Knevett had argued that her neighbour was receiving rent assistance and therefore she should. The AAT stated that it could not explain why Knevett's neighbour would receive rent assistance when according to law, Knevett was not entitled to it. The AAT suggested that the DSS might look into this matter.

Formal decision

The AAT affirmed the decision under Review.

[C.H.]

Age pension: meaning of 'loan'

KLIGERMAN and KLIGERMAN and SECRETARY TO DSS (No. 11023)

Decided: 14 June 1996 by J. Handley.

The Kligermans requested review of an SSAT decision of 14 November 1995, which affirmed the DSS decision to reduce the rate of age pension payable to them because of interest deemed to have been earned on a loan made by the Kligermans to their friends.

From July 1995, the Kligerman's were paid the age pension. The Kligermans and their friends, the Kirbys, decided to sell their respective homes and buy a piece of land upon which they would construct two self-contained units. The sale of each couple's home financed the cost of purchasing the land and building the units. The land was purchased, and the Kligermans sold their home and instructed the builder to commence building their unit. The Kirbys also instructed the builder to commence building their unit, even though their home had not yet been sold.

The Kligermans agreed to pay the builder's costs on behalf of the Kirbys, until the Kirbys home was sold. The Kirbys agreed to repay the Kligermans when their house was sold. Both units have been completed and the Kligermans now live in their unit. At the date of the AAT hearing, the Kirbys had still not sold their home, and thus were unable to move into their unit. It remains empty. The sum paid to the builder by the Kligermans on behalf of the Kirbys was $47,660.

The issue

The issue to be resolved by the AAT was whether the sum of $47,660 was a 'loan', within the meaning of s.1099J of the *Social Security Act 1991* (the Act). 'Loan' is not defined in this part of the Act, and the AAT found that other definitions of 'loan' in the Act were not relevant. To ascertain the definition of 'loan' the AAT referred to *Gordon and Secretary to DSS* (decided 2 June 1992).

The loan

The AAT concluded that the monies advanced by the Kligermans to the builder on behalf of the Kirbys, was a loan because:

> 'It was in the nature of a contract, there was agreement to lend monies in consideration of an express promise and it was agreed that repayment would be made at a fixed or future time yet conditionally upon some other event occurring. The absence of any agreement to pay interest is immaterial, as also was the advancing to the applicants by Mr and Mrs Kirby of any security in consideration of the monies being advanced.'

(Reasons, para. 14)

The AAT noted that even though there was no agreement to pay interest on the money advanced, the Kirbys did enter into a written agreement in which it was stated that if something were to happen to the Kirbys, their Estate would be required to repay the Kligermans the sum of $47,660. The AAT rejected the argument that because the money was paid to the builder rather than the Kirbys it changed the nature of the transaction. It concluded that the sum of money was nonetheless a loan by the Kligermans to the Kirbys.

The AAT assured the Kligermans that it did not believe that this had been a device by the Kligermans to divest themselves of assets to obtain a higher rate of age pension. The decision by the AAT was simply an interpretation of the law as set out in the *Social Security Act.* Section 1099J provides that if there is a loan, and the person is not paid interest on the loan, then interest is deemed to be received on each anniversary of the making of the loan. The assumed rate of interest is set out in s.1099M. This interest is then treated as ordinary income under the income test, and thus reduces the rate of pension payable to the Kligermans. Because the DSS had originally made an error when calculating the date from which interest was deemed to have been received, it was necessary for the AAT to remit the matter back to the DSS to recalculate the interest.

Formal decision

The AAT set aside the decision under review and remitted the matter back to the DSS to recalculate the deemed rate of interest on the loan.

[C.H.]

Age pension: income from managed investments

CARTER and SECRETARY TO DSS (No. 10847)

Decided: 3 April 1996 by P. Burton.

The facts

Mrs Carter had received the age pension since 1987, and Mr Carter since 1991. In 1991 Mrs Carter purchased 63,366 managed investment units from GIO for $70,000. The investment was to return 12% a year under the prospectus, such that if actual investment earnings were less than 12%, payment would be made from capital to make up the balance of 12%. The prospectus stated that the monthly distributions would include accrued investment income, capital gains raised from disposal of investments and repayment of capital as required. It specified a target distribution rate of 1% a month to be determined from time to time by GIO, and did not contain any declaration of the performance of the investment in the specified period.

The DSS calculated the value of the age pension for Mr and Mrs Carter for the period November 1992 to November 1993, and took into account the value and annualised rate of return on the GIO managed investment. The rate of return for the period was calculated by the DSS as 17.994%.

The applicants sought review by the AAT of an ARO decision confirming this rate of return and of the SSAT decision that the date of effect of any favourable review of this decision would be limited to the date of lodgement of the SSAT appeal, because the appeal was lodged more than 3 months after notice of the decision. (The SSAT did not consider the merits of the DSS decision.) The AAT considered that the date of effect of its decision would be limited to the date of lodgment of the SSAT appeal, because the applicants had received sufficient notice by mail.

The substantive issue: rate of return on managed investment

The substantive issue concerned whether the formula used by the DSS to assess the applicants' income from their GIO investment was appropriate. A rate of 17.955% was reached by calculation of the formula applied by the DSS under s.1074E(7). However, it was not disputed

that applicants only received a rate of return of 12% during the period. It was also not disputed that the capital of the investment of Mrs Carter had diminished over a period of time, to $59,728 in 1994.

It was agreed that the investment was a 'managed investment' under s.9(1A) and (1B)(a) of the Act, being an investment in which the money or property is paid into a body corporate or trust fund, for example, a public unit trust, and the invested assets are not held in the names of investors. Therefore, the income of the applicants from the GIO investment would be calculated in accordance with ss.1074A to 1074E of the Act.

Under s.1074B the ordinary income of the applicants was taken to have increased by the value of the investment multiplied by the annualised rate of return, based on the performance of the GIO product over the previous 12 months. The AAT found that there was no 'declared rate' on the investment because the GIO was to decide what rate of return was appropriate from time to time based on expectations and perfomance. Therefore, the rate of return for the period from November 1992 to November 1993 was calculated under s.1074E(5), (6) and (7) utilising a DSS formula. Under s.1074E(7), in working out the rate of return or loss on an investment product for a period of 12 months, the DSS was required to take into account (in addition to the value of the product, bonus issues and any other rights):

> '(d) the amount of the distributions (however described) made to the holders of the product during the period.'

The formula applied by the DSS was as follows:

> 'Rate of return = 100 x [(current unit price – unit price 12 months ago) + last 12 months income distributions per unit], divided by the unit price 12 months ago.'

The DSS included the total distribution for the period November 1992 to November 1993 in the formula. The applicants submitted that amounts described as 'return of capital' in respect of the GIO investment comprised solely owner's original capital and that the DSS had incorrectly included the return of original owner capital in calculating the rate of return. They submitted that the expression 'distributions' in s.1074E(7) does not include return of owner capital.

The DSS argued that s.1074E(7)(d) required them to include distributions of capital of all kinds in calculating the income on the managed investments. Further, the DSS did not concede that all of the amounts described as 'return of capital' in respect of the applicants' GIO investments comprised owner capital.

The AAT accepted, citing *Clifford* (1995) 38 ALD 695 and a number of other AAT cases, that the formula utilised by the DSS was an appropriate interpretation of s.1074E(7), and that it was recognised by the finance industry as the correct way to determine the annualised rate of return. It also found that the distribution from the GIO investment included at least some return of original owners capital. However, it found that the return of original owners capital was taken into account in the assessment of the value of the investment and that s.1074E(7)(d) was intended to include any return of capital within 'distributions (however described)'.

The AAT noted that, although correct, the formula appeared to have operated unfairly in this case, as the applicants were assessed as having 17% income from the investment at a time when the in hand receipts were less than 12% including some return of their original capital.

Formal decision

The AAT affirmed the decision under review.

[M.S.]

Income: proceeds of sale of house placed on term deposit

ACONLEY and SECRETARY TO DSS
(No. 11040)

Decided: 27 June 1996 by P. Bayne.

Background

In December 1994 Aconley sold her interest in her home. She received $100,000 from the sale and invested it in a 6-month term deposit. At all relevant times, Aconley intended to use the proceeds of the sale to purchase another home. This she did in July 1995. The DSS did not regard the proceeds of the sale as an asset, but treated the interest generated from the term deposit as income. This affected Aconley's rate of pension.

The issues

Was the interest earned from the moneys placed on deposit 'income' as defined in s.8(1) of the *Social Security Act 1991*? If this were so, then the amount of income imputed to Aconley by reason of the investment was to be assessed in accordance with s.1099DA.

The legislation

Aconley sought to rely on s.1118(2) of the Act. The Tribunal considered the heading and some parts of s.1118(1) also relevant:

> 'Part 3.12 — GENERAL PROVISIONS RELATING TO THE ASSETS TEST
>
> Division 1 — Value of person's assets
>
> Certain assets to be disregarded in calculating the value of a person's assets
>
> 1118.(1) In calculating the value of a person's assets for the purposes of this Act (other than subparagraph 263(1)(d)(iv) and sections 1125 and 1126), disregard the following . . .
>
> 1118.(2) If:
>
> (a) a person sells the person's principal home; and
>
> (b) the person is likely, within 12 months, to apply the whole or part of the proceeds of the sale acquiring another residence that is to be the person's principal home;
>
> so much of the proceeds of sale as the person is likely to apply in acquiring the other residence is to be disregarded during that period for the purposes of this Act.'

The Tribunal also referred to ss.1296 and 1072A(2).

Proceeds of the sale

Aconley argued that the combination of the amount gained on the sale of the house and the interest earned from the money on deposit were 'the proceeds of the sale'. As there was agreement that Aconley intended to purchase another house within 12 months, the 'proceeds of the sale' should be disregarded for any purposes of the Act. Accordingly, she argued that the proceeds could not be regarded as 'deposit money' and could not earn income for the purposes of assessment under s.1099DA.

The Tribunal looked at what 'purposes of this Act' meant within s.1118. The Tribunal concluded that the phrase as used in s.1118(2) could be characterised as 'the purposes of ascertaining the entitlement of a person of a kind mentioned in that provision to the income support entitlement of the Act': Reasons, para. 9.

The Tribunal characterised the sum of $100,000 deposited in the bank in two ways. For the purpose of assessing Aconley's entitlements under the Act, it retains its character as proceeds of the sale of the house and is to be disregarded. But the Tribunal also found that the sum may also be regarded as deposit money under s.1099DA, 'because for the purpose of this provision the sum of $100,00 is so disregarded. What is taken into account under s.1099DA is the interest earned on