TO THE DSS and
GRAY-CORKING
(No. 12002)

Decided: 2 July 1997 by M.T. Lewis.

The issue

In May 1994 the SSAT affirmed the earlier decision of the DSS that Gray-Corking owed a debt of \$4996.20, but directed that recovery of the debt be waived. The debt had arisen because Gray-Corking, it was contended by the DSS, had lived in a de facto relationship with Malcolm Gray-Corking from 22 April to 21 October 1993, but did not notify the DSS of this until 18 October 1993.

Background

Gray-Corking met Malcolm Gray-Corking, whom she later married, while on an overseas trip after the death of her first husband. They became friends, and returned separately to Australia in early 1993 and April 1993 respectively, after which they shared accommodation. Gray-Corking had initially intended to finalise her affairs and return permanently to England. However, a few months later they established a flower growing business, and then married on 18 December 1993. Despite considerable investment, the business never returned a profit, leaving large debts including an overdraft and mortgage.

In October 1993 Gray-Corking notified the DSS of her de facto status, indicating that she had not done so previously as she had been unsure whether her partner would be accepted as an Australian resident. Until that acceptance, she understood his formal status to be a 'tourist' in Australia.