that the respondent be paid sickness benefit from and including 7 November 1989.

[B.S.]

Family allowance supplement: backdating

HATCHER and SECRETARY TO DSS
(No. 6389)
Decided: 14 November 1990 by P.W. Johnston.

Jane Hatcher arrived in Australia from England in September 1988. On her arrival, she went with her husband to the DSS and applied for family allowance. She did not complete those parts of the form which related to 'income details for family allowance supplement'. She told the officer of the DSS that the family was in financial difficulties pending the arrival of finance from the United Kingdom. However, she later told the AAT, she was not told about the existence of family allowance supplement and advised to only complete those parts of the form that related to family allowance.

On learning of the existence of family allowance supplement in November 1989, Hatcher lodged a claim for it. She subsequently discovered that she could have claimed the supplement from the date of her arrival and in January 1990 she applied for backdating of the payment to the date of her arrival. She claimed that the misleading information had prevented her from making the claim.

The DSS refused to accept her claim for back payment and the SSAT subsequently affirmed this decision. Hatcher then asked the AAT to review the decision.

The legislation

Section 76 of the *Social Security Act* provides:

> 'Subject to this Part, where a claim by a person for an allowance is granted, the allowance shall be paid during the period starting on the day when the claim was lodged and ending on the next 31 December, and shall start to be paid from the first allowance pay day after the day before the day on which the claim was lodged.'

Section 158(1)(c) provides that the payment of the allowance 'shall not be made except upon the making of a claim for [the allowance]'.

Section 159(1) requires the claim to be in writing in accordance with a form approved by the Secretary and lodged with the DSS.

No payment prior to claim

The AAT referred to the decision of the Full Federal Court in *Formosa* (1988) 45 *SSR* 586, where in similar circumstances the lodging of a claim was regarded as a precondition for payment, and arrears prior to the date of the claim were not payable. This approach had been followed in *Fry* (1990) 56 *SSR* 753 and *Rockley* (1990) 58 *SSR* 787.

The AAT thus concluded:

> '... there is no legal basis on which the family allowance supplement can be paid in the present circumstances. This is so irrespective of what happened or did not happen when the applicant spoke to the respondent's officer on 8 September 1988. In this respect there is no difference between lodging a claim partly filled out, leaving the relevant part blank, and not lodging a claim form at all.'

(Reasons, p.3)

Claim for a payment 'similar in character'

The Tribunal also referred to s.159(5) of the Act, which allows a claim for a payment under the Act to be regarded as a claim for another payment which is 'similar in character' to that claimed. This is allowed in circumstances where a claim for the second type of payment might properly have been made.

In the present situation the AAT considered that s.159(5) could not apply. The Tribunal commented:

> 'In its terms, it [s.159(5)] could be read in an appropriate case to allow the respondent to characterise family allowance supplement as a benefit "similar to" family allowance. Whilst s.159(5) would normally be concerned with pensions and the like which are near alternatives, it could be read to include another benefit that is cumulative upon the other. Such a case might be where, for instance, in the body of the claim form relating to family allowance, some financial details were included that would advert the respondent to the fact that supplement is also being sought. In the present circumstances, however, there is nothing elsewhere in the claim form that could satisfactorily overcome the fact that part of the claim form relating to family allowance supplement is entirely blank. That part clearly relates to what is a distinct and discrete claim, and failure to fill in any part of it must be treated as a failure to make the claim as required by s.159 of the Act.'

(Reasons, p.5)

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Assets test: mortgage over NZ property

SECRETARY TO DSS and ROBINSON
(No. W90/107)
Decided: 14 December 1990 by T.E. Barnett.

This was an application by the DSS for review of a decision of the SSAT which determined that the value of Paul Robinson's property in New Zealand should not be included as property for the purposes of determining his entitlements to a rehabilitation allowance under the assets test.

The facts

Robinson was the beneficiary under his father's will of a third share of a farm in New Zealand. His father had died in 1982. It was a term of the will that Robinson's brother had 6 months after the death of the father to exercise an option to buy out the shares of Robinson and his sister.

To facilitate the purchase by the brother of the total interest in the farm, the father's will provided that the trustees of the father's estate could advance loans to the respondent's brother out of the share of the estate belonging to the respondent and his sister.

Within 6 months of the father's death, Robinson's brother exercised this option and executed a second mortgage over the property to the trustees to secure the loan advanced from the share of the estate beneficially belonging to the respondent and his sister. The terms of the mortgage provided that repayment was postponed for 10 years, i.e. until 1992.

Robinson's brother ran into financial difficulty and in 1986 had to refinance. This involved, *inter alia*, discharging the mortgage to the trustees and executing a new mortgage directly to Robinson and his sister. This mortgage was executed on 19 April 1987. This mortgage was redeemable on 1 June 1992.

In 1988 Robinson and his sister made a gift to their brother by way of forgiving part of the debts secured by their mortgages.

Robinson commenced receiving the rehabilitation allowance on a date not stated in the AAT's Reasons. The issue arose as to whether the value of Robinson's share in the mortgage over the New Zealand farm should be included in his assets for assets testing purposes and, if so, what was the ap-

propriate amount of the value of the mortgage to be so included.

The legislation

Section 151(1) of the *Social Security Act* provides that the rate of rehabilitation allowance is the invalid pension rate and is thus subject to the assets and income tests under s.33.

In applying the assets test, s.4(1)(a)(vii) provides that

'there shall be disregarded –

...

(vii) the value of any property (not being a contingent, remainder or reversionary interest) to which the person is entitled from the estate of a deceased person but which has not been and is not able to be received'.

The other relevant provision is s.4(11), which provides:

'Where a person lends an amount after the commencement of this subsection, the value of the property of the person for the purposes of the Act shall include so much of that amount as remains unpaid but shall not include any amount payable by way of interest under the loan.'

This provision came into force on 27 October 1986.

[*Note:* This case was determined before the enactment of s.4C of the *Social Security and Veterans' Affairs Legislation Amendment Act (No. 2)* 1990.]

Decision

The AAT held that Robinson's loan to his brother was made in 1982 at the time the trustees first made the loan to his brother. Robinson had an equitable interest in the mortgage at this point. The Tribunal appears to have taken the view that the 1987 transaction, in which Robinson and his sister took a legal interest in the mortgage, was not a new source of legal rights against the brother; rather, the respondent merely 'took over the existing loan' originally made by the trustees.

Having made this finding, the AAT noted that, as the original loan predated the enactment of s.4(11), that provision had no application in this case.

Robinson argued that, because the mortgage redemption had been deferred until 1992, the value of the loan was not able to be received until that date; and, accordingly, s.4(1)(a)(vii) applied to exclude the value of the loan from the respondent's assets.

The AAT did not explicitly deal with this argument but did implicitly reject it in finding that part of the value of the loan should be included in Robinson's assets.

The Tribunal held that, in the case of transactions predating the enactment of s.4(11), the appropriate valuation technique to adopt in relation to a debt owed to a person was an actuarial approach rather than merely taking the present face value of the loan as provided for in s.4(11). In applying the actuarial calculation the Tribunal indicated that the value of the debt should be discounted by, *inter alia*, the gift made by Robinson to his brother by way of partial forgiveness of the debt and by a factor reflecting the depressed market situation in New Zealand.

Formal decision

The AAT set aside the decision of the SSAT and substituted a new decision along the lines indicated above.

[*Note:* The AAT's finding, that the part of the debt forgiven by the respondent should be deducted from the value of Robinson's property, should be viewed with caution. Section 6 provides that any asset or income producing property disposed of, beyond certain threshold amounts, after 1 June 1984 is property in a person's hands. The forgiveness of a debt may be a disposition of property (*Rogers* (1987) 41 *SSR* 517) and possibly a disposition of income producing property (*Gibbons* (1986) 36 *SSR* 457). The Tribunal did not address this issue in its decision.]

[A.A.]

Assets test: reversionary interest in land

SMART and SECRETARY TO DSS (No. W90/185)

Decided: 6 December 1990 by T.E. Barnett.

This case concerned an application by an age pensioner for review of a decision by the SSAT not to disregard his wife's interest as a tenant in common in certain property, for the purposes of the assets test, when calculating his age pension.

The facts

Henry Smart was eligible for an age pension. Among other assets owned by him and his wife, his wife owned a 50% share as tenant in common in land at Rockhampton. She had obtained this interest in the land through her parents and had subsequently executed a life tenancy in respect of the property in favour of her mother. The evidence was that Smart's wife had voluntarily created the life tenancy in favour of her mother without reserving any right to herself to collect rent from her mother.

The issues

There were two issues:

(1) whether the AAT should disregard the reversionary interest of Smart's wife in the property as it produced no income; or

(2) whether s.4(1)(a)(vi) of the *Social Security Act* applied to exempt the inclusion of the reversionary interests in the assets test.

The hardship provisions did not apply.

Legislation

Section 3(5) of the *Social Security Act* provides that, for the purposes of the assets test, a married person's property is taken to be half the total property of the pensioner and spouse. Thus half of the value of Smart's wife's reversionary interest in the property would be included in his assets.

Section 4(1)(a)(vi) provides:

'in calculating the value of property of a person for the purposes of this Act . . .

(a) there shall be disregarded –

...

(vi) the value of any contingent, remainder or reversionary interest of the person (not being an interest created by the person, by the person's spouse or by both of them) . . .'

Decision

The AAT implicitly decided the first issue in favour of the DSS without giving express reasons. Nevertheless the decision is obvious on its face: the lack of rent received by the wife of the applicant is relevant only to the income test and not to the assets test.

[*Note*: The DSS apparently did not take the issue of whether Smart's wife had disposed of income or income producing property within the meaning of s.6 of the Act.]

In relation to the second issue, the AAT noted the provisions of s.4(1)(a)(vi) to the effect that, if the reversionary interest is created by the applicant or his spouse, then it is not exempt from the assets test. In this case the evidence was that Smart's wife had voluntarily created the life tenancy for her mother and accordingly Smart was not entitled to the protection of s.4(1)(a)(vi).

Formal decision

The decision of the SSAT to include the reversionary interest in the assets test was affirmed.

[*Note*: The Tribunal recommended