pleted with evident reluctance. The following views were expressed by the Tribunal, referring to *Millner* (1986) 35 *SSR* 445 and *Christian* (1987) 39 *SSR* 492:

'I would incline to the view that it is no part of the function of the respondent to determine the nature of an equitable interest in these circumstances or to predict the type of equitable relief that would be ordered by a court, when considering the value of assets of an applicant for pension. If outstanding equities are alleged, then it is a matter for the parties to have them determined independently. Were it not for the admissions made by the respondent, I would be of the view that the applicant would not be entitled to have the value of the equitable charge deducted from the value of the [property] when considering the overall value of her means.

. . .

In an area of developing equitable theories and competing approaches, it is not practical to expect an administrator to conduct an extensive inquiry between parties (who would rarely, in any event, be at arm's length) so as to value the beneficial interest of the applicant in her property by anticipating what relief would be granted in equity. In the absence of any written agreement, or any formalisation of claims and entitlements, he must adopt a robust commonsense approach, not subordinated to subtleties and competing theories of equity.'

(Reasons, paras 31-2)

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Assets test: implied trust, loan or gift?

WADE and REPATRIATION COMMISSION
(No. N89/377)
Decided: 9 July 1990 by D.P. Breen, J.A. Hooper and T.R. Russell.

George Wade asked the AAT to review a decision of the Repatriation Commission that his assets included half the value of a home unit, the legal title to which was vested in his wife.

The facts

The purchase of the unit in January 1988 was financed entirely by Mrs Wade's parents, aged 90 and 88 years, who lived in the unit. Mrs Wade was an only child.

There were before the AAT letters from the Wades' solicitors and accountant that contained conflicting statements in relation to the purchase. In a letter dated 25 November 1988, the solicitors stated that Mrs Wade held the unit merely as trustee for her parents and Mrs Wade never considered the property to be hers. However, in a letter dated 5 December 1988, the accountant stated that Mrs Wade used money loaned from her parents to purchase the unit and that the value of the unit as an asset should be offset by the liability of the loan.

No implied trust

The AAT said:

'The law recognises a resulting or implied trust in certain cases where there has been a transfer of legal ownership for no valuable consideration to a transferee who is a stranger to the transferor.

In this case there is no presumption that [Mrs Wade's parents] intend to transfer the beneficial interest in the property to Mrs Wade. The presumption does not arise as [they] stand in a parent-child relationship and thus are not "strangers" as judicially recognised.'

(Reasons, paras 12 and 13)

As Mrs Wade did not give valuable consideration, the presumption of advancement applied and it was presumed that Mrs Wade's parents intended to benefit her. This presumption could be rebutted by proof of an intention at the time of the purchase that Mrs Wade should take as trustee i.e. not beneficially. Reliance for this proposition was placed on *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 365-6.

The facts of this case did not establish the existence of a trust and could not rebut the presumption of advancement. The AAT was of the view that the solicitor's letter –

'is of minor evidential value for it does not prove the intention of the parties *at the time of the acquisition*. The correspondence was written in the light of knowledge as to the adverse effect of the property transaction upon the applicant's service pension entitlements.'

(Reasons, para. 17)

Not a loan

Reliance was placed on the following passage from Halsbury's *Laws of England* to not treat as determinative Mrs Wade's belief that the money was a loan:

'The mere fact that the recipient regards the thing given as a loan and intends so to treat it does not by itself prevent the transaction from being effective as a gift.'

(Reasons, para. 20)

The AAT noted that there was no formal loan agreement and, after quoting from the Federal Court's decision in *Frendo* (1987) 41 *SSR* 527, concluded:

'We are not persuaded upon the evidence that [Mrs Wade and her parents] intended to enter into legal relations and effect a binding oral loan agreement . . . We are satisfied that the transaction was purely of a family or domestic character and is of no legal effect. We are not satisfied that the transaction was other than an outright gift . . . to Mrs Wade on the understanding Mrs Wade would assist her parents by way of accommodation in their old age.'

(Reasons, para. 24)

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Family allowance supplement: receiving sickness benefit?

HART-TOWERS and SECRETARY TO DSS
(No 6114)
Decided: 13 August 1990 by J.A. Kiosogolous.

Mrs Hart-Towers applied for review of a decision by the DSS, affirmed by the SSAT, that she was not entitled to be paid arrears of family allowance supplement (FAS) for the period 26 October 1988 to 13 January 1989.

The facts

Hart-Towers' husband was unable to work for a period of 3 months. He was granted sickness benefit from 26 October 1988 and the benefit was paid to 13 January 1989, after which he returned to work. Later, he received compensation for this period and the full amount of sickness benefit payments received were repaid to the DSS pursuant to s.155 of the *Social Security Act*.

Prior to this time, Mrs Hart-Towers had been receiving FAS for her 2 dependent children. Payments ceased when her husband commenced receiving sickness benefit. After her husband received his compensation and had repaid the DSS the full amount of sickness benefit, Mrs Hart-Towers wrote to the DSS requesting that she be paid the FAS to which she would have been entitled had her husband not received sickness benefit. She repeated this request for arrears covering that period in a further FAS claim lodged 9 February 1989.

Her claim for the period October-January was rejected pursuant to s. 73(1) of the *Social Security Act*, but the delegate recommended that she be granted an '*ex gratia*' payment pursuant to s. 34A of the *Audit Act* 1901. She then sought review by the SSAT which af-