



Neutral Citation Number: EWCA [2003] Civ. 138
Case No: A1/2002/1320

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SOCIAL SECURITY COMMISSIONER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th February 2003

Before :

LORD JUSTICE ALDOUS
LORD JUSTICE CARNWATH
and
SIR DENIS HENRY

Between :

MAUREEN HINCHY **Appellant**
- and -
SECRETARY OF STATE FOR WORK AND PENSIONS **Respondent**

John Howell QC (instructed by **Stewart Wright, Legal Officer, Child Poverty Action Group**) for the Appellant
Richard Drabble QC (instructed by **Office of the Solicitor, Department of Work and Pensions, Department of Health**) for the Respondent

**JUDGMENT : APPROVED BY THE COURT FOR
HANDING DOWN (SUBJECT TO EDITORIAL
CORRECTIONS)**



Lord Justice Aldous:

1. For a number of years Maureen Hinchy, the appellant, received income support which included an amount referred to as a severe disability premium. That premium was payable because the appellant was categorised as severely disabled and was in receipt of an award of the care component of disability allowance at the middle rate. That award was for a fixed period which expired on 13th October 1998 and despite an appeal was not renewed. The result should have been that the appellant's income support payment no longer included a severe disability premium. However payment of severe disability premium continued until 3rd July 2000. The sum paid in respect of that premium between 13th October 1998 and 3rd July 2000 was £3,550.40. It was that sum that the Secretary of State for Work and Pensions sought to recover.

2. By letter dated 27th November 2000 the Benefits Agency, an executive agency of the Department of Social Security, wrote to the appellant stating that the overpayment needed to be paid back. The right to recover relied on was that provided for in section 71 of the Social Security Administration Act 1992. The relevant parts of that section are as follows:

“71. (1) 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.

...

(3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.”

3. The appellant appealed against the decision of the Benefits Agency. The Agency looked again at the appellant's case and concluded:

“You were being paid an income support severe disability premium on the basis that you were receiving the middle rate care component of disability living allowance but you failed to tell the income support section that your disability living allowance had ceased as instructed to do in the instruction pages of your order book and you used an order in your order book date 3.7.00 declaring that you were entitled to the amount

show on the order whereas you had already been notified that you were entitled to a lesser amount.”

Thus the Agency maintained its decision that repayment was necessary.

4. The order book was in standard form. It contained instructions including one that the person should read the pages carefully and a statement that “Every time you sign an order you are declaring that you have read and understood them.” They also remind the person that the amount of entitlement was based on what was told and that contact must be made with the Social Security Office if change occurred. Attention was also drawn to the need to send a letter or form if any benefit went up or down. The declaration is on the counterfoil to be signed when payment is made. It stated:

“I declare that I have read and understand all the instructions in this order book. That I have correctly reported any facts which could affect the amount of my payment and that I am entitled to the above sum. I acknowledge the receipt of the above sum.”

5. The appellant appealed against the decision of the Agency to the Whittington House Appeal Tribunal. In their decision dated 22nd August 2001 they rejected the appeal. They found as a fact that an overpayment of £3550.40 had been made between 13th October 1998 and 3rd July 2000: that they held occurred because the award of the middle rate of the care component had ceased on 13th October 1998, but payment of the severe disability premium had continued. They also held that the appellant knew that her award of the middle rate of the care component had expired and that she had not disclosed that to the section of the Benefits Agency which was responsible for paying her income support. Further the failure to disclose was reasonably to be expected of the appellant and had been the cause of the overpayment. There was no finding that the appellant had acted dishonestly.
6. The appellant appealed to the Commissioners. She argued that there had been no material non-disclosure in that the Secretary of State at all material times knew that her care component of disability living allowance had not been renewed. Mr Commissioner P.L. Howell QC in his decision of 3rd May 2002 dismissed her appeal. He said:

“5. The question of law that arises in such circumstances is whether there can properly be said to have been any failure of disclosure and to what extent any continued miscalculation of the claimant’s benefit can be properly attributed to wrongful failure on the part of the claimant, rather than the Department’s own failure to marry up the information it already has. This is a question of which differing views have been expressed by Commissioners, and it is of course one of general importance.

6. The Tribunal’s decision holding the claimant liable to repay is expressed with admirable clarity, and there is no question of it being open to challenge on the way the facts are found and

recorded or the way the reasons for the decision are explained in the statement issued to the parties on 24th August 2001. The only issue was whether the Tribunal was right in law to follow as it did the recent decision of a Tribunal of Commissioners on the 'failure to disclose' issue in case CG 4494/99, it being conceded as recorded in paragraph 7 of the statement of reasons that this was indistinguishable, and binding so far as the Tribunal was concerned.

...

8. It is the practice of the Commissioners in the interests of comity and certainty of the law to follow the decision of a Tribunal of Commissioners on a question of legal principle unless there are compelling reasons not to do so: case R(I) 12/75 paragraph 21. It is not suggested though there are such reasons for me to depart from the normal practice here, even though I understand it has been decided not to select case CG 4494/99 for reporting in the official series ...

9. In those circumstances the claimant, now represented by the Child Poverty Action Group, in view of the point of principle involved, concedes that the appropriate order for me to make is to dismiss her appeal.”

The Commissioner gave leave to appeal.

7. Since the hearing before the Commissioner, further facts have come to light. The Commissioner was told that there was no automatic computer link or manual process in operation to transmit information between the person who was responsible for adjusting the appellant's award of disability living allowance and the person who was responsible for administering her income support. That was correct in part as there was at that date no automatic computer link between the two. However there was at the time a manual process for the transmission of information. In accordance with that system a "card" would be sent by internal post from the person concerned with the disability allowance to the relevant person in the Income Support Office which would give notification and particulars of any award. If changes were made a further card would be sent containing the details of the changes, but no further card would be sent when an award came to an end automatically. When the person in the Income Support Office received the card, the details of the award would be recorded and, if necessary, the amount of the award including its period would be altered accordingly. The purpose of the card was to tell the Income Support Office of the rate and period of award. It was to be retained until superseded by another card or weeded out after the expiry of a limited period award. Thus if such a card had been sent to the person administering the appellant's income support, as it should have been, that person who would have known that the award expired on 13th October 1998. That should have been entered on the computer at the Income Support Office in accordance with ISGAP Amendment 14 of November 2001. Further the fact that no further card was renewed would have informed the Income Support Office that the award had not been renewed.

8. In the present case neither a card nor copy of it appear on the Secretary of State's files. That may be because no card was sent or because it has been lost or weeded out. It is therefore not right or possible for this Court to conclude that a card was sent. If what actually happened had been material, it would need to be investigated by a Tribunal which would be able to look at the file or a print out of the complete records and hear evidence. From that the Tribunal would be able to decide, on the balance of probabilities, whether a card was sent and if so what was on it. It would also have been necessary to reconsider causation in the light of any fresh finding of fact.
9. We have had the advantage of sophisticated and clear submissions upon the issues that arise in the appeal. It was argued as a test case. I will come to those submissions later, but the parties' cases can be very generally summarised as follows. Mr John Howell QC, who appeared for the appellant, submitted that a claimant, such as the appellant, could not fail to disclose a material fact of which the Secretary of State had actual knowledge. In the present case the Secretary of State had full knowledge that the award was for a fixed period and of his decision not to renew the appellant's disability award component. In consequence there could not have been any material non-disclosure. Mr Drabble QC, who appeared for the Secretary of State submitted that on the accepted findings of fact there had been a failure to disclose within the meaning of the section 71 of the 1992 Act. His reason was that the relevant fact, namely that the disability award had not been renewed, had not been disclosed by the appellant to the office responsible for administering her income support.
10. I turn to the construction of section 71. The general law provides a remedy for money mistakenly paid by the Secretary of State, but that remedy is subject to known defences. Section 71 gives the Secretary of State an entitlement to recover in certain circumstances without the general law applying. However that entitlement is limited to cases where there is an omission, namely a failure to disclose, or a positive act, namely a misrepresentation of material fact. Absent such a failure to disclose or a misrepresentation, section 71 does not provide a remedy. Parliament did not provide a statutory right to repayment if the payment was due to an administrative error. The entitlement to recover an overpayment under section 71 only arises if:
 - (1) a person has misrepresented or failed to disclose a material fact, and
 - (2) as a consequence of such a misrepresentation or failure to disclose, a payment has been made which should not have been made.
11. In the present case we are primarily concerned with an alleged failure to disclose a material fact. A material fact must be a fact which is material to the decision of the Secretary of State to make the payment. Is there a failure to disclose when the relevant recipient knows the fact? Can it be material if it is known to the Secretary of State?
12. Mr Howell submitted that there could not be a failure to disclose a material fact if the relevant recipient already knew the fact. Relying upon Foster v Federal

Commissioner of Taxation [1951] 82 CLR 606 and Condon v Commissioner of Taxation [2000] FCA 1291, he submitted that it was not possible to disclose to a person a fact of which he was aware.

13. Mr Drabble sought to qualify that submission. He submitted that there would be a failure to disclose a fact to a person if the person making the disclosure did not know that the recipient knew the fact.
14. In *Foster* the appellant sent his tax return to the Deputy Federal Commissioner of Taxation. A notice of assessment was issued which the Deputy Commissioner sought to amend. However the legislation did not allow amendment when the appropriate disclosure had been made. The full court decided that appropriate disclosure had been made because a fact, omitted in the tax return, had been known to the Commissioner although not to the Deputy Commissioner. Latham CJ said at page 614:

“In *Federal Commissioner of Taxation v. Westgarth* it was held that disclosure of “all the material facts necessary for making an assessment” under s. 20 (1) of the *Estate Duty Assessment Act* 1914-1942 meant disclosure of relevant facts known to the taxpayer or of relevant beliefs held by him, and that it did not involve making the commissioner aware of facts unknown to the taxpayer. In the present case it is urged for the commissioner that the taxpayer did not disclose to the commissioner the facts that the appeal was pending, and the company succeeded upon the appeal. But the commissioner, as the taxpayer must have known, was already aware of those facts and he was aware of them as facts having a direct relation to the assessment of the company in which the taxpayer was a shareholder. In my opinion it is not possible, according to the ordinary use of language, to “disclose” to a person a fact of which he is, to the knowledge of the person making a statement as to the fact, already aware. There is a difference between “disclosing” a fact and stating a fact. Disclosure consists in the statement of a fact by way of disclosure so as to reveal or make apparent that which (so far as the “discloser” knows) was previously unknown to the person to whom the statement was made. Thus the taxpayer could not add anything to the commissioner’s knowledge with respect to the appeal. In my opinion in these circumstances it should be held that the failure of the taxpayer to repeat to the commissioner what he already knew did not constitute a failure to disclose material facts.”

15. Dixon J gave judgment to similar effect. He said at page 618:

“The limitation upon the commissioner’s power of amendment arise under s. 170 (3) where a taxpayer has made to the commissioner a full and true disclosure of all the material facts necessary for the assessment and an assessment is made after

the disclosure. This condition was, in my opinion, fulfilled. The taxpayer did not, it is true, tell the deputy commissioner that the company had appealed, but he knew that the commissioner was aware of this fact. The commissioner was, in fact, a party to the appeal. It may be doubted whether this was a fact "necessary for the assessment". It bore only on the wisdom of withholding an assessment till the appeal was determined, not on the contents of the assessment, if made. But a taxpayer can hardly be said to fail to disclose to the commissioner a fact which is not only within the commissioner's knowledge in connection with the exercise of his functions in the very matter, but which the taxpayer knows so to be within his knowledge."

16. The judgments in *Foster* make it clear that disclosure is the act of providing information not known to the recipient. Their judgments are limited to the factual scenarios present, where the person making the disclosure was aware that the recipient knew the fact. The judgments are consistent with the submission of Mr Drabble, but the question of whether disclosure required knowledge of the taxpayer as to what was known by the Commissioner was not argued.
17. The facts of the *Condon* case are not relevant, but Hely J said at page 6:

"24. *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606 at 615 confirms that there is a difference between "disclosing" a fact and stating a fact. Disclosure consists in the statement of a fact by way of disclosure so as to reveal or make apparent something which was previously unknown to the person to whom the statement is made."
18. I find the statement by Hely J in the *Condon* case persuasive. The word "disclosure" requires something to be revealed or made apparent. That can only happen if the fact as stated is unknown to the recipient. The distinction between disclosure and stating a fact is that in the former there is revelation and in the latter there may not be. Revelation does not depend upon whether or not the discloser realises that the information was known or unknown to the recipient. Thus a person who makes a statement may believe that it amounts to a disclosure or may believe that it is only a statement of fact, which does not depend upon his belief but upon the knowledge of the recipient.
19. In the present case the fact that the appellant's disability allowance was for a fixed period and had not been renewed was known to those who administered the appellant's disability allowance. Whether or not it was known to the relevant persons in the Income Support Office is as yet unknown as there has been no finding as to whether the card system which prevailed at the time was carried out. If the appropriate card was sent and received, then the appellant could not have been in breach of his duty by failing to disclose a material fact.

20. The more difficult question concerns the dispute as to the legal entity to whom disclosure can be made. Mr Howell reminded us that section 70(1) did not identify the person to whom the disclosure had to be made, but he submitted that it was clear that it was the Secretary of State. Thus what was required was disclosure to the Secretary of State. Difficult questions could arise as to how the Secretary of State could become aware of a fact, but this was not such a case as the relevant fact, namely the end of the disability premium, was the result of a decision of the Secretary of State in his decision making capacity and he must be aware of his own decisions. In support he relied upon a passage in the speech of Lord Diplock in Bushell v Secretary of State for the Environment [1981] AC 75 at page 95:

“What is fair procedure is to be judged not in the light of constitutional fictions as to the relationship between the minister and the other servants of the Crown who serve in the government department of which he is the head, but in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached. To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise.”

21. Mr Howell submitted that the conclusion that the Secretary of State must be aware of his own decisions was consistent with the principle stated by Lord Greene MR in Carltona Ltd v Commissioners of Works [1943] 2 AER 560 at 563:

“The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. ... The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.”

22. Mr Drabble relied upon the decision of the Commissioners in the decision R(SB) 15/87 as stating the law.

“26. To what members of the staff of the Department should disclosure then be made? The section uses the phrase “fails to disclose” and not “does not disclose” and one Commissioner said that a failure imported the breach of some obligation such that the relevant non-disclosure occurred in circumstances in which, at the lowest, disclosure by the person in question was reasonably to be expected. To whom is there this obligation to disclose? We are concerned here with breaches of the obligation which have the consequence that expenditure is incurred by the Secretary of State; and, in our view, the obligation is to disclose to a member or members of the staff of an office of the Department handling the transaction giving rise to the expenditure. We consider hereafter the way in which this obligation can be fulfilled. Miss Kearns conceded, rightly in our view, that once disclosure has been made to a particular person there can be no question of his being under any obligation to repeat that disclosure to the same person ...

...

28. We accept that a claimant cannot be expected to identify the precise person or persons who have the handling of his claim. His duty is best fulfilled by disclosure to the local office where his claim is being handled either in the claim form or otherwise in terms that make sufficient reference to his claim to enable the matter disclosed to be referred to the proper person. If he does this it is difficult, having regard to our acceptance of Miss Kearns's concession, to visualise any circumstances in which a further duty to disclose the same matter can arise. ... But, as was pointed out in R(SB) 54/83, there can be other occasions when the duty can be fulfilled by disclosure elsewhere. This can happen, for instance, if an officer in another office of the Department of Health and Social Security or local employment benefit office accepts information in circumstances which make it reasonable for the claimant to think the matters disclosed will be passed on to the local office in question. It was in reference to this sort of case that the Commissioner included in paragraph 18 of the Decision R(SB) 54/83 his statement about a continuing duty. A claimant who has made such disclosure has not in fact made disclosure to the right person or in the right place, but he has done something which has the effect that, for the time being at least, further disclosure is not reasonably to be expected. We consider that paragraph 18 of R(SB) 54/83 is concerned with the case of a claimant who subsequently becomes aware, or should have become aware, that the information has not been transmitted to the proper person or place and who is then under a duty to make disclosure to that person or place. We desire to reserve for

consideration when it arises the question whether the means of knowledge that the information has not been transmitted has the same effect as actual knowledge.”

23. Mr Drabble drew our attention to the fact that section 71 of the 1992 Act followed the wording of section 53 of the Social Security Act 1986 and that the 1992 Act was a consolidating Act. It followed, he submitted, that Parliament must have intended, when passing the 1992 Act, to continue the law as stated in Decision R(SB) 15/87. That submission has force, but leaves open the application of the reasoning of Decision R(SB) 15/87 to this case. In that case it was not argued that the Secretary of State must have the knowledge of his own decisions.
24. The statement of law in that decision cannot be taken as a definition. For example, in paragraph 26 it is stated “...in our view, the obligation is to disclose to a member or members of the staff of an office of the Department handling the transaction giving rise to the expenditure.” Nobody could believe that the Commissioners thought that it would be sufficient to tell the member of staff responsible for cleaning, whereas it would be reasonable to hand a letter containing the information to a person responsible for accepting letters. Another example is the statement in paragraph 28 which expands the way that the obligation of disclosure can be satisfied by disclosure to a legal entity “ ... in circumstances which make it reasonable for the claimant to think the matters disclosed will be passed on to the local office in question.” The obligation is to disclose. That obligation cannot depend upon the characteristics of a particular claimant. The standard must be objective.
25. Section 71 enables recovery if there is a failure to disclose a material fact. There is, as I have pointed out, no failure to disclose if the fact is known to the relevant official. Against that background I accept the thrust of the Decision in R(SB) 15/87. Parliament must have realised that the Secretary of State acted through his officials and therefore it was the knowledge of the relevant official or officials that was important. They can properly be described as the ‘decision makers’. If there is to be disclosure then it has to be in circumstances where it would be reasonable to believe that it would reach the decision makers. Thus a letter written to the Secretary of State would be sufficient as it would be reasonable to believe that it would reach the decision makers for whom he was responsible. A statement made to the cleaner or at a social event or in the street would be unlikely to be sufficient unless it was established that it actually came to the notice of the decision makers.
26. In my view it would not be appropriate to take into account maladministration when deciding what is reasonable to believe would occur. Parliament must have assumed that the Secretary of State would put in place reasonable measures for the administration of the departments for which he was responsible.
27. I turn back to the facts of this case. The Secretary of State administered the appellant’s disability allowance through decision makers in that office. They knew that the appellant’s middle rate care component was for a fixed term and was not renewed. They knew that the decision affected the amount and duration of income

support payable and therefore should be available to the decision makers dealing with income support. In those circumstances a reasonable Secretary of State would put in place, and would be expected to put in place, a system to enable the decision makers in the Disability Living Allowance Office to provide the decision makers in the Income Support Office with knowledge of the material facts. Further, everybody would expect that that would have been done. It is therefore not surprising that the card system existed to do just that.

28. In the present circumstances the information as to the appellant's disability allowance was within the knowledge of the Secretary of State acting through the decision makers in the Disability Living Allowance Office. That the appellant knew. It was reasonable to believe that that knowledge would reach the Secretary of State acting through his decision makers in the relevant Income Support Office. Therefore there was no need for the appellant to give the information to the decision makers in the Income Support Office. Disclosure to or knowledge of the decision makers in the Disability Allowance Office was sufficient. In those circumstances there is no need to remit the case for further findings of fact as to whether the relevant card was sent as there was no failure to disclose.
29. I said earlier that this Court was mainly concerned with disclosure, but a case of misrepresentation was raised.
30. The decision stated that the appellant had "misrepresented the material fact that she was not entitled to the amount of benefit shown on the order book dated 3.7.00 because by that date she had already been notified that she was entitled to a lesser amount." The allegation meant that there had been an overpayment for one week. As stated the allegation of misrepresentation was ambiguous as it could be read as an allegation that there had been a misrepresentation of law not of fact. However it would be reasonable to assume that if the matter had been investigated further before the Tribunal or before the Commissioner a misrepresentation of fact would have been relied upon.
31. The case for recovery was that the appellant, when she presented her book to the Post Office for payment and signed the counterfoil, misrepresented that she was entitled to a payment of income support that included a disability premium. The appellant's case was that she had telephoned the relevant department and explained her health problem and that she would have no money for herself and her grandchildren if she could not use her book. She said that she was told to present the book for payment and post it back on the Monday. Whether that was in fact the true position has not been investigated and therefore the case on misrepresentation will need to be remitted unless the submission of law put forward by Mr Howell is correct. For reasons I will give I believe that the question of misrepresentation should in any case be remitted back for findings of fact.
32. Mr Howell submitted that it had not been established that the benefit that had been paid by the Secretary of State was the consequence of the appellant signing the

counterfoil in her book because the counterfoil was only taken as a receipt and therefore it had played no part in the payment of the benefit.

33. I do not believe that it is possible nor right for this Court to decide whether that submission is correct without further findings of fact. Clearly the Post Office is the Secretary of State's agent for the payment of the benefit and therefore a misrepresentation which caused the payment by the Post Office could enable recovery under section 71. But is the Post Office a person to whom the decision makers look to receive material facts affecting entitlement to payment or is the sole requirement, as Mr Howell submits, to obtain a receipt in a particular form? For example, those who live the country would not be surprised to hear a conversation such as this when the book was presented. "Good morning Mr X are you feeling better?" "Yes, but it's difficult to cope as they've stopped my disability allowance." Such a conversation would, so far as the Post Office is concerned, vary the appellant's statement made when the signed counterfoil was presented. But would such a statement form part of the representation made which caused the payment? If the answer is no, then it would appear odd that the receipt by the Post Office of the signed counterfoil would amount to a misrepresentation causing the payment, despite the fact that there had been an oral statement which modified it. Perhaps Mr Howell is right that in reality the signed counterfoil is only a receipt.
34. I am not certain whether the Post Office is a person to whom it would be sufficient to disclose material facts as it is not obvious to me that it would be reasonable to believe that disclosure of facts to the Post Office would reach the decision makers in the Income Support Office. If that be right it requires investigation as to why statements made to the Post Office, whether in writing or orally, can amount to a misrepresentation causing the overpayment. This difficulty might be resolved with knowledge of the legal relationship between the Secretary of State and the Post Office and what happens in practice. The question of whether the signing of the counterfoil amounts merely to a receipt needs to be resolved when all the facts are known, that may require evidence both from the Secretary of State and the Post Office explaining how a misrepresentation comes to the attention of the decision makers. If and when it reaches the decision makers, do they act on it? Perhaps the decision is left to the Post Office. If so, what is the instruction given to their staff? The answers to those questions may depend upon the contract between the Secretary of State and the Post Office and how it is in fact implemented.
35. In my view all those matters need to be investigated before it is possible to decide whether the signing of the counterfoil in this case did amount to a statement which, if false, would be a statement of a material fact and whether it caused the overpayment. It is at that stage that it would be appropriate to consider the effect of such cases as Jones v Chief Adjudication Officer [1994] 1 WLR 62 where the submission of Mr Howell does not appear to have been argued.
36. For those reasons I would allow the appeal in part, but would remit the question of misrepresentation so as to enable this Court to decide the matters of law against a full and complete background of fact.

Lord Justice Carnwath:

37. On the first issue, I agree that the appeal should be allowed for the reason given by my Lord, but also for the more fundamental reason that the Secretary of State cannot disclaim knowledge of his own decisions.
38. I agree that the word “disclose” implies revelation of that which was previously unknown to the recipient. That is the ordinary meaning of the word, and it is supported by the cases to which Aldous LJ has referred. Furthermore, although section 71 does not say so in terms, it is implicit in my view that the disclosure must be to the person responsible for the decision, and, accordingly, that it is his or her knowledge accordingly which must be considered.
39. Under the scheme as now established by the Social Security Act 1998, the decision on any claim for a “relevant benefit” (which includes a claim for disability allowance or income support) is entrusted to “the Secretary of State” (s 8(1)(a),(2)). In practice of course, the decisions are made by officials on his behalf; but he remains constitutionally responsible for them, to Parliament and to the Courts (see *Carltona* case [1943] 2 ALLER 560, 563; and Wade, *Administrative Law* 8th Ed 323-5). Furthermore, although his responsibility is in his official capacity, he may be answerable in person for the consequences (see *M v Home Office* [1994] 1 AC 377, 395E, 425G). Consistently with that principle, I do not see how either he, or an officer acting in his name, can be heard to say that one of his own decisions is a “revelation” to him.
40. Mr Drabble says that it would be surprising if such a major change were intended to be made by the 1998 Act. Before that Act the decisions were made by officers with separate responsibilities under the old legislation (e.g., Adjudication Officers and Social Fund Officers). The Department, then as now, was responsible for gathering or storing information. There would have been no reason for a significant change to the disclosure requirements in 1998. He also asks us to recognise that the idea that there is “one omniscient Secretary of State is a myth”, as is the idea that “the Department has a computer which knows everything about everyone”.
41. On the last point, Mr Drabble showed us (without objection by Mr Howell) a note giving some information as to the scale of the Secretary of State’s responsibilities in this field, and the arrangements for decisions on the two forms of benefit relevant to this case: -

“(The Department) administers some 24 different benefits, the cost of which in 2002 was £110 billion, one third of all government spending. The spend on DLA in 2002 was £6.5 billion, with 2,329,000 beneficiaries. The numbers for IS were £9.6 billion and 2,227,000 beneficiaries.

Organisationally, the Department is not monolithic. In 2002 (following merger with the Employment Service of the old

Department for Education and Employment) it employed 122,687 people. These civil servants are organised in discrete structures, although those structures may change from time to time. For example currently there are four agencies – Jobcentre Plus, the Pensions Service, the Child Support Agency and the Tribunals Appeals Service...

.... DLA and IS are separate benefits (with separate legislation and indeed different rules eg as to duration of the award). Further DLA has always – since its introduction in the early 1990s – been a centrally administered benefit whereas IS is locally administered, through several hundred local offices. The civil servants administering DLA and IS have always been geographically separate, with separate “files”. There has never been a computer link between these two systems...”

(I understand that, although administered by separate offices, both Disability Living Allowance and Income Support are the responsibility of “Jobcentre Plus”.)

42. Without in any way questioning the practical implications of that information, I do not think that it affects the legal analysis in any way. The claimant is not concerned with the internal administrative arrangements of the Department. His or her rights and responsibilities are governed by the statute. Surprising or not, the change made in 1998 was one of substance. Whereas formerly the legal responsibility for the decisions was that of the Adjudicating Officer (or the officer designated by the statute), after 1998 direct responsibility for every decision was imposed on the Secretary of State.
43. I emphasise two points about the view expressed in the previous paragraphs. First, it is directed to the issue of failure to disclose under section 71, rather than misrepresentation. It arises from the ordinary meaning of the word “disclose”, as used in the section. It does not follow that the same approach applies to the other part of section 71. If the claimant actively misrepresents the position in relation to a previous decision, it is no less a misrepresentation because the Secretary of State knows about it. The issue then is whether (as a matter of fact) the payment was “in consequence of” the misrepresentation, even if it was only one of the causes (cf *Duggan v Chief Adjudication Officer* 8.12.88 CA; reported apparently only as an appendix to Commissioner Decision R(SB) 13/89).
44. Secondly, it is limited to actual decisions. The same approach cannot be applied to other categories of information, relevant to the decision-making process. There one is faced with the familiar problem of attributing knowledge within a large organisation. The correct approach will depend on the legal context (see *Meridian Asia v Securities Commission* [1995] AC 500, 507, 511; see also the discussion of “Corporate Knowledge, in the Law Commission’s report on Limitation of Actions, LC No 270 paras 2.33-4, 3.67ff.). In the present context I agree with Aldous LJ, in accepting the “thrust” of the reasoning in Commissioner Decision R(SB) 15/87 (itself based on

previous decisions reflecting the accumulated experience of the Commissioners in this field), subject to the modifications proposed by him.

45. On the second issue, I agree that we do not have sufficient material, either generally or on this case, to reach a concluded view as to the significance of the signing of the declaration quoted by Aldous LJ; nor to consider the issues left open by this Court in *Jones v Chief Adjudication Officer* [1994] 1 WLR 62, and discussed in the carefully reasoned decision of Commissioner Rowland in CG/662/98. In view of their decision against the claimant on the disclosure point, these questions were not examined by the Tribunal or the Commissioner in this case.

46. There was in any event disagreement before us as to the statutory basis for requiring the declaration. Mr Howell said that the Declaration is simply part of a "receipt" required in accordance with Social Security (Claims and Payments) Regulations 1987 reg 20A (6), which provides for a person receiving benefit from a paying agent to sign a receipt in a form approved by the Secretary of State. Mr Drabble said that regulation 20A is concerned with a special type of arrangement for payment (under "an instrument for benefit payment") and is not relevant to the present case. He relied on regulation 32, which requires a person entitled to benefit to provide information in the form required by the Secretary of State, and to notify the Secretary of State of

"any change of circumstances which he might reasonably be expected to know might affect the right to benefit".

This regulation, he said, was made under section 5(1)(i) of the Social Security Administration Act 1992, which allows regulations to provide

"for the person to whom, time when and manner in which a benefit to which this section applies is to be paid and for the information and evidence to be furnished in connection with the payment of such a benefit".

47. Mr Drabble's submission appears more probable. However, section 71 of the 1992 Act does not (as it might have done) base the right of recovery on a breach of any requirement of section 5, or of the regulations made under it. It requires a misrepresentation in consequence of which a payment is made. In *Jones v Chief Adjudication Officer* (above, p 73 per Dillon LJ), it was accepted that "as a matter both of common sense and law" the relevant information must have been known to the claimant. However, even with that qualification, and recognising that the section applies to a misrepresentation "fraudulent or otherwise", I would need some persuasion that the signing of the declaration, without more, is sufficient to found a claim under section 71, in any case where it turns out that for some reason the entitlement had not arisen or had changed. If the Secretary of State wishes to advance such a case he must do so on the basis of full information as to how the declaration is used in practice, clear particulars of the mis-representation on which he relies, and evidence as to its consequences.

48. Accordingly I agree that, if the Secretary of State wishes to pursue this matter, the case will have to be remitted to the Tribunal to reconsider on this issue.

Sir Denis Henry:

49. I agree with both judgments.

