

IN THE SUPREME COURT OF JUDICATURE No CCRTF 94/0621/F
COURT OF APPEAL
CIVIL DIVISION
APPEAL OF PLAINTIFF
FROM ORDER OF
HIS HONOUR JUDGE HARRISON HALL

Royal Courts of Justice
Strand
London WC2

Monday, 31st October, 1994

Before:

LORD JUSTICE KENNEDY

MRS JUSTICE HALE

WARWICK DISTRICT COUNCIL

-v-

FREEMAN

MISS LORNA FINDLAY (Instructed by Sharpe Pritchard, London, agents for Legal Department, Warwick District Council) appeared on behalf of the Appellant.

The Respondent appeared in person.

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J U D G M E N T
(As Approved)

LORD JUSTICE KENNEDY: Mrs Justice Hale will give the first judgment.

J U D G M E N T

MRS JUSTICE HALE: This is the Plaintiff's appeal pursuant to leave given by Steyn LJ on 27th April 1994 against an order of His Honour Judge Harrison Hall at Warwick County Court on 28th February 1994. That order granted the Defendant leave to appeal out of time and allowed his appeal from the decision of a District Judge under the small claims procedure on 11th November 1993, giving judgment for the Plaintiff in the sum of £1,316.05 and costs of £121.00, totalling £1,437.05.

The background is that the Defendant is the landlord of a house in Leamington Spa which he let to a Miss Bohan in 1991. She claimed housing benefit from the Plaintiff local authority and requested that it be paid direct to him. Payment was made as from a date in May 1991 and continued until November 1991. The Defendant's case is that Miss Bohan gave him one month's notice on 4th October 1991 and he telephoned to tell the local authority that day. She handed over the keys on the evening of 3rd November 1991 and benefit was cancelled from the next day. In fact, it appears that she had moved to Coventry at the beginning of August. In January 1992 the Department of Social Security notified the local authority that her entitlement to income support had ended in August and they, therefore, cancelled the housing benefit back to 4th August 1991 and

reclaimed just over three months' overpayment of housing benefit from the Defendant.

There was correspondence between the local authority and a solicitor who was then acting for the Defendant. He requested an internal review of the decision. A reply was returned in a letter of 25th August 1992 that the formal review procedures were only applicable to the benefit claimant and not to the landlord. There was further correspondence culminating in a reply from the Assistant Treasurer in September 1992: he had looked into the correspondence and, having considered the matter, saw no reason not to seek recovery from the Defendant. There matters seem to have stood until July 1993 when again a lawyer wrote on behalf of the local authority. In September a claim was made in the Warwick County Court for the overpaid amount and for costs. The District Judge found in the Plaintiff's favour. On appeal, the Circuit Judge allowed the appeal: he held that the overpayment was one caused by official error to which the Defendant landlord had not contributed, and that the Defendant landlord could not have been expected to know that it was an overpayment, within the meaning of Regulation 99 (3) and (2) of the Housing Benefit (General) Regulations 1987 respectively.

Accordingly, the Plaintiff local authority appeal to this court. There are two grounds of appeal. First, it is argued that although overpayments can be recovered in a County Court, the County Court has no jurisdiction to determine whether or not the payment is a recoverable overpayment and should be recovered

from the particular Defendant from whom it is claimed. The statutory context is this: under the Social Security Administration Act 1992, section 134(1)(c) and (4)(c), the Appellant local authority are the appropriate local authority charged with funding and administering housing benefit under the Social Security Contributions and Benefits Act 1992 for dwellings in their area. Under the Social Security Administration Act 1992, section 63(1), regulations may be made requiring notification of determinations to claimants and providing for the review of determinations. By virtue of the Social Security Consequential Provisions Act 1992, section 2 (2) the previous regulations, that is, the Housing Benefit (General) Regulations 1987, continue to apply. Part XI of those Regulations deals with determination of questions. Regulation 76(1) provides that -

" any matter required to be determined under these Regulations shall be determined in the first instance by the appropriate authority."

Regulation 79(2) provides that a "person affected" may within six weeks make written representations and upon receiving such representations the authority must conduct a review. Regulation 81(1) provides that the person affected can ask for a further review by the Housing Benefit Board. Furthermore, Regulation 77 states that -

"An authority shall notify in writing any person affected by a determination made by it under these Regulations

- (a)
- (b)

and every notification shall include a statement as to the matters set out in Schedule 6."

It is argued that all of this procedure applies to decisions as to overpayment and the recovery of overpayments under Part XIII of the Regulations. Although Part XIII does not expressly refer to determinations as such, it is clear from the terms of Schedule 6, in particular paragraph 14, that the Regulations do contemplate that the question of whether or not there is a recoverable overpayment is a matter for determination by the appropriate authority within the terms of Part XI of those Regulations. That being the case, the decision as to whether there has been an overpayment, whether it is recoverable, whether under Regulation 100 it is to be recovered and from whom it should be recovered under Regulation 101, are matters which can be determined under Part XI.

However under the facts of this particular case, the problem facing the Plaintiff local authority is that they did not, and it is agreed that they did not, follow that procedure.

They did not make anything which they described as a determination and including the required information. They did not inform the Defendant landlord of his entitlement to a review, although when the matter was taken up on his behalf by a solicitor they apparently conducted an internal review. At no point did they inform either the Defendant landlord or his solicitor of the right to seek a review by the Review Board, so that they have not followed the procedure for determining such a request. Indeed, they did the reverse by stating that in their view that

procedure did not apply at all to the landlord as opposed to the claimant. That is clearly misconceived, as is conceded in this court, because Part XI applies to any "person affected" and clearly a person from whom an overpayment is to be recovered is a "person affected" by a determination. That being the case, the local authority have not got their claim for repayment off the ground.

However, it was further argued on behalf of the local authority that once they had made their determination, and the determination had not been overturned by judicial review, it could not be challenged in the County Court. The decision prayed in aid in support of that proposition was of course that of the House of Lords in Cocks v Thanet District Council [1983] 2 AC 286. Nevertheless, there are subsequent decisions of the House of Lords, in particular, Wandsworth Borough Council v Winder [1985] AC 461 and Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 AC 624 which point out that where private rights are involved a person can raise, especially by way of defence, matters which should otherwise be raised by way of judicial review. It is, to say the least, an unattractive argument on behalf of the local authority, that where they have chosen to proceed in the County Court, and a challenge might be raised to their decision under the principles applicable to judicial review proceedings, it is not open to the Defendant to raise that challenge in defence to the proceedings they have brought in the County Court. It is, after all, scarcely reasonable to expect the Defendant to embark

upon judicial review proceedings before he has been sued for payment. It may then be appropriate for the County Court to transfer that matter to the High Court so that it can be dealt with by those who are normally charged with dealing with such questions. But it does not follow from that that the matter cannot be raised in the proceedings which the local authority themselves have brought.

The second ground of appeal is the interpretation and applicability in this case of Regulation 99 of the Housing Benefit (General) Regulations 1987. Regulation 99(1) provides that -

"Any overpayment, except one to which paragraph (2) applies, shall be recoverable."

Regulation 99(2) applies to -

" an overpayment caused by an official error where the claimant or a person acting on his behalf or any other person to whom the payment is made could not, at the time of receipt of the payment, reasonably have been expected to realise that it was an overpayment."

Regulation 99(3) goes on to define what is meant by "overpayment caused by official error" as follows:

" overpayment caused by a mistake made or something done or omitted to be done by the appropriate authority or by an officer or person acting for that authority or by an officer of the Department of Health and Social Security or the Department of Employment acting as such where the claimant, a person acting on his behalf or any other person to whom the payment is made did not cause or materially contribute to that mistake, act or omission."

Thus, there would appear to be three parts to this question: first, was it an overpayment caused by a mistake made

or something done or omitted to be done by the appropriate authority or by an officer or person acting for that authority or by an officer of the Department of Social Security or the Department of Employment as such? Although it is argued that any overpayment must be a mistake in those terms, it seems quite plain that there was indeed an overpayment by a mistake which falls within that part of the definition. Secondly, however, in order to be an overpayment caused by official error it has to be one where the claimant, a person acting on his behalf, or any other person to whom the payment is made, did not cause or materially contribute to that mistake or omission. In this particular case, although it is said on behalf of the Defendant that the material cause of the mistake was the failure of the Department of Social Security to transmit information to the Plaintiff local authority, it has to be accepted that the claimant herself contributed by failing to disclose information to the local authority.

So there was a contribution on the agreed facts. The question is: is it sufficient for this purpose if the person who contributed to the mistake was any one of the three persons mentioned there, "the claimant, a person acting on his behalf or any other person to whom the payment is made"? It is submitted on behalf of the Appellant Plaintiff that it is sufficient if any one of those did so. Otherwise, for the purposes of this Regulation, it would be difficult to determine that the overpayment was recoverable at all.

It is significant to note that these Regulations first

define what is meant by a "recoverable overpayment", and then go on in Regulation 100 to provide that the authority which paid the recoverable overpayment may recover it, and in Regulation 101 to

provide the people from whom it may be recovered. Nowhere in the scheme of the Regulations is it expressly said that it can only be recovered from a person who himself or herself contributed to the error. Hence it must be sufficient if any one of those people contributed.

The third item in the process is whether, in accordance with Regulation 99(2), "the claimant or a person acting on his behalf or any other person to whom the payment was made could not at the time of receipt of payment have reasonably been expected to realise that it was an overpayment". For the same reasons it is submitted that it is only sufficient if all three of those people could not reasonably have been so expected. Of course, if it had been sufficient to take the overpayment out of the definition of official error if either the claimant or a person acting on his behalf or any other person to whom the payment is made did

not cause or materially contribute to the mistake or omission, according to Regulation 99(3), then strictly speaking, it would be unnecessary to decide the question in relation to Regulation 99(2) at all. However, for the same reasons, it appears to me that if any one of those could reasonably have been expected to realise it was an overpayment it is still recoverable.

The consequence of all of this is that, in terms of the

substance of the claim, the local authority may, indeed, have been able to decide that the overpayment was recoverable and recoverable from the Defendant landlord, but they did not go through the proper process for so doing so as to entitle them to take action in the County Court.

For my part, therefore, the appeal should fail.
LORD JUSTICE KENNEDY: I agree.

Order: Appeal dismissed. No application for costs.