Case No: C3/2004/2753

Neutral Citation Number: [2005] EWCA Civ 929
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM A TRIBUNAL OF
SOCIAL SECURITY COMMISSIONERS

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 20 July 2005

Before :

LORD JUSTICE BUXTON
LORD JUSTICE SEDLEY
and
SIR MARTIN NOURSE

- -

Between:

B	**Appellant**
- and -	
THE SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr. J Howell QC and Mr. T Weisselberg (instructed by Child Poverty Action Group) for the **Appellant**
Mr. R Drabble QC and Mr. J Coppel (instructed by Office of the Solicitor) for the **Respondent**

- -

Judgment

Lord Justice Sedley :

1. The appellant, who has quite severe learning disabilities, is the mother of three children. She is literate, but her mental capacity is described as below borderline. Nevertheless, and notwithstanding the pitiful state in which she has been living, no person had been appointed by the Secretary of State, under powers which he is given by his own Regulations, to exercise her right to claim social security and to receive and deal with payments on her behalf.

2. From May 1990 she was claiming and receiving, in addition to child benefit, income support for herself and her children. But in October 2000, because of her inability to cope, the children were taken into care and – what is not the same thing – removed from her home and taken to live elsewhere. The Benefits Agency, which acts on the Secretary of State's behalf, did not know and was not told of this, and so continued to pay child-related benefit premiums for a substantial further period. Adjusted for the disability premium to which it turned out that the appellant had been entitled but which she had not claimed, the overpayment amounted to £4626.74, and this sum the Secretary of State claimed an entitlement to recover.

3. His own decision to this effect was overset by the Hounslow Appeal Tribunal (chairman Mr P. Quinn) on 7 July 2003, but his appeal to a Tribunal of Commissioners succeeded. The fact that a full tribunal (HH Judge Hickinbottom, the Chief Commissioner, Mr Commissioner Henty and Mr Commissioner Jacobs) sat reflects the importance of what was to be decided. The decision, however, was one of principle: it determined only whether the Secretary of State was entitled to recover the net amount overpaid. Whether he would proceed to do so if successful was not only a matter for his discretion but – as is accepted on his behalf – a decision subject to scrutiny in public law.

The issues

4. The central issue for the Commissioners and for this court arises out of two provisions, one of primary and one of delegated legislation. For reasons which will become clear, it is appropriate to cite the latter first.

5. Regulation 32 of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) provided at the material time:

> (1) Every beneficiary and every person by whom or on whose behalf sums payable by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such information or facts affecting the right to benefit or to its receipt as the Secretary of State may require.

The current version is materially the same.

6. Section 71 of the Social Security Administration Act 1992 provides:

> **Overpayments – general**

(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure –

(a) a payment has been made in respect of a benefit to which this section applies; or

(b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.

.....

(2) An amount recoverable under subsection (3) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.

7. The Secretary of State's contention is that the appellant was required, by virtue of Reg. 32, to tell the Benefits Agency if any of her children stopped living with her, and that by virtue of s.71 her failure to do so entitled him to recover the amount consequently overpaid. The material requirement, for the purposes of Reg. 32, had been communicated to her

(a) by Form INF4, which is routinely sent to all income support claimants and which says, under the caption "**Changes you must tell us about"**:

"Tell us if … someone you have claimed for

- move[s] to a different address [or]

....

- if children who you have claimed for go into care"

(b) by the order book by means of which the appellant was paid, which at the back told her that she must tell the Benefits Agency "if things change" and in particular "if any dependant or anyone else who you have told us is living with you moves to a different house". Under the caption "**How to tell us about changes"**, it said: "You must get in touch with the social security office named at the front of this book as soon as you can"

8. Among the arguments advanced for the appellant is that it was assumed by the Commissioners without evidence that the appellant had received form INF4. On the face of it this is correct, and it is no answer for the Secretary of State to assert in his skeleton argument, as he does, that his records show that the form was duly issued more than once to the appellant. But it does not follow that the Commissioners, with their knowledge of the day-to-day working of the system, were not entitled to assume that the form had routinely reached the appellant unless the contrary was asserted.

One may compare the approach of the House of Lords in *Secretary of State for Work and Pensions v Hinchy* [2005] 1 WLR 967, §8. There was in any case the uncontested entry to similar effect (which is further considered at §16 below) at the back of the appellant's order book. It is appropriate in these circumstances for this court to approach the appeal on the same factual footing as the Commissioners did.

9. The appellant's case (which is not in any significant way dependent on the foregoing) is that a claimant who is unable to understand that she has an obligation to report something has not "failed to disclose" it within the meaning of s.71(1) if she does not report it. On her behalf John Howell QC (appearing with Tom Weisselberg, who represented her before the Commissioners) accordingly relies upon the finding of the Appeal Tribunal that, although she could read the material requirements, the appellant

> "did not understand that the placing of her children in care was a material fact that she needed to disclose."

It is not disputed before us that, if the legal test of failure to disclose is dependent on mental capacity, the appellant lacked the necessary capacity.

The decision of the Tribunal of Commissioners

10. The decision from which this appeal is brought (CIS/4348/2003) is so closely and fully reasoned that any attempt at paraphrase risks doing it an injustice. It records, however, certain important propositions which were uncontentious:

(a) that one could not disclose, nor therefore fail to disclose, what one did not know;

(b) that failure to disclose something required not merely the negative fact of non-disclosure but an affirmative obligation to disclose;

(c) that the materiality of a fact was an objective question independent of the claimant's perception; and

(d) that "fraudulently or otherwise" meant that innocent failures of disclosure could result in recovery.

11. The Commissioners concluded that the present duty of disclosure arose not from s.71(1) but from Reg. 32. They considered, however, that a failure which constituted a breach of the duty did not import additionally a breach of some moral or legal obligation such as made it reasonable to expect disclosure by the individual concerned. In so deciding, they departed from a substantial line of commissioners' decisions, starting in 1982, which had limited the Secretary of State's entitlement to recover overpayments by qualifying the claimant's obligation of disclosure. Since it has been submitted by Mr Howell that this line of authority should be restored by us, it will be necessary to look at it in some detail, as the Commissioners did.

12. The Commissioners concluded:

> 62. In this case, the Secretary of State relies upon the first duty within the unamended regulation 32 (1), namely upon a request for information with which the claimant failed to comply. The requests relied upon are found in the Form INF4 ("Tell us if you or someone who you have claimed for …move to a different address.. [or] if children you have claimed for go into care") and order book ("You must send us a letter or Form A9 if you or your partner or any dependent or anyone else who you have told us is living with you, moves to a different address"). These requests were unambiguous. They imposed a duty on the claimant to report the fact that her children had been removed from the house. She knew that fact. She was able to communicate that fact to others. By not disclosing the fact to the Department, she was in breach of her obligation under regulation 32(1). She failed to disclose a material fact in breach of her obligation to do so, resulting in an overpayment of benefit to her. The consequences of the breach were those under section 71, i.e. the Secretary of State was entitled to recover the overpayment resulting.

Arguments

13. Mr Howell argues, first, that it would have been very simple, had it been Parliament's intent, to provide for the Secretary of State to recover any benefit to which the recipient was not entitled. Instead it made recovery dependent on the making of a payment which would not have been made but for a misrepresentation or an omission on the part of the recipient. Thus "personal culpability" is required – a test he wisely modified in argument to "personal fault". If it were not, there would be no logic in the conceded proposition of law that there can be no failure to disclose what is not known. Yet the Commissioners have generated a form of strict liability out of provisions which are manifestly intended to have no such effect, and in doing so have disturbed a settled meaning which for two full decades Parliament has not chosen to disturb. The effect, moreover, is sufficiently drastic to bring into play the presumption against penal construction of statutes.

14. For the Secretary of State Richard Drabble QC (appearing with Jason Coppel, who conducted the Secretary of State's case before the Commissioners) submits that the Commissioners' reasoning and conclusions are entirely correct. He contends that the system took a wrong turning with the 1982 decision that the Secretary of State must establish a breach of some moral or legal obligation which made it reasonable to expect disclosure on the claimant's part; that the subsequent legislation carries no presumptive endorsement of this line of authority; that mental incapacity is catered for not only in the uncontested proposition that there is no duty to disclose what the claimant does not know but in Reg. 33 which allows a proxy to be appointed for claimants who are unable to manage their own affairs; and that even where recovery is permitted, execution is both a matter of executive discretion and subject to public law constraints. Beyond this point, however, he contends that what is material is (as is conceded) an objective question; that (as is also conceded) a failure to disclose may

be innocent; and that if further authority is needed, it is now provided by aspects of the reasoning of the House of Lords in *Hinchy* (ante).

15. Mr Howell advanced two further arguments. One was that the order book entry (see §7(b) above), by requiring the claimant to get in touch with the Agency "as soon as you can", itself contemplates a reporting obligation within the claimant's mental capacity: in other words, it looks to what can be reasonably expected of the claimant. The other was that the legislative provisions fall to be construed, so far as possible, compatibly with art 14, read with art.1 of the First Protocol, of the European Convention on Human Rights. It is convenient to begin by considering these submissions.

The order book

16. This argument was not considered by the Commissioners, although it was among those advanced by Mr Weisselberg on the claimant's behalf. It was not, however, an argument capable of affecting the outcome. First, as is held above (§8), the Commissioners were in any event entitled to rely on the rather firmer and clearer wording of INF4. Secondly, the argument that the order book, by saying "as soon as you can", has introduced a limitation based on mental capacity rather than simply on practicality, is sophistry. The kindest thing the Commissioners could do – as they did – was ignore it. The appellant has far better arguments than this.

The ECHR

17. The Convention argument is raised for the first time in this court. Since such arguments, by virtue of the Human Rights Act 1998, are akin to submissions going to jurisdiction, it would be wrong to shut the argument out. It remains regrettable that a human rights issue, assuming it to be viable, should arise so late in the day.

18. Art.1 of the First Protocol provides

Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

19. Art. 14 provides:

Prohibition of discrimination

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

20. Mr Howell's argument is not – as it might conceivably have been - that art 1P1 is directly breached by depriving the appellant of funds paid to her in circumstances in which it was unjust and unreasonable to expect her to draw attention to a fact which disentitled her to them. It is that the state's interference with her possessions discriminates unjustifiably between people who are unable to report facts because they are not aware of them and people who, like the claimant, are unable to report them for some other reason. Alternatively it is that the law treats identically people who are capable and people who are incapable of understanding that there is something they are required to report.

21. The first question is therefore whether, although not directly incompatible with art. 1P1, the Commissioners' construction of the legislation is sufficiently closely related to the right enshrined in that article to make it unlawful to discriminate unreasonably between individuals in relation to its enjoyment.

22. I consider that the argument falls at the first fence, because it does not appear to me that any possessions of the appellant are at stake. What the Secretary of State is claiming is an entitlement to recover money which should not have been paid to the appellant in the first place. This much is not in issue. What is in issue is whether he is prevented from recovering the money because of the appellant's lack of understanding of her obligation of disclosure. Although the decision of this court in *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797 3 All ER 577, §47-8, to the effect that a non-contributory benefit such as income support is not a possession within the meaning of art 1P1, was taken as correct by the House of Lords [2005] UKHL 37, the underlying issue of principle currently awaits the decision of the Grand Chamber in *Hepple v United Kingdom*, heard in March this year. But the recovery of overpaid benefits, for the reason I have given, seems to me to stand outside this question and by parity of reasoning outside art 1P1.

23. If this is wrong, I am prepared to accept that the grounds of discrimination asserted by Mr Howell, insofar as they turn on mental capacity, are of the kind contemplated by art. 14. But I do not accept that the first distinction he relies on – between people who are unable to report facts because they are not aware of them and people who, like the claimant, are unable to report them for some other reason – compares like with like. The proposition that you cannot report something you do not know is (at least outside journalism) a simple proposition of logic. The proposition that you cannot report something you do not appreciate you have to report depends on often difficult questions of cognitive capacity and moral sensibility which vary from person to person. The contention that it is unreasonable not to put the two things on a par is untenable.

24. Mr Howell's second critique - that the law, if the Commissioners are right, treats identically people who are capable and people who are incapable of understanding that there is something they are required to report – is closer to the mark. Mr Drabble's response to it is that Parliament or the executive is entitled, indeed obliged,

to draw a line somewhere, and that a much more draconic location of the line has been adopted in, for instance, the housing benefit system, where only "official error" prevents recovery of overpayments (Housing Benefit (General) Regulations 1987, reg.99). Where to draw the line, he submits, is a question falling within the state's discretionary area of judgment, at least where the ground of discrimination is not a "suspect category" such as race or sex.

25. I am not persuaded that this is necessarily right. Mental capacity, although not listed in art. 14, is arguably at least as sensitive a personal characteristic, in relation to discrimination, as race or sex. And it is too readily forgotten that in the jurisprudence of the Convention the state includes the courts, with the result that the national legal system has a part to play if the state is to enjoy the proper benefit of the so-called margin of appreciation. The state's own discretionary area of judgment, as it has come to be known, may correspondingly include the judgment of the courts as to what is and is not Convention-compliant, at least where compliance has a distinctive legal, as opposed to policy, component.

26. If therefore the alleged discrimination were sufficiently related to art 1P1, I would need to be persuaded that the distinction made by the legislation between those capable and those not capable of appreciating their obligation to report a change in circumstances was reasonable and justifiable to the extent of situating the distinction within the executive's legitimate area of policy choice. But since I do not consider, for the reasons that I have given, that the recovery of overpaid benefits has anything to do with deprivation of possessions, I do not propose to answer what seems to me a difficult but in the event academic question.

Is there a secondary restraint on recovery?

27. This returns the argument to the same issue, but unassisted by the Convention: is a claimant under any legal obligation to report more than she can reasonably be expected to report? In other words, is non-compliance with reg. 32 not only a necessary but a sufficient condition of the Secretary of State's entitlement under s.71(1)?

28. On the face of the legislation, for reasons which the Commissioners' conclusion, quoted above, makes plain, the answer to both questions is yes.

29. In developing his reasons for going behind the face of the legislation, Mr Howell invokes the principle that statutory construction should lean "against doubtful penalisation", relying on Bennion's gloss (*Statutory Interpretation*, 4th ed, p.706) that "the principle applies to any form of detriment". I have the same doubts about the applicability of the description "detriment" to the recovery of overpaid benefits as I have about the applicability to them of the word "property"; but since Mr Howell limits his submission under this head to the corollary that s.71 should not be construed expansively in favour of the Secretary of State, I limit my response to agreeing that the section should not be construed expansively in favour of anybody. Mr Drabble does not argue otherwise.

30. The secondary "reasonable expectation" test entered the case-law in the decision of Mr Commissioner Edwards-Jones QC in *R(SB) 21/82*. At that date the same obligations as now feature in reg. 32 were present, although differently configured, in the predecessor regulations. The facts of the case, as the Commissioners have pointed out, were unusual (they concerned a wife's undeclared capital resources discovered after her and her husband's deaths and sought to be recovered from her estate), but the statement of principle was unqualified:

> "I consider that a 'failure' to disclose necessarily imports the concept of some breach of obligation, moral or legal – i.e. the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected."

31. As the Commissioners in the present case record, this holding was doubted in at least one subsequent Commissioner's decision but was followed without comment and apparently without argument in the majority of cases which succeeded it. For instance, in *CIS/1769/1999* it was held that "the relevant test is *not* what a reasonable man in the shoes of a particular claimant would have thought it appropriate to disclose, but what a reasonable man *knowing the particular circumstances of the claimant* would have expected him to disclose". The holding was also cited with approval in three decisions of Tribunals of Commissioners (*R(SB) 15/87; CG/4494/1999* and *R(IS) 5/03*). Such decisions do not bind, although they carry great weight with, subsequent Tribunals of Commissioners: see *R(U) 4/88*. In this court, however, the issue is open.

32. We start, even so, from what the present Tribunal of Commissioners said about the interpolated test:

> "51.…we agree that it is difficult to understand. We agree that "failure to disclose" imports some concept of breach of obligation. As we have already indicated, we do not understand what the Commissioner meant by "moral obligation" in this context, and certainly we do not understand what place such obligations have in the case of a non-disclosing claimant. However, even more obscure is what the Commissioner meant by "the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected". Mr Coppel submitted that this was an additional criterion for "moral obligation" cases but, if so, then it has been approved in many subsequent cases in respect of legal obligations to disclose. Mr Coppel submitted that, in his view, the criterion could have no place where there was a legal duty. Mr Weisselberg submitted that the Commissioner appeared to have introduced into the construction of section 71 – entirely erroneously, he accepted – a concept from the then-equivalent of the second duty in regulation 32(1). He frankly submitted, and we accept, that the phraseology used is so close to that used in the regulation that it would be an astonishing coincidence if it had not been derived from the regulation.

> 52. With considerable regret, we have concluded that, on any analysis, the passage of Mr Commissioner Edwards-Jones QC cannot represent the proper construction of what has now become section 71(1). Insofar as he imported words from the equivalent of regulation 32 (1), he was not entitled to do so. Before us, no one could suggest how those words could properly be imported otherwise. On the most generous view, the words do not represent a possible construction of section 71.
>
> 53. There was no suggestion that, in the words quoted, the Commissioner was construing the then-equivalent of regulation 32 (1) (as delimiting the scope of the duty to disclose sufficient to found an entitlement to recover an overpayment under section 71). However, if and insofar as he was, for the reasons set out above, it was equally impermissible of him to have imported a reasonable expectation criterion into the first duty, i.e. the duty relating to disclosure."

Discussion

33. It is as well to deal first with Mr Drabble's reliance on the discretion which accompanies the Secretary of State's entitlement to recover overpayments, a discretion which he points out is subject to judicial review if exercised on wrong principles. The submission is, in effect, that there is ultimately nothing to worry about. I would reject this as an aid to construction. We are concerned here with law. If to remit the maintenance of constitutional right to the region of judicial discretion is, as Lord Shaw of Dunfermline memorably said in *Scott v Scott* [1913] AC 417, 477, to shift the foundations of freedom from the rock to the sand, so too in the less dramatic context of the present case it is not acceptable to determine law by falling back upon executive discretion.

34. On the other hand, I do not consider that Mr Howell's argument from settled construction is decisive. It is quite true that when Parliament readopted this wording, first enacted in s.20 of the Supplementary Benefits Act 1976, in s.53 of the Social Security Act 1986, the line of reasoning on which he relies had been taken in more than one Commissioner's decision. It is therefore also true that the opportunity could have been taken in 1986 to exclude it if it was contrary to the legislative intent. (It is accepted that the same cannot be said of the current Act, which was a consolidating measure.) Moreover, as Mr Drabble accepts, any of these decisions could have been but were not appealed.

35. But there are limits to the theory of legislative adoption, known as the *Barras* principle after the decision in *Barras v Aberdeen Sea Trawling etc Co* [1933] AC 402. Lord Radcliffe in *Galloway v Galloway* [1956] AC 299, 320, was disposed to limit it to instances of "authoritative judicial interpretation over a period", and no authority in any event rates it higher than a presumption. Bennion, somewhat delphically (but I think justifiably so), says: "where an Act uses a form of words with a previous legal history, this may be relevant in interpretation. The question is always whether or not Parliament intended to use the term in the sense given by this earlier history" (*Statutory Interpretation,* 4th ed, §210(3)). But there is no doubt that the courts have

not infrequently read into a statute a construction which had been settled by prior judicial decisions on the meaning of the same words, and that in at least one case (*R v Chief Constable of the Royal Ulster Constabulary* [1997] 4 All ER 833, 839) such a meaning has been derived from an official report rather than from judicial decisions. Mr Howell is, moreover, entitled to rely on the repeated adoption of his construction by the specialist commissioners who daily interpret and apply this legislation. But the adoption of it has not been uniform. There are some reported cases in which commissioners have declined to follow it, including of course the present case.

36. It seems to me necessary to begin by looking at the intrinsic quality of the decision which is the source of Mr Howell's construction, and which is cited in §30 above. I confess that I have found it baffling. The Commissioner cited no authority for his secondary test beyond the definition of "failure" in the Shorter Oxford English Dictionary ("non-performance, default; also a lapse"), which afforded no very obvious basis for it. Nor was it apparent why his preferred construction ("some breach of obligation, moral or legal") required him to interpret the legal obligation contained in the Regulations as involving a secondary test of what was reasonably to be expected. To articulate the two by the phrase "i.e." was to suggest a spurious identity between two quite different things. Moreover, as Baroness Hale pointed out in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, §53, the introduction of a moral duty to disclose places people at risk of serious legal consequences for breach of a wholly indeterminate obligation. If there is a reason for construing "failure" as involving fault, it has to be better than this.

37. Mr Howell places weight upon a submission that the Commissioners in the present case wrongly considered that it was Regulation 32 which prescribed the duty of disclosure and that s.71 simply prescribed remedies for a breach. Undoubtedly it is in s. 71 that the phrase "has … failed to disclose" is found, but failure presupposes obligation, and it is in Regulation 32 that the obligation – an unqualified one – is found. It is in fact part of Mr Howell's case that the obligation is so widely cast (by virtue in particular of s.119) that third parties may be exposed to recoupment for not disclosing things which they know but the relation of which to the claimant's benefit entitlement is entirely unknown to them. For these reasons, he submits, it is necessary to accept not only that you cannot disclose what you do not know but that you have not failed to disclose what you do know unless you appreciate that you have an obligation to disclose it.

38. One readily sees the moral justice in this approach. It is no doubt why it has commended itself to a good many decision-makers in the appellate system. But does the legislation leave any space in which to insinuate it? The case for doing it, if it can be done, is augmented by Mr Drabble's concession that the Secretary of State's construction means that not only the present claimant with her intellectual handicap but someone who is physically prevented, say by a serious accident or illness, from reporting a material change of circumstances is caught by s.71.

39. In *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16 the House of Lords had to consider whether overpaid severe disability premium was recoverable under s.71 when, despite the claimant's failure to disclose the material facts to the department's income support office, these had been known to its disability living allowance office. The House held that there had been no due disclosure. Mr Drabble can draw comfort but not, I think, direct support from Lord Hoffmann's remarks at

§21 ("The Commissioners have therefore consistently rejected attempts to introduce a theoretical or constitutional dimension into the question of whether disclosure has been made for the purposes of s.71") and from those of Baroness Hale at §53, approving the Commissioners' decision in the present case but only (see §36 above) in relation to the importation of a moral duty of disclosure in addition to the legal one. Neither the decision nor the dicta bring the Secretary of State's present argument home; and Lord Hoffmann's pointer in §22 to a "theme … that the claimant must do what a person in his position would reasonably regard as sufficient to communicate the information to 'the proper person'" might be thought to offer some support to Mr Howell.

40. One returns, therefore, to the wording of the enactments. Mr Drabble submits that the phrase "whether fraudulently or otherwise" in s.71 admits of no excuses for failure. The phrase links up, he submits, with the principle that what is a material fact is an objective question unaffected by the claimant's own appreciation (a proposition which, although I cannot discern it in the authorities Mr Drabble cites for it, I think is self-evident). The question is then whether the qualification for which Mr Howell contends is implicit in either regulation 32 or s.71. The commissioner's decision which is the source of the qualification is itself incoherent; the decisions which have followed it have not repaired or improved its reasoning; and the same, in my reluctant view, is true of the arguments which have been deployed in this court in support of it. This is no criticism of the claimant's case: it is simply a reflection of the fact that the moral argument against fixing her with the financial consequences of not reporting something which she did not appreciate she needed to report encounters a statutory provision which not only makes no such allowance but leaves room for none. This was the reasoned opinion of the tribunal of three commissioners against which the present appeal is brought, and while my reasons for reaching a similar conclusion have sought to follow the contours of the arguments addressed to us, I find myself in the end in full agreement with them.

The discretion to enforce recovery

41. This is not the end of the case. Although I have rejected the executive discretion not to enforce repayment as an aid to the construction of the primary provision, its availability becomes of central importance once the construction advanced by the Secretary of State is separately upheld. The conclusion I have reached means that his officials will have in a variety of cases to decide whether it is right to take advantage of his entitlement to recover overpaid sums which in all probability will have been spent, in cases like the present, by people who did not realise that they were being overpaid.

42. There are restrictions in the Regulations on how much can be withheld at a time from future payments by way of recoupment; but this does not touch the underlying issue whether it is fair to recover the money at all. As to this, Mr Drabble told the court that his instructing Department has a written policy which could be produced if desired. It then emerged that the Child Poverty Action Group, instructing Mr Howell, had never heard of it.

43. It is axiomatic in modern government that a lawful policy is necessary if an executive discretion of the significance of the one now under consideration is to be exercised, as public law requires it to be exercised, consistently from case to case but adaptably to the facts of individual cases. If – as seems to be the situation here – such a policy has been formulated and is regularly used by officials, it is the antithesis of good government to keep it in a departmental drawer. Among its first recipients (indeed, among the prior consultees, I would have thought) should be bodies such as the Child Poverty Action Group and the Citizens Advice Bureaux. Their clients are fully as entitled as departmental officials to know the terms of the policy on recovery of overpayments, so that they can either claim to be within it or put forward reasons for disapplying it, and so that the conformity of the policy and its application with principles of public law can be appraised, although two such policies were evidently described or shown to Newman J in *R (Larusai) v Secretary of State for Work and Pensions* [2003] EWHC 371 Admin: see §15 and 19.

Conclusion

44. While therefore I would dismiss this appeal on the ground that the statutory meaning of "failed to disclose" admits of no qualification in favour of claimants who do not appreciate that they have an obligation to disclose something once they are aware of it, the argument has exposed a lacuna in the use of the Secretary of State's power to mitigate the potentially harsh consequences of this ruling which it is to be hoped will be rapidly remedied.

Sir Martin Nourse:

45. I agree with both judgments.

Lord Justice Buxton:

46. I agree that this appeal must be dismissed; but since that outcome is, for the reasons indicated by my Lord, not an attractive one on the facts of this case, I seek shortly to express my own reasons for arriving at it. I venture respectfully to think that nothing that follows departs from what has fallen from my Lord.

Construction

47. Read in isolation, the phrase "failed to disclose" might seem to be addressed to some sort of deliberate concealment, or conscious suppression, of a material fact. That might well be its application where the fact in issue is not one addressed by specific regulations, but is nonetheless determined to be "material". But that cannot be the

expression's meaning or application where, as in our case, the fact in question is mandated for transmission to the Secretary of State by a specific regulation. Provided, as the Commissioners found in their paragraph 62, Mrs B knew the fact and was able to communicate it to others, then the language of failure to disclose comfortably fits her case. It is nothing to that point that she did not understand the *materiality* of the fact. That issue is determined in respect of this fact by regulation 32(1).

48. And it is notable that the gloss introduced by the decision of Mr Edwards-Jones QC did not give a special meaning to the word "disclosure", but sought to do so in respect of the word "failure". That could only be achieved by the insertion into the requirements of section 71 of a "breach of obligation moral or legal" to disclose, to take the place of the bare fact of non-disclosure. But as my Lord has demonstrated that step is plainly misconceived. The *legal* obligation to disclose is that imposed by regulation 32, so that limb adds nothing. There is no basis at all in the statute for imposing or requiring a *moral* obligation to disclose, a step that would only have the effect, if it were taken seriously, of introducing vagueness and contention into what is clearly supposed to be a simple, albeit austere, system.

49. I should perhaps add that, in my respectful view, that is the objection to the Edwards-Jones formula, rather than that identified by Baroness Hale of Richmond in paragraph 53 of her speech in *Hinchy*. If the reference to moral duty indeed exposed people to liability for breach of a wholly indeterminate obligation, then it would indeed be open to the most serious objection on that ground alone. But, at least in a case such as ours, which is governed by statutory rules as to the provision of information to the Secretary of State, the object of the formula is to limit, not to extend, the liability of the subject. It is objectionable because that limitation cannot be found anywhere in the statutory scheme.

Settled construction

50. This is not the place to determine the limits of the *Barras* principle. My Lord correctly describes Bennion's attempt to do so as delphic. What is however entirely clear is that the few decisions before section 53 of the Social Security Act 1986 was enacted cannot possibly qualify as encouraging, much less compelling, an interpretation that the words of the statute do not naturally bear. And that is the more so because the Edwards-Jones formula requires the insertion of words into the statute, rather than confining itself to the meaning of the words that are already there.

51. It is not necessary, in order to reach this conclusion, to adopt a test as demanding as that suggested by Lord Radcliffe in *Galloway*. All that is necessary is to point out that none of the decisions that adopted the moral duty approach reasoned the matter out; none of them were given at appellate level; and the period of time involved was far too short to establish a settled practice at commissioner level.

Article 14

52. Mr Howell was, I think, originally minded to say that the "possessions" of Mrs B that were being interfered with were or was the money originally paid to her. That was an unpromising, and unattractive, argument, because Mrs B never had any right to be so paid. Mr Howell accordingly reformulated the argument, to say that the possessions

were Mrs B's *current* assets, out of which the Secretary of State was seeking repayment. That formulation suffers from two fatal flaws.

53. First, it only restates the original and objectionable identification of the relevant possessions. The Secretary of State claims £x out of Mrs B's possessions because that is the amount by which she was overpaid. In any "repayment" case, what is sought is not, except in very unusual circumstances, the return of the very notes and coins originally paid over; indeed, in this case I do not doubt that no specie changed hands, the payment having been by the universal "giro". Rather, the repayment is of a sum equivalent to and representing the original payment. That that involves a transfer of part of Mrs B's liquid assets to the Secretary of State is in truth merely a recognition of the fact that her apparent assets, when properly totalled, have to be diminished by the debt that she owes to the Secretary of State. Payment of that debt does not deprive her of her possessions, but merely recognises that her possessions do not properly include a sum representing that debt. Second, if the possessions of which Mrs B is deprived were indeed simply her current liquid assets, then that deprivation does not take place on the basis of a discriminatory act. This identification of the possessions urged by Mr Howell requires that Mrs B's current possessions be treated as entirely separate from, and not to be judged according to, any default of Mrs B. It is only by that means that the objection to her claiming ownership of the wrongful payments can be avoided. But it is precisely in the process of identifying that default that the allegedly discriminatory act is committed.

Conclusion

54. I accordingly agree with my Lord that none of the criticisms of the careful and balanced judgment of the Commissioners can succeed. I also would dismiss this appeal.