evidence the directors would attempt to remove him, and any attempt to sell without his agreement would most likely give rise to an equitable claim in terms of a constructive trust. Geidans continued to reside at the property and the email of 4 January 2002 provided further evidence of effective control. In considering Principle 8, the AAT found no evidence that anyone apart from Geidans had made financial contributions to the company. Ultimately, having regard to all the Principles, the AAT was not satisfied a sufficient basis existed to determine Geidans was not an attributable stakeholder.

Finally, the AAT considered the attribution percentage. Geidans submitted that there should be no attribution, but if attribution was necessary, 50% would be appropriate. The Departmental representative and Counsel for Geidans were not aware of any determinations that had been made of an asset attribution of less than 100%. The AAT stated:

> ... The Tribunal accepts that Mr Geidans has taken progressive steps to divest himself of legal control of the company. Notwithstanding this fact there is no evidence to show that the running of the company has been effectively transferred to anyone else, even if that is Mr Geidans' desire. The Tribunal accepts that as outlined in the letter from his GP Mr Geidans has a number of health conditions which would render him unable to do physical work on the property. However the property is no longer a working farm and there is no evidence that Edgar himself undertakes any regular work on the property. Mr Geidans lives on the property and he alone has the ongoing benefit of it to the extent he can. In the absence of Edgar being contactable or his whereabouts even being known, it is difficult at this time to envisage decisions being made about the property by Edgar alone or even in conjunction with his father. The Tribunal has heard that Indra, Mr Geidans' daughter, is a co-director but there was no evidence that she played any role other than having mail for the company forwarded to her. For these reasons I can find no basis at this time to justify the asset attribution percentage at less than 100%.

(Reasons, para. 45)

Formal decision

The AAT affirmed the decision under review.

[S.L.]

Assets: loan to a trust; whether trust continued to exist

SZMERLING and SECRETARY TO THE DFaCS (No. 2003/661)

Decided: 15 July 2003 by B.H. Pascoe.

Background

Mr and Mrs Szmerling were beneficiaries of the Rossim-Szmerling Family Trust ('the trust'). As at 30 June 2000, Mr and Mrs Szmerling were owed $618,797. Centrelink treated the loan as an asset, rejected Mr Szmerling's claim for age pension on 22 February 2001 and cancelled Mrs Szmerling's age pension. A debt was raised against Mrs Szmerling in the sum of $34,133.44 for the period 28 November 1996 to 27 March 2001.

Mr and Mrs Szmerling had been involved in a business operated by Rossim Nominees as Trustee of the trust. In 1986, they borrowed $150,000 from NAB for the business secured by a mortgage over their home. Rossim Nominees also borrowed $600,000 from Carrington Confirmers Pty Ltd ('Carrington'). This loan was secured by mortgage and personal guarantee. In 1990, the business collapsed and Mr and Mrs Szmerling sold their home. The $150,000 NAB loan was paid in full and the remaining sum of $290,000 was paid to Carrington. An amount of $708,433 was recorded as a loan to the trust following the sale of the home in 1990. Rossim Nominees was removed and replaced as trustee in 1993, and until 1998, the trust remained dormant.

The SSAT decided that the $290,000 paid to Carrington was paid pursuant to a personal guarantee and not an amount loaned to the trust to operate its business. The reduction, however, did not reduce the loan below the relevant asset threshold. The SSAT decided that the debt relating to the period 28 November 1996 to 15 November 1998, during which the trust was inactive, ought to be waived due to 'special circumstances'.

Subsequent to the SSAT decision, the accountants prepared amended financial statements and returns for the trust from 1991 to 2001. These showed a loan account from Mr and Mrs Szmerling of $596,743 as at 30 June 1991, but nil at 30 June 1992, and no further loan account thereafter. The statements were prepared on the basis that Carrington as mortgagee in possession on 10 September 1991 took possession of all of the remaining assets of the trust leaving no funds for unsecured creditors. Mr and Mrs Szmerling entered into Part X arrangements vesting their assets in a trustee pursuant to a composition with their creditors. Given the trust had no assets, the loan was irrecoverable and written off.

The issue

The issue for the Tribunal was whether the loan to the trust by Mr and Mrs Szmerling was, at all material times, an assessable asset.

Discussion

The AAT commented that the accountant had erroneously characterised the events in 1991 and 1992. The AAT held as incorrect the assumption that a trust had been established in 1974 and continued until this day as a legal entity. The Tribunal stated:

> ... In simple terms, a trust is not a legal entity; it is a relationship between a trustee and property. As a general proposition of law, any liabilities incurred by a trustee in carrying out the terms of the trust are personal liabilities of the trustee with a right of recovery out of the assets held in trust. If there is no property, there is no *trust.*

(Reasons, para. 8)

The AAT took the view that the trust ceased to exist by 30 June 1992:

> From the evidence, which I accept, the business carried on by the trustee had ceased prior to 30 June 1992, all property held in trust by the trustee was seized by the mortgagee in possession leaving no property in which the then trustee had any obligation. The trustee, being a company, was wound up. It is clear, in my view, that *the trust* had ceased to exist by 30 June 1992. Some years later, when a new business was commenced, the accountant sought to have the benefit of the losses incurred by that former trust offset against profits of the new business by treating it as a continuation of the same trust under a new trustee. This was not legally possible. At best, the new trustee agreed to hold new assets on the same terms of trust as contained in the original trust deed. However, it was a new trust. It appears, also, that the same process occurred again when another business was commenced with a new trustee following the failure of the second business.
>
> From the foregoing, the alleged loan account was, at least to the extent of monies advanced to the then trustee prior to September 1991, a loan to the then trustee. It could well be argued that, given the knowledge of and involvement in the trust by Mr and Mrs Szmerling, the right of recovery by them was limited to the property held in trust. However, the liability was that of the trustee company. The trustee ceased to hold any property in trust, was subsequently wound up, and the debt became ir-

recoverable by 30 June 1992. It was no longer an asset of Mr and Mrs Szmerling from that date. Even if an asset constituted by a loan to the trustee continued to exist after the mortgagee entered possession, which I am unable to accept, such an asset would have been disposed of under the Part X arrangement and, again ceased to be an asset of Mr and Mrs Szmerling.

(Reasons, paras 9, 10)

Formal decision

The Tribunal set aside the decisions under review and held the applicants had no asset in the nature of a loan account to the trust since 1992.

[S.L.]

Austudy: progress rules; allowable study time

MARTINSEN and SECRETARY TO THE DFaCS (No. 2003/801)

Decided: 15 August 2003 by O. Rinaudo.

Background

Martinsen commenced a law degree, full time, at James Cook University in 1996, which he later continued at Queensland University of Technology. His Austudy was cancelled on 6 March 2002 on the basis that he had exceeded his 'allowable study time'. It was not in dispute that, at that time, he had completed 3.625 years of study.

Centrelink later varied that decision, deciding that Martinsen's allowable study time would expire at the conclusion of semester two, 2003.

Legislation

Austudy entitlement provisions are in Part 2.11A of the *Social Security Act 1991* (the Act).

Section 569(1) of the Act requires that a person will satisfy the activity test for Austudy if they are *'undertaking qualifying study'* which in turn requires satisfying the *'progress rules'* (s.569A) which, for tertiary students, are set out in s.569H(1):

> **569H.(1)** A person who is a full-time student in respect of a tertiary course satisfies the progress rules if:
>
> (a) in the case of a person who is enrolled in the course — on the day on which the person enrolled in the course; or
>
> (b) in the case of a person who is not yet enrolled in the course but intends to enrol in the course — on the day on which enrolments in the course are next accepted;
>
> the time already spent by the student on the course, or on one or more other tertiary courses at the same level as that course, does not exceed the allowable study time for that course.

Allowable study time is defined by s.569H(3)

> **569H.(3)** The allowable study time for a course undertaken by a full-time student or a 66% concessional study-load student is:
>
> (a) if the minimum amount of time needed to complete the course as a full-time student is one year or less — that minimum amount of time; or
>
> (b) if the minimum amount of time needed to complete the course as a full-time student is more than 1 year and:
>
> (i) the student is enrolled, or intends to enrol, in a year-long subject; or
>
> (ii) the student's further progress in the course depends on passing a whole year's work in the course;
>
> the minimum amount of time plus 1 year; or
>
> (c) in any other case — the minimum amount of time needed to complete the course as a full-time student plus half an academic year.

Submissions

Martinsen submitted that calculation of allowable study time under s.569H(3)(b)(i) should occur at the commencement of his course, (January 1996) taking into account whether or not he was *then* enrolled in a year long subject (which he was). This resulted, he said, in five-year allowable study time, which was fixed for the duration of his enrolment in the law degree, provided he did not withdraw from the course. It then became a matter of determining when that study period expired. (Centrelink and the SSAT had calculated his allowable study time as four and a half years, because he had not been enrolled in a full-year subject in 2002.)

The Department submitted that allowable time must be recalculated each time a student re-enrolled in their course, stating the structure of s.569H does not allow for a prospective determination, only a determination as to whether or not allowable time had been exceeded at a certain date. Each determination remains in force until the next re-enrolment date. The Department argued:

> It is then incorrect to find that the substantive decision under review is, say, 'to assess the applicant's total allowable time for Austudy payment purposes as 4.5 years to expire at the conclusion of semester 2, 2003, as varied by Centrelink on 20 November 2002'.
>
> Such a determination could only be made were the applicant to re-enrol for Semester 1, 2004 and claim Austudy for that period. At that point in time the assessor would calculate the applicant's allowable study time and the time already spent on the course, less disregarded matters pursuant to subsection (7).
>
> There are good reasons for this. No person can currently know, for example, whether the applicant will fail further subjects and have these disregarded for the purposes of the progress rules. Such a situation would result in the applicant being entitled to Austudy for a longer period of time.

(Reasons, para. 17)

The Department referred to *Priest and Secretary, Department of Family and Community Services* [2002] AATA 1191, para. 25:

> ... the 'further progress' referred to is progress beyond the current enrolment period. Mr Priest's current enrolment is for semester-based subjects only and so his further progress in the course does not depend on passing a whole year's work in the course.

(Reasons, para. 18)

The Department concluded by submitting that the substantive decision under review was that, as at 26 June 2002, Martinsen satisfied the progress rules, and remained eligible for Austudy. After disregarding subjects failed due to illness (under s.569H(7)), Martinsen had not exceeded his allowable study time.

The Department also submitted that:

> Arguably the determination to calculate the applicant's allowable time limit is not a reviewable decision ...
>
> Even were it to be viewed a reviewable decision it has had absolutely no affect [sic] on the applicant's present circumstances, and is subject to change (for instance, it is dependent on the applicant's subject choices in his final allowance year of study). He is not a person affected by the decision, and does not have the requisite standing to request a review under s.129.

(Reasons, paras 20 and 22)

Discussion

The AAT accepted the Department's submission in relation to the decision under review, and noted that Centrelink had conceded Martinsen's eligibility as at 26 June 2002 and continued to pay him.

The AAT considered that Martinsen had misconstrued the legislation, saying about s.569H(1)

> Clearly, this provision envisages initial enrolment and re-enrolment. Re-enrolment will, of course, occur on a number of occasions during the course. After successfully