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

investments totalling more than $40 000 which produced income of about $6000 per annum and was granted a part pension.

Home interest not deductible

The AAT said:

> 'No question arises in this case like those which arose in [*Haldane-Stevenson* (1985) 26 *SSR* 323 and *Garvey* (1989) 53 *SSR* 711], there is no basis for arguing that the interest paid on the mortgage on [the applicant's home] should be deducted from the income received from any part of the applicant's investments. She cannot claim the proposed deduction is associated with the income merely because it was or would be possible to repay the loan with some of the moneys invested . . .
>
> The interest on the mortgage . . . is no more than a living expense incurred by the applicant, like rent . . . That interest is entirely unrelated to any investment which returns income. It is not a cost of achieving that income.'

(Reasons, p.4)

SSAT's reasons

The AAT noted in passing that the SSAT in its reasons -

> does not expressly distinguish its findings on material facts and evidence or material on which the findings were based from the reasons for its decisions as required by paragraph [204(1)(a) of the *Social Security Act*] . . . [but it] complies substantially with those requirements and is adequate to determine this application.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Investment income: spreading of capital gains

SPENCE and REPATRIATION COMMISSION
(No. V88/883)
Decided: 25 January 1990 by H.E. Hallowes.

Spence asked the AAT to review a decision of the Commission to maintain as income for 12 months capital profit earned on redeeming an investment.

The legislation

Under s.35A(4) of the *Veterans' Entitlements Act* 1986, where a person becomes entitled to receive an amount of income, not being income from remunerative work or a return from an accruing return investment, the person is taken to have received one 52nd of that amount as income during each week in the period of 12 months from the date when he becomes entitled to the income.

To be an 'accruing return investment' the value of the investment must be unlikely to decrease from time to time as a result of market changes; s.35A(1).

[These provisions were replaced and substantially replicated by ss.37B and 37J from 1 December 1988. These provisions are identical to *Social Security Act* 1947 s.3A(1) and (4) prior to 1 December 1988 and ss.12B and 12L since then.]

The facts

Spence invested $5000 with a BSL property trust in 1982 and withdrew $8283 on 5 February 1988 when the trust was terminated. The trust documents provided that neither repayment of the investment nor the performance of the trust were guaranteed. Indeed, in September 1986, the capital value of Spence's investment had dropped to $3906.

Not an 'accruing return investment'

The AAT decided that Spence's investment was not an 'accruing return investment' because its value was not guaranteed and affirmed the decision to apply s.35A(4) and maintain the $3283 profit component as income at the rate of $126.23 per fortnight until 5 February 1989 .

Definition of income

Spence argued that the decision was contrary to the definition of income in the dictionary and that applied by the Tax Commissioner; but the AAT stated that it must apply the *Veteran's Entitlements Act* definition rather than those other definitions.

Retrospectivity

In response to the argument that the decision operated retrospectively, the AAT said:

> 'The legislation affects a veteran's rate of income from the day the veteran becomes entitled to receive the income. To that extent, the Act does not operate retrospectively, although Mr Spence did not perceive that the legislation may be amended when he made his original investment.'

(Reasons, p.8)

'Double dipping' by the Commission & unconstitutional deprivation of property

The AAT rejected an argument that redefining an asset as income represented 'double dipping'. Spence also raised a rather ingenious argument that the Commission had acquired his property on unjust terms in contravention of s.51(31) of the Constitution by reducing his rate of service pension. This was also rejected by the Tribunal.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Supporting parent's benefit: which parent?

MINASSIAN and SECRETARY TO DSS
(No. N89/80)
Decided: 2 March 1990 by J.R. Gibson, J. Kalowski and M.T. Lewis.

Gerry Minassian had applied for supporting parent's benefit in respect of his son Luke on 3 June 1988. His claim was rejected on the basis that Luke was deemed to be in the custody, care and control of his mother, Donna Beales, who was receiving family allowance for him.

After appealing unsuccessfully to the Social Security Appeals Tribunal, Minassian applied to the AAT for review.

The facts

Luke was born on 31 October 1986. His parents separated on 26 April 1988. Ms Beales had sought orders of custody and guardianship in the Local Court and on 29 April 1988 the court had made an interim order giving the father access from 5 p.m. each Saturday to 1 p.m. Wednesday, and the mother access from 1 p.m. Wednesday to 6 p.m. Saturday.

Both parents had applied to the Family court for sole custody but, at the time of the AAT hearing, these applications were not finalised.

After Minassian's application for supporting parent's benefit was rejected, he applied for and was granted special benefit. In addition, family allowance payments were split between the two parents, as provided by s.86 of the *Social Security Act*.

The law

At the time Minassian applied for supporting parent's benefit, s.58(1) of the *Social Security Act* provided: