been paid invalid pension, rather than sickness benefit, for the whole of the period in question. Section 135TB(5) of the *Social Security Act* allows the Secretary to treat a claim for a pension, allowance, benefit or other payment under the Act as if it were a claim for another pension, allowance or benefit under the Act where 'the Secretary considers it reasonable'.

As the *Social Security Act* stood at the relevant time (prior to 1 May 1987), the only payments which the DSS could recover from a damages settlement were sickness benefit payments: s.115D.

According to s.108(1) of the *Social Security Act*, sickness benefit is payable to a person who is temporarily incapacitated for work by reason of sickness or accident and has suffered a loss of income. According to s.24, invalid pension is payable to a person who is permanently incapacitated for work.

Kaloudis' medical practitioner, told the AAT that he believed that K had been permanently incapacitated for work from May 1982 to May 1984. The doctor explained that he had supported Kaloudis' regular applications for grant and continuation of sickness benefit, by certifying that Kaloudis was temporarily incapacitated for work in an attempt to help Kaloudis' very slight prospects of rehabilitation.

However, the AAT noted that, at the time when the DSS had granted sickness benefit to Kaloudis, there had been ample evidence that Kaloudis was temporarily incapacitated for work and suffering a loss of income. This evidence included medical certificates signed by Kaloudis' doctor early in 1983.

Consequently, the AAT said, the DSS decision that Kaloudis had been qualified for sickness benefit, not invalid pension, prior to May 1984 had been correct; and his claim for sickness benefit should not be treated as a claim for invalid pension for the period prior to that date.

Formal decision
The AAT affirmed the decision under review.

Assets test

CHRISTIAN and SECRETARY TO DSS
(No.S86/192)
Decided: 3 June 1987 by R.A. Layton, J.A. Kiosoglous and D.B. Williams.

Mrs Christian asked the AAT to review a DSS decision that the value of three pieces of farming land ($219 500) should be included in her assets for the assets test.

The evidence
Christian had been the registered proprietor of the land until May 1985, when she transferred it to her son, F, for no consideration. The property had originally been owned by Christian's late husband who had died in July 1979.

Christian told the AAT that, in 1951, her husband had told her that he had made a will of which she was to be executrix and that their son 'was to get the land'.

At this time, F was one year old and her husband owned only one piece of land. Her husband later acquired eight other areas as sole proprietor and four other areas as tenant in common with his wife. This land was used as a single farming property.

In 1969, F entered into a partnership arrangement with his parents. In 1971, F and his parents entered into a sharefarming arrangement, under which F was to receive 50% of the profits from the properties. In 1973, Christian and her husband transferred some of their properties to F for $70 635.

Following the death of Christian's husband in 1979, she was appointed executrix of his estate, of which she was the sole beneficiary. She continued the sharefarming agreement with her son until about 1983, when she sold another of the properties to F for $42 000. At the same time, she transferred six other properties to F for no consideration.

The remaining three properties, the subject of the present appeal, were transferred by Christian to F for no consideration on 8 May 1985.

An equitable transfer?
Christian argued that, because of a secret trust created by her husband in 1951, the beneficial interest in the three properties had been transferred to F before the introduction of the assets test.

The AAT refused to follow the earlier decisions in *Millner* (1986) 35 *SSR* 445, and *Wachtel and Repatriation Commission* (1986) 10 ALD 427, which had said that equitable interests were not relevant for the purposes of the assets test. The AAT said it was obliged to consider both legal and equitable interests when determining whether the applicant owned the properties in question in March 1985.

The AAT said that Christian was now claiming that her husband had created a secret trust in favour of F in 1951. A secret trust, the AAT said, was properly classified as an express trust. Under s.29(2) of the *Law of Property Act* 1936 (SA), an express trust had to be evidenced in writing. Because, in the present case, there was no written evidence of the alleged secret trust, the AAT could not find that F had acquired an equitable interest in the property in question before the transfer of title in May 1985, as claimed by the applicant.

The AAT went on to say that if, on the other hand, a secret trust was a form of constructive trust which did not require written evidence, there was insufficient evidence in the present case to satisfy the AAT that a secret trust had existed. The AAT pointed out that Christian had share-farmed the subject properties with her son until 1983; and had sold another property, which would also have been subject to the secret trust if it had existed, to her son in 1983. These actions were inconsistent with the alleged secret trust.

Formal decision
The AAT affirmed the decision under review.

DWYER and SECRETARY TO DSS
(No.V86/513)
Decided: 29 May 1987 by J.R. Dwyer, H.C. Trinick and C.G. Woodard.

Mr and Mrs Carter, who were age pensioners, asked the AAT to review a DSS decision that the rate of their age pension should be reduced by taking into account 'deemed' income of $5600 a year. This was the amount which, according to the DSS, their farming property (being worked by their son) could be expected to produce.

The legislation
Section 6AD of the *Social Security Act* directs that a pensioner's property is to be disregarded for the purposes of the assets test if it would be unreasonable to expect the person to sell, realise or lease the property; and taking the property into account would cause the person severe financial hardship.

The DSS had decided that this provision applied to Mr and Mrs Carter and that the value of the property in question, $226 400, should be disregarded for the purposes of the assets test.

This application for review focused on the 'annual rate of income that could reasonably be expected to be derived from' the farming property. Under s.6AD(3), the annual rate of pension payable to Mr and Mrs Carter could be reduced by this 'deemed income'. The DSS had, in accordance with departmental guidelines, taken 2.5% of the capital value of the farming property as the annual rental which could reasonably be expected to be derived from that property.

The evidence
Mr and Mrs Carter had worked their farming property between 1950 and the early 1970s. From about 1962, their son, M, worked on the farm. From 1965 M farmed the land in partnership with Mr and Mrs Carter. Mr and Mrs Carter moved from the farm and obtained other employment in 1970. In 1975, M and his wife agreed to lease the farm from Mr and Mrs Carter for $2500 a year and to pay for all maintenance and outgoings on the property, other than the mortgage repayments (which, at the time of the hearing, amounted to approximately $1340 a year).

The farming property had been worked by M on his own account since 1975 and he had continued to pay $2500 each year to Mr and Mrs Carter. In 1984-85, the net profit from the farm was $23 249; and in the following year it was $17 469. Mr Carter told the AAT that he had asked M to increase the rent paid for the use of the property by approximately $1300 to cover the mortgage repayments; but M had said that he could only pay more rent if he went into debt.

There was evidence that the annual rental which could be derived by letting the property on the open market was about $17 500.

'Reasonable income' related to son's ability to pay
The AAT said that it was not reasonable to expect Mr and Mrs Carter's son, M, to leave the farming property so that it could be leased to a third party.

However, if M was to continue farming the property, it was reasonable to expect him to pay some additional rent from the time when his parents' circumstances changed with the introduction of the assets test in March 1985.

The evidence in this case showed that M had some capacity to pay extra rent. He could afford to pay an extra $1300 a year so as to cover the mortgage repayments being made by Mr and Mrs Carter. This was the amount of 'deemed income' by which Mr and Mrs Carter's age pension should be reduced under s.6AD(3).

Deduction from income
The AAT noted that Mr and Mrs Carter had actual, rather than deemed, income from the farming property. It pointed out that, for the purposes of the income test, their actual income should be reduced by the amount of the mortgage interest and insurance payments made by Mr and Mrs Carter. This was the effect of the Federal Court decision in *Haldane-Stevenson* (1985) 26 *SSR* 324.

Formal decision
The AAT set aside the decision under review and directed that the annual rate of pension payable to Mr and Mrs Carter, after taking into account their net income, should be reduced by $1300, that is $650 each.

GOLDSTEIN and SECRETARY TO DSS
(No.N86/326)
Decided: 3 July 1987 by A.P. Renouf, M.S. McLelland and G.P. Nicholls.

Mr and Mrs Goldstein were age pensioners. They had sold their home and moved to a 'self-care unit' in a retirement village after paying a 'resident contribution' of $43 000 to the religious organisation which operated the village.

The DSS decided to treat the Goldsteins' unit as their principal home, which it valued at $43 000. This had the effect of allowing the Goldsteins a smaller deduction from the value of their assets than if they had been treated as not owning their principal home.

The Goldsteins asked the AAT to review the DSS decision.

The legislation
The pension assets test distinguishes pensioners who are home-owners from non-home-owning pensioners. A married couple who own their principal home are entitled to have the value of that residence excluded from the value of their assets: s.6AA(1)(a)(ii) of the *Social Security Act*.

Section 6AA(7) provides that a person's right or interest in a principal home -

> 'shall be read as not including a reference to a right or interest that, in the opinion of the Secretary, does not give reasonable security of tenure in relation to that home.'

However, pensioner home-owners are entitled to a smaller overall exemption under the assets test than are non-homeowners: s 6AE. The difference between those exemptions is $60 000.

'Reasonable security of tenure'?
The Goldsteins claimed that they should be treated as non-homeowners, and allowed the larger exemption, because they did not have any security of tenure in the unit which they occupied in the retirement village.

The organisation which owned and operated the village told the AAT that people entering the village were usually required to make a contribution, part of which was refunded where the resident died or left the village within five years of entry. Residents did not have any equity in the unit which they occupied, but only a license terminable at will by the organisation. However, the organisation indicated that it was committed to providing accommodation for life; and that the organisation had not terminated a license for at least seven years.

The AAT decided that the question of the Goldsteins' security of tenure did not depend exclusively on the legal interest which they had in the retirement village. The high reputation of the organisation which owned the village, and the fact that no resident of the village had been asked to leave for at least seven years, were important factors.

In fact, those factors were enough, the AAT said, to establish that the Goldsteins had reasonable security of tenure in their principal home, the unit which they occupied in the retirement village. The AAT said that the Goldsteins' interest in their principal home should be valued at $43 000, the amount which they had paid upon entering the village.

Formal decision
The AAT affirmed the decision under review.

VENTRA and SECRETARY TO DSS
(No.S86/242)
Decided: 27 August 1987 by R.A. Layton.

In March 1985, when the assets test came into effect, Mr and Mrs Ventra were registered, with their son, A, as the owners of a 2.5-acre block of land. The DSS decided that two thirds of the value of that land should be included in the value of their assets, and the rate of pension payable to them calculated accordingly.

They asked the AAT to review that decision.

A history of family arrangements
Mr and Mrs Ventra and their eldest son, M, were registered as the proprietors of a 5-acre block of land in January 1974. M provided the purchase price, partly from his own funds and partly from a loan from his parents, which he repaid by the end of 1975. They later told the AAT that the land had been regarded as belonging to M; and that the parents had been placed on the title to ensure that the land would pass to them if M should die.

In August 1975, M borrowed $12 500 to build a house on the land. He and his parents executed a mortgage as security for the loan. M repaid the mortgage and paid all of the rates, taxes and other outgoings on the land.

In 1979, M decided to transfer half of this land to his brother, A . The land was divided into two allotments of equal size. Allotment 1 was registered in the names of Mr and Mrs Ventra and A as joint tenants and allotment 2 was registered in the name of M as sole proprietor. A later told

the AAT that he had adopted the same course as M, of having his parents registered on the title of allotment 1, as a precautionary measure to ensure that if he died his parents would receive the land.

Following this transaction, A married and built a house for his wife and family on allotment 1. A met all the outgoings on the allotment and made all the payments on a loan of $45 000 raised to pay for the construction of the house.

Legal or equitable interest?

The AAT said that the 1974 transaction, which led to Mr and Mrs Ventra and M becoming the registered proprietors of the 5-acre block of land, had created a resulting trust over that land in favour of M:

> 'It was M's money alone which was used to purchase the land, and therefore a presumption arises that the trust of a legal estate resulted to the purchaser (*Snell's Principles of Equity*; 28th edn, *Calverley* v *Green* (1985) 59 ALJR 111).

(Reasons, para.30)

On the other hand, the May 1979 transaction, by which A had been registered as a proprietor of allotment 1, had not created a resulting trust over that land in favour of A, who had not advanced any moneys towards the purchase of the allotment. Nor had that transaction led to an implied trust over the allotment in favour of A, as M had intended to give the allotment to A rather than to create a trust in A's favour.

However, the AAT said, the circumstances did give rise to a constructive trust over allotment 1 in favour of A: A had at all times behaved as though he were legally entitled to the property, having constructed a house on the allotment, paid for all outgoings and generally acted to his disadvantage. Mr and Mrs Ventra had never acted as the legal or beneficial owners of the property. In this situation, it would be unconscionable for Mr and Mrs Ventra, as holders of a legal interest in the allotment, to retain the beneficial interest and it would be a fraud for them to deny the trust in favour of A.

The AAT referred to *Follone* (198) and *Frendo* (1987) 38 *SSR* 483, where the AAT had said that -

> 'it is only legally enforceable agreements that may be considered and that family arrangements *per se* do not constitute legal transactions. In this application for review, however, it is clear that the applicants and their sons intended to create legal relations between themselves, and that these transactions which were entered into were not merely an informal family arrangement which did not give rise to legal obligations. Legal relations, albeit different from those which appeared on the titles, were intended to be created.'

(Reasons, para.36)

It followed that, although Mr and Mrs Ventra held a legal interest in the land, they did not hold the beneficial interest. Accordingly, the value of the property should not be included in the value of the their assets for the purpose of the pension assets test.

Formal decision

The AAT set aside the decision under review and substituted a decision that the land in question was not property of the applicants for the purposes of the pension assets test.

Invalid pension: permanent incapacity

BLANDO and SECRETARY TO DSS (No.N86/765)

Decided: 9 June 1987 by G.P. Nicholls.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a woman who had migrated to Australia from the Philippines in 1982, when she was 72 years of age. Up to the time of her departure from the Philippines, Blando had worked on the domestic staff of a local family. On her arrival in Australia, she made some attempt to find work but was offered no employment.

The DSS did not dispute that she Blando was permanently incapacitated for work but there was a difference of medical opinion as to whether her incapacity had arisen before or after her arrival in Australia. According to s.25(1) of the *Social Security Act*, an invalid pension cannot be granted to a person who became permanently incapacitated for work outside Australia (except during a temporary absence).

The AAT said that, at the time of her arrival in Australia, Blando had been 12 years beyond the age at which Australian women become qualified to receive age pension. Accordingly, she could not be treated as able to attract an employer who would engage her in full-time remunerated work - the test of incapacity for work laid down in such decisions as *Panke* (1981) 2 *SSR* 9. She should, therefore, be regarded as being permanently incapacitated for work at the time of her arrival in Australia and prevented from qualifying for invalid pension by s.25(1).

In coming to this conclusion, the AAT endorsed such earlier decisions as *Krupic* (1984) 23 *SSR* 279 and *Maniatis* (1986) 32 *SSR* 407, where it was said that s.25(1) should be strictly applied to persons who immigrate to Australia at an age beyond the normal working age in the Australian workforce.

REILLY and SECRETARY TO DSS (No.V86/695)

Decided: 6 August 1987 by H.E Hallowes, G.F. Brewer and D.M. Sutherland.

The AAT *affirmed* a DSS decision to reject a claim for invalid pension lodged in May 1986.

At that time and at the time of the DSS decision, s.23 of the *Social Security Act* provided that a person should be deemed 'permanently incapacitated for work', and so qualified for invalid pension under s.24, if the degree of the person's permanent incapacity for work was not less than 85%.

By the *Social Security and Veterans' Entitlements Act* 1987, s.23 of the *Social Security Act* was repealed and replaced, as from 1 July 1987, by a new s.23, which provides that a person will be regarded as permanently incapacitated for work, first, if the degree of the person's permanent incapacity for work is not less than 85%; and, second, if 'at least 50% of that permanent incapacity is directly caused by a permanent physical or mental impairment of the person.'

The AAT decided that the new s.23 was irrelevant to this matter. It pointed out that s.135TB(2) of the *Social Security Act* made it clear that the relevant date for determining the applicant's eligibility for invalid pension was the date on which he had claimed invalid pension.

The AAT also pointed to s.8 of the *Acts Interpretation Act*, which provides that, in the absence of a contrary intention, the repeal of whole or part of an Act 'shall not . . . affect any right privilege obligation or liability acquired, accrued or incurred under any Act so repealed'. The AAT said:

> 'By lodging a claim, the applicant asserted his right to an invalid pension. Although at the date of lodgment the applicant's right may have been "inchoate or contingent" . . . and subject to administrative determination, it was nevertheless an "accrued" or "vested" right for the purposes of the relevant rules. . . We are satisfied that the legislation to be applied to this application in determining whether the applicant is qualified to receive an invalid pension is the legislation as it stood on the date of the applicant's claim for invalid pension on 28 May 1986. Any other conclusion could be productive of grave injustice to an applicant qualified for but wrongly denied a pension at the date of his claim.