Funds committed to home building to be excluded

The AAT rejected the DSS argument that s.519(1) was a new provision which had no equivalent in the 1947 Act; and that, because s.1118(2) did have an equivalent in the 1947 Act (s.4(2)), s.519(1) should prevail over s.1118(2).

The AAT said that the reference in s.1118(2) to 'assets test' encompassed the 'liquid assets test' in s.519(1).

The AAT noted that s.13 of the *Acts Interpretation Act* 1901 deems the headings of Parts of an Act to be part of the Act. The heading to Part 3.12 described it as containing 'general provisions'. Section 1118(2) was declared to operate 'for the purposes of this Act':

> 'No exclusion of s.519 is attempted. The application of s.1118(2) to s.519 is likely given that both provisions expressly or by necessary implication only refer to assets in the nature of liquid assets.'

(Reasons, para. 13)

The AAT also said that it was 'persuaded that s.519 must be subject to s.1118(2) by reason of the absurd and unjust results which would otherwise be reached': Reasons, para. 18.

After noting that the assets test limit was lower for homeowners than it was for non-homeowners, the AAT said:

> 'If the value of a person's home was not excluded from the calculation of assets in relation to a lesser assets limit then an injustice would be inflicted on homeowners which could not have been intended by the legislature. In addition, it would be artificial and absurd if an unemployed home owner could qualify for job search allowance but an unemployed home builder would be ineligible notwithstanding that the liquid funds responsible for the ineligibility were committed to the building of the principal home.'

(Reasons, para. 19)

After noting that some exclusions from the rule in s.1118(2) were expressly mentioned in that provision, the AAT said that it could not infer an exclusion of s.519 from the ambit of s.1118(2): Reasons, para. 20.

The AAT decided that the funds which Gelders was using for the construction of a new home should be excluded from the liquid assets test. This had the effect of reducing his liquid assets to some $7000, below the maximum reserve.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Newstart allowance: student

MURFET and SECRETARY TO DSS

(No. 8529)

Decided: 11 February 1993 by M.T. Lewis, I.R. Way and D.D. Coffey.

Murfet applied for review of a DSS decision to cancel payment of newstart allowance. The decision was affirmed by the SSAT.

The facts

Murfet was a full-time student studying for a PhD at the University of New South Wales. He attended the university 20 to 24 hours each week. The university advised that the course could be undertaken on a full or part-time basis, and that Murfet had elected for full-time study. Murfet advised the DSS that he was available for work on a full-time basis while enrolled as a PhD student. He also indicated some medical limitations to his capacity to work because of a rare eye disease, asthma and rheumatoid arthritis. He said he needed to work to pay for his studies, and the studies did not interfere with his job-seeking. He had been unsuccessful in gaining a graduate award from the university but would try again.

Murfet told the AAT that he was not required to attend classes or seminars and his personal research could be undertaken during evenings and weekends totalling 30 hours study a week. This constituted a part-time study program despite his continuing enrolment as a full-time student. He had previously been granted newstart under the same circumstances and queried why payments had now been cancelled.

While in receipt of the allowance he had applied for some 90 jobs, but since cancellation he had not had money to search for work or to attend regularly at the university. The cancellation had reduced his study activities on both financial and psychological grounds. He acknowledged that if he changed his status to part-time he could still complete his thesis on time. He was not prepared to do this because it would hamper his application for a graduate research award.

A letter from a professor at the university indicated that full-time enrolment would not be tolerated if it ran concurrently with full-time employment.

The legislation

Section 613(1) of the *Social Security Act* 1991 provides that subject to subsection (2) a newstart allowance is not payable to a person who is enrolled in a full-time course of education. Prior to the enactment of the *Social Security Act* 1991 sub-section 136(1) of the *Social Security Act* 1947 referred to 'a person who is engaged .... in a course of education on a full-time basis'. Section 613(1) had not previously been interpreted by the courts.

The cases

In *Harradine* (1988) 47 *SSR* 615 the issue was whether a person who is enrolled as a full-time student in a course which is regarded by the educational institution as full-time, and who is pursuing the course at the planned rate of progress, is 'engaged in a course of education on a full-time basis'. The court decided that Harradine, who was enrolled as a full-time law student and worked half-time as a teacher, was engaged in a course of employment on a full-time basis. Davies J said the words 'on a full-time basis' should be construed as qualifying the words 'is engaged in a course of education'.

The AAT distinguished two prior decisions of the Tribunal:

(a) In *Thomson* (1981) 2 *SSR 12;* 53 *FLR* 356 the court decided that Thomson was continuing to seek employment and continued to be unemployed notwithstanding that she was undertaking a full-time course until she found work. The AAT in this case said that such a decision would not be open to it under s.163(1) without invoking s.601(2). That provision enables the Secretary to require a person to undertake a course to improve the person's work prospects.

(b) In *Cheary* (unreported, I.R. Thompson No. 8490, 22 January 1993) the respondent was undertaking a TAFE course requiring 20 to 25 hours a week. TAFE colleges do not use the phrase 'full-time course of education' and the AAT was not assisted by any definition in the Act. In the present case, the university formally required that PhD candidates enrol full-time.

The decision

The AAT followed *Harradine* in interpreting the words 'enrolled in a full-time course of education' as referring to the formal enrolment record rather than to any informal practice adopted by Murfet. The AAT made no distinction between coursework and research work and used the Macquarie

Dictionary definition of 'course' as being 'a systematised or prescribed series, a course of studies, lectures, medical treatments etc.' and 'customary manner of procedure; regular or natural order of events'. In a doctoral research program there is usually no series of lectures but there is a customary manner of procedure within the confines of the academic discipline relevant to the research.

The AAT interpreted the program of education undertaken by Murfet as falling within the term 'full-time course of education'. Had Murfet changed his enrolment to part-time he would have been eligible.

Formal decision

The AAT affirmed the decision under review.

[B.W.]

Overpayment of family allowance supplement: estimate of income

SECRETARY TO DSS and HARTNETT

(No. 8633)

Decided: 1 April 1993 by H.E. Hallowes.

Background

Eva Hartnett had resigned from her employment on 6 July 1989. On 10 July 1989, she claimed Family Allowance Supplement (FAS) for her three children and advised that her taxable income for the tax year ended June 1988 (the 'base year of income') was $15,118, while her partner's income for the same period was $38,716. As this would have rendered her ineligible for payment of FAS, she lodged an estimate of combined income for the tax year 1989-1990 which was $16,000. This was at least 25% less than the income in the base year and FAS was granted from 13 July 1989. At the end of the calendar year, she returned a further form on which she was advised that payment in 1990 would usually depend upon the income for the 1988/1989 year. However, the form made provision for changes and asked whether the combined income for the current year (1989/1990) was both at least 25% lower than it had been for 1988/89 and below the income threshold (in her case, below $17,998). Hartnett ticked yes to both options. As it turned out, notices of assessment for the year ended 1989 indicated a combined income of $58,152 while the assessed income for the year ended June 1990 was $27,728. The latter was revealed to the Department on 30 November 1990 when the Department received a notice of assessment for Hartnett's partner.

As a result of that advice, on 3 December 1990, the Department advised Hartnett that FAS was no longer payable, and on 5 December 1990, she was advised that she had been overpaid an amount of $6751.50. Hartnett asked the SSAT to review that decision. The SSAT set aside the decision and sent it back to the Department with a direction that the overpayment was limited to payments of FAS made in the period 10 July 1989 to 31 December 1989; that no additional amount (penalty) should be added to the debt under s.246(3) of the *Social Security Act* 1947 and that repayment of any amounts still owing in respect of the 1989 period should be effected by means of withholdings of family allowance. It was against this decision that the Department appealed to the AAT.

The legislation

The relevant events, including the decisions to cancel FAS and to raise the debt, occurred prior to the repeal of the *Social Security Act* 1947 and the coming into effect of the 1991 Act from 1 July 1991. Therefore, the SSAT applied the 1947 Act.

Section 73 set out the basic qualification for FAS. The rate of FAS payable to Hartnett was calculated by reference to s.74B(3) which provided that a person may request payment by reference to an estimate for the 'current year of income' if the taxable income in that year is at least 25% less than that in the base year of income. Section 72(2) provided that where no assessment had yet been issued for the current year, an estimate could be lodged. Section 74B(6A) explained the circumstances in which an eligible reduction in income had occurred.

Section 74B(5) provided that where a payment was made by reference to an estimate, and the notice of assessment subsequently issued indicated that the estimate was less than 75% of the assessed amount, payments in excess of what would have been paid had the estimate been correct were taken to be a debt due to the Commonwealth.

Which period?

The SSAT had decided that any debt covered only the period to the end of 1989 but the AAT disagreed and found that Hartnett's 'most recent estimate' of her taxable income for the year ended 30 June 1990 was her estimate of $16,000 and that this was not restricted to the period ending 31 December 1989. The AAT decided that this was an estimate for a year of income, not an allowance period, by reference to s.72(2). Accordingly, the AAT decided that, since the estimate was less than 75% of the assessed amount, there was a debt due to the Commonwealth under s.74B(5) for both periods, i.e. 1989 and 1990 which was recoverable under s.246(2) (i.e. withholdings of allowance).

Recovery of the debt

The AAT first agreed with the SSAT that this was not a case in which it was appropriate to add an additional amount (penalty for late payment) to the debt and stressed that Hartnett had not made any false statement or representation. Indeed, it was conceded by the Department that when she lodged her claim, her allowance was correctly granted on the information then available. The AAT commented:

> 'It is frequently only with the benefit of hindsight that debts become apparent. It is no easy matter to correctly apply the legislation which deals with 'Base year of income', 'Income threshold', 'Notifiable event', 'Notional notifiable event', 'Relevant taxable income'. 'Last year of income', 'Year of income' and estimates across allowance periods.'

(Reasons, para. 19)

Although Hartnett did not ask the SSAT to review the decision until the 1947 Act had been repealed, the decision to raise the debt had effect as if it were a decision under the 1991 Act. The SSAT had set aside the decision under review and directed a change in the period for which there was a debt. However, with respect to the remainder of the debt, that SSAT had decided not to waive or write off the debt.

The AAT, applying the decision in *Re Bradley* (1992) 70 *SSR* 1003, decided that consideration of the discretion to waive the right of the Commonwealth to recover the debt was not dependent on the Minister's May