2 years, the AAT said that the training referred to in s.94(2)(b) could not be 'on the job training', because it was formal training conducted prior to the person taking up employment: Reasons, para. 50. And training specifically designed for people with impairments was excluded from the definition of educational or vocational training in s.94(5).

It was clear from the evidence of the psychologist, the AAT said, that Hamal's impairment would prevent him undertaking educational or vocational training during the next 2 years: he did not have the intellectual capacity or aptitude for formal study; he lacked English skills, did not have sustained concentration and was unable to sit for prolonged periods; he had been assessed as unemployable by the Commonwealth Rehabilitation Service; and he had 3 failed attempts at rehabilitation.

Formal decision

The AAT set aside the SSAT decision and decided that Hamal was qualified for DSP and that his DSP should be reinstated.

[P.H.]

Income test: Italian pension

SECRETARY TO DSS and PELLONE
(No. 8786)

Decided: 11 June 1993 by W.J.F. Purcell.

Maddalena Pellone, an Australian resident, began to receive an Australian age pension in June 1985. She was granted an Italian 'survivor's pension', with effect from 1 August 1989, in November 1991.

The DSS then reduced Pellone's age pension on the basis that the survivor's pension was 'income' under the *Social Security Act* 1991.

Pellone appealed to the SSAT, which decided that Pellone's pension should be maintained without regard to the Italian pension (which Pellone had not yet received).

The DSS appealed to the AAT.

The legislation

Section 8(1) of the *Social Security Act* defines 'income' of a person to mean 'an income amount earned derived or received by the person for the person's own use or benefit'.

Section 1208(1) of the Act reads as follows:

> 'The provisions of a scheduled international social security agreement have effect despite anything in this Act.'

According to s.1208(4), an agreement is a scheduled international social security if it is an agreement between Australia and a foreign country, relating to reciprocity in social security matters and the text of the agreement is set out in a Schedule to the Act.

Schedule 3 contains an agreement between Australia and Italy. Article 16 of the agreement, entitled 'Determination of Claims', provides in art. 16(4) that one of the contracting parties (Australia or Italy) may request the other party to pay any arrears of pension, owing by the other party to a pensioner, to the first party so as to allow the first party to recover from the arrears any overpayment of pension made by the first party to the pensioner.

The AAT's decision

The AAT agreed with the DSS that Pellone's Italian pension was 'income' for the purposes of the *Social Security Act*, even though Pellone had received none of the pension by June 1993 and it was not known when she would receive the arrears of pension (owing from 1 August 1989). The Federal Court's decision in *Inguanti* (1988) 15 ALD 348; 44 *SSR* 568 required the pension to be treated as income because, even though it had not yet been received, it had been derived by Pellone.

However, the AAT said, art. 16(4) of the relevant agreement gave the DSS power to recover any overpayment of age pension made to Pellone while she was waiting for the payment of her Italian pension to commence; and the article should be used to avoid the harsh result which would follow from treating as income moneys not yet received. The AAT rejected an argument advanced by DSS that art. 16 only applied where a claim for pension had not yet been determined; and said:

> '15. The purpose of the Agreement between the two countries is to co-ordinate the operation of their respective social security systems, and to enhance the equitable access by people who move between Australia and Italy. An element of that co-ordination is to ensure that "double-dipping" does not occur, and that each Government is able to recover overpayment of benefit from lump sum arrears of the other Government's benefit.
>
> 16. Social security legislation is beneficial in nature and should be so construed, unless it appears by clear words that such was not the intention of the legislation. In my view, as a matter of ordinary language, there are no such words which preclude a construction that avoids the harsh and inequitable effect for which the Department contends.
>
> 17. It seems contrary to the spirit and the stated intent of the Agreement, to provide equitable access to benefit; that a person in the respondent's position, through no fault of her own, should be so disadvantaged. Article 16 contemplates the possibility of overpayment of benefit, and recovery of such overpayment by means of the Italian authorities paying lump sum arrears of Italian pension to the Australian Government, which may deduct any excess amount of the benefit paid by it, and shall pay any balance remaining to the beneficiary . . . '

The AAT said that it was satisfied that the provisions of art. 16 of the Agreement with Italy should prevail.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Assets test: constructive trust?

KIDNER AND SECRETARY TO DSS
(No. 8844)

Decided: 19 July 1993 by D.P. Breen.

George Kidner was the owner of several areas of land used in connection with his logging and earthmoving business. In 1982, Kidner agreed with his 3 sons that they would take over the business from him and he would retire.

Kidner and his sons entered into an oral agreement, under which the sons would buy the properties. The sons then ran the business and improved the properties. However, the oral agreement was not completed – the agreed purchase price remained unpaid and the properties remained in Kidner's name.

Kidner was granted an age pension in October 1991. The DSS subsequently decided that the value of Kidner's assets, including the subject properties, was too high and cancelled his pension.

The SSAT affirmed the DSS decision. Kidner appealed to the AAT.

Constructive trust?

Kidner argued that the properties in question should be excluded from the value of his assets for the purpose of the assets test because Kidner held the properties on a constructive trust for his sons.

The AAT referred to the Federal Court decision in *Kintominas* (1991) 23 ALD 573; 63 *SSR* 891 and said that it was bound to take account of equitable principles, including those relating to constructive trusts.

A constructive trust could create or dispose of an interest in land, notwithstanding a lack of writing: *Property Law Act* 1974 (Qld), s.11(2). But did the evidence establish the elements of a constructive trust? Those elements were:

- a common intention between the parties concerning ownership of the beneficial interest in the property;
- a detriment to the claimant of the beneficial interest; and
- the fact that it would be a fraud on the claimant for the other party to deny the claimant's beneficial interest.

The AAT said that, in *Kintominas v Secretary*, DSS, Einfeld J had held that equity would intervene to protect the interest of a pensioner's son who had improved a property in the expectation of owning the property. But, the AAT said, 'Significantly, at no time did Einfeld J find that the arrangement between Mrs Kintominas and her son Terry constituted a constructive trust': Reasons, para. 24.

The AAT said that the present case had similarities to the cases of *Wachtel v Repatriation Commission* (1986) 11 ALN N213 and *Dineen v Secretary*, DSS (1988) 17 ALD 91; 48 *SSR* 628. In the present case, just as in those cases, although Kidner had acted in relation to the properties in accordance with the wishes of his sons, there was nothing which would make it unconscionable for Kidner to deny the trust.

The expenditure of Kidner's sons on the property had been undertaken to improve their income-producing capacity and that did not create the type of detriment required to invoke the equitable doctrine. The AAT's decision in *Rogers* (1987) 14 ALD 178; 41 *SSR* 517 reinforced this approach.

The AAT concluded –

> 'that the equitable doctrine of constructive trusts cannot extend to cases where one party incurs expenditure for business purposes and the parties purport to transfer property by sale but fail to lawfully complete the transaction.'

(Reasons, para. 34)

It followed that Kidner remained the legal and beneficial owner of the relevant property, which should be included in his assets.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Assets test: deposits in Pyramid Building Society

SECRETARY TO DSS and MIDDENDORP (No. 8791)

Decided: 22 June 1993 by R.A. Balmford, G.F. Brewer and B.H. Pascoe.

Adrianus Middendorp had deposits of some $353,376 in the Pyramid Building Society when the Society closed its doors in mid-1990. The Society was placed in liquidation in December 1990.

Middendorp received an initial payment of 25c in the dollar on his deposits from the liquidator of the Society.

In May 1992, Middendorp lodged a claim for age pension. The DSS rejected his claim on the basis that the value of his assets, including his claim against the liquidator of Pyramid, exceeded the assets test limit.

On review, the SSAT set aside that decision, adopting a lower valuation for Middendorp's Pyramid deposits. The DSS appealed to the AAT.

The issue

The single question before the AAT was the proper value to be attributed to Middendorp's Pyramid deposits. That question depended on the amount and timing of any distribution of funds to be made by the liquidator.

The SSAT had assumed that the liquidator would pay depositors only 40 cents in the dollar; and, as Middendorp had already received 25 cents in the dollar, his deposits were worth only 15 cents in the dollar, less a discount to allow for the delay in receiving that amount.

However, the DSS presented the AAT with an estimate, prepared by the liquidator, of the probable payments to creditors of the Society. This estimate was said to be 'based on a number of economic and legal assumptions that may or may not prove correct'.

According to the liquidator, a number of payments would be made at 12-monthly intervals, coming to some 51 to 53 cents in the dollar by some time after June 1995. The DSS was prepared to assume that the last payment would be made on 30 June 2010, and that earlier payments would be made on 30 June 1994 and 30 June 1995.

On those assumptions, the DSS proposed that the payment expected on 30 June 1994 ($10,601) be taken at a discount value of 0.8404; the payment due on 30 June 1995 ($42,405) be discounted at 0.7746; and the payment due on 30 June 2010 be discounted at 0.2276. On this basis, Middendorp's interest in the Society would be valued at $52,211 at the date of his claim.

The AAT accepted the liquidator's estimates of expected payments and generally endorsed the DSS's approach. But the AAT decided that, in discounting the future expected distributions, 'a discount rate including a premium for risk should be adopted', because of the uncertainty associated with the winding up of the Society.

Whereas the DSS had used a discount factor of 8.5%, the AAT adopted a factor of 12.75%. The result was that Middendorp's interest in the Pyramid Building Society was valued at $41,456 as at the date of his claim. That amount, when added to Middendorp's other assets, meant that he was eligible for a part pension.

Formal decision

The AAT set aside the decision of the SSAT and remitted the matter to the Secretary with a direction that, as at 14 May 1992, the value of Middendorp's investment in the Pyramid Building Society was $41,456.

[P.H.]