'Knowingly'

It was argued that there was no evidence that the statement made by Hassan's mother had been made 'knowingly' as required by s.1237AAD. Sundberg J observed that the AAT had accepted Hassan's evidence that his mother's statement was false. That is, the information provided by Hassan's mother was not true. According to the Court it must then follow that Hassan's mother knew they were untrue. An interpreter had read the statement to her in Arabic and then she had signed the statement with a cross. There is no evidence that the statement had been made by anybody else and that the mother was not aware that it was false.

The AAT failed to deal with whether or not the statement had been made knowingly. The Court found that in the circumstances this was not an error of law.

Natural justice

It was argued that because Hassan had answered some questions in English before the AAT rather than using an interpreter, he had been denied natural justice. The Court found that only a small portion of the evidence had been given in English and there was a reason for doing so. Nothing that Hassan had said had harmed his case.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

Assets test: constructive trust

SECRETARY TO THE DSS v AGNEW
(Federal Court of Australia)

Decided: 4 February 2000 by Drummond, Sundberg and Marshall JJ.

The Agnews appealed to the Full Court of the Federal Court against the decision of O'Loughlin J at first instance. O'Loughlin J had remitted the matter back to the AAT to decide whether there was a constructive trust given that the AAT had found that Agnew was a witness of truth and that he intended giving his farm to his sons in 1980.

The facts

The facts are set out in the summary of this case in the (1999) 3(10) *SSR* 158. Briefly, the Agnews' claims for age pension were rejected in May 1996. Prior to September 1995 Mr Agnew was the registered proprietor of a farm, Rosedene. Since the late 1970s the Agnews and their three sons had carried on the business of farming on Rosedene in partnership. By June 1995 the partnership owed a debt of $371,105 secured by registered mortgage over Rosedene and the Agnews' personal guarantees. The partnership was dissolved in July 1995, allowing the Agnews to retire and the three sons to continue the farming business. The partners assumed liability for all debts of the partnership and indemnified the Agnews. In return the Agnews' share of the partnership vested in the three sons. In September 1995 the Agnews agreed to sell Rosedene to Rosedene Nominees Pty Ltd, a trustee company of the Rosedene family trust, for $450,000. He then waived payment of the purchase price. In evidence to the AAT, Agnew stated he had intended giving Rosedene to his sons in 1980 but the cost of stamp duty had prevented this. In 1980 Agnew had given up farming and moved to the city. His sons had continued working on the farm and improving it.

The DSS argued that the Agnews had disposed of their property, Rosedene, without receiving adequate remuneration.

The law

Section 1123(1) of the *Social Security Act 1991* (the Act) provides:

Disposal of assets

1123.(1) For the purposes of this Act, a person disposes of assets of the person if:

(a) the person engages in a course of conduct that directly or indirectly:
  (i) destroys all or some of the person's assets; or
  (ii) disposes of all or some of the person's assets; or
  (iii) diminishes the value of all or some of the person's assets; and

(b) one of the following subparagraphs is satisfied:
  (i) the person receives no consideration in money or money's worth for the destruction, disposal or diminution;
  (ii) the person receives inadequate consideration in money or money's worth for the destruction, disposal or diminution;
  (iii) the Secretary is satisfied that the person's purpose, or the dominant purpose, in engaging in that course of conduct was to obtain a social security advantage.

According to s.1124, the value of the assets is either the value of the asset when it was transferred or the value of the asset when transferred less the consideration.

The AAT decision

The AAT was not prepared to accept Mr Agnew's evidence that he intended to give Rosedene to his three sons when he left the farm in 1980 and thus a constructive trust existed. This was in spite of the fact that the AAT found Agnew to be a witness of truth.

The Federal Court

O'Loughlin J had found an error of law when the AAT had accepted that Agnew was a witness of truth but then did not accept his evidence that he intended giving the farm to his sons in 1980. The DSS argued that the sons had derived a benefit because they had used the farm for over 15 years, rent free. The detriment they suffered by not having the land transferred to them had been adequately compensated. O'Loughlin J found that if a constructive trust had come into existence in 1980 then the sons were entitled, as the beneficial owners of the land, to the use and enjoyment of the land free of any restriction or obligation to their father to pay rent. It was not true to say that the sons had not suffered a detriment. The sons would be denied the capital gain from the farm property derived from their work over the years expanding and upgrading the farming business.

O'Loughlin J also found that the AAT had incorrectly valued the asset. It had valued the asset as Rosedene less the mortgage. The SSAT had found that the asset was Rosedene, less moneys owed to the Agnews from the capital account. The mortgage was a debt of the partnership, even though there was a mortgage over Rosedene. If the lender had called in the debt he would first have had to approach the partners.

The Full Court

The DSS argued that the Agnews' entitlement to pensions had to be considered at the time they made their claim. At that time, Mr Agnew had disposed of Rosedene and given the proceeds to his sons. He had thus diminished his assets by $450,000, and this was within five years of the Agnews' claims for pension. The fact that there was a constructive trust was irrelevant.

Constructive trust

The Full Court found that the sons had relied on their father's statement that Rosedene was theirs and improved it and doubled its capacity. In light of this the Court stated 'We consider that a remedy that falls short of the imposition of a trust would be inappropriate in the circumstances' (Reasons, para. 11).

It was noted that the AAT rejected the claim for a constructive trust on the grounds that the sons had established no detriment. The Full Court considered *Hohol v Hohol* [1981] VR 221 which set out what was called the three necessary elements for a constructive trust. These were: a common intention as to the ownership of the beneficial interest, acts to the detriment of the party claiming the beneficial interest, and that it would be a fraud on the claimant for the legal owner to deny that interest. It was no longer necessary to show a common intention according to the Full Court. However, there remained a type of constructive trust where a common interest was exhibited. The Privy Council had classified a common intention constructive trust as a particular application of the proprietary estoppel principles. It was intended to frustrate unconscionable conduct.

> Thus the notion of detriment common to both should have the same content. That is, one should not look for an act that can be seen to be to the claimant's detriment when done, but for an act done by the claimant in reliance on the conduct of the legal owner in circumstances where detriment would be suffered if the owner were permitted to depart from the assumption that induced the reliance.

(Reasons, para. 14)

The Full Court found that the AAT erred in literally applying the criteria that the sons had to suffer a detriment when the acts were done.

The AAT had also erred when it found that Mr Agnew had not intended to transfer the whole of the beneficial title in Rosedene to his sons in 1980. The AAT had accepted Mr Agnew's evidence that he had told his sons that Rosedene was theirs. Having accepted that evidence, the AAT could not turn around and decide that this was not the real situation.

The AAT made a further error of law indicating that it did not understand the nature of a trust. The AAT had found that when Mr Agnew told his sons that Rosedene was theirs, it was not his intention to divest himself of all rights as the legal and beneficial owner. The Federal Court noted that if Mr Agnew had divested himself of his legal and beneficial interest then, of course, there would have been no trust in the sons' favour. The total interest in the land would have been transferred to his sons. The AAT then went on to say that there had been a specific purpose behind why Mr Agnew had retained legal title. The Full Court stated 'To search for reasons why Mr Agnew retained it (legal title) shows that the Tribunal regarded a positive decision to retain legal title (that is not to transfer the land outright) as fatal to the existence of a trust ... the Tribunal erred in law in its understanding of the duality of ownership inherent in a trust' (Reasons, para. 17).

Following case law, the Full Court decided that a constructive trust will take effect from the time at which the conduct which has given rise to it occurs. In this case the trust came into existence when the conduct which gave rise to its imposition occurred. That conduct occurred when in reliance on Mr Agnew's statement that the land was theirs, the sons acted in a manner which relied on that statement. It is the conduct of the claimant that gives rise to the trust's existence.

Value of the asset

The DSS had argued that the actions in September 1999 altered any previous legal entitlements (a constructive trust). The Full Court pointed out that s.1125A(1) requires the asset being disposed of to be valued. In September 1995 Mr Agnew had the bare legal title to the land. This asset had no, or no significant value and certainly did not exceed $10,000 in value. Therefore no asset of value was disposed of.

Formal decision

The Full Court of the Federal Court dismissed the appeal.

[C.H.]

Member of a couple

KAJZER v SECRETARY TO THE DFaCS
(Federal Court of Australia)

Decided: 8 March 2000 by Drummond J.

Kajzer appealed against a decision of the AAT that she was a member of a couple. This meant that her entitlement to newstart allowance was subject to her husband's income. As her husband refused to supply information about his income, her entitlement could not be calculated.

The facts

Kajzer was married and living in the same house as her husband. The AAT found that Mr and Mrs Kajzer had entered the marriage for economic reasons and to overcome child care problems. Their marriage continued on that basis. The only change in circumstances was Kajzer's need for financial support. She applied for newstart allowance and it was accepted that she was qualified to receive it. The only issue in contention was the rate her newstart allowance should be paid. Kajzer was regarded as being a member of a couple and therefore her husband's income had to be taken into account when the rate of newstart allowance was calculated. Mr Kajzer refused to supply information about his income, and therefore Kajzer's rate of newstart allowance could not be calculated.

The law

In s.4(2)(a) of the *Social Security Act 1991* a member of a couple is defined as including a person who is legally married to another person and is not, in the Secretary's opinion, living separately and apart from that person on a permanent or indefinite basis. Section 4(3) sets out guidelines which the Secretary is to use when having regard to whether or not a person is a member of a couple.

The AAT decision

The AAT concluded that Mrs Kajzer was a member of a couple because she was legally married to Mr Kajzer and not living separately and apart from him at the relevant time. Mr and Mrs Kajzer's marriage was unusual but there had been no change to the relationship since they were first married. The only change was that Mrs Kajzer became in financial need. They continued to live in the same house, albeit with some tension, and Mrs Kajzer told the AAT that she did not intend to change this arrangement.

Member of a couple

The Federal Court noted that Mrs Kajzer's marriage could not be regarded as traditional or orthodox. However, it was the role of the Federal Court to decide whether or not the AAT had made an error of law in coming to the conclusion that Mrs Kajzer was a member of a couple. Such an error could only be shown if there was no evidence to support that conclusion.

Drummond J noted:

> It is apparent from the material before the AAT and the way the AAT arrived at its conclusion that the decision cannot be said to be affected with any such error of law. There was far more than a scintilla of evidence be-