the determination to suspend had not been made.'

Which law applied?

The AAT held that as s.1302A was inserted before the cancellation notice was sent to Hartmann, the section applied to the notice so that it was validly served.

It also held that the effect of s.1243A was to remove any accrued rights to have the cancellation decision reviewed in accordance with the law prior to 23 December 1994, that is the law applied in *Sevel & O'Connell*. This meant s.1243A applied in this case.

It concluded that the combined effect of ss.1302A and 1243A prevented payment of arrears to Hartmann.

Formal decision

The AAT set aside the SSAT decision and decided that Mrs Hartmann was not entitled to be paid FP prior to 21 November 1996, the date she lodged a claim for FP.

[K.deH.]

[Contributor's Note: It would seem the AAT did not consider setting aside the 1992 suspension decision which was possible under s.883. Note 3 to s.1243A suggests that the effect is different from setting aside a cancellation decision. Also, there was no mention of a notice of the suspension decision having been sent to Mrs Hartmann, and it was made long before s.1302A was inserted, so s.887(3) would have played no role.]

Payment of arrears: whether notice given of decision

SECRETARY TO THE DSS and AUSTIN
(No. 13420)

Decided: 30 October 1998 by J.A. Kiosoglous.

Background

Mr and Mrs Austin were in receipt of newstart allowance and partner allowance respectively. Over a number of years they had made enquiries with the DSS about their rate of payment. Ultimately these enquiries led to a recalculation of their rate of payment, but in so doing a critical error was made, to the Austin's disadvantage. Rent being received fortnightly was coded as received weekly. The DSS acknowledged the error was theirs. It was conceded that the Austins were underpaid benefits to which they were fully entitled over a period of years directly as a result of this error, but the DSS said that there was no provision under the legislation that would allow the arrears now to be paid to them.

The SSAT, however, decided that arrears were payable to the Austins. The SSAT said that no notice of a decision had been given to the Austins at the time they queried their rate of payment, nor till some 2 years later. When letters were then issued, the SSAT said these 'conveyed the bare facts related to actual changes in the rate'. The SSAT said they were defective as notices in that they did not give the detail of the basis on which the rate was assessed, nor advise of appeal rights and time limits.

The DSS sought review of the SSAT's decision.

The issue

The essential issue for the AAT was whether arrears were payable from the date at which the rates of payment were incorrectly calculated. The AAT expressed this issue as being dependent on when decisions regarding rates of payment were notified to the Austins and on consideration of what constitutes sufficient notice of a decision under the *Social Security Act 1991* (the Act).

The legislation

The Act provides, in regard to each of the different payment types, that different consequences will flow when review is sought where a decision has been notified to a person as against where no notice of the decision has been given. Essentially, where a person has received notice of a decision, they have 3 months in which to seek review in order to have the benefit of a corrected decision backdated to the earliest possible time. Where review of a notified decision is not sought within 3 months, the date of effect of a corrected decision is the date on which review was sought. However, where a decision has not been notified, a person can seek review at any time and have the benefit of backdating.

The provisions that applied in this regard to Austin's newstart allowance are found at s.660K of the Act as follows:

> '660K.(1) The day on which a determination under section 660G or 660J (in this section called the **"favourable determination"**) takes effect is worked out in accordance with this section.
>
> 660K.(2) If:
>
> (a) a decision (in this subsection called the **"previous decision"**) is made in relation to a newstart allowance; and
>
> (b) a notice is given to the person to whom the allowance is payable advising the person of the making of the previous decision; and
>
> (c) the person applies to the Secretary under section 1240, within 3 months after the notice is given, for review of the previous decision; and
>
> (d) a favourable determination is made as a result of the application for review;
>
> the determination takes effect on the day on which the previous decision took effect.
>
> 660K.(3) If:
>
> (a) a decision (in this subsection called the **"previous decision"**) is made in relation to a newstart allowance; and
>
> (b) a notice is given to the person to whom the allowance is payable advising the person of the making of the previous decision; and
>
> (c) the person applies to the Secretary under section 1240, more than 3 months after the notice is given, for review of the previous decision; and
>
> (d) a favourable determination is made as a result of the application for review;
>
> the determination takes effect on the day on which the person sought the review.
>
> 660K.(4) If:
>
> (a) a decision (in this subsection called the **"previous decision"**) is made in relation to a newstart allowance; and
>
> (b) no notice is given to the person to whom the allowance is payable advising the person of the making of the previous decision; and
>
> (c) the person applies to the Secretary under section 1240, for review of the previous decision; and
>
> (d) a favourable determination is made as a result of the application for review;
>
> the determination takes effect on the day on which the previous decision took effect.'

Identical provisions applied for partner allowance.

Notice of a decision

The resolution of the issues in this matter rested on consideration of what constitutes proper notice of a decision. On this question there were conflicting authorities in AAT decisions, notably between the approach taken in *McAllan and Secretary to the DSS* (1998) 3 *SSR* 62 and that taken in *Secretary to the DSS and Sting* (1995) 39 ALD 721.

The former decision took the view that proper notice of the making of a decision must encompass giving sufficient information to the recipient to enable them to understand the main reason for the decision and sufficient so that a reasonable person in similar circumstances would be in a position to decide whether or not to exercise rights of review:

> '"Making" a decision involves reasoning, and consequently, notifying a person of the making of a decision involves notifying the person of the reasons (or at least the main reasons) for the decision.'

(Reasons, para. 18, citing *McAllan* para. 26)

In contrast, the earlier decision of *Sting* considered that the requirements of the Act were met with a lesser standard of information provided in a notice of decision. The AAT in that case said that the statutory provisions to which s.660K applies (in the case of newstart allowance, s.660G) use the term 'rate' of payment. In terms of satisfying requirement for a notice of a decision about a rate of payment, the legislation was sufficiently met by advising the amount to be paid without the need for particularity about the manner in which that rate was calculated. Once the total amount to be paid to a person was advised to them, this was sufficient.

The AAT decided that the reasoning in *Sting* was to be preferred. Specific comment was made by the AAT that *McAllan* appeared to be have been decided without the benefit of a consideration of *Sting*. The AAT concluded that the Act requires simply that there be a notice setting out the total rate payable. The Tribunal said:

> 'The notices in this case did so, by informing the respondent of the amount that had to be credited to their account each fortnight.'

(Reasons, para. 24)

In so deciding, the Tribunal was making clear reference to the submissions of the DSS, that the fortnightly review forms were a sufficient vehicle for the advice of a decision. The fortnightly review forms are a form on which newstart allowees indicate their work efforts or activities for the previous fortnight and any relevant change of circumstances in that time. As the AAT pointed out, these forms also state the amount of newstart allowance paid into an account in that fortnight.

The AAT, while acknowledging the difficulty faced by the Austins with the meagre information provided to them, said that the legislation does not require extensive information for a notice to validly exist. The AAT said that the SSAT erred in failing to distinguish between the validity of the content of the notice and the validity of the notice itself.

Formal decision

The AAT set aside the decision of the SSAT, and substituted the decision that arrears were not payable to the Austins.

[**Contributor's note**: In finding that the fortnightly review forms were notices of decision, the AAT may have extended *Sting*, where that question was not addressed.

It is understood that the Austins have appealed this decision to the Federal Court.]

[M.C.]

Income test: savings investment account; deemed investment income

FIELDEN and SECRETARY TO THE DSS (No. 13415)

Decided: 15 October 1998 by W. Purcell.

Background

Fielden's husband died in 1996 and she later sold the family home and purchased another financed by a mortgage loan. The amount of the loan exceeded the amount required for purchase by $7100, which was to be used for renovations to the new home. The balance was deposited in investment accounts with the Savings and Loan Credit Union, pending renovations.The DSS applied the relevant deeming rate of interest to the investments (the rate applied was not in dispute), as a result of which Fielden's age pension was reduced. Fielden contended that the money borrowed was a mortgage amount on which she was paying interest, that the balance would be expended within a matter of months on renovations to the home, and that had she been advised of the implications she could have withdrawn moneys from the lending institution as required to meet renovation costs. She contended that the DSS should exercise its power to disregard these amounts for pension purposes. She sought a review of the decision, but it was affirmed by the ARO and then on 13 March 1998 by the SSAT. Fielden appealed to the AAT.

The issue

The issue was whether the income derived from the investment of the balance of mortgage moneys should be subject to the deemed interest provisions of the *Social Security Act 1991* (the Act).

The law

The definitions of financial asset and financial investment are contained in s.9 of the Act which provides:

> '9.(1) In this Act, unless the contrary intention appears:
>
> . . .
>
> ***financial asset*** means:
>
> (a) a financial investment; or
>
> (b) a deprived asset.
>
> Note: For ***deprived asset*** see subsection 9(4).
>
> ***financial investment*** means:
>
> (a) available money; or
>
> (b) deposit money; or
>
> (c) a managed investment; or
>
> (d) a listed security; or
>
> (e) a loan that has not been repaid in full; or
>
> (f) an unlisted public security; or
>
> (g) gold, silver or platinum bullion.'

Section 1076 of the Act provides that a deemed rate of interest is to be applied to income from financial assets. It was not disputed that the DSS had correctly calculated the relevant interest amount, if the deeming provisions applied. However, the Act also allows certain investments to not be regarded as financial assets for pension purposes. Section 1084 of the Act provides:

> '1084.(1) The Minister may determine that:
>
> (a) specified financial investments; or
>
> (b) a specified class of financial investments;
>
> are not to be regarded as financial assets for the purposes of section 1076, 1077 or 1078.'

Financial assets

The AAT determined that the moneys held in the investment account were 'financial assets', that the relevant legislation had been properly applied to these funds, and that it had no discretion to disregard the borrowed moneys held in the investment accounts. The AAT noted that Fielding had also written to the Minister seeking an exemption of the investment moneys from the deeming provisions, and that she had been advised that the outcome of her request would be notified to her by the Minister as soon as possible. If successful in this regard, the AAT noted that some arrears of pension would be payable.

Formal decision

The AAT affirmed the decision under review.

[P.A.S.]