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

by assigning the debt of redemption moneys to the trustees of the APSF in consideration for the issue of units to APF5 unit holders in APF. The Van Geests' investments were affected as follows:

- 2106 APF units were derived from 9739 APF5 units (one unit remained in the original fund);
- 10178 APF units were derived from 20,355 ASPF units.

The further purchase of 1228 APF units in June 1993 took their total to 13512 APF units.

On 28 July 1993 DSS assessed the income value of the investment at a rate of return of 34.61% and the Van Geest's age pension rates were considerably reduced. The DSS calculated the income from the units on the basis of capital growth from $1.05 on 29 May 1992 to $1.30 on 28 May 1993 and a current value of $1.31.

Both parties agreed that the investments were managed investments. The point of contention was whether the 2016 units derived from the APF5 were purchased prior to 9 September 1988, and therefore excluded under s.1074A(b) from being assessed under Subdivision AA of the *Social Security Act 1991*.

The Tribunal found that the investment in APF5 was realised, within the meaning of s.9(10), upon restructuring of the investment in April 1992, referring to a letter to the applicants from Advance Asset Management which stated that all but one of their units in APF5 were redeemed and the proceeds applied to acquiring units in APF. Although no positive action by the applicants led to the realisation of the investment through restructuring, the restructure was accepted by a majority of unit holders at a meeting of which the Van Geests' were aware but did not attend.

As the original units were realised, the subsequent acquisition of the 2016 units in APF must be considered a new investment and, as they were not acquired before 9 September 1988, they must be assessed under Subdivision AA of the Act.

The AAT then considered the calculation of the income from the investments under ss.1074B and 1074E of the Act. These sections provided that the calculation of non-exempt managed investment returns are based on the investment's performance over the preceding 12 months and that a person's ordinary income on a yearly basis is taken to be increased by the value of the investment multiplied by the annualised rate of return (expressed as a % per year) on the investment product, based on performance over the previous 12 months. The AAT noted that the DSS had erred in assessing the Van Geests' income by calculating the growth of the investment (per unit) on a current unit value of $1.30 while calculating their yearly income on the basis of a current unit value of $1.31, thus overstating their annual income by $46.76. The DSS conceded that the unit value of $1.31 should have been applied in both instances.

The Van Geests then submitted that the 1228 units which were purchased after the first review period in May 1993 should not have been considered in the calculation of their income. The Tribunal accepted that submission and found that the 1228 units should not have been included in the May 1993 review to determine prospective earnings over the next 3 months, but should have been considered in the following review some 3 months later.

The Van Geest's final submission was that the method of calculation under s.1074B, applying the value of the investment at the end of the review period rather than at the commencement, was inequitable. The AAT noted their concern but considered that the method logically required that the value of the investment be taken at the date of the assessment as the assessment was 'not one to calculate actual growth or loss over the preceding twelve month period but is intended to determine income for a projected period'. The Tribunal further said that the most accurate gauge of the unit value was not the listing price, but the price at the close of the day's trading as that price reflects its real value in the market place.

Formal decision

The AAT varied the decision under review and remitted the matter to the respondent with directions:

- that in the assessment under review, the current unit value at 28 May 1993 of $1.31 be used to calculate the annualised rate of return on the investment product; and
- that the 1228 units purchased on 3 June 1993 not participate in the assessment of 29 May 1993 but instead be considered in the following three monthly review.

[B.W.]

Job search allowance: gift of assets

DE RYK and SECRETARY TO DSS (No. 9516)

Decided: 2 June 1994 by S.A. Forgie, L.Rodopoulos and I.L. Campbell.

De Ryk was appealing a decision to pay him jobsearch allowance at a reduced rate.

The issues

The DSS decided to pay De Ryk at a reduced rate because he was deemed to receive income amounting to $4560 a year from gifted and loaned assets. The issue to be decided was whether or not these amounts should reduce the amount of job search allowance payable to De Ryk.

Background

In 1991 De Ryk had given amounts of money to his children. Three of his four children had received $25,000 each. This money was used by his children to offset existing debts that they had. De Ryk lent an additional $11,000 to one of his daughters.

Which law applied?

The AAT recognised that if the gifted amounts had to be taken into account when assessing allowance then it was first necessary to determine which law applied in this case. After Ryk lodged his claim, the provisions relating to disposition of assets were amended with affect from 1 January 1993. Section 1125A, inserted by the amendment, requires the secretary when assessing the amount of allowance payable, to take into account the value of some assets which have been disposed of in the past.

The AAT decided that De Ryk had an accrued right to have his claim considered under the law in force at the date of his claim. The AAT had regard to many authorities including *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, *Re Circovski and Secretary, DSS* (1992) 15 AAR 55 and *Esber v Commonwealth of Australia and Another* (1992) 106 ALR 577. On consideration, the AAT chose to adopt the reasoning in *Re Jin and Secretary, DSS* (unreported, Decision No. 9463, 11 May 1994). The AAT concluded that s.1125A did not apply to De Ryk's claim, which had been lodged and determined, and the determination appealed, before the section came into operation.