The law

If the distribution from the trust was considered to be income, it was sufficient to preclude King from receiving any social security benefit. Section 8(1) of the *Social Security Act 1991* defines income as 'an income amount earned derived or received by a person for that person's own use or benefit'. An 'income amount' includes moneys. The AAT concluded that King had received the amounts set out in his tax return. The trust had assets of $776,990, and King was entitled to $97,321 accumulated distributions. There had never been an agreement between King and his father that King would lend the money back to the trust. The AAT did not accept L. King's evidence that he did not know how a loan account worked. He was a self-employed insurance broker who would be well aware of how these financial structures worked. L. King had set up the trust to minimise his tax. He had never advised his son of the distributions from the trust, even when his social security benefits were cancelled. The AAT was satisfied that the statement by King to the DSS concerning his income was incorrect, but found that King did not know that the statement was incorrect when he made it.

The overpayment

Section 1223(1) of the *Social Security Act 1991* provides that a debt to the Commonwealth has occurred:

> 'wherever a social security payment has been made to a person who was not qualified for that payment. Section 1224 in contrast only applied if the amount has been paid because:
>
> "the recipient or another person:
>
> (i) made a false statement . . . "'

(Reasons, para.31)

The issue for the AAT to determine was whether a statement is 'false' simply because it is incorrect, or whether the person must also know that the statement is incorrect. The statements to the DSS by King about his income were incorrect, and as a result of those statements King was paid a benefit he was not entitled to receive. The AAT referred to previous AAT decisions of *Pepi and Director-General, DSS* (1984) 23 *SSR* 270, and *Vocale and Secretary, DSS* (1985) 26 *SSR* 313 in which it had been stated that the corresponding section in the repealed *Social Security Act 1947* did not only apply to those situations where a criminal offence had occurred. In *Cameron* v *Holt* (1980) 142 *CLR* 342, the High Court had said that 'false' must mean knowingly false or misleading, and in a later judgment that the meaning of 'false' is ambiguous, and can mean 'merely "untrue" or "wrong" or can mean "purposely untrue"': Reasons, para. 42. The AAT found that the statements made by King were clearly untrue and therefore false within the meaning of s.1224, in that the statements were wrong or incorrect.

Even if the AAT had not found that the statements made by King were false, it would have been satisfied that King was not entitled to the social security payments paid to him, and that they were not payable, so that a debt to the Commonwealth would have been incurred under s.1223(1).

Waiver or write off

In his appeal King had stated that he had done nothing wrong, and he believed he was entitled to receive the payments. He had not received any distribution from the trust since 1991-92. King obtained employment in August 1993 and since then the DSS had not been recovering the debt from him. The AAT noted that the trust owed King $97,321 and stated that it could see no reason why the overpayment could not be recovered from the moneys owed to King by the trust. As there were funds available to repay the debt, the AAT could see no reason to consider the write off or waiver provisions in the *Social Security Act*.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

Age pension: overpayment

UMANSKI and SECRETARY TO DSS
(No. 9489)

Decided: 23 May 1994 by H.E. Hallowes.

The DSS had decided that Mr Umanski had been overpaid age pension, including rental assistance, totalling $21,536 as he had failed to advise the DSS of income he had received from investments in AGC and IOOF, and from a UK pension, and because he had been paid rental assistance during a period when he had owned a home. The amount of the debt had been recovered by garnishee from Umanski's account with the IOOF. After an internal review by the DSS, the amount of the overpayment was varied to $15,932, being an amount paid within the period from 23 February 1984 to 25 February 1993, and the balance was refunded to Umanski.

The SSAT set aside the decision and substituted a new decision that the amount of the overpayment was $15,272, as it was not satisfied that Umanski had been overpaid rental assistance for a period prior to 21 March 1985.

Umanski contended that the money recorded as invested in his name with AGC and IOOF was assitance given to him by his son who lived overseas and that, in availing himself of the interest, he was receiving no more than the equivalent of assistance received by the average pensioner in Australia who is provided with meals and assistance in kind rather than cash. Umanski had no family on whom to rely in Australia.

From the evidence, the AAT was satisfied that:

- the investments in AGC and IOOF were assets belonging to Umanski and that the interest from the investments was not exempt income under para.8(8)(z) of the *Social Security Act 1991* as a periodical payment or benefit by way of gift or allowance from his son;
- Umanski was not entitled to receive rent assistance after 21 March 1985;
- Umanski failed to tell the DSS of the purchase of a home in which to live; and
- Umanski derived income from an overseas pension and failed to comply with the relevant provisions of the *Social Security Acts 1947* and *1991* with respect to notices sent to him requiring him to notify the DSS of any changes in his circumstances including any variation in his income.

The Tribunal decided that there were no grounds to waive or write-off the debt.

Formal decision

The AAT afirmed the decision of the SSAT.

[B.W.]