then the person may be paid from the date of the original cancellation.

Was notification given by the DSS?

The AAT found on the evidence that, in relation to the review of her entitlement to FAS, Moully had not provided evidence of her rent payments until 27 May 1991. Thus a decision to reduce her payment was made in January 1991.

The critical question, said the Tribunal, was whether that decision had been notified to Moully for the purposes of s.168. If she had been properly notified then she would not be entitled to arrears. She had not applied for review until 24 May 1991, more than 3 months later.

The letter of 29 January 1991 did not state that Moully's payment had ben reduced nor did it say that she was not being paid rent assistance. The question was whether the letter could constitute a notification of the decision. The AAT said the letter did comply with the Act.

> 'Clearly it would have been preferable had the letter indicated that the reinstated FAS payments were at a reduced rate and that the rent assistance component was no longer payable. On the other hand it would have been clear to Mrs Moully that the rate of FAS being paid to her was $3.62 and, as stated on the back of the letter, it was open to her to query how that rate was calculated if she thought it incorrect. Mrs Moully had been paid FAS at a rate almost $60.00 per fortnight more in 1990, a situation which, on its own, could have been sufficient reason for Mrs Moully to query the rate stated in the letter.'

(Reasons, pp.12-13)

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with a direction that the respondent was not eligible for the rent assistance component of FAS from 1 January 1991 to 23 May 1991.

[B.S.]

[*Editor's Note:* see comment on this case in *Opinion*.]

Income test: rate of return

RUSSELL and SECRETARY TO DSS

(No. 7874)

Decided: 3 April 1992 by B.A. Barbour, J.P. McAuley, and G.D. Stanford.

The case concerned an appeal from the SSAT over a valuation of the current annual rate of return on Fay Russell's accruing return investment.

Russell purchased units in a 'growth annuity' from Zurich Australia Life Insurance Limited on 28 August 1986. On 29 August 1988, Russell transferred her investment with the same company to a Public Securities portfolio.

The DSS assessed Russell's accruing return investment for the purposes of an age pension to be 13%. The matter proceeded to the SSAT, which affirmed the decision, holding the investment to be an accruing return investment on the basis that although it was possible for the unit valuation to decrease, it was not probable that it would do so because 75% of the fund was invested in Government securities.

The issue of the classification of the investment as an accruing return investment was not before the AAT. Nevertheless, the Tribunal said that it was satisfied that the investment was an accruing return investment on the basis that the portfolio now had a 100% investment in government securities (a 25% increase since the SSAT decision). Hence it was unlikely that the value of the investment would decrease as a result of market changes, bringing the investment within the definition of 'accruing return investment' in s.3(1) of the *Social Security Act* 1947.

The fund manager for Zurich provided monthly returns to the DSS, indicating the approximate rate of return for that month on each of their investments, including the investment portfolio in which Russell had invested. The DSS made its assessment of Russell's current annual rate of return on these figures.

The legislation

As Russell's original application for an age pension was lodged prior to the date of commencement of the *Social Security Act* 1991, it was determined that the appropriate legislation to apply was that in the 1947 Act: *Cirkovski* (1992) 67 *SSR* 955.

Section 3 of the 1947 Act defines a 'return' in relation to accruing return investments as follows:

> 'a return in relation to an investment (including an investment in the nature of superannuation), means any increase, whether of a capital or income nature and *whether or not distributed*, in the value or amounts of the investment' (emphasis added).

The issue

Russell raised 2 issues for determination in this appeal:

(1) First, she said it was unjust that her pension should be reduced by reason of notional increases in her accruing return investment, when she would not physically receive any benefit from the investment until the end of the 10 year period of the investment.

(2) The second issue for determination was the appropriateness of the DSS policy of determining the current rate of return on accruing return investments by taking an average over the preceding 12 months, based on the fund manager's returns to the Department.

The AAT's decision

In relation to the first issue, the AAT noted that the definition of 'return' did not require any distribution of a gain made in the investment. For this reason the AAT determined this issue against Russell.

The AAT considered and approved the DSS policy of taking an average return over the preceding 12 months based on the fund manager's returns.

The AAT noted that there would necessarily be a discrepancy between the actual rate of return received by Russell and the average rate applied by the Department. The Tribunal nevertheless determined that this was acceptable, given the difficulty involved in making these assessments.

However, the AAT noted that, where a particular aberration in the investments occurred such that the average figure for any particular pension period would give a particularly unfair result, then Russell would be at liberty to approach the DSS to make representation concerning this point. The AAT said that it expected the DSS would appropriately adjust the calculation of the current rate of return. The power of the DSS (and accordingly, of the Tribunal) to approximate these returns by way of averaging is to be found in s.12C of the 1947 Act.

Formal decision

The AAT affirmed the decision under review.

[Editor's note: It should be noted that the original investment in this matter was made prior to 1 January 1988 and the subsequent transfer to the government securities portfolio occurred after that date. This raises the issue of the difference in the way such investments are treated under the Act. The AAT did not address this issue and did not indicate whether the investment was to be treated as a pre or post 1 January 1988 investment.

For a discussion of related issues, see the Annotated Social Security Act 1991, Federation Press, 1992, para [1075.02].]

[A.A.]

Assets test: valuation of land

TORV and SECRETARY TO DSS

(No. P91/339)

Decided: 18 June 1992 by M.D. Allen, C.A. Woodley, and D.D. Coffey.

This was an appeal against the valuation of a farm upon which a dwelling house was situated. The valuation was conducted for the purpose of an age pension. The land consisted of 2 titles, Portion 117 being 22.66 hectares and Portion 116 being 16.196 hectares. The Australian Valuation Office valued the property on the basis of its 'highest and best use as 2 individual home sites'. They purported to have considered a number of comparative sales in the area to arrive at a valuation of $227 000. From this figure the valuer subtracted the independent valuation of the applicant's dwelling house and curtilage of 2 hectares (s.11(5) of the *Social Security Act* 1991 and its 1947 equivalent). The valuation of the house and 2 hectare curtilage was $127 000, leaving a nett asset for age pension purposes of $100 000.

The facts

The AAT found as a fact that the land consisted of only approximately 2 hectares of arable land and the remainder was 'eroded bush, best described as brown snake and rock wallaby country'. The Tribunal found that sub-division was unlikely to be approved by the local Council for various reasons.

The Tribunal heard evidence by a local real estate agent to the effect that the land was unimproved and that its roughness precluded it being sold as a rural home site. The real estate agent was of the opinion that it was likely to sell, if at all, as a 'bush block'. The Tribunal accepted the agent's opinion that the applicant would have had considerable difficulty in selling the land at the time of the application.

The Tribunal heard evidence that the comparative sales relied on by the valuer were of improved blocks and of blocks that were substantially bigger than the applicant's. It was found that there were no true comparative sales to the applicant's block by which it was possible to estimate the value of the applicant's property.

The issue

The issue was the appropriate method of valuing the applicant's land, particularly in the absence of any true comparative sales.

The legislation

As the applicant's original application for a pension was lodged prior to the commencement of the 1991 Act, the AAT determined that the appropriate law to apply was that contained in the 1947 Act. The Tribunal did not refer to the provisions of the 1947 Act and determined the matter by reference to general valuation principles.

The AAT's decision

The AAT approved of the overall approach of valuing the whole of the land inclusive of the dwelling house and 2 hectares curtilage, and then deducting the value of the house and 2 hectares curtilage (*Reynolds* (1987) 35 *SSR* 444 was cited).

In relation to the lack of comparable sales the Tribunal observed:

- One of the sales alleged to be a comparative sale was a mortgagee sale. This fact alone did not entirely dismiss it from consideration although its difference in size and zoning rendered it non-comparable.
- It was difficult to draw conclusions as to the value of unimproved blocks from comparable sales of improved blocks.
- In the absence of any true comparable sales, less reliable comparisons between properties of different sizes and degrees of improvement would have to be relied on with appropriate adjustments.
- The evidence of the local real estate agent with his knowledge of local conditions, even though he was not a qualified valuer, was useful.

Formal decision

The AAT determined that the value of the applicant's property was $205 000 and that the value of the land curtilage was $126 000 and remitted the matter to the DSS to re-determine the applicant's pension.

[A.A.]

Overpayment: marriage-like relationship

SECRETARY TO DSS and MOORE

(No. 8098)

Decided: 9 July 1992 by J.A. Kiosoglous.

The DSS decided to cancel the sole parent's pension being paid to Moore because she was living in a marriage-like relationship. Subsequently DSS raised an overpayment of $8360.60 of sole parent's pension paid between 10 March 1990 and 14 March 1991.

The SSAT set aside this decision, substituting a decision that no marriage-like relationship existed. The DSS requested that the AAT review this decision.

The facts

Moore rented a house from the South Australian Housing Trust (SAHT) from 29 October 1988. Her son Scott was born on 20 April 1990 and she was paid sole parent's pension from 10 May 1990. At some point after Moore rented the house but before she became pregnant, Mr Dennis Webber moved in.

The issues

The AAT set out the issues it must address as:

(a) whether Moore was living in a marriage-like relationship during the relevant period and thus not a 'single person';

(b) whether there was a recoverable debt;

(c) whether all or part of the debt should be waived.

The law

The substantive law relevant in this matter was set out in the 1947 Act.