

presenting as an  
by Mr. Assistant Recorder Harvey Crush  
(Case No. D7 27 129)

This is a rough transcript of the judgment given in at  
Brenley County Court on Monday the 12th February 1989  
in the case of Barry Franklin Walsh against the  
Department of Social Security.

This is an application under Order 37 Rule 7 of the  
County Court Rules 1981 to set aside an award made on  
the 4th November 1988 by Mr Registrar Matthews on the  
grounds of error of law. The facts are not in issue.

The facts are that on the 24th February 1989 the  
plaintiff, Barry Walsh was issued with a giro for  
£124.95 handed to him personally at the Rushley Green  
Department of Social Security, for invalidity benefit.  
He was still within the confines of the building when  
the giro was mislaid or stolen by someone. He reported  
the loss to the counter staff immediately. They refused  
a replacement. I understand it was finally cashed by  
someone else later that day and Mr Walsh did not  
receive any benefit.

The Department admit that following the loss of  
the cheque the plaintiff did not benefit from the sum  
represented by the cheque. However, it denies it has a  
duty to replace the cheque as a matter of law.

I was told the girocheque was in fact cashed  
later that day, the 24th February 1989 at a post office  
in SE13.

The case was argued before the Registrar on two  
bases of law.

The first was founded on the basis that the

girocheque was a cheque within the Bills of Exchange Act 1882 and on that occasion the plaintiff, probably assisted by the Social Services Department at Lewisham appeared for himself and Mr Blake for the Department of Social Security. The other ground was based on Regulation 20 of the Social Security (Claims and Payments) Regulations 1987. It is with these regulations that we are concerned today.

<sup>When</sup> ~~With~~ the matter <sup>came</sup> before us the grounds of appeal refer to the Bills of Exchange Act; this part of the argument has now been abandoned. The parties agree the instrument is not within the Bills of Exchange Act.

I have received considerable assistance from the advocate Mr Blake, solicitor for the Department of Social Security and a member of its staff who has considerable knowledge of the subject and imparted it with clarity, and Mr Drabble <sup>of Council</sup> who has significant experience in cases of this kind and kept his submission relatively short.

The defendant in his application is concerned with the proper construction of the regulations. In reaching the regulations the defendant drew my attention to Section 87 of the Social Security Act 1975 and the detailed provisions in sub-section (1), establishing the inalienability of benefits. Once benefit is adjudicated to you it cannot be assigned or charged.

It was explained to me that under Section 97 and

the subsequent Sections of that Act entitlement to benefit is determined by an adjudication officer described in that part of that Act, together with the procedure. My attention was drawn to Section 51 of the Social Security Act 1986, the enabling Section for the relevant regulations. Sub-section (1) of that Section provides for regulations <sup>to be made</sup> made covering a host of matters including the application for payment of benefit, running to more than 20 paragraphs. Paragraph (a) of those ~~regulations~~ provides for the requirement for a claim <sup>to be made</sup> in a certain way and (k) of those regulations provides for <sup>a person to whom, the time when, and the manner in which</sup> a person to whom, the time when, and the manner in which <sup>a benefit under the</sup> regulations are <sup>to be paid</sup> to be paid.

~~made.~~

There is no provision for discharging the right to benefit other than payment save <sup>(o)</sup> ~~the~~ extinguishing rights in certain circumstances.

Mr Blake said that this part of this Act contains common provisions for administration of all types of benefit, and so from the enabling sections I was taken to the Social Security (Claims and Payments) Regulations 1987 SI No. 1968 of that year brought into force on the 11th April 1988 by an affirmative resolution of each House.

There was some force to the argument that the regulations represent the intention of Parliament. The material regulation the Department relies on is Regulation 20.

Regulation 20 says,

'Subject to the provisions of Regulations 21 to 27, benefit shall be paid in accordance with an award as soon as is reasonably practicable after the award has been made, by means of an instrument of payment or such other means as appears to the Secretary of State to be appropriate in the circumstances of any particular case.'

It is common ground that it is a normal principle of debt and credit that the debtor must seek out his creditor when the time for payment is due and pay him legal tender. There is no difficulty with this principle applying here. Mr Blake submits that the principle is replaced by the regulation. Otherwise the rule would be that the Department must place legal tender in the hands of the benefit claimant.

What is the proper construction on the facts of this case? Is the effect of the regulation to discharge the duty established by Regulation 20? Is the duty discharged by an instrument of payment or by cash, and if by an instrument whose is the risk of loss?

Mr Blake submits that the regulation displaces the common law rule. Once paid otherwise than by cash but in accordance with the regulations the beneficiary's rights have been met by the Secretary of State who has discretion as to how to pay. Is payment in cash different, what would happen if the beneficiary had lost the cash? Is it different if it is an

instrument of payment? Mr Blake says there is no need to strain the meaning of the regulation to say it is the same if the instrument is lost or stolen before the claimant has a chance to do anything with it. If the Secretary of State has paid by other means, the risk passes to the beneficiary when the instrument is in his hands. I would refer to the Registrar <sup>with a view to the earned part of the</sup> in his judgment, paragraph 4, the Registrar said after reciting the regulation,

'I interpret these words in the following way. The instrument of payment is merely the means by which the cash sum represented by an award is put into the hands of the claimant. It would be stretching the construction of the regulation if I were to accept Mr Blake's submission which was that once the instrument had been placed in the hands of the claimant then the risk of loss fell upon him. The girocheque is simply a means of getting the money into the claimant's pocket and the duty to make payment is discharged not merely by providing such an instrument of payment if, on the particular facts, the money did not get into the pocket of the claimant. Those were the facts in this case.'

Mr Drabble had said the question is, does Regulation 20 contain material to reverse the common law position? The defendant's argument misconstrues the effect of the simple delivery of an instrument of payment. Mr Drabble adopted the defendant's summary of the common law

position and added that unless it was clear that a bill or other instrument is in total satisfaction of the debt, it operates only as a conditional discharge of the debt, and if dishonoured he can sue on the original debt as well as on the bill.

He referred to some authority, the strong Court of Appeal case in Bolt and Nut Company (Tipton) Limited ~~against~~ Rowlands, Nicholls and Company Limited reported in [1964] Now2 Weekly Law Reports at p98 which considered the consequences of judgment where there was a cheque which was presented and subsequently discharged. The judgment respects the common law position. The cheque was conditional payment and suspended until met or dishonoured. This must have exercised the minds of parliamentary draughtsmen in primary and delegated legislation which was then followed in 1975, 1986 and 1987.

Mr Drabble argued that the instrument is specific, and the named claimant only is entitled to it. It is only cash when signed by the right person in the right place. Nothing in Section 51(1)(k) <sup>of the 1986 Act</sup> suggests for a moment payment is at the time when the instrument is handed over, and Regulation 20 goes no further.

A number of analogies were described by both sides as to what should happen in the event of cash being handed over and lost, or sent through the post and not delivered, or stolen at the moment it is handed over to a post office clerk. Those analogies are

helpful in the discussion of the difficulties of the case all round. On the facts in this case, what happened when the instrument was placed in the hands of the beneficiary? Mr Blaks asks, where do we draw the line?

I draw the line this way. Statutes and regulations deal with payment; in my judgment they entitle the secretary of state not to have to carry around stocks of legal tender in his offices but to make payment by an instrument of payment or such other means as seems appropriate in the particular case.

The enabling power and regulations do not go as far as to entitle payment to be discharged by payment of an instrument. The obligation is on the Department to make payment and if this is not in fact effected by the Secretary of State the obligation to pay remains.

I am fortified in this view by Regulation 38 of the Claims and Payments Regulations. These deal with extinguishing rights to payment. If payment is not obtained within the prescribed period then Regulation 38(1) operates to extinguish that right within twelve months of it arising. It ~~extinguishes the right to~~

~~payment and the instrument, and fixes the time for~~ *of the instrument or the date of giving or sending the instrument of payment.* <sup>the right to payment arises at the</sup>

It is clear, therefore, that Regulation 38 recognises the right to payment continues when the instrument is issued.

For those reasons the application fails. The application is dismissed with no order for costs.

The defendant is given leave to appeal to the Court of Appeal.

Signed as an accurate record of the judgment.

Charles G. Blake  
Solicitor appearing for the Defendant  
31-v-90

Richard Dredder  
Counsel for the Plaintiff.

2/6/90.

Approved as amended by me in red.

H.M.B.  
21/8/90.