was also advised by the Council that it has a concern to preserve low cost accommodation and that there may be other issues such as safety requirements, including the need for fire doors. In addition she would have to establish a separate water meter for each unit. This would all be very costly and, according to Hewitt, beyond her means.

The reasons

There was no dispute about the facts and the AAT accepted Hewitt's evidence. It noted the decision of *Secretary, DETYA v Ovari* (2000) 98 FCR 140 concerned the AUSTUDY Regulations but centred on an identical definition of 'principal home'. Their Honours said:

> 12 The term 'principal home' as such is not defined in the regulations. Regulation 15(1) only deals with some specific situations in which there might be some room for argument as to the physical extent of the 'principal home'. It could not be doubted that a suburban residence of the kind described was a home of the respondents' family. The adjective 'principal' is directed to excluding holiday homes and the like. No such suggestion is raised in the present case.
>
> 13 Therefore the Monash property is an asset (any kind of property) but once identified as the 'principal home' it is to be excluded by reg 15 from the family assets for the purposes of the AUSTUDY assets test. Provided the property in question is properly characterised as a principal home, the regulations do not provide for apportionment by reference to any non-domestic uses to which the home may be put. This is in contrast with the specific provision in s.51(1) of the Income Tax Assessment Act 1936 (Cth) where the words 'to the extent to which' have been held to authorise and require apportionment: *Ronpibon Tin No Liability v Federal Commissioner of Taxation* (1949) 78 CLR 47, 55, 58-59.
>
> 14 The regulations are concerned with the value of assets. To the extent that a person or a person's family has assets, such assets can be turned into money and the person is less in need of taxpayer-funded financial support for study. The regulations fix an arbitrary limit under which a person may have assets and still receive support. Thus the focus is on value, that is to say the money equivalent of assets.
>
> 15 There was no evidence, nor did the AAT find, that the market value of the Monash property was increased or decreased by the fact that it was partly used for business purposes. Given the nature of the property, such a variation seems inherently unlikely. Nor was there any evidence or finding that some physical part of the property was exclusively used for business purposes.
>
> 16 As his Honour noted, there are cases such as that dealt with by the AAT in *Di Primio v Secretary, Department of Social Security* (1993) 31 ALD 233 which involve somewhat unusual premises, but they turn on their own facts.

The Secretary submitted that Hewitt's property was a different kind of dwelling to that considered in *Ovari*. The AAT said that while there is a distinction between a four-bedroom suburban house and a two-storey suburban house comprising two self-contained three-bedroom dwellings, much of the reasoning in *Ovari* was applicable in this matter. There was no dispute that the property was Hewitt's principal home. There was no provision in the Act for apportionment. There was, in this case, as in *Ovari*, no evidence that the market value of Hewitt's property was increased or diminished by its partial use for income generating purposes.

While the Full Court in *Ovari* noted that no part of the property in that case was exclusively used for business purposes, the AAT was mindful of the Court's comments in relation to the use, by doctors, of a portion of the doctor's principal home exclusively for the practice of medicine. In commenting on the hypothesis put forward by the Department in that case, of two doctors, one of whom practised from home and the other from a surgery at separate premises, the Court noted that the different results in rate of pension arising from the circumstances of each of the doctors are not anomalous as those different circumstances lead to different results.

The AAT noted Hewitt did not wish to leave her home, as she would need to, to realise the value placed on the ground floor of her property. She felt safe and protected in her home, with friendly and helpful neighbours she had known for many years. She had lived in the property continuously since 1967 or 1968 and prior to that spent the years from age 16 to 33 there. These matters served, in the AAT's view, to attract the 'long-standing social and political policy' referred to in *Ovari* — 'that a family home has a special importance beyond its value as an economic asset'.

For these reasons, the AAT considered that the whole of the Burwood property was Hewitt's principal home within the meaning of s.11(5) of the Act. However, the rental income of $240.00 per week she derived from the use of her home could be taken into account in the calculation of her rate of pension by the application of the income test provisions of the Act.

Formal decision

The Tribunal set aside the decision under review and remitted the matter for reconsideration with the direction that the whole of the Burwood property was Hewitt's principal home within the meaning of s.11(5) the Act.

[K.deH.]

Assets test: principal home; value of land

REID AND SECRETARY TO THE DFaCS
(No. 2002/0652)

Decided: 2 August 2002 by J. Cowdrey.

Background

Reid owned 12 parcels of land in Dale Drive, Tiaro. He claimed newstart allowance which was rejected on the basis that the value of his assets exceeded the allowable limit. His rate of disability support pension was also reduced on the basis of the value of his assets. It was the value of these properties which was the issue of contention in this appeal.

Evidence

Reid gave evidence that he purchased the land in 1994 as an investment. He had attempted to sell the land but had been unsuccessful. One of the parcels of land was his principal place of residence. Due to the housing slump he withdrew the remainder of the land from sale. All the blocks, which were of varying sizes, either adjoined or were adjacent to his principal residence. He walked over the land on a regular basis and had planted out some of the blocks. Evidence was also provided by a licensed valuer, who indicated that a discount of 50% should be applied to the land if the blocks were sold as one item, rather than individually.

Submissions

Reid submitted that two hectares of land should be disregarded in assessing his level of assets on the basis that it was land which was used primarily for private or domestic purposes. He also argued that the value of the property should be reduced by the amount that he initially borrowed from family members to purchase the lots.

He further submitted that the value of the land should be assessed on the basis of a recent valuation. His valuer had comprehensive local knowledge and an ability to confidently assess sales evidence. He indicated that a bulk sale discount should apply.

The Department submitted that the loans which Reid wanted to offset against the value of the land were loans for improvement and development of the property, rather than to purchase the property. It was also argued that there was no legal basis on which unsecured loans could be deducted from the value of land.

In relation to the argument that the land should be regarded as curtilage, the Department argued that Reid had indicated that if he was offered a reasonable amount he would consider selling the land. The fact that some trees were planted and the land was maintained did not mean that it was held by Reid for domestic purposes. The Department argued that if the land was sold in bulk, a discount of 30% would be appropriate.

The law

The legislation relevant to the argument that the land formed a curtilage to Reid's private home is s.118(1) and ss.11(5)(a) and (6). These provisions allow certain assets to be disregarded and define 'principal home' and 'private land'.

Findings

The Tribunal concluded that Reid purchased the land for commercial purposes. The fact that he planted trees on some of the blocks and maintained them did not mean that the properties were used primarily for private or domestic purposes. Consequently, land was not 'private land' as defined in the Act and did not form curtilage to his principal residence.

The Tribunal found that there was no evidence of a charge or encumbrance over the blocks and consequently there was no basis to reduce the value of the land on the basis of money borrowed by Reid.

In relation to the valuation of the land, the Tribunal noted that the Act is silent in relation to the meaning of value, however the Tribunal has consistently followed the principles outlined by the High Court in *Spencer v Commonwealth of Australia* (1907) 5 CLR 418.

As to whether a discount should be applied for bulk sales, the Tribunal noted the evidence of Reid's valuer that if three lots were sold at the one time, he would suggest a discount of between 20 and 25%. The Department argued that a 30% discount would be appropriate if ten lots were sold at the one time. The Tribunal noted that Reid owned 11 blocks and that there was very little demand for this property.

When considering the valuations and the evidence, the Tribunal accepted Reid's valuation of the property and discounted this by 20%.

Formal decision

The AAT affirmed the decision of the SSAT in relation to Reid's claim for newstart allowance and remitted the decision in relation to disability support pension to the Department for reconsideration in accordance with the reasons for decision of the Tribunal.

[R.P.]

Assets test: whether loan to private company forgiven

SECRETARY TO THE DFaCS and DOWNES
(No. 2002/737)

Decided: 30 August 2002 by R.G. Kenny.

Background

The Downes were the sole directors and shareholders of a private company, which was involved in investment activities. Over a period of years the Downes made loans totalling $337,100 to the company. Centrelink viewed this loan as an asset during the period November 2001 to January 2002.

Issues

The issue was whether the loan of $337,100 by the Downes to the company was an asset that had to be taken into account in determining the rate of payment of their age pension.

Legislation

Section 11 of *the Social Security Act 1991* sets out the assets test definitions.

Section 1122 states:

> If a person lends an amount after 27 October 1986, the value of the assets of the person for the purposes of this Act includes so much of that amount as remains unpaid but does not include any amount payable by way of interest under the loan.

Section 1129 sets out when the financial hardship rules can apply to application of the assets test.

Whether loan an asset?

Downes submitted that, whilst loans totalling $337,100 had been made to the company, the assets of the company had been dissipated by poor sales performance and by the accumulation of interest on moneys borrowed. Consequently the company was in no position to repay the loan. The company was still a legal entity but an application had been made for it to be deregistered. The only amount that the Downes were able to recover from the original investment of $337,100 was $11,002.

Downes argued that it was unfair that, prior to 21 November 2001, Centrelink had been aware of the loans to the company and had been willing to accept a valuation, which reflected the inability of the company to repay those loans.

Downes conceded that he and his wife were not in financial hardship and no application in that regard had been made by them.

The Department conceded that, prior to November 2001, the value of the loan of $337,100 had not been taken into account as an asset. There had been a change in policy in respect of loans to private companies and family trusts and they were taken into account where the legislation so required. There had been a further change in policy in January 2002, which, again, enabled the value of the loans not to be taken into account for asset valuation purposes. The decision under review related only to three fortnightly periods between November 2001 and January 2002.

The Department submitted that although the Downes had forgiven the company's obligation to repay the loan to them, as this had not been done as part of a process of winding-up the company, the loan was still to be taken into account as an asset in the period of reduced pension payments.

The Department argued that the notion of a non-recoverable loan being an unrealisable asset was only relevant if there was an application for financial hardship and this had not been made.

The Tribunal found that in the period November 2001 until January 2002, the loans had not been repaid and s.1122 was applicable. The value of the Downes' assets should include the amount of the unpaid loans.

The Tribunal decided that in the relevant period the Downes' loan to the company was an unrealisable asset. But this was not relevant as s.1129 only operates if a request in the approved form for the financial hardship provisions has been made. No such application was made by the Downes.

The Tribunal addressed the issue of whether the loan had been forgiven.