During 1987, the relationship improved. However, they were still physically separated and *consortium vitae* had not resumed. This situation continued until the trip to Bali. And, even though the relationship improved, they did not fully reconcile until after they had undergone counselling.

On this basis, the AAT determined that the payments made to Mrs Kothstein between July 1986 and an unspecified date in July 1988 were correctly made.

'Failure or omission . . .'?

The next question was whether or not amounts paid between July 1988 and 8 September 1988 should be recoverable. This involved determining whether or not payment had been made in consequence of a false statement or representation or a failure or omission to comply with a provision of the Act: s.246(1). However, the AAT determined that no overpayment under s.246(1) had occurred.

Formal decisions

The DSS had apparently notified Kothstein that her pension was to be cancelled from 21 July 1988 but payment had continued to 1 September 1988 as a result of her seeking review. In view of that, the AAT determined that it was appropriate to dismiss Kothstein's application. However, with respect to the DSS application, the AAT set aside the decision under review and remitted the matter to the Secretary with a direction that the applicant qualified to receive a supporting parent's benefit in the period July 1986 to July 1988.

[R.G.]

Family allowance supplement: income test

SECRETARY TO DSS and CHAPLIN
(No. 5823)
Decided: 12 April 1990 by J. Handley.

This was an appeal by the Secretary from a decision by the SSAT to set aside a DSS decision to pay Valerie Chaplin a reduced rate of Family Allowance Supplement (FAS).

Chaplin had applied for FAS on 1 March 1989. Prior to this time she had been in receipt of supporting parent's benefit. This ceased when she commenced to live with Mr Lewin in a *de facto* relationship on 19 February 1989.

Chaplin's income for 1987-88 was $5950 and Lewin's $19 470. In 1988-89, their respective incomes were $3634 and $19 289.

The reduced rate of FAS had been calculated because the DSS in its original decision had taken account of Lewin's income in the 1987-88 financial year, despite the fact that Lewin was at that time a stranger to Chaplin.

The legislation

By s.74B of the *Social Security Act*, a FAS rate is calculated using the 'relevant taxable income' for the 'base year of income'. These terms are as follows:

'Base year of income' is defined in s.72 as 'the year of income of the person that ended in the preceding calendar year'.

'Relevant taxable income' is defined as -

> '(a) in relation to an unmarried person at a particular time, the amount that is at that time, the taxable income of the person for the year of income;
>
> (b) in relation to a married person at a particular time - the sum of:
>
> (i) the amount that is, at that time, the taxable income of the person for the year of income; and
>
> (ii) the amount that is, at that time, the taxable income of the person's spouse for the year of income.'

Applying the legislation

The AAT noted that the phrases 'at a particular time' and 'at that time' were not defined, and concluded that -

> '"at a particular time" means the time that an application for FAS is made, and the phrase "at that time" means the time referred to under the phrase "at a particular time"'.

It decided that, as Chaplin was a 'married person' for the purposes of the *Social Security Act* when she applied for FAS, the DSS was entitled to take into account both her own and Lewin's income for 1987-88 in setting the rate of FAS.

The Tribunal commended Chaplin for the way she had presented her case: she had argued that it was absurd for the DSS to take into account Lewin's income in a period when they were strangers to each other and when she did not have any access to his income. She also pointed out that Lewin would have been unable to claim Chaplin as a dependent spouse during that year for the purposes of the *Income Tax Assessment Act* and thus did not receive the benefit of being assessed at a lower tax rate.

However, the Tribunal concluded that the provisions of the *Social Security Act* were unambiguous and thus the Tribunal was not authorised by s.15AA of the *Acts Interpretation Act* to give effect to any other interpretation.

The Tribunal endorsed the comments in *Meadows* (1989) 52 *SSR* 693 and *Miller* (1990) 54 *SSR* 723, that these provisions were causing applicants financial hardship, (noting as well that a reduction in taxable income of some $3000 between 1987-88 and 1988-89 would lead to an increase of only $3.30 a week in FAS); and asked the Secretary to draw the difficulties to the attention of the Minister in the hope that they could be remedied in the proposed Social Security legislation due to be enacted this year.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Income test: deduction of home mortgage interest

ROWNTREE and SECRETARY TO DSS
(No. 5759)
Decided: 28 February 1990 by R.C. Jennings.

Rowntree asked the AAT to review a decision refusing to deduct her home mortgage interest payments from her investment income when applying the age pension income test.

The facts

In 1962 Rowntree and her husband purchased a home with the assistance of a 5000 pounds mortgage. At the time of the AAT hearing, she was still residing in that home which was subject to the same mortgage.

In 1983 she received about $73 000 but chose not to pay off her home mortgage because she was able for income tax purposes to set off interest on that mortgage against the income she derived from investing some of the money.

In her application for an age pension in June 1988, Rowntree revealed