AAT finally determined the matter. Thus no debt would be due to the Commonwealth.

The AAT referred to *Kingston v Deprose Pty Ltd* (1987) 11 NSWLR 404 which endorsed a purposive rather than literal approach to statutory interpretation and considered that it was appropriate for the AAT to construe s.1223AB in a way which would promote the purpose of the section. Having considered the Explanatory Memorandum, the AAT decided that the purpose of the section is to provide for those circumstances in which money has been paid 'to a person appealing'. On this basis, the AAT held that s.1223AB has no relevance to the circumstances of this matter as the person appealing here was the Secretary. Whatever the AAT did, no money would be paid 'to the person appealing' before the Tribunal had heard and determined the application. Therefore, the application came to be determined generally by reference to s.41(2) of the *AAT Act*.

In exercising its discretion the AAT took into account the fact that the DSS may not be able to recover the sum. After noting that the DSS had an arguable case, the AAT decided, taking into account the interests of the parties, that no order should be made staying the operation of the decision of the SSAT.

Decision

The AAT decided not to make an order staying the operation or implementation of the decision of the SSAT.

[R.G]

Job search allowance: disposal of assets to family trust

GALEA and SECRETARY, DSS
(No. 9576)
Decided: 30 June 1994 by J.R. Dwyer

Mrs Galea applied to the AAT for review of the SSAT's decision that job search allowance (JSA) was not payable to her because of the level of her assessable assets.

The assets in question included an amount of $188,734.78 which was held in a Commonwealth Bank account in the name of 'Antonia Galea in Trust for the Galea Family Trust'. The DSS had determined that Mrs Galea had disposed of her assets totalling that amount by transfer of payments to the Trust without receiving consideration for the amounts, and therefore the amount in excess of the disposal limit of $10,000, namely $178,734, was included in Mrs Galea's assessable assets for the purpose of determining her entitlement to JSA. As the assets limit for a single homeowner was $112,500, the amount, together with her other assets, precluded JSA being paid to Mrs Galea and her claim had been rejected.

Mrs Galea asserted that the amounts deposited in the Trust were not all her property. She produced a number of bank books including one which showed that some of the money paid into the Trust came from National Australia Bank accounts in the name of Mrs Galea as trustee for her children. The substantive issue for determination was whether those amounts were Mrs Galea's money or money which was already held by Mrs Galea on trust for her children. After consideration of a number of authorities on whether there had been a declaration of, and communication of the intention to create, a trust, the Tribunal concluded that establishing a trustee bank account was not an unambiguous declaration of trust, and Mrs Galea had not established 'the expression and communication of the necessary intention' to show the establishment of the trust.

The Tribunal found, on balance, taking into account:

- Mrs Galea's lack of understanding of the concept of a trust and the obligations of a trustee;
- the lack of any declaration of a trust beyond the designation of the account;
- Mrs Galea's failure to keep any records of withdrawals from the account;
- the lack of communication by her to her children or to any other person of the fact that she had established the account as a trust account for their benefit; and
- the fact that she included the interest on the account in her own tax return and no trust tax returns were lodged;

that the mere placing of money in an account in the name of herself as trustee for her children, did not constitute Mrs Galea a trustee for the money. Thus the money deposited from the account to the Galea Family Trust was Mrs Galea's money and not money subject to trust, and the transfer of the money constituted a disposal of assets within ss.1123-1125A of the *Social Security Act 1991*.

The Tribunal then looked at whether the disposition could be disregarded under s.1127.

It noted there was a disparity between paragraphs (a) and (b) of s.1127 in relation to whether it applied to 'benefits' (including JSA) and suggested that some clarification of the legislation was required. However, as Mrs Galea would attain 60 years of age within 5 years of the disposition of the amount in issue, and expected to be sustained by some social security payment, including age pension, the Tribunal concluded that there was no basis for applying s.1127(b) even if it could be used in a case of a disposition of assets by a person claiming a 'social security benefit'.

Formal decision

The AAT affirmed the decision that Mrs Galea disposed of assets totalling $188,734.78 and that disposal was properly taken into account in determining that she had no entitlement to JSA .

[B.W.]

Age pension: calculation of income from managed investment

VAN GEEST and SECRETARY, DSS
(No. 9579)
Decided: 28 June 1994 by D.J. Grimes.

Mr and Mrs Van Geest were granted age pensions in 1990. At the time of their claims for the pension they held 9740 units, acquired between May 1987 and July 1988, in an investment in Advance Property Fund No 5 (APF5). They purchased a further 20,355 units in Advance Split Property Fund (ASPF) on 23 August 1990 and another 1228 units in Advance Property Fund (APF) on 3 June 1993.

On 1 April 1992 the investments underwent restructuring: APF5 was merged with ASPF and restructured as APF. The units held by the Van Geests' were redeemed by the trustee of APF5