Recovery of overpayments

From 1969 to 1979 a husband and wife were in receipt of supplementary benefit claimed either by the husband or by the wife acting on his behalf. After the husband's death the wife claimed and was in receipt of supplementary benefit until her own death three months later. Benefit had been assessed and paid in reliance on successive statements signed by both husband and wife to the effect that neither had capital resources. Following the wife's death it was discovered that she had possessed significant capital resources and the Secretary of State sought to recover from her estate the benefit which had been overpaid as a result of the non-disclosure of those resources, in accordance with Section 20 of the Supplementary Benefits Act 1976 prior to its amendment by the Social Security Act 1980. The administrator of the estate disputed that the Secretary of State was entitled to recover the overpayment and the question was referred to an Appeal Tribunal who determined that £2,955.08 was recoverable from the estate The administrator appealed to a Social Security Commissioner.

Held that:

1. It was clear from *Secretary of State for Social Services v Solly* [1974] 3 All ER 922 that Section 20 of the Supplementary Benefits Act 1976 enabled an overpayment to be recovered out of the estate of a deceased person from whom recovery would lie if he were still alive (paragraph 3);

2. The expression "any person" in Section 20 was to be used in its ordinary sense and extended to any person, provided he or she had made the material misrepresentation or failed to make the material disclosure (paragraph 4(2));

3. A "failure" to disclose could occur only in circumstances in which, on moral or legal grounds, disclosure by the person was reasonably to be expected (paragraph 4(2)),

4. The reference to "fraudulently or otherwise" in Section 20 extended the scope of the provision beyond fraudulent misrepresentation or failure to disclose to wholly "innocent" misrepresentation or failure to disclose, e.g. by reason of forgetfulness (paragraph 4(3));

5. The right of recovery depended on the establishment of a clear causal link between the overpayment of benefit and any misrepresentation or non-disclosure, i.e. the benefit must have been paid "in consequence" of the misrepresentation or failure to disclose (paragraph 18),

6. While it must be shown that a person had knowledge of the true facts which it is alleged that he failed to disclose, such knowledge is not a material ingredient where the allegation is one of misrepresentation (paragraph 24).

The appeal was allowed.

1. This appeal achieves entire technical success and may or may not lead hereafter to some practical success. My decision is that the decision dated 11 December 1980 of a Supplementary Benefit Appeal Tribunal be set aside as having been given in error of law and that the question referred to a Supplementary Benefit Appeal Tribunal on 23 July 1980 under section 20 of the Supplementary Benefits Act 1976 ("the present Act") be re-heard by a differently constituted tribunal.

2. The basic facts are simple: the law in point is in various respects of some complexity. In brief summary the present appeal arises in the following circumstances:

(1) During the period from 15 September 1969 until his death on 24 February 1979 Mr W. C. ("the Father") and Mrs V. C. ("the Mother") were husband and wife residing together (hospitalizations apart) and the Father was in receipt of supplementary benefit (inclusive of an element in respect of the Mother) claimed either by the Father or by the Mother acting (or purporting to act) on his behalf.

(2) As from the Father's death until her own death on 11 May 1979 the Mother herself claimed and was in receipt of supplementary benefit.

(3) Such benefit was awarded on the footing that (whilst both the Father and the Mother were alive) neither had any capital resources falling to be taken into computation and (during her period of survivorship) that the Mother had no such resources. From time to time the Father, and sometimes the Mother, were required by the Department to and did submit signed statements as to the resources of both, whilst both were alive, and the Mother was required to and did submit a similar statement once after his death; and benefit was computed and paid in reliance upon these successive statements.

(4) Following the Mother's death it came to the knowledge of the Department that in fact the Mother had significant reckonable capital resources, which would had they been taken into computation have diminished or negatived the payments of benefit in fact made.

(5) The Department therefore invoked the procedure under section 20 of the present Act with a view to recovery of benefit overpaid.

(6) The Mother and the Father are survived by their son Mr D. P. C. ("the Son").

(7) The Son is the duly constituted administrator of the estate of the Mother but—no doubt because it was not considered there was any estate of his to administer—no grant of representation has been taken out to the estate of the Father.

(8) The assets of the Mother's estate at the time of her death exceeded £5,000.

(9) It has been the Department's contention that had benefit throughout been computed with due regard to the Mother's reckonable capital resources then:

(i) if those are taken only from the respective dates from which they are now positively established to have been held, overpayment in the aggregate amounting to £2,955.08 was in fact made; but

(ii) if it is to be inferred that the total amount of the Mother's capital at the date of her death had been held by her throughout, the amount of overpayment increases to total £3,737.45.

(10) The S.B.A.T. heard the reference under section 20 substantively on 11 December 1980 and gave a unanimous decision from which, by my leave, the Son as administrator of the Mother's estate has now appealed.

3. As a preliminary to considering other material questions it is convenient to indicate that although on first encounter it might appear that section 20 of the present Act is so worded as to fail to confer power to recover overpayment out of the estate of a person deceased from whom recovery lay if still alive, there is clear authority to the contrary, binding on a Commissioner: see *Secretary of State for Social Services v Solly* [1974] 3 All E.R. 922 (C.A.)—which though not a decision on section 20 of the present Act was given in respect of identical wording in a predecessor—section 26 of the Ministry of Social Security Act 1966.

4. (1) But since in the present case the assets from which it is sought to recover are to be found exclusively within the estate of the Mother, although for all but a few months of the period over which, as now asserted, overpayment took place occurred whilst the Father was the titular claimant, I have to consider also (and in the absence of any prior direct authority of which I am aware) whether in respect of any period in which the Father was the titular claimant the Mother could as a matter of law constitute "any person..... that person", in the context of section 20, for it was and is contended on behalf of the Son, as the Mother's personal representative, that the only "person" within the ambit of the section is a claimant in reference to whose own claim misrepresentation or failure to disclose has occurred.

(2) In my judgment "any person" is quite clearly to be taken in its ordinary sense and extends to any person whatsoever—provided that it is he or she who has made the material misrepresentation or failed to make the material disclosure; but whilst the concept of making or not making a misrepresentation needs no explanation or refinement, 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: see amongst the definitions of "failure" in the shorter Oxford English Dictionary:

"1..... non-performance, default; also a lapse..."

(3) However, the reference to "fraudulently *or otherwise*" necessarily extends the scope of the provision beyond *fraudulent* misrepresentation or failure to disclose to wholly "innocent" misrepresentation or failure to disclose—for instance, by reason of forgetfulness.

(4) I can accordingly here indicate that the appeal has not succeeded upon the foundation of the contention advanced as to "person" not extending to the Mother as regards any period whilst the Father (and not she) was the titular claimant.

5. It is convenient to indicate also at this point what were the capital resources which, as now known, the Mother had at material times. They consisted as follows:

(1) Holdings of 7th issue and 12th issue National Savings Certificates purchased on various dates in 1943/44 at an aggregate cost of £849.25.

(2) London Goldhawk Building Society Account opened in March 1972 in an unknown initial amount, but standing in the sum of £681.71 at 1 January 1974 and at each successive 1 January to 1 January 1979 (when it stood at £963.15) in increased yearly amounts which indicate a very strong likelihood that there was no movement on such account between 1964 and 1979 save for the crediting of accrued interest.

(3) Two accounts with Woolwich Equitable Building Society, namely:

(a) Account 5-023-91593 opened 6 December 1974 in an unknown initial amount but standing at £534.33 on 1 January 1976 and at £658.47 at 1 January 1979, with intermediate increments which again indicate a strong probability that there was no movement between January 1976 and January 1979 save for the crediting of accrued interest and a distinct likelihood that the account had been opened with £500 and thereafter moved only by credit of interest.

(b) Account 3-440-77630 opened 14 February 1975 in an unknown initial amount, but standing at £726.84 on 1 January 1976 and £885.63 on 1 January 1979 again with intermediate increments raising the same probability and a distinct likelihood that the account had been opened with £700 and thereafter moved only by credit of interest.

(4) Two accounts with Nationwide Building Society, namely:

(a) Account 223/45. 539733, opened on 20 January 1975 in an unknown amount but standing at £962.13 on 1 January 1976 and £1,172.77 on 1 January 1979, again with intermediate increases raising the same probability and the distinct likelihood that the account had been opened with £900 and thereafter moved only by credit of interest; and

(b) Account 223/542. 326.802 opened on 19 December 1978 and standing on 1 January 1979 in the sum of £867.90.

6. (1) On 19 September 1969 the Mother, signing as "V.C. (wife of W.C.)" signed a statement for supplementary benefit, in the Father's name, embodying a declaration that neither of them had any "property, savings etc".

(2) On 12 November 1969 she signed a further such statement in the Father's name embodying a declaration as to no change in circumstances.

(3) On 30 June 1971 a "statement by claimant" naming the Father as claimant was made which embodied:

(a) a declaration by the Mother as to no change in circumstances, save as reported, since her last declaration; and below that

(b) a declaration by the Father as to the information given on the form being true and complete save as indicated (and with no material indication).

(4) On 3 June 1973 the Father made in response to a Departmental inquiry for current information as to the circumstances relevant to supplementary benefit a signed statement embodying the answer "no change" to the intimation that the records held showed no savings and/or capital of himself or his dependants.

(5) On 24 August 1973 the Father signed a statement declaring that neither he nor the Mother had any property, savings etc.

(6) A further statement as to "no capital assets (property, savings etc)" was made by the Father on 30 April 1974, indicating "none" in respect of "claimant and wife".

(7) A further Departmental Enquiry Form as to current circumstances was completed and signed by the Father on 16 September 1974. It included an intimation that records showed no savings or capital of the claimant or his dependants and an invitation to answer "no change" if that was still correct—but in fact, though other paragraphs are so completed there is no answer given in regard to this inquiry.

(8) A further "statement by claimant" was made by the Father dated 11 August 1975, signed below a declaration of truth and completeness, indicating no capital assets (property, savings etc) by the claimant or the Mother.

(9) A further declaration as to neither the Father nor the Mother having any capital was made by the Father on 26 May 1976 and updated as to the continuance of that position by his subsequent declaration of 5 January 1977 and 16 June 1977.

(10) On 17 March 1978 the Father again submitted signed answers to departmental inquiries which included "no change" as regards the recorded "NONE" savings and/or capital of himself and his dependants.

(11) The Father having died on 24 February 1979, the Mother signed on 15 March 1979 and as principal a claim to benefit endorsed on the form which the Father had last signed (naming him as claimant) on 16 June 1977 and embodying a printed declaration "I declare that the information given by me and recorded on this form has been read over to me and is true and complete with the following exceptions", there then following above her signature various details (not relating to any capital resources) as to her personal financial position.

7. By a form LT207 reference to a S.B.A.T. under section 20(2) of the present Act, served on the Son's solicitors dated 23 July 1980 and addressed:

"Mr W.C. (Deceased)
Mrs V.C. (Deceased)"
—followed by the name and address of the solicitors—

it was alleged by the Department that in consequence of non-disclosure or misrepresentation of a material fact by "Mrs V.C/Mr W.C." they incurred expenditure by way of payments of supplementary benefit in excess of those which they would have incurred "but for the non-disclosure or misrepresentation".

Particulars were then given "of the alleged non-disclosure or misrepresentation" specifying:

"Failure by Mr C. and Mrs C. to disclose two Woolwich Building Society accounts, two Nationwide Building Society accounts, a Goldhawk Building Society account, Premium Bonds and a National Savings Bank Account", the aggregate alleged overpayment being stated as £3,737 computed as indicated in attached schedule, in which aggregate sum the tribunal was invited to certify that "because of Mr and Mrs C's failure to disclose.....they incurred a recoverable overpayment".

8. In the light of correspondence on the case file between the Department and the Son's solicitor on his behalf I do not consider that any objection could be taken to such reference—albeit expressed in somewhat omnibus form as between the Father, the Mother, the two of them and the estate of the latter—proceeding before the tribunal on the basis that the Son in his capacity as personal representative of the Mother had been properly joined—indeed he was represented by his solicitor and himself gave evidence at the tribunal's hearing on 11 December 1980.

However, there can in my judgment be no permitted "woolliness" as to what was the proper subject matter of the reference so instituted, what the allegations which constituted the issues which so arose or what the certification the tribunal were being asked to render: all these matters must in my view be taken as expressed on form LT207 unless (as was not the case) amended by leave or consent.

9. Further, since the Son was not the legal personal representative of the Father's estate, and the Father was dead, there was in my judgment clearly no jurisdiction in the tribunal to reach upon that reference any decision, or issue any certificate, binding on any estate the Father might have.

In practical reality this is almost certainly of itself immaterial, since there is no evidence that there ever was or ever will be any estate of the Father. But the clarification is material to further considerations arising in regard to the tribunal's proceedings and decision, and the re-hearing I have directed.

10. (1) The Department's submissions to the tribunal included a schedule of the declarations as to no capital alleged to have been made by the Father and Mother respectively, but, so far as the information before me goes, none of the declarations themselves—and six of the entries in that schedule are not represented at all by the declarations now added to the case file, by my direction that all material declarations be so added; and one is misdescribed in the summary.

(2) The Schedule of Assets and computation submitted with the LT207 did not refer to any Savings Certificates but included reference to Premium Bonds and a National Savings Bank account—there was no evidence as to either of the latter before the tribunal, so far as can be gathered from the case files. The Schedule was headed with the Mother's name, totalled alleged overpayment of £3,737, and was based on the assumption that equivalent capital pre-existed the actual investments of which there was evidence.

[I should here interpose that as the case file is now constituted the £3,737 computation appears only at a late stage, and £2,955 is shown as the total of the computation accompanying the reference—but later materials on the case file show that the £2,955 computation came in as an alternative later introduced—and that what has happened is that the two schedules have now become inserted in the file in the wrong places.]

11. The reference first came before the tribunal on 25 September 1980, but as the Son's solicitors had then recently furnished details of the assets of the Mother's estate the tribunal granted an adjournment "so that all facts are available for proper consideration of the case".

12. The tribunal hearing next proceeded on 11 December 1980, and there was then before them a further submission by the Department, and also a fresh Schedule of Capital and a revised overpayment computation by reference thereto, totalling £2,955.08. However, the latter was put forward only

as "second choice" if the tribunal did not accept the basis on which that originally put in form LT207 (totalling £3,737) had been compiled. The new Schedule of Assets referred to Savings Certificates in the same total amount as the earlier had attributed to "NSB & PB" (i.e. National Savings Bank and Premium Bonds)—but nothing appears to have been done about amending either the reference to the latter in the "particulars" on the form LT207 or the (still relied upon) original Schedule and computation in this respect.

And, as I have mentioned, the case file and the tribunal's record contain nothing supportive of the Mother having at any material time any National Savings Bank Account or any Premium Bonds.

13. (1) At the adjourned hearing the tribunal had also in evidence a letter from the Mother's doctor (writing without her records but from the doctor's recollections of having been her GP at least from the early 1960s until her death).

She refers to her having suffered as from the commencement of her responsibility for her care, and she believes from 1948, from psychotic illness which had included in-patient hospitalisation for some years; and to her behaviour having become, in respects she indicates, increasingly abnormal during her period under her care, concluding with the opinion "In my opinion" [the Mother] "was a chronic schizophrenic and would not have understood the significance of signing an application for such things as Supplementary Benefit. Certainly from the early 1970s, possibly before this, I would have thought that by reason of her mental disorder she was incapable of managing her property or affairs".

(2) The Son gave evidence that he had no idea of the sources of the Mother's capital, but believed the Father to have had no knowledge of the Mother having had any capital. His solicitor gave evidence that about 4 years prior to the Mother's death the Mother and the Father had lived in private accommodation and she was given property, is recorded as having "stated" also that she might have inherited some expensive jewellery from her own mother—and gave evidence also that the existence of the assets came to light piecemeal after the death of the Mother, the "books" being found concealed in various hiding places.

(3) The Son, by his solicitor, conceded that overpayment might have occurred after the Father's death, but with the reservation that in view of her mental condition she could not have been held responsible for any such.

14. (1) The tribunal's unanimous decision was in the following terms:

"That an overpayment of £2,955.08 has been incurred and is recoverable under Part II of the Supplementary Benefits Act 1976".

(2) The reasons expressed for such decision are (after reference to the complete lack of evidence to identify the source of any of the capital):

"The tribunal have decided having regard to equity that the overpayment should be calculated on the assumption that no capital existed prior to the initial deposits in the Building Society Accounts.

The tribunal have considered several possible sources and have concluded that cash may have been produced from the sale of jewelry" [sic] "and chattels.

> In spite of" [the Mother's] "medical history and the tribunal's decision has been influenced by" [her] "meticulous organization of her investments and doubt therefore whether loose cash was retained on the premises. It is therefore our decision that £2,955.08 is recoverable by the Department under section 20 of the Act."

I should here interpose that the first above expressed decision is, if read literally, clearly at variance with the evidence as to the dates of purchase of the savings certificates which had been provided by the Son's solicitors and was not in controversy. I think that what the tribunal were so trying to convey was that they were deciding in favour of the £2,955 computation based on "historical evidence" in preference to the £3,737 computation based upon an asserted earlier pre-existence of equivalent assets as to which there was no evidence.

But they have clearly failed to achieve that, as a matter of construction of their actual wording.

15. I have the greatest sympathy with a Supplementary Benefit Appeal Tribunal required to decide a section 20 case of any complexity. There are no doubt many quite straightforward overpayment cases which present no difficulties to such a tribunal—but there are others, such as the present, in quite a different category. As it was put by the late Lord Widgery, in the judgment of the Divisional Court in *R v Southampton S.B.A.T. ex parte Secretary of State for Social Services,* [1972] S.B.1, such cases can involve issues which a tribunal may "with every commonsense justification" consider they cannot decide—but they are required to do so, and their decision must nevertheless come under proper scrutiny when appealed from. Indeed, consideration might usefully be given to the introduction of a "leap-frogging" provision under which upon certification by a Benefit Officer or S.B.A.T. Chairman that a *section 20* case was of special difficulty or complexity it could be referred direct to a Commissioner.

16. I am sure that the tribunal in the present case made every effort to reach proper conclusions—but I am also satisfied that their decision cannot stand, and must be set aside, on a variety of counts—the preponderance of which stem from the way the case was mounted before them; which in turn attracts my sympathy for the Department's officers concerned, for whom correct presentation would clearly have presented a formidable if not impossible task without specialist skills with which I have no reason to think they were equipped.

17. However, just as it does not suffice in personal injuries litigation to reach the conclusion "there has been an accident—someone must pay", so upon a reference under *section 20* it is incumbent upon the tribunal to reach and express findings of fact and conclusions upon all the issues in play, sufficient to constitute collectively a proper foundation for their decision.

18. In the present case it is a simple matter to conclude that overpayment of benefit has occurred which would not have occurred had either the Father or the Mother made disclosure to the Department of the Mother's capital resources at material dates—but that is in truth only the beginning, and not the end, of the case.

For the right of the Department to recovery arises only upon a clearly stipulated causal basis. Overpayment can be recovered only if and so far as—taking the here material provision in section 20 of the present Act—the benefit overpaid (which can without great difficulty be identified as "the expenditure incurred under this Act" by the Secretary of State) has been paid "in consequence of" misrepresentation, or failure to disclose a

material fact, on the part of a person—X—; and, where that is established, is recoverable only from "that person"—X (or his estate, if he or she has died).

19. Thus, amongst the issues upon which the tribunal needed to reach conclusions were (in the light of the Department's contentions as to what were the facts not disclosed and what were the amounts overpaid):

(1) What were the capital resources properly to be taken into account in arriving at the constituent amounts overpaid?

(2) As regards each constituent overpayment, was it made "in consequence of" a non-disclosure on the part of:

(a) the Father

(b) the Mother

(c) both of them?

[I pause here to indicate that on a strict view of the form LT207 particulars "Failure by Mr and Mrs C. to disclose....." it might be held that only (c) was put in issue, but that I think on a fair reading in the context of the facts (a) and (b) were also].

(3) How far, if at all, did the Father know of the Mother's capital resources?

(4) If and so far as he did not, could any non-disclosure on his part constitute "failure" to disclose?

(5) If and so far as there was any non-disclosure by the Mother, could it be held a "failure" to disclose having regard to the medical evidence as to her mental capacity?

Since the Father had no estate and no personal representative, the significant conclusions would in practice be whether any and if so what amount was properly to be certified as recoverable from the Mother's estate—but in the light of the terms of reference to the tribunal all the above issues were integral to arriving at that end result.

20. (1) The tribunal clearly directed their consideration to selecting between the two alternative bases of arriving at the amounts of the Mother's capital at different dates which were put forward by the Department; and made by reference to the respective totals of £3,737 and £2,955 shown on the alternative computations a wise decision in preferring the latter, since it must be for the Department to discharge the burden of proof of the existence and amounts of the capital which have been taken into account in the computation of the overpayment they allege to have been made (as well as their existence "as a fact") in order to found their allegations of misrepresentation and/or failure to disclose.

(2) However, the tribunal do not appear to have applied themselves at all to the "causal issues" I have listed in paragraph 19(2), (3) and (4) above, save that they have purportedly decided the issue in 19(5) without first deciding 19(2).

(3) Nor can they have directed any very critical consideration to the schedule of capital resources in relation to the evidence and the Department's "Particulars" in the reference, since no finding or reference is made in their decision to the discrepancy of description between "Savings Certificates" and "National Savings Bank Account and Premium Bonds"—though as the same total is reached in respect of both this would perhaps not of itself serve to vitiate their decision.

(4) However, a closer consideration of the composition of the assets should have brought to their attention an aspect of them of some relevance to other issues—namely that in the cases of Savings Certificates and Building Society deposits there is a "silent build up" of the asset by the attribution periodically of accrued interest, so that if the existence of the asset is once forgotten by its owner there may be nothing thereafter to remind him or her, or alert anyone else, as to its existence and ownership. True it is that in the case of Building Societies they generally send out a half-yearly statement—but if, the owner having forgotten the asset, a change of address is not notified to them, this is likely to cease to be a continuing source of reminder.

In many cases such considerations will be irrelevant, since a lapse of memory will not in my view excuse the *owner* from "failure to disclose" if, as will normally be so, he or she once knew of it. But whilst this will be a matter for the tribunal re-hearing the reference to decide, I would myself as at present advised consider it highly doubtful if a person (such as the Father, who was *not* the owner) could be held to have "failed to disclose" without a finding (as to which the burden of proof would be on the Department) that such person knew or had known of that which is the subject of the alleged failure, bearing in mind that the person so failing can be made accountable for the resultant overpayment notwithstanding that he or she may not have been the recipient of that or have received any benefit out of it.

21. A further aspect of the case which the re-hearing tribunal will have to entertain in deciding what I have termed the "causal issues", and which the previous tribunal do not appear to have grappled with, is how far the Mother's non-disclosure of the capital she in fact owned when she made the declarations she did in 1969 and 1971 (to the effect that neither she nor the Father had any) carries the Department's claim against her estate. For, assuming that such non-disclosures constituted a "failure to disclose" on her part, she did not herself make any further declaration until after the Father's death in 1979; and although it may well be that overpayment made to her in reliance upon that declaration is properly recoverable, as also overpayments made to the Father in direct reliance upon her 1969 and 1971 declarations, it certainly does not in my view follow "as the night the day" that any overpayments made to the Father after a fresh declaration by the Father (even of "no change") had supervened since the last preceding declaration by the Mother must be held to have been made "in consequence of" any declaration by the Mother.

There is clearly a tenable argument that all such subsequent overpayments to the Father were made "in consequence of" his declarations, and not of the Mother's.

22. (1) If the Department are (as the original terms of reference imported) desirous of obtaining at the re-hearing a ruling binding on the estate of the Father, as well as against the Mother's estate, it should be appreciated that this will be practicable only if notice of the reference has been given to a duly constituted personal representative of his (and there appears to be no-one yet so constituted).

(2) Assuming that hurdle to be surmounted it would at the re-hearing be essential, as against the Father's estate, for the tribunal to reach specific conclusions:

(a) as to whether actual knowledge (or alternatively either actual or constructive knowledge) on the part of the Father as to the Mother's capital assets is an essential ingredient of "failure to disclose" on his part; and if so

(b) as to what he knew, or is to be taken as having known, about such assets at all relevant dates—bearing in mind that the present computations in regard to them take her assets into account as acquired by her, but that on the footing of knowledge on his part being requisite to liability upon his estate only such overpayments as were from time to time consequential upon his failure to disclose what he knew would be recoverable against his estate.

23. (1) Nothing I have above indicated is intended to discourage the tribunal re-hearing the case from taking a commonsense view as regards such matters as knowledge that a Building Society account earns interest even if the precise balance is not known.

(2) However, close regard will, if knowledge of the Father is considered relevant, be needed to be had to the differing acquisition dates of the several assets, for there may be significant differences in probability of knowledge involved—e.g. as between Savings Certificates acquired in the 1940s and Building Society Accounts opened only in the 1970s.

24. I should for completeness mention that whilst the Department have not in their terms of reference in this particular case incorporated any charge of *misrepresentation,* alleging only "failure to disclose", it is settled law that knowledge is *not* a material ingredient in "innocent misrepresentation". Thus if knowledge is a material ingredient in "failure to disclose" the alternative charge may in other cases be an easier ground to establish.

25. My decision is as indicated in paragraph 1 above.

(Signed) I. Edwards-Jones
Commissioner