

Case No :CCRFT 1998/1488/CMS 2

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE LOWESTOFT
COUNTY COURT (HIS HONOUR JUDGE
MELLOR)

Royal Courts of Justice
Strand, London WC2A 2LL

Wednesday, 1 December 1999

Before:

LORD JUSTICE PILL
LORD JUSTICE MAY
and
LORD JUSTICE HALE

WAVENEY DISTRICT COUNCIL

Appellant

v

BARRY KENNETH JONES

Respondent

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street
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Official Shorthand Writers to the Court)

Mr B McGuire (instructed by Waveney District Council Legal Department) appeared for the appellant.
Mr D Bean QC (instructed by Messrs Nash & Co, Plymouth, Devon) appeared for the respondent.

Judgment
As Approved by the Court

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Wednesday, 1 December 1999

JUDGMENT

LORD JUSTICE PILL:

This is an appeal, by permission of the judge, from a decision of His Honour Judge Mellor sitting at the Lowestoft County Court on 21 September 1998. Judge Mellor dismissed an appeal by Waveney District Council (“the Council”) from a decision of Deputy District Judge Rollin made on 3 June 1998. The District Judge had given judgment for Mr Barry Kenneth Jones (“Mr Jones”) in the sum of £1,070.

Mr Jones is the landlord of a number of properties occupied by tenants who qualify under statute for housing benefit. This benefit is often paid direct to the landlord and was in this case. The relevant procedures are set out in the Housing Benefit (General) Regulations 1987 (“the 1987 Regulations”). These include a detailed procedure by means of which the Council may recover housing benefit which they say was overpaid.

In this case, the Council were of the opinion that Mr Jones was overpaid with respect to 35 Rotterdam Road, Lowestoft. On 22 December 1997, they deducted the amount they had determined as overpaid when sending to Mr Jones a cheque for sums due upon other of his properties. On 14 January 1998, Mr Jones claimed the sum deducted, £1,070, by County Court summons. In their defence, the Council stated that there was no money owing to Mr Jones. The sum claimed was “an overpayment of housing benefit made by the defendant to him and as such” was recoverable from him. The defendant “was entitled to recover the sum due to it” under the legislation. The wording suggests a claim rather than a defence but the claim made is the right to deduct from the benefit payable on other properties the amount they had determined to be overpaid on this one.

The procedure whereby the Council may recover an overpayment includes an obligation to notify the recipient of certain matters, including his right to request a statement of reasons for their determination. It is unnecessary in this case to set out the provisions of Regulations 76 to 83 and Schedule 6 of the 1987 Regulations because it is common ground that the procedure required by the Regulations was not followed by the Council. Indeed we have not been referred to them. Unlike in the case of *London Borough of Haringey v Awaritefe* (unreported 26 May 1999), where the statutory scheme is set out in the judgments, it has not been contended, and cannot now be contended before this Court, that there had been substantial compliance with the procedure required by the regulations. The Court in that case found substantial compliance under the 1987 Regulations, following a determination.

Following the determination that housing benefit had been overpaid, Judge Mellor found that, having failed to follow the procedure, the Council were not “entitled to invoke the offset procedures”. He held “that the determination of overpayment itself can only be challenged by judicial review; but that the paying authority has to be in a position to show that a public law determination of overpayment has been made before it can enforce a deduction”.

For the Council, Mr McGuire submits that, where a statutory scheme provides for payments by a public body, and unless the scheme provides otherwise, the obligations of the public body are enforceable only in public law by an application for judicial review. It is not open to a person claiming to be entitled to a sum of money under the 1987 Regulations to bring an action in the County Court for its recovery. Mr McGuire relies upon the statement of Geoffrey Lane LJ in *Wyatt v Hillingdon LBC* (1978) 76 LGR 727, 733 cited with approval by Lord Hoffmann in *O'Rourke v Camden LBC* [1998] AC 188, 193. The plaintiff in that case had claimed damages from his local authority for failure to provide benefits under the Chronically Sick and Disabled Persons Act 1970:

“It seems to me that a statute such as this which is dealing with the distribution of benefits — or, to put it perhaps more accurately, comforts to the sick and disabled — does not in its very nature give rise to an action by the disappointed sick person. It seems to me quite extraordinary that if the local authority, as alleged here, provided, for example, two hours less home help than the sick person considered herself entitled to that that can amount to a breach of statutory duty which will permit the sick person to claim a sum of monetary damages by way of breach of statutory duty.”

(Lord Hoffmann would wish to substitute the word “was” for “considered herself” in that paragraph).

Mr McGuire also relies upon the decision of this Court in *Haringey LBC v Cotter* (1997) 29 HLR 682. The counter-claiming defendant in that case was seeking to establish a claim for breach of statutory duty, alleging that the Council had failed to pay arrears of rent allowance due to him. It was held that the 1987 Regulations provided a “detailed, self-contained and exhaustive procedure” for enforcing the duties of a local authority in relation to the determination and payment of housing benefits. Mummery LJ giving the judgment of the Court, stated, at p 687:

“In our judgment, the application of the relevant principles to this case leads to the conclusion that Parliament did not intend that the 1992 Act and the 1987 Regulations should confer on claimants or any other person, such as a landlord, a private law right of action for breach of duty in relation to the payment of housing benefit. The legal obligations of the Council under the 1987 Regulations are enforceable by other means *i.e.* by pursuing the

procedure prescribed in the 1987 regulations and, if appropriate, by an application for judicial review of the public law duties and discretions of the Council, as, for example, in *R v Stoke City Council ex p Highgate Projects* (1994) 26 HLR 551.”

In my judgment the judge reached the correct conclusion. A claimant who seeks to obtain relief must normally follow the procedures set out in the Regulations, as this Court held in *Cotter*. Where, however, as in this case, the Council have not themselves followed the procedures which they are obliged to follow under the regulations, and have thereby deprived the claimant of the protection and opportunities offered him by the regulations, he is entitled to bring a County Court action. In substance, by their defence the Council were seeking to “recover”, under the regulations, what they had determined to be an overpayment under the regulations.

It is conceded that if a Council purported to make a payment by cheque of housing benefit they had determined to be due, but declined to sign the cheque, the sum determined to be due would be recoverable in the County Court. That would be a mere debt collecting exercise for which an ordinary action is appropriate. Such an action is also appropriate in present circumstances where the Council have, by their own conduct, deprived the claimant of his opportunity to challenge, under the statutory procedures, the determination by the Council that there has been an overpayment. The procedural defect in this case has the same effect as it did in *Warwick District Council v Freeman* (1994) 27 HLR 616 where a defendant landlord successfully resisted a claim by the Council in the County Court, for the return of housing benefit allegedly overpaid, because of the failure of the Council to follow the procedures under the 1987 Regulations. Hale J, with whom Kennedy LJ agreed, stated in this Court that “the local authority have not got their claim for repayment off the ground”. In *Cotter*, the Court did not doubt the correctness of *Freeman*, Mummery LJ stating at p 689:

“Further, there is no allegation that there was a refusal or failure to make a determination at all. There is no allegation of a flaw in the procedure for internal and external review of any determination that was made (*cf Warwick DC v Freeman* (1994) 27 HLR 616 at 619, 620, where, in respect of a county court claim for an overpayment, a defence was successfully raised that the local authority had failed to follow the statutory procedure for the determination of the recoverable overpayment under Part XI).”

The same approach is required in my judgment whether the claimant of benefit is, as in *Freeman*, a defendant or, as in the present case, a plaintiff. Evidence of compliance by the Council with the statutory procedures they are required to follow, consequent upon a determination that there had been an overpayment, would enable the Council to defeat the County Court claim in circumstances such as the present.

For those reasons I would dismiss this appeal.

LORD JUSTICE MAY:

I agree.

LORD JUSTICE HALE:

I also agree.

Order: Dismissed with costs; leave to appeal refused.