was unsatisfactory and the AAT concluded that it was unsafe to rely on her evidence unless it was corroborated.

Corroboration?

Aronovitch produced a copy of her mother's will (the details of which were suppressed from publication) and the Family Court agreement. The AAT found these to be unhelpful, since they were consistent with Aronovitch's evidence but could also be explained in other ways.

Aronovitch produced supporting evidence as follows:

- a statutory declaration from her mother Mrs Rubel, confirming that Rubel had sent $17 000 via a friend to Aronovitch to buy her a house in Australia, and that she authorised her daughter to keep the rental income from the property;
- statutory declaration by Aronovitch's accountant stating that on several occasions since 1980 Aronovitch had told him that the property was her mother's, and had sought his advice concerning transferring the title to her mother's name;
- oral evidence from a Mrs S. who had met Rubel some years ago, who told her that she owned a house in Australia; and
- similar evidence to Mrs S's from Mr Z. contained in a statutory declaration.

The advocate for DSS had not challenged any of that evidence and did not require Aronovitch's accountant to attend the hearing for cross-examination. Applying the decision of the Federal Court in *Repatriation Commission v Maley* (15 October 1991), the AAT said that there being no reason advanced by the DSS advocate nor apparent to the Tribunal why that evidence should be rejected, the evidence was accepted.

A resulting trust

The AAT was satisfied that Rubel provided the purchase price for the Bentleigh property on the express understanding it was to be her property. Under equitable principles, this gave rise to a resulting trust in favour of Rubel. A resulting trust need not be manifested and proved by some writing s.53(1) and (2) *Property Law Act* 1958 (Vic.). Although there may be no resulting trust where a parent gives money to a child for the purchase of property, the presumption of advancement (i.e. that a gift was intended) was rebutted in the present case by evidence that Rubel did not intend to make a gift of the Bentleigh property to her daughter.

Formal decision

The AAT set aside the decision of the SSAT that the value of Aronovitch's assets was sufficient to preclude the payment of sickness benefit to her. The AAT remitted the matter to the Secretary for consideration in accordance with a direction that the value of her assets be reduced by the value of the property at Bentleigh.

[P.O'C.]

Deprivation of assets

COPLEY and SECRETARY TO DSS

(No.7697)

Decided: 24 January 1992 by P.W.Johnston.

On 26 May 1987 payment of Mr Copley's age pension was suspended 'pending enquiries' into deprivation of his assets and income. His pension was cancelled on 17 June 1988 because of 'no contact or reply to corres.'. Mr Copley applied to the AAT for review after his appeal to the SSAT was rejected.

The legislation

Deprivation of assets was controlled by s.6AC (later renumbered s.6) of the *Social Security Act* 1947.

By virtue of s.6AC(9) that section did not apply (a) to a disposition that took place more than 5 years before the person became qualified to receive a pension, or (b) to a later disposal that was before the time when the Secretary was satisfied that the person 'could reasonably have expected that [s/he] would become qualified . . . to receive such a pension . . . '

Section 6AC(11) defined a disposal to include where the person 'receives no consideration, or inadequate consideration, in money or money's worth'.

The facts

Mr Copley was born in 1918. He received invalid pension from 1978 and age pension from October 1986.

After his wife died in March 1985, Mr Copley, in accordance with an undertaking he had made to her, disposed of her assets and set up a trust in her name from which considerable amounts of income were distributed to various charities. The DSS was advised of this disposal in November 1986 but Mr Copley refused to give details of the charities or amounts. Subsequently, in April 1987, the DSS cancelled then reinstated Mr Copley's pension at a reduced rate.

In May 1987 the DSS once again sought details of the disposals of Mr Copley's assets but without success, as he felt that the Department was 'prying'. Consequently, on 26 May 1987 his pension was suspended 'pending enquiries'.

Mr Copley appealed to the SSAT in October 1987 but this was not determined until August 1988 when his appeal was rejected. In the meantime Mr Copley worked in Indonesia with a Christian mission but had maintained contact with the SSAT. Despite this, on 17 June 1988, before the SSAT heard the appeal, the DSS cancelled Mr Copley's pension because of 'no contact or reply to corres.'.

At the AAT hearing Mr Copley contended that in giving away his income to charity, he received 'adequate consideration' as he had obtained 'God's grace'. However he maintained his position of not providing details of the charitable distributions. The AAT found that Mr Copley had 'very strong convictions grounded in his Christian faith' which made him 'a very difficult person to deal with and understand'.

Mr Copley also told the AAT that, at the time when he disposed of his assets, he believed that he would die shortly and hence had no reasonable expectation of ever needing to claim a pension.

Cancellation set aside . . .

The AAT concluded that the grounds for cancelling Mr Copley's pension on 17 June 1988 could not be sustained having regard to the fact that he maintained contact with the SSAT in relation to his appeal which he was still pursuing. It was also considered relevant that this decision to cancel was not conveyed to Mr Copley.

And suspension affirmed . . .

The AAT found that Mr Copley 'did *unreasonably refuse* to supply information properly required of him under the Act': Reasons, para.21.

As far as the substantive issue of disposition was concerned, the AAT said that 'it is not enough for the Applicant to say that by disposing of

his assets into a trust to be used for charitable purposes he did so in a way that attracted "adequate consideration"': Reasons, para. 22. Section 6AC(11) regarded consideration in secular terms of money or money's worth.

Section 6AC(9)(b) was not available to the Mr Copley. It posited an objective test that —

> 'requires the decision-maker to stand in the shoes of the Applicant as at the date of disposition and, in retrospect, to form an opinion whether, at that point of time, the person could "reasonably have expected to become qualified or eligible for pension".'

(Reasons, para. 25)

As Mr Copley was born in 1918 he was already qualified to receive the age pension before the time of disposal in 1985.

An argument put forward by Mr Copley that the disposition was not made during a 'pension year' for the purposes of s.6AC(2)(a) was rejected because it was not necessary that the person actually receive pension throughout that 12-month period.

But suspension no longer maintainable

Although the decision to suspend pension 'was made reasonably' (Reasons, para. 28), there was no longer any basis for maintaining the suspension. This was because the AAT found that 'the greater part of the disposition must have occurred during or prior to June 1985' (Reasons, para. 28), the charitable trust having been established on 5 June 1985. As this meant that over 5 years had passed since the disposition of assets, s.6AC(9)(a) prevented the disposition of assets provisions applying to Mr Copley after 30 June 1990

Formal decision

The AAT decided that the cancellation decision of 17 June 1987 be set aside; that the suspension of payment of pension should have ceased to have effect from 30 June 1990; and that age pension was payable to Mr Copley from that date.

[D.M.]

Veteran's entitlements: income on investments

STUART and REPATRIATION COMMISSION

(No. N91/294)

Decided: 31 January 1992 by P.A. Moore, J.H. McClintock and T.R. Russell.

This case concerned an application by Stuart to review a decision of the Repatriation Commission which assessed a certain level of income on 2 accruing return investments under the *Veterans' Entitlements Act* 1986.

The facts

The applicant made 2 accruing return investments on 3 November 1988 and 1 July 1989 respectively. On 15 November 1990 a delegate of the Repatriation Commission made a decision to apply the income test in s.46D of the *Veterans' Entitlements Act* to the applicant.

For the purposes of this test, the delegate was required to determine the 'current annual rate of return' on the investments. To determine this the delegate took the average of the monthly rates of return in the period commencing 12 months prior to the date of the delegate's decision. This, it was claimed, was the policy of both the Repatriation Commission and the Department of Social Security.

It was found as a fact by the AAT that the rate of return on the 2 investments had decreased markedly in the year prior to the date of the delegate's decision. At the beginning of the 1 year period, the monthly rate of return was as high as 14% but, by the end of that period, the rate of return had fallen to a monthly rate of 8.25%.

The legislation

The pivotal provision for the purpose of this decision was s.46D of the *Veterans' Entitlements Act*, which reads as follows:

> 'If a person makes, on or after 1 January 1988, an accruing return investment, the person is for the purposes of this Act, to be taken to receive the current annual rate of return on that investment as ordinary income of the person from the day on which the investment was made.'

The issues

The issue for the AAT was whether the term 'current annual rate of return' justified the Repatriation Commission taking the average of the monthly returns on the investment over the year preceding the date of the decision. It was argued by the applicant that this approach was wrong and that the emphasis should fall upon the word 'current', which required the Repatriation Commission to determine the current rate of return on the investment as at the date the delegate's decision was made. The applicant argued that, given the facts of the case, the current rate of return at the date of the decision was 8.25%.

Decision of the Tribunal

The AAT referred to the High Court decision in *Harris v Director-General of Social Security* (1985) 57 ALR 729; and (1985) 24 *SSR* 294; and noted that, in determining an annual rate of return, the emphasis was on the word 'rate' which called for a determination of the rate existing at the time of the determination, which would then be converted into an annual rate.

The AAT rejected the argument that it is necessary to take a 12-month averaging period, the same argument in a slightly different context having also been rejected by the High Court in *Harris*.

The AAT then reviewed a number of authorities relating to the word 'current' and determined that, in the context of the phrase 'current annual rate of return', what was required was the rate of return existing in the period immediately preceding the date of determination and not an historical rate determined by averaging over a 12-month period.

The AAT noted the administrative difficulties involved in frequent adjustments in the rate of return and noted the administrative rationale underpinning averaging over significant periods of time. The AAT noted that, notwithstanding the arguments of administrative convenience, where such an approach produced a prejudice to the applicant then the administrative convenience was not a sufficient justification for the approach. The AAT suggested that an averaging period of 3 months might in some cases be appropriate rather than an averaging over a period of 12 months.

Formal decision

The AAT set aside the decision of the Repatriation Commission and determined that the 'current annual rate of return' was to be determined as the rate of return actually existing at the date of the delegate's decision.