and leasehold as long as they were held by persons in their individual capacity.

The AAT said that the case law recognises that the test of whether there is reasonable security of tenure is an objective one. In *Johnston's* case the Johnstons were sole shareholders and directors of a company and were found to be the 'controlling minds' of the company. Whilst the company was the lessor they were the 'controlling mind' of the lessor and it was considered unlikely that they would pass a motion as directors that would require them as tenants to quit the house. Similar principles were applied in *Letcher and Secretary Department of Social Security* (decided 15 September 1995) and in *Wheatley and Repatriation Commission* (decided 11 March 1996).

The AAT in the *Williams* case said that it is always a question of fact whether the claimants 'are conducting a business as a company or as their own': Reasons, para. 13.

The AAT took into account that Mr and Mrs Williams accepted that they had full control over the company; that the company was up to date with its mortgage repayments; and that the Williams had made loans to the company to ensure that it was always able to meet its debts. The Williams acknowledged that if the property had to be sold it would be sold subject to their subsisting lease. In all the circumstances the AAT decided that the Williams were carrying on the business of the company as their own and that it was unlikely that the company in making decisions would fail to take into account their circumstances. It was unlikely that they as directors would make a decision against themselves as tenants that would place in jeopardy their security of tenure.

The AAT pointed out that the legislation looks to reasonable security of tenure. 'The security does not have to be absolute': Reasons, para 17.

Formal decision

The AAT set aside the decision of the SSAT.

[M.C.]

Compensation and recovery: defect in legislation

LAWRIE and SECRETARY TO THE DFaCS (No. 13470)

Decided: 19 November 1998 by T.E. Barnett.

Background

Lawrie sought a review of a decision to impose a preclusion period preventing him from receiving social security payments between January 1995 and October 1999, due to his entitlement to compensation. The DFaCS sought a review of that part of the SSAT decision which held that the DFaCS was not entitled to recover directly from the insurer an amount $27,810.85 pursuant to a notice issued under s.1179 of the *Social Security Act 1991.*

Legislation

The relevant provisions are ss.1165 and 1179 of the *Social Security Act 1991.* In particular s.1179(4) states:

> 'If the person claiming compensation is not a member of a couple, the recoverable amount is equal to the smallest of the following amounts:
>
> (a) the sum of the payments of the compensation affected payments payable to the person for:
>
> (i) the periodic payments period; or
>
> (ii) if a lump sum compensation payment is received before **20 March 1997** — the old lump sum preclusion period; or
>
> (iii) if a lump sum compensation affected payment is received before **20 March 1997** — the new lump sum preclusion period;
>
> (b) the compensation part of the lump sum payment or the sum of the amounts of the periodic compensation payments; or . . .'

Preclusion period

Lawrie submitted that the preclusion period should not apply because he was entitled to sickness allowance or disability support pension from the date of the accident until the date of the lump sum settlement. He thought it was not fair to expect him to repay social security payments which he received in a period of great financial hardship. He did not challenge the calculation of the preclusion period nor did he claim special circumstances under s.1184(1). The AAT, however, agreed with the decision of the SSAT on this issue.

Defective legislation

The more important issue involved the decision of the SSAT that the amount of compensation which had been recovered by Centrelink from the insurer, was not properly recoverable under s.1179 because of a defect in the legislation.

The DFaCS submitted that s.1179(4)(iii) should refer to 'after' rather than 'before' 20 March 1997. The defect occurred when s.1179(4) was amended by the *Social Security Legislation Amendment (Budget and Other Measures) Act 1996.*

The AAT found from 'both the legislation and the general scheme of the Act (supported by reference to the second reading speech and explanatory memorandum for the Bill) that the paragraph was intended to read as submitted by the respondent': Reasons, para. 10.

The AAT concluded that 'a drafting or printing error has clearly occurred, and if the words are given their literal meaning it leads to an irrational and absurd result — leading to the frustration of the parliament's clear intent': Reasons, para. 15.

The DFaCS submitted that when legislation, read literally, is unintelligible, and the meaning intended by the parliament is clear, the courts may correct the error in expression. The AAT referred to *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1980-81] 147 CLR 304 and found that the section would be meaningless unless the Tribunal 'assumes a mistake and corrects it so as to accord with the obvious intention of the legislature' (per Muirhead J, in *Lindner v Wright (1976)* 14 ALR 105 at 111). The Tribunal adopted 'a construction of the subsection in which s.1174(a)(iii) applies to compensation received on or after 20 March 1997.

Formal decision

The AAT set aside the decision under review, and in substitution, decided:

(a) the applicant was not entitled to receive compensation affected payments for the period 17 January 1995 to 19 October 1999; and

(b) the sum of $27,180.85 was properly recovered by Centrelink from the insurer.

[M.A.N.]