

Recoverability of overpayment where
no grant of arrears 7

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File Nos.: CJSA/1423/1997

Starred Decision No: 37/00

Commissioners' decisions are identified by case references only, to preserve the privacy of individual claimants and other parties.

Starring denotes only that the case is considered to be of general interest or importance. It does not confer any additional status over an unstarred decision.

Reported decisions in the official series published by DSS are generally to be followed in preference to others, as selection for reporting implies that a decision carries the assent of at least a majority of Commissioners in Great Britain or in Northern Ireland as the case may be. Northern Ireland Commissioners' decisions are published by The Stationary Office as a separate series.

*The practice about official reporting of Commissioners' decisions in **Great Britain** is explained in reported case R(1) 12/75 and a Practice Memorandum issued by the Chief Commissioner on 31 March 1987. The Chief Commissioner selects decisions for reporting after consultation with Commissioners. As noted in the memorandum there is also a general standing invitation to comment on the report-worthiness of any decision, whether or not starred for general circulation. However, a decision will not be selected for reporting if it is known that there is an appeal pending against it. The practice in **Northern Ireland** is similar, decisions being selected for reporting by the Northern Ireland Chief Commissioner.*

Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 14th September 2000

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Ipswich social security appeal tribunal dated 18 June 1996 is of no legal force or effect and that there is no validly constituted appeal before me on which I can make any further determination.

2. That decision rests on the following conclusions of law, which I explain below. The adjudication officer's decision dated 15 June 1995, in which in a revised decision on review an overpayment of income support amounting to £26,640.36 was expressed to be recoverable under section 71 of the Social Security Administration Act 1992 from the estate of the late claimant was one which he had no power to make. That is because there had been no grant of probate to the executors of the claimant's will executed on 7 December 1994 (and indeed the validity of that will was the subject of legal proceedings following the entering of a caveat on 15 June 1995 against the executors' application for the grant of probate), and therefore there was no person from whom the overpayment could be made recoverable in respect of a misrepresentation made by the claimant. The purported appointment dated 4 September 1996 (probably in fact 1997) by the Secretary of State of one of the executors (Miss PS) to act in relation to the overpayment does not validate the adjudication officer's decision. Accordingly, there was no valid appeal to an appeal tribunal when Miss PS, on behalf of herself and the other executor under the will of 7 December 1994, purported to appeal against the adjudication officer's decision. There was no person who could make a properly constituted appeal as a representative of the claimant's estate and Miss PS had no standing personally to do so. The decision of the social security appeal tribunal was therefore of no legal force or effect. By the same token, there was no person who had power to make a properly constituted appeal to the Commissioner against the social security appeal tribunal's decision. In those circumstances, I consider that I do not have the statutory power to set the social security appeal tribunal's decision aside and that the proper form of my decision is as in paragraph 1. If I am wrong about that, I set the social security appeal tribunal's decision aside in so far as it is necessary to do so and record that there was no validly constituted appeal before it.

3. As well as explaining the reasons for those conclusions below, I attempt to say where that leaves matters. I stress that my conclusions are based on the law of England and Wales. It is possible (I do not know) that the position may be different in Scotland.

4. I am sure that my decision in this case will not please any of those concerned with it. The social security proceedings have already dragged on for many years. The probate litigation and an

action against the claimant's son, Mr PS, have been stayed pending the Commissioner's decision in this appeal, on a basis which I do not understand and which may have rested on a mistaken understanding of the legislation on the recoverability of overpayments of benefit. If my conclusions on the law are right, they reveal an entirely unsatisfactory state of affairs. Indeed, whether they are right or wrong, it is entirely unsatisfactory that the answers should depend on analysis of the abstruse issues which I have had to grapple with. Legislation should be introduced to provide clearly and expressly for the powers to recover overpayments of benefit in cases where there is no grant of probate or of letters of administration in respect of a deceased claimant's estate and for appropriate rights of appeal against recoverability decisions.

THE FACTUAL BACKGROUND

5. I shall set out the history, as briefly as I can, roughly in the order in which things became known to the income support adjudicating authorities, acknowledging that I shall leave out many matters which are hotly disputed. The relevant claim for income support was made on the form SP1 signed on 26 January 1990. The claim was treated as made on 23 January 1990. The claimant was then aged 97 and had moved into a retirement home. Her previous home was being put up for sale. There is no dispute that at that time her son, Mr PS, was seeing to the practicalities of her financial affairs. The evidence suggests that she was fully mentally aware of what was being done (eg there was no appointee and no power of attorney granted until December 1994 and there was medical evidence of mental alertness in March and May 1995). The answers on the form SP1 were completed by Mr PS. The claimant signed the form, with the declaration that the information given on the form was correct and complete. That was what the appeal tribunal found, although there has recently been a suggestion on behalf of Miss PS that the signature may have been written by Mr PS. Income from retirement pension and an occupational pension was declared. The answer to the question "Do you or your partner have any savings?" was ticked yes and the amount was stated to be £1,488.29. Income support was awarded on that basis.

6. In July 1994 the claimant's previous home was sold. The receipt of the proceeds of sale (£39,554.37) was promptly declared. Payment of income support ceased after 6 July 1994.

7. In a letter dated 14 January 1995 (following an earlier telephone call and an interview) Mr PS wrote to the Department of Social Security saying that in November 1989 £26,000 was transferred from a building society account in the joint names of himself and the claimant to an account in his sole name and that in December 1989 a further £14,000 was transferred to an account in his sole name. He said that this movement was carried out deliberately to reduce his mother's cash below £2,000 so that she could receive income support on her pending admission to residential care. He gave some further information about the

later use of the money (including the distribution of four parcels of £6000 to himself and his three sisters) and then said that he wished to return the benefit paid to the claimant and to clear his conscience. On 7 December 1994 the claimant had executed a new will appointing her daughters Miss PS and Mrs KB as executors and leaving the whole of her estate to Mrs KB or, if she predeceased the claimant, to Miss PS. A statement in connection with the will explained, among other things, why the claimant did not wish any of her money to go to Mr PS.

8. On 2 February 1995 the adjudication officer gave the following decision:

"I have reviewed the decisions of the adjudication officer dated 16.2.90 awarding income support from and including 1.2.90 because I am satisfied that the decision was given in ignorance of a material fact.

[The claimant] was not entitled to Income Support from 1.2.90 to 6.7.94 (both dates included) because she had capital in excess of the £8,000 Income Support capital limit.

As a result an overpayment of Income Support has occurred amounting to £26640.36 because [the claimant] misrepresented a material fact on 26.1.90, when signing her SP1 claim form and stating that the only capital she had was £1488.29, when in fact she had capital in excess of £8000.00.

Accordingly, Income Support of £26640.36 from 1.2.90 to 6.7.94 (both dates included) as detailed below, has been overpaid and is recoverable from [Mr PS], who is holding the capital on behalf of [the claimant]."

9. Following the issue of that decision to him, Mr PS contacted the Department to say that he now thought that the overpayment should be recovered from all parties concerned and that he had been given legal advice not to touch the remaining £27000 until the position of the enduring power of attorney granted to Miss PS and Mrs KB was sorted out. No further action was taken until the claimant died on 1 June 1995. Mr PS immediately contacted the Department to suggest that the recovery of the overpayment should be from the claimant's estate. Miss PS and Mrs KB applied for the grant of probate very promptly. Mr PS entered a caveat on 15 June 1995. A warning was issued and Mr PS entered an appearance within the time limit. His contention is that the will executed on 7 December 1994 is invalid on the ground of the undue influence of Miss PS and Mrs KB. The accounts containing the proceeds of sale of the claimant's former home and the remainder of the transferred £40,000 have been frozen by order of the court until the various actions come to trial.

10. On 15 June 1995 the adjudication officer gave the following decision:

"On 2.2.95 I reviewed an award of Income Support and on that date decided that the resulting overpayment from 1.2.90 to 6.7.94 (both dates included) amounting to £26640.36 was recoverable from [Mr PS] who was holding capital on behalf of [the claimant].

I have reviewed that decision where it applies to the recoverability of the overpayment.

My revised decision is as follows.

[The claimant] was not entitled to Income Support for the period from 1.2.90 to 6.7.94 (both dates included) because she had capital in excess of the £8,000 Income Support capital limit.

As a result an overpayment of Income Support has occurred amounting to £26640.36 because [the claimant] misrepresented a material fact on 26.1.90, when signing her SP1 claim form and stating that the only capital she had was £1488.29, when in fact she had capital in excess of £8000.00.

Accordingly, Income Support of £26640.36 from 1.2.90 to 6.7.94 (both dates included) as detailed below, has been overpaid and is recoverable from the estate of the late [claimant]."

The decision was sent to solicitors with a covering letter dated 19 June 1995, saying that it was understood that they were acting on behalf of the executors dealing with the affairs of the late claimant, that an overpayment had been made and that it was formally requested that the Department be reimbursed from her estate.

11. In letters dated 4 September 1995 and 12 September 1995 Miss PS appealed against the adjudication officer's decision of 15 June 1995 on behalf of both executors, giving detailed grounds. There was copious exchange of correspondence and documents before the appeal came before the appeal tribunal on 18 June 1996. Miss PS was present at the hearing, represented by a solicitor. Mr PS was also present. Both of them gave evidence and there was an exhaustive hearing.

12. The appeal tribunal decided that there had been an overpayment of income support in the sum of £26,640.36 to the claimant which was recoverable from her estate. Very much in brief, the appeal tribunal decided on the evidence that the claimant when signing the SP1 form knew what the contents were and that the £40,000 had been transferred into Mr PS's sole name, with her retaining control of the assets. It was accepted that

she might not have appreciated the legal implications and possible liabilities, but it was found that she had made a misrepresentation, which caused the overpayment. The appeal tribunal concluded that there were grounds (ie error of law) to review the recoverability decision and to change the person liable from Mr PS to the claimant's estate, and that there was a review of entitlement on which to base the recoverability. Finally, it was said that the appeal tribunal had no power under the Social Security Administration Act 1992 to fix a third party with liability, though the estate or the Secretary of State might be able to trace assets belonging to the estate not currently in its hands. During the hearing the chairman had stated that the appeal tribunal had no power to make an order against Mr PS.

13. Miss PS applied to the Commissioner for leave to appeal, which was granted on 12 September 1997. It looks as though prior to that the Commissioners' office, following the usual practice, had asked Miss PS for sight of the grant of probate or of an appointment by the Secretary of State. Miss PS, in the absence of a grant, then asked the Department for an appointment and the result, after the usual period of bemusement, was the document of appointment now at page 149A of the papers. In view of the dates just mentioned, it seems very probable that the purported appointment by the Secretary of State was made on 4 September 1997, not 1996 as typed on it.

14. There have been voluminous written submissions on the appeal. I need not detail all the twists and turns, but they have taken up a lot of time. On 27 April 1999 I gave a detailed direction requiring submissions on the jurisdiction of the adjudication officer and of the appeal tribunal to make a recoverability decision against the claimant's estate when there were no duly constituted personal representatives of the estate. Very unfortunately, there were delays in getting missing documents to the adjudication officer and then by an oversight his very full submission was not sent to the Commissioners' office once it was prepared. Thus a copy was not sent to Miss PS or to Mr PS (whom I had ruled should be made a party to the proceedings) until 1 December 1999.

15. I directed that there was to be an oral hearing of the appeal. Both Miss PS and Mr PS were present, as well as some other members of the family. Miss PS was represented by Miss Elizabeth Aldous of Felixstowe and District Citizens Advice Bureau. Mr PS was represented by his daughter. The Secretary of State (who has now taken over the functions of adjudication officers) was represented by Mr Jeremy Heath of the Office of the Solicitor to the Department of Social Security. I am grateful to all present for their assistance in a particularly difficult, and sometimes fraught, case.

THE JURISDICTION OF THE ADJUDICATION OFFICER ON 15 JUNE 1995

16. There seems to me to be no doubt that the adjudication officer had power on 15 June 1995 to consider whether the

decision of 2 February 1995 should be reviewed, whether there had been an application by some person entitled to apply or not. It also seems to me plain that there was a ground of review under section 25(2) of the Social Security Administration Act 1992, because the decision of 2 February 1995 was erroneous in point of law. That is because the decision made the overpayment recoverable from Mr PS, but identified the relevant misrepresentation as that made by the claimant in signing the SP1 claim form. Section 71(1) and (3) of the Social Security Administration Act 1992 only allows an overpayment to be made recoverable from the person who misrepresented or failed to disclose a material fact. Thus the decision did not contain the necessary basis for recoverability from Mr PS. I should add at this point that that does not mean that in some future decision the overpayment cannot be found to be recoverable from Mr PS, if he is also found in that decision to have himself misrepresented or failed to disclose a material fact. I come back to this later.

17. The difficult questions are to do with the revised decision which the adjudication officer of 15 June 1995 was able to give on review. One question is whether, following review of a decision which made an overpayment recoverable from one person, a revised decision can make the overpayment recoverable from another person. In a direction I referred to an earlier decision of mine, in appeal CIS/332/1993, which dealt with a similar situation before an appeal tribunal and suggested that at that stage normally there could not be a change in the person against whom the decision was made. I am not at all sure that the same principle applies to a decision by an adjudication officer on review. I tend to think that once the first decision has been ceased to exist on review the adjudication officer is able to make any decision on recoverability which is open on the review of the decisions on entitlement and having made the necessary findings on misrepresentation or failure to disclose. However, in the light of my conclusions on other issues I do not have to decide that question finally.

Regulation 30(1) of the Claims and Payments Regulations

18. The major question is whether it was legally possible for the adjudication officer to make a recoverability decision against the claimant's estate when probate of her will had not been granted. I look first at whether any obstacle of that kind could be overcome by the appointment of Miss PS by the Secretary of State. For it is settled by several reported Commissioners' decisions - R(SB) 8/88, R(SB) 5/90 and R(A) 1/92 - that a subsequent appointment by the Secretary of State under regulation 30 of the Social Security (Claims and Payments) Regulations 1987 and its predecessors relates back and validates earlier action taken after the death of a claimant. However, those decisions were in cases where what seem to have been in issue were appeals against decisions on claims made by the deceased claimants. They do not decide that regulation 30 allows an appointment in overpayment cases.

19. Regulation 30(1) and (2) provides, so far as relevant:

"(1) On the death of a person who has made a claim for benefit, the Secretary of State may appoint such person as he may think fit to proceed with the claim.

(2) Subject to paragraph (4), any sum payable by way of benefit which is payable under an award on a claim proceeded with under paragraph (1) may be paid or distributed by the Secretary of State to or amongst persons over the age of 16 claiming as personal representatives, legatees, next of kin, or creditors of the deceased [and regulation 38 on the extinguishment of the right to payment applies]."

The remaining paragraphs of regulation 30 contain further details about payments of awards on claims under paragraph (1) and provide for the making of claims after the death of a person, in relation to some benefits.

20. Regulation 30 was made under powers granted by section 51(1)(g) and (s) of the Social Security Act 1986 (now section 5(1)(g) and (q) of the Social Security Administration Act 1992):

"(1) Regulations may provide--

- (g) for enabling one person to act for another in relation to a claim for a benefit to which this section applies and for enabling such a claim to be made and proceeded with in the name of a person who has died;
- (s) for the payment or distribution of such a benefit to or among persons claiming to be entitled on the death of any person and for dispensing with strict proof of their title;"

21. In my judgment, the plain words of regulation 30(1) do not allow the Secretary of State to appoint a person to represent the claimant or their estate in the context of a decision for the recoverability of an overpayment from the claimant's estate. And if they had purported to allow that, they would not have been within the powers granted by primary legislation.

22. Mr Heath's submission was to the contrary. He considered that the definition of "claim for benefit" in regulation 2(1) of the Claims and Payments Regulations might be an obstacle to his submission, in that the definition only includes an application for review where that is made for the purpose of obtaining an increase of benefit. He submitted that as the definition did not apply where the context otherwise required, the context of regulation 30 required "claim for benefit" to be construed to include a review carried out for the purposes of section 71 of the Social Security Administration Act 1992. He further submitted that, if payment had been made on a past claim, there was sufficient connection with the claim for an appointment to be made under regulation 30(1).

23. I do not think that any particular problem stems from the definition of "claim for benefit". It seems to me that the problems for Mr Heath's submission are the ordinary meaning of the words "proceed with a claim" and the context of regulation 30 as a whole. Although it can be accepted that the claimant had made a claim for benefit, that claim terminated in 1994 when the proceeds of sale of her former home were received. I find it impossible to say that an appointment of a person to act where the adjudication officer was to review past entitlement and make an overpayment decision could be to "proceed with the claim". It might be said that the appointment was not made in this case until Miss PS wished to challenge the decision of the appeal tribunal, and so wished to proceed with the matter on behalf of the claimant, but if the appointment were to have a retrospective validating effect, the position as at 15 June 1995 must be considered.

24. The general context of regulation 30 is instructive. The main problem with which it deals is that of finding a way of making payments where a claimant dies either before a claim has been decided or where there is an appeal after an adverse decision on the claim, and there are no personal representatives of the estate (as there often will not be if there are no or very few assets in the estate). Regulation 30(1) allows the appointment of someone to proceed with the claim. Then regulation 30(2) allows the Secretary of State to make payment on any award. But the people to whom payment can be made do not include the person who is appointed under regulation 30(1), at least in that capacity. Payment can be made to the personal representatives, or to others with a claim on the estate. That is an acknowledgement that, in the absence of regulation 30(2), the Secretary of State could only properly make payment to a duly constituted personal representative of the estate. The existence of regulation 30(1) does not alter that or remove the necessity for regulation 30(2).

25. There is a similar problem where an adjudication officer (or now a decision-maker on behalf of the Secretary of State) wishes to make an overpayment decision, the claimant has died and there are no personal representatives of the estate (which I shall go into in more detail below). If a decision is to be effective against the estate, it must be made against a person who in law represents the estate, and who can act in that representative capacity bearing in mind the interests of those with claims against the estate. In my judgment regulation 30(1) falls a long way short of providing that effect. Further, section 51(1)(g) of the Social Security Act 1986 (section 5(1)(g) of the Social Security Administration Act 1992) only allows regulations to made for a claim to be proceeded with in the name of a person who has died. In my judgment, different and more specific language would be necessary to authorise the appointment of a person to represent the estate of a deceased claimant in relation to a decision on the recoverability of an overpayment. It does, also, seem unfair or at the very least incongruous that the Secretary

of State should have the power to appoint a person to represent the claimant or her estate in order to enable a decision to be made that the Secretary of State can recover an overpayment.

26. I must however consider whether I am bound to accept that the document of 4 September 1997 was an appointment which did have that effect, although Mr Heath did not raise this point in his submissions. There is no right of appeal to appeal tribunals or Commissioners from the Secretary of State's decision to make or not to make an appointment. I would be reluctant to conclude that appeal tribunals and Commissioners are bound to accept appointments which have no legal basis. But I think that there is in the present case a clear distinction between the fact of an appointment by the Secretary of State and the question of its legal effect in relation to the adjudication officer's decision of 15 June 1995. The document of 4 September 1997 (now at page 149A of the papers after some renumbering) is in rather vague terms. It is headed with the claimant's name. It records that there was an overpayment outstanding at her death, and that there had been decisions on the overpayment by an adjudication officer and an appeal tribunal. Then it states that the "Secretary of State has appointed the following person to act", giving Miss PS's name and address and describing her relationship as daughter. The final sentence is "Please continue claim to recover the amount still outstanding". The document is signed by someone described as an overpayments supervisor. There is no reference to any legislative provision under which the appointment was made. Leaving aside any argument that the document is not an appointment on behalf of the Secretary of State, but a report of such an appointment having been made, it can be accepted as evidence of the fact of Miss PS's appointment. But, in my judgment, the question of the effect of the document on the adjudication officer's jurisdiction on 15 June 1995 is a question for me to determine. The document was not, could not in law be, and possibly did not purport to be, an appointment by the Secretary of State of Miss PS to represent the claimant's estate.

27. Thus I conclude that regulation 30(1) of the Claims and Payments Regulations did not provide the adjudication officer with any jurisdiction to make a decision against the claimant's estate on 15 June 1995 if he did not otherwise have jurisdiction. Therefore I must look at the more general arguments.

The power to make an overpayment recoverability decision against a claimant's estate

28. The starting point here is found in the terms of section 71 of the Social Security Administration Act 1992. Subsection (1) contains the fundamental rule that where it is determined that, whether fraudulently or otherwise, "any person" has misrepresented or failed to disclose any material fact and in consequence payment of benefit has been made, the Secretary of State is to be entitled to recover the amount of any payment which he would not have made but for the misrepresentation or failure to disclose. Subsection (3) provides:

"(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."

And subsection (10) provides:

"(10) Any amount recoverable under the provisions mentioned in subsection (8) above [which include subsection (1)]--

- (a) if the person from whom it is recoverable resides in England and Wales and the county court so orders, shall be recoverable by execution issued from the county court or otherwise as if it were payable under an order of the court; and
- (b) if he resides in Scotland, shall be enforced in like manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland."

29. It might be thought that, if benefit has been overpaid as a result of a misrepresentation or failure to disclose a material fact by a claimant who has died, there is no longer a person from whom the overpayment can be recovered, on the basis of that misrepresentation or failure to disclose, under section 71(3). However, the Court of Appeal decided otherwise in Secretary of State for Social Services v Solly [1974] 3 All ER 922. The case concerned recoverability under section 26(1) of the Ministry of Social Security Act 1966, which provided:

"(1) If, whether fraudulently or otherwise, any person misrepresents or fails to disclose any material facts, and in consequence of the misrepresentation or failure--

- (a) the Minister incurs any expenditure under this Act, or
- (b) any sum recoverable under this Act by or on behalf of the Minister is not recovered,

the Minister shall be entitled to recover the amount thereof from that person."

Thus section 26(1) incorporated the same rule as is currently in section 71(3) of the Social Security Administration Act 1992. In Commissioner's decision R(SB) 21/82 it was held that the decision in Solly applied to section 20(1) of the Supplementary Benefits Act 1976, whose terms were identical to those of section 26(1) of the 1966 Act. I have no doubt that the principle laid down in Solly applies also to section 71 of the Social Security Administration Act 1992.

30. In Solly, national assistance and supplementary benefit was paid to the claimant. After her death in March 1970 the Department of Social Security became aware that she had left a sum of about £2,000. They made enquiries of her son, who had been appointed executor under her will. He did not cooperate and the question as to recoverability was referred to a supplementary benefit appeal tribunal as required by section 26(2) of the 1966 Act. The tribunal certified that £832 was recoverable from the

claimant's estate. The Minister then brought an action against the son, as executor of the claimant's estate, and applied for summary judgment against him, which ordered by the High Court. The son appealed to the Court of Appeal. The grounds of appeal accepted that probate of the will had been granted, as it was stated that it was assumed that the Department had obtained the son's address from the will annexed to the probate ([1974] 3 All ER 924h). One of the arguments for the son was that there could be recoverability under section 26(1) and a reference to a tribunal under subsection (2) only where the person mentioned in subsection (1), ie the person liable, was still alive. That argument was rejected. Lord Denning MR said (at [1974] 3 All ER 926j):

"I cannot accept this submission. It is plain to me that s26(1) enables the Minister, after the person is dead, to recover the sums from her executors."

In agreeing, Stamp LJ said (at [1974] 3 All ER 927f):

"It seems to me quite clear that this £832 claimed in the action is recoverable against Mr Solly as executor of his mother... ."

31. The effect of Solly is clear in a case where probate or letters of administration have been granted, so that there are duly constituted personal representatives of the claimant's estate. An overpayment is recoverable from the personal representatives in that capacity and that is recovery from the deceased person. Solly and section 71(3) of the Social Security Administration Act 1992 are often described as allowing recovery from the claimant's estate (and I plead guilty to having used those loose words in the book of annotated legislation which I produced for many years). However, Solly does not in my judgment determine the question whether an overpayment can be recoverable from a claimant's estate where there are no duly constituted personal representatives.

32. Mr Heath submitted that there could be recoverability in such circumstances. He accepted, I think, that the Secretary of State would not be able to bring legal proceedings to enforce the actual payment of any amount due out of the estate unless there was a personal representative against whom the action could be brought. But he submitted that the lesser step of the making of an adjudication officer's decision on the recoverability of an overpayment could be taken.

33. He first submitted, relying on Commissioner's decision R(IS) 12/94, that the claimant's estate as such has a recognised legal personality and was a "person" against whom a recoverability decision could be made. In R(IS) 12/94, the claimant had lived with her daughter and grandson. The mortgage on the house was in the daughter's name. The daughter died. The question then, under the existing form of Schedule 3 to the Income Support (General)

Regulations 1987, was whether "the person liable to meet the housing costs [was] not meeting them", so that the claimant could be treated as liable for the mortgage interest. The daughter's will had not been admitted to probate. The Commissioner held that the estate was liable to pay the mortgage repayments and was not doing so, and had a sufficient legal personality as such to be a person for the purposes of the provision before him. That holding allowed a fair result to be reached in the circumstances of R(IS) 12/94. The fact that the decision is reported means that at least a majority of the Commissioners at the time thought that it was right. Nevertheless, and despite the scope of the learning of the Commissioner involved, I am unable to accept the proposition set out in paragraph 13 of R(IS) 12/94 that the estate of a deceased person is recognised in law as an incorporeal person. I find that contrary to what I understand to be the essential legal nature of the estate of a deceased person where there are no personal representatives.

34. As is so often the case with the most fundamental propositions, it is difficult to find an authoritative statement about the lack of legal personality of an estate. But the matter was put very clearly by Lord Diplock, sitting in the Court of Appeal with two other Law Lords, in In re Amirteymour [1979] 1 WLR 63. The case was concerned with the Proceedings Against Estates Act 1970 and the provisions of Order 15, rule 6A of the Rules of the Supreme Court. That Act and rule 6A were introduced specifically to allow legal proceedings to be brought against an estate when there was no duly constituted personal representative and to provide a mechanism for the court to appoint someone to represent the estate in the action. The necessity for that legislation seems to me of considerable general significance. The Court of Appeal was concerned with a fairly narrow issue of what was to happen where the Official Solicitor had been appointed for specific purposes which had been fulfilled, and decided that the action could not continue unless and until some further appointment was made. Lord Diplock, at [1979] 1 WLR 66, said that proceedings under this legislation were actions in personam (ie actions against persons) and not actions in rem (ie against some property) and continued:

"nor are they actions against an abstraction - a form of proceeding unknown to English law. As in all actions in personam there must be in existence some person, natural or artificial and recognised by law, as a defendant against whom steps in the action can be taken."

It is inherent in that statement that an estate without personal representatives is an abstraction and not a person recognised by English law. I apply that principle, which requires the rejection of Mr Heath's submission relying on R(IS) 12/94.

35. Mr Heath made a further submission, if I have understood it correctly, that an overpayment recoverability decision could be made against the executors under a will which had not yet been

admitted to probate. He relied on the undoubted principle (see paragraph 5 of R(SB) 8/88 and Halsbury's Laws of England (4th edition, reissue), Volume 17(2), paragraphs 30 and 31) that an executor derives title from the will, not from the grant of probate, and that an executor may do things including the taking of legal action before the grant of probate, but may not proceed beyond the stage at which it becomes necessary to prove title. He submitted that that stage was not reached when an overpayment recoverability decision was made, although it would be reached before the Secretary of State could sue for recovery of the overpayment.

36. I reject that submission also. I think that it is probably inconsistent with the position set out in the previous paragraph. Nor does it overcome the difficulty that, once it is accepted that the decision is to be made against a person representing the estate (rather than against the estate as such), that can only be done if the adjudicating authority can be satisfied that that person does represent the estate. Only then could the adjudicating authority be satisfied that recoverability is being found against the person who made the misrepresentation in question or who failed to disclose. In that sense, the need to prove title arises immediately. And it seems to me to arise just as much in the present context as in legal proceedings in court. I am reinforced in that conclusion by the effect of section 71(10) of the Social Security Administration Act 1992 in making an overpayment recoverability decision potentially enforceable as if it were (in England and Wales) a county court judgment. I find my conclusion also reinforced by the statement of general principle by Lord Macnaghten in the Privy Council in Mohamidu Mohideen Hadjiar v Pitchey [1894] AC 437, at page 442:

"A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either administered, that is, intermeddled with the estate, or proved the will."

The action of applying for probate cannot in itself possibly amount to an intermeddling in the estate. Finally, in paragraph 22(1) of decision R(SB) 21/82 the Commissioner said:

"If the Department are (as the additional 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)."

37. I have considered the other authorities referred to in the various submissions, including the recent decision of the Commissioner in CIS/538/1998, but have not found any of them of assistance on this central problem. The essence of the problem

is whether the person against whom a decision is made properly has a representative character. The facts of the present case illustrate the problem dramatically. Miss PS and Mrs KB were the executors named in the claimant's will of 7 December 1994 and might be said to be able to act in a representative capacity. But Mr PS is contending in the probate litigation that that will was not valid. If that contention were to succeed, they would not be the personal representatives of the claimant's estate. It cannot be said that a decision against them is a decision against the claimant unless and until probate of the will appointing them is granted. As Lord Macnaghten said in the Mohamidu case, at [1894] AC 443:

"It would certainly be a most dangerous doctrine to hold that creditors could tear an estate to pieces on going through the form of an action against a person who has neither intermeddled with the assets nor duly clothed himself with a representative character, so as to become responsible for his acts and defaults to the beneficiaries under the will."

38. I do not consider that the Secretary of State was powerless to take any action on the overpayment in the circumstances of the present case. As I understand it, he could have made an application to the High Court for a limited grant of administration under section 116 of the Supreme Court Act 1981. The court can apparently make a limited grant of that kind for a variety of purposes. Where the recoverability of an overpayment is in issue and, say, executors refuse to apply for a grant of probate or, as here, the grant of probate could not occur until probate proceedings have been determined, I do not see why the Secretary of State could not apply to the court so that a suitable person could be appointed to represent the estate for the purposes of the adjudication on the recoverability of the overpayment, including any appeal against a decision made by an adjudication officer. Such a procedure would have the advantage that the appointment would be made by the court and not by a party interested in the proposed legal action against the estate. The Secretary of State may well wish to consider and take advice whether these suggestions (which go well beyond the area of expertise of Commissioners) are legally well-founded and, if so, whether to apply to the court in the present case. The existence of this possible course of action does not in my view lessen the need for specific legislation, as noted in paragraph 4 above.

39. All of that leads to me to the conclusion that the adjudication officer on 15 June 1995 did not have power to give a decision that the overpayment resulting from the claimant's misrepresentation was recoverable under section 71 of the Social Security Administration Act 1992 either from the her estate as such or from Miss PS and Mrs KB as executors under her will.

THE EFFECT ON THE APPEAL TO THE APPEAL TRIBUNAL AND TO THE COMMISSIONER

40. On general principle, the adjudication officer's recoverability decision of 15 June 1995, although he had no power to give it, exists until set aside or replaced. Was there then an appeal validly before the appeal tribunal on 18 June 1996, on which such a replacement could be carried out on the re-hearing of the case? The difficulty is that the reasoning which led me to conclude that the adjudication officer had no power to give the decision against the claimant's estate also leads to the conclusion that there was no person who could properly appeal against that decision. The estate itself was not a person with a right of appeal under section 22(5) of the Social Security Administration Act 1992:

"(5) Where an adjudication officer has determined that any amount, other than an amount [of benefits not including income support], is recoverable under or by virtue of section 71 or 74 below, any person from whom he has determined that it is recoverable shall have the same right of appeal to a social security appeal tribunal as a claimant."

Nor was there any person duly representing the claimant's estate or the claimant herself, and the appointment of Miss PS by the Secretary of State did not cure the deficiency.

41. In cases where a claimant dies after making an appeal against a decision on a claim, but there is no personal representative of the estate or an appointee under regulation 30(1) of the Claims and Payments Regulations (but now see regulation 34 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999), it was settled that the appeal is a nullity (R(SB) 8/88) or, I think more properly, abates (R(I) 2/83 and R(SB) 25/84). Where there is no duly constituted person with a right of appeal at the time when the appeal is purportedly made, I think there can be no question of abatement, but it must be the case that there has never been a valid appeal in being. In R(SB) 8/88, the Commissioner, having decided that the appeal to the appeal tribunal in that case was a nullity, as there was no validly constituted party to the appeal, set the appeal tribunal's decision aside. But there was no validly constituted party to the appeal to the Commissioner either, so that I am not at all sure that he had the statutory power to set the appeal tribunal's decision aside. Accordingly, my determination in the present case is as set out in paragraph 1 above. I do not think that it would make any practical difference if I did not set the appeal tribunal's decision of 18 June 1996 aside in the present case. But, in case I am wrong about these particularly obscure matters, I do set the decision aside as far as it is necessary for me to do so.

42. The question therefore does not arise for decision whether the appeal tribunal, if it had had a validly constituted appeal

by representatives of the claimant's estate before it, should have expressly considered whether to exercise powers under section 36 of the Social Security Administration Act 1992 to make a determination as to whether Mr PS had personally misrepresented or failed to disclose any material fact so that the overpayment was also recoverable from him. As I have attempted to make clear at various points in the proceedings, an overpayment may be recoverable under section 71 of the Social Security Administration Act 1992 from a number of different people, so long as the conditions for recoverability are made out against each of them. It then becomes a matter for the Secretary of State to decide against whom to attempt to enforce recovery and for how much of the total overpayment. There could have been a cogent argument that the appeal tribunal took a wrong view in law of its powers in ruling out any power to make the overpayment recoverable from a "third party", by which I think must have been meant Mr PS. However, the power in section 36 only exists where a question "first arises in the course of an appeal". As there was no validly constituted appeal before the appeal tribunal, there was nothing in the course of which any other questions could arise.

43. There were many other points discussed in written submissions and at the oral hearing. In the light of the view I have taken of the law, those points do not arise for decision by me. They may well arise in some future proceedings and it is better that I say nothing about them in the present decision.

THE PRESENT POSITION IN LAW

44. I should, however, say something about where my decision leaves matters. Although what I say here goes beyond what is necessary for my decision and will not have any binding effect, those concerned are entitled to some guidance.

45. In my view, the adjudication officer's decision of 2 February 1995 was rightly reviewed as erroneous in point of law and is no longer effective. The adjudication officer's decision of 15 June 1995 exists until set aside or replaced, and the appeal tribunal's decision of 18 June 1996 has not validly replaced it. However, the adjudication officer had no power to make a recoverability decision against the claimant's estate or against Miss PS and Mrs KB. Accordingly, that decision cannot be relied on as the basis of any action by the Secretary of State to enforce recovery of the overpayment. It seems to me that the adjudication officer's decision of 15 June 1995 could now be superseded by the Secretary of State on the ground that it is erroneous in point of law under section 10 of the Social Security Act 1998 and regulation 6(2)(b) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 and the superseding decision could deal properly with the issues of recoverability of the overpayment. But before such a decision could be made against the claimant's estate, if the currently deferred probate proceedings have not resulted in a grant of probate and the due constitution of executors, an application for

some kind of limited grant of administration would have to be made (and succeed) as suggested in paragraph 38 above.

46. A recoverability decision could I think be made against Mr PS personally before a full grant of probate or a limited grant, providing that all the necessary conditions for recoverability were found to exist, and bearing in mind the amendment to section 71 of the Social Security Administration Act 1992 in July 1996 to allow a recoverability decision to be made separately from the review of entitlement to benefit. However, it might be thought better to wait until all those against whom a recoverability decision might potentially be made could be dealt with together.

(Signed) J Mesher
Commissioner

Date: 23 June 2000