The AAT referred to the decision in *Littlejohn* (1989) 49 *SSR* 637. In that case, the AAT had said that the DSS could not investigate the merits of an award and substitute its own terms for those of the award where, on its face, the award had been made under the State scheme of compensation and the facts known at the time had provided a basis for that award.

The AAT said that there was nothing on the face of the award in this case suggesting that the apparent effect of the award was 'fanciful', because it was clear that Emetlis had been permanently incapacitated for work at the time of the award, so that compensation for the future was properly payable.

On the basis of the approach in *Littlejohn*, the AAT said that it could not go behind the terms of the award and form an opinion, under s.115B(3A), that the award was some other form of compensation. There was, the AAT said, no basis on which it could find that the award was paid by way of compensation for the same incapacity for which sickness benefit had been paid; and, accordingly, the sickness benefit could not be recovered under s.115B(3A).

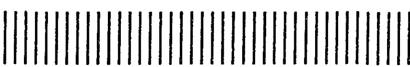
On behalf of the DSS, it was argued that a form of release, signed by Emetlis some 2 weeks after the consent award, allowed the DSS and the AAT to look behind the award. The release contained a clause which discharged Emetlis' employer from all claims arising out of his industrial injury, whether those claims were 'past, present or future'.

The AAT said that it was not proper to rely on the release to justify departure from the award. Partly, this was because the release contained a number of factual errors and partly because there was no evidence that Emetlis had understood the terms of the release when he signed it.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration with a direction that no part of the compensation award was a payment in respect of the incapacity for which Emetlis had received sickness benefit.

[P.H.]



Assets test: debt owed by a company

CLARKE and SECRETARY TO DSS

(No. W89/11)

Decided: 18 May 1989 by G.L. McDonald.

The AAT *affirmed* a DSS decision refusing Clarke unemployment benefits on the basis that his assets exceeded the limit of $89 250 imposed under s.122(10) of the *Social Security Act*.

The facts

The only asset which was in dispute was the sum of $112 802 owed to Clarke by a company of which he was a shareholder and director. This amount was outstanding from loans Clarke had made to the company between 1979 and 1981-2.

Clarke argued that he had no hope of recovering all but $400 of the debt from the company because it had no assets or income and that the debt must be taken to be abandoned. He said that the company could only earn income by securing work for him as a consultant geologist but, as his experience was in gold mining, there was no chance of his obtaining such work given the current state of that industry.

However, he continued to seek work for the company, had received payments totalling $20 016 from the company in 1987/88, and had loaned the company a further $3000 in the 3 months prior to the AAT hearing. No steps had been taken, or were anticipated, to wind up the company. On these facts, the AAT found that the company could not be said to be no longer operational or defunct.

The decision

First, the AAT said:

> 'There is no doubt that a debt owing, being a chose in action, constitutes property in the hands of the person to whom it is owed regardless of whether the debt is secured or unsecured.'

(Reasons, p.2)

This approach was based on the ordinary meaning that courts have attributed to the word 'property', as it is not defined by the *Social Security Act* other than to include property situated outside Australia.

The second issue to be decided was the value that should be placed on the debt. In relation to this the AAT said:

> 'Even if it was open to the Tribunal to find that the debt was irrecoverable and that such a finding could influence the value attributed to the property, that point has not, on the facts presented by the applicant, yet been reached.'

(Reasons, pp. 3-4)

[D.M.]

Overpayment: custody, care and control

LEPPALA and SECRETARY TO DSS

(No. 4962)

Decided: 2 March 1989 by J.R. Gibson.

The applicant sought review of a DSS decision to recover $6929, overpaid as widow's pension.

Leppala applied for widow's pension on 30 June 1980 on the basis that the man with whom she had been living had left her, and her 3 children were in her custody, care and control. Pension was granted under s.60 of the *Social Security Act*, at the rate for a widow with children in her custody, care and control.

Pension was cancelled on 11 February 1982 on the basis that Leppala had no children in her custody, care and control. The DSS said Leppala had not had her eldest child, R, in her care since his birth in 1965 and she had ceased to have the 2 younger children in her care in November 1980. Accordingly, an overpayment had resulted from a breach of s.74(5)(b)(a)(i); a debt for that amount should be raised; the overpayment should be recovered from any future entitlement to pension or benefit; and her entitlement to family allowance should be reviewed.

The evidence

It was not in dispute that the 2 younger children ceased to be in Leppala's care on 11 November 1980, when they were committed to the care of the NSW Department of Youth and Community Services. In February 1982 a DSS field officer visited Leppala's parents' home where he saw R and his grandparents, Mr and Mrs Hakala. He said he was told that Leppala's whereabouts were unknown, that her 2 younger children had become state wards and that R had always been in the

care of his grandparents. The field officer prepared a written statement, in English, and had Mr Hakala sign it.

Leppala gave evidence that she lived with her parents from R's birth until he was about 9. She lived at various addresses but returned with R to her parents' home when he was 10, and again for a period when he was 11. She was in gaol for about 4 months in late 1981 and during this time R was looked after by her parents. Upon her release she lived with her parents for a while and then, in about 1981, moved out and then back to her parents. Throughout the period in question R attended a special school. Leppala said that during the times she and R lived with her parents she looked after R.

Leppala said that, before the 2 younger children were removed from her care in November 1980, she was visited regularly by a welfare worker, and she thought that 'the welfare' dealt with pensions as well as child welfare matters and therefore the DSS knew about the children being removed from her care.

Mr Hakala was elderly, in poor health, and gave vague answers to the AAT. His wife had died 3 years earlier. He said R did not always live at his place, but lived with his mother. When his mother was in prison, R was looked after by Hakala and his wife. He remembered signing a document at the request of field officers but said he did not know what was in it. Mr Hakala identified his late wife's signature on another statement in which it was noted that Mrs Hakala had the care, custody and control of R for the last 2 years.

An officer of the State Department of Family and Community Services testified that from May 1981 he had supervised Leppala's 3 children for about 18 months. All his conversations at the home had been with Mr and Mrs Hakala and R, and he saw Leppala at that home on one occasion only. He had arranged access for the Hakalas to the other 2 children and on one occasion Leppala had unexpectedly attended an access meeting. He had understood from the Hakalas and from R that the applicant could not be located.

The decision

The AAT found the evidence to be sketchy and incomplete. Leppala's inability to tell the whole story could be explained by her alcoholism, rather than because she was untruthful.

The Tribunal found, 'not without some hesitation', that on the balance of probabilities R was in his mother's care except for the period of her imprisonment. As R was not in her custody, care and control during her imprisonment she was overpaid the whole of the widow's pension for that period.

In addition she was overpaid in respect of her 2 younger children from 11 November 1980 until 11 February 1982. There was no evidence that she had notified when the children ceased to be in her custody, care and control and accordingly the total amount overpaid was recoverable.

The AAT said that it could not determine the exact amount recoverable, the extent to which it should be recovered, and the manner of recovery, in the absence of an accurate calculation of the overpayment, and of evidence which might have bearing upon the exercise of the discretion.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration in accordance with its findings and directions.

[B.W.]

Dependent children overseas - additional pension?

CALLEYA and SECRETARY TO DSS
(No. T88/113)

Decided: 5 May 1989 by R.C. Jennings.

Calleya appealed against a decision to cancel his additional invalid pension for dependent children.

Calleya first received an invalid pension in 1976. At that stage he was married and had 2 Australian-born children. In December 1978 he returned to Malta, and 2 more children were born there.

Until 1 October 1987, Calleya received additional pension for his dependent children, the *Social Security Act* providing for payment if the children were living with him and were dependent on him.

Legislative changes

During 1987 and 1988, a number of amendments were made to the *Social Security Act*, (see Act Nos 88, 130 and 58 of 1988) affecting the definition of 'Australian resident' and 'dependent child'. The effect of these changes was that, from 1 October 1987, a person was only to be treated as a 'dependent child' if, as well as fulfilling the basic definition in s.3(1), the person met one of the following requirements, set out in s.3(10):

> '(a)the child is an Australian resident;
>
> (b) the child is living with the person while the person is an Australian resident;
>
> (c) the child had been an Australian resident and is living with the person outside Australia; or
>
> (d) the child has been living with the person in Australia and is living with the person outside Australia.'

'Australian resident' is defined in s.3(1) as meaning a person who resides in Australia and who meets one of the requirements as to legal status - either an Australian citizen, the holder of a non-temporary entry permit or a return visa under the *Migration Act*, or a person covered by s.8(1) of the *Migration Act* (which was not relevant here).

No additional pension payable

The Tribunal concluded that extra payments for the 2 younger children had been correctly cancelled. Although they had visited Australia for 3 months with Mrs Calleya, there was no evidence that they had lived with their father in Australia as required by the two provisions relied on (s.3(10)(b) and (d)) nor were they Australian residents.

The Tribunal stated:

> 'It is apparent that it was the intention of the legislative changes which began in Parliament in May 1987 to deprive overseas pensioners of benefits for their children except in special circumstances. In my opinion the legislation which has been enacted has achieved that purpose at least so far as this applicant is concerned.'

(Reasons, p.6)

Formal decision

The AAT affirmed the decision under review.

[J.M.]