a homeowner if he or she has sold the principal home not more than 12 months ago and some or all of the proceeds of sale are likely to be used to acquire another principal home. Section 526(1) of the Act provides that JSA is not payable if a person's assets exceed the prescribed assets value limit.

Section 1118(1)(a) states where a person is not a member of a couple, the value of a person's principal home where they have reasonable security of tenure is to be disregarded.

Submissions

Kellam contended he was a homeowner of 51-59 Progress Street, Goulburn and that it should therefore be excluded from his assessable assets. The DSS argued that he was not a homeowner as defined by the Act, that the house should be included in his assets, and that his assets exceeded the limit for a non-homeowner.

Was Kellam a homeowner?

The Progress Street property was the home Kellam and his de facto partner shared prior to their separation. As at the date of the cancellation of his JSA, Kellam was not a member of a couple. The AAT had to determine whether Kellam had a right or interest in the property that gave him 'reasonable security of tenure'. The AAT cited and approved of *Johnston and Repatriation Commission* (AAT 9508, 31 May 1994) which decided that the words 'security of tenure' meant 'a certainty or an assurance of occupation': Reasons, paras.19 and 20.

The AAT noted that an agreement filed with the Goulburn Court on 15 June 1994, between Kellam and his former de facto partner allowed her to occupy the property for the next 6 months or until the property was sold. The AAT found that he did have a right or interest in the property. However, the AAT considered that his right or interest did not give him reasonable security of tenure, as he had no 'certainty or assurance of occupation.'

Accordingly, the AAT found that he was not a 'homeowner' of 51-59 Progress St Goulburn and that one half of its value should be included in an assessment of his assets. The AAT found that the total value of his assets exceeded the allowable limit of $197,000 for a non-homeowner.

Formal decision

The decision under review was affirmed. Kellam's JSA was cancelled.

[H.B.]

Rent assistance: whether reasonable security of tenure

SECRETARY TO THE DSS and WILLIAMS (No. 13067)

Decided: 8 July 1998 by H.E. Hallowes.

Background

Williams and his wife were directors of T. Pty Ltd. Before retirement they operated a family real estate agency. They applied for and received age pension when they each reached pension age in 1995. They also were eligible for and were paid rent assistance. In 1997 they moved residence to a property at Mt Eliza. In the 1996 partnership returns this property had been shown as a personal asset of the Williams. The Williams claimed rent assistance after the move to Mt Eliza. In support of the claim they supplied a copy of their lease which provided for a term of 3 years with two 5-year options. Documentary evidence at the hearing showed that the initial intention was that the Mt Eliza property was to be purchased by the Williams personally but before final settlement the company was nominated as purchaser. Vendor finance was provided for the sale.

The DSS decided that the Williams were ineligible for rent assistance, as they were 'homeowners', having reasonable security of tenure in the home. In coming to that conclusion, the authorised review officer relied on the fact that they were majority shareholders in the company, owning 4 of the 7 issued shares, and holding all the 'A' class shares. These shares controlled the assets of the company in the event of a winding up, and were the only shares with voting rights. Furthermore, the lease between Williams and the company was considered by the authorised review officer not to be an 'arms length' arrangement as it had no commercial purpose.

The SSAT set aside by majority the decision to treat the Williams as ineligible homeowners. The majority decided that the registered legal and equitable proprietor of the Mt Eliza property was the company and that ownership of shares in a company does not give the owner of the shares an interest in company property. The SSAT considered that any rights that the owner of shares has in a possible future winding up do not affect the realities of the present.

The SSAT considered that the Williams did have a right or interest by virtue of the lease, and considered that in practical reality they did have reasonable security of tenure in the home. However, the SSAT stated that it was not sufficient in terms of the definition of 'homeowner' that a person have reasonable security of tenure in the home; the security of tenure must arise from the right or interest they have in the property. The lease did not do this, in the SSAT's view. Their security of tenure arose from their control of the company. If it were the case, the SSAT said, that the right or interest that arises from a lease was sufficient to give reasonable security of tenure then any tenant would be a 'homeowner' which would defeat the purpose of the legislation.

The legislation

The *Social Security Act 1991* (the Act) defines 'homeowner' in the following terms in s.11(4):

> 'Homeowner
>
> 11.(4) For the purposes of this Act:
>
> ...
>
> (b) a person who is a member of a couple is a homeowner if:
>
> (i) the person, or the person's partner, has a right or interest in one residence that is:
>
> (A) the person's principal home; or
>
> (B) the partner's principal home; or
>
> (C) the principal home of both of them; and
>
> (ii) the person's right or interest, or the partner's right or interest, in the home gives the person, or the person's partner, reasonable security of tenure in the home
>
> ...'

Homeowners are excluded from eligibility for rent assistance under the Act.

Reasonable security of tenure

In support of their case the Williams argued that the house was leased to them under a residential tenancies lease at market value. They also argued that the company had suffered trading losses over several years and would not be able to pay the interest payment for the purchase without the rent. The evidence before the AAT was that the company was up to date on mortgage payments on the property.

The AAT looked at several authorities on the point, some of which had been considered by the SSAT. In *Johnston and Repatriation Commission* (decided 31 May 1994) the AAT had referred to the High Court decision in *Stow v Mineral Holdings (Aust) Pty Ltd* (1977) 14 ALR 397 where it was stated that the expression 'estate or interest in land' should bear its ordinary meaning as an estate or interest of a proprietary nature including equitable and legal interests both freehold

and leasehold as long as they were held by persons in their individual capacity.

The AAT said that the case law recognises that the test of whether there is reasonable security of tenure is an objective one. In *Johnston's* case the Johnstons were sole shareholders and directors of a company and were found to be the 'controlling minds' of the company. Whilst the company was the lessor they were the 'controlling mind' of the lessor and it was considered unlikely that they would pass a motion as directors that would require them as tenants to quit the house. Similar principles were applied in *Letcher and Secretary Department of Social Security* (decided 15 September 1995) and in *Wheatley and Repatriation Commission* (decided 11 March 1996).

The AAT in the *Williams* case said that it is always a question of fact whether the claimants 'are conducting a business as a company or as their own': Reasons, para. 13.

The AAT took into account that Mr and Mrs Williams accepted that they had full control over the company; that the company was up to date with its mortgage repayments; and that the Williams had made loans to the company to ensure that it was always able to meet its debts. The Williams acknowledged that if the property had to be sold it would be sold subject to their subsisting lease. In all the circumstances the AAT decided that the Williams were carrying on the business of the company as their own and that it was unlikely that the company in making decisions would fail to take into account their circumstances. It was unlikely that they as directors would make a decision against themselves as tenants that would place in jeopardy their security of tenure.

The AAT pointed out that the legislation looks to reasonable security of tenure. 'The security does not have to be absolute': Reasons, para 17.

Formal decision

The AAT set aside the decision of the SSAT.

[M.C.]

Compensation and recovery: defect in legislation

LAWRIE and SECRETARY TO THE DFaCS (No. 13470)

Decided: 19 November 1998 by T.E. Barnett.

Background

Lawrie sought a review of a decision to impose a preclusion period preventing him from receiving social security payments between January 1995 and October 1999, due to his entitlement to compensation. The DFaCS sought a review of that part of the SSAT decision which held that the DFaCS was not entitled to recover directly from the insurer an amount $27,810.85 pursuant to a notice issued under s.1179 of the *Social Security Act 1991*.

Legislation

The relevant provisions are ss.1165 and 1179 of the *Social Security Act 1991*. In particular s.1179(4) states:

> 'If the person claiming compensation is not a member of a couple, the recoverable amount is equal to the smallest of the following amounts:
>
> (a) the sum of the payments of the compensation affected payments payable to the person for:
>
> (i) the periodic payments period; or
>
> (ii) if a lump sum compensation payment is received before **20 March 1997** — the old lump sum preclusion period; or
>
> (iii) if a lump sum compensation affected payment is received before **20 March 1997** — the new lump sum preclusion period;
>
> (b) the compensation part of the lump sum payment or the sum of the amounts of the periodic compensation payments; or . . .'

Preclusion period

Lawrie submitted that the preclusion period should not apply because he was entitled to sickness allowance or disability support pension from the date of the accident until the date of the lump sum settlement. He thought it was not fair to expect him to repay social security payments which he received in a period of great financial hardship. He did not challenge the calculation of the preclusion period nor did he claim special circumstances under s.1184(1). The AAT, however, agreed with the decision of the SSAT on this issue.

Defective legislation

The more important issue involved the decision of the SSAT that the amount of compensation which had been recovered by Centrelink from the insurer, was not properly recoverable under s.1179 because of a defect in the legislation.

The DFaCS submitted that s.1179(4)(iii) should refer to 'after' rather than 'before' 20 March 1997. The defect occurred when s.1179(4) was amended by the *Social Security Legislation Amendment (Budget and Other Measures) Act 1996.*

The AAT found from 'both the legislation and the general scheme of the Act (supported by reference to the second reading speech and explanatory memorandum for the Bill) that the paragraph was intended to read as submitted by the respondent': Reasons, para. 10.

The AAT concluded that 'a drafting or printing error has clearly occurred, and if the words are given their literal meaning it leads to an irrational and absurd result — leading to the frustration of the parliament's clear intent': Reasons, para. 15.

The DFaCS submitted that when legislation, read literally, is unintelligible, and the meaning intended by the parliament is clear, the courts may correct the error in expression. The AAT referred to *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1980-81] 147 CLR 304 and found that the section would be meaningless unless the Tribunal 'assumes a mistake and corrects it so as to accord with the obvious intention of the legislature' (per Muirhead J, in *Lindner v Wright (1976)* 14 ALR 105 at 111). The Tribunal adopted 'a construction of the subsection in which s.1174(a)(iii) applies to compensation received on or after 20 March 1997.

Formal decision

The AAT set aside the decision under review, and in substitution, decided:

(a) the applicant was not entitled to receive compensation affected payments for the period 17 January 1995 to 19 October 1999; and

(b) the sum of $27,180.85 was properly recovered by Centrelink from the insurer.

[M.A.N.]