★ 41/93

Commissioner's File: CIS/674/1994

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

1. I dismiss the claimant's appeal against the decision of the Taunton Social Security Appeal Tribunal dated 11 April 1994.

2. At the oral hearing of his appeal, the claimant was represented by his son and the adjudication officer was represented by Mr. M. Hunt of Counsel, instructed by the Solicitor to the Departments of Social Security and Health. I am grateful to both representatives for their helpful submissions on this appeal.

3. There is no dispute about the facts in this case. The claimant was paid income support amounting to £11,547.64, in respect of the period from 17 April 1990 to 19 July 1993. During that period, the claimant had a modest amount of savings. His wife also had two National Savings accounts. One of them had about £5000 in it during the relevant period. The other was over £19,000 in credit in 1989 and interest was added from time to time until the balance was £29, 701 . 55 on 1 5 July 1 993 when it was closed. When making his claim for income support, the claimant declared that he and his partner had savings worth in total £2,500 or more. However, when asked how much they were worth he answered "£6,000". At the end of the claim form he placed his signature beneath a declaration in the following terms:

> "I declare that the information I have given on this form is correct and complete."

It appears to have been accepted that the claimant was unaware of his wife's accounts and the £6000 he declared referred to his own savings. When the Department of Social Security discovered the existence of the claimant's wife's accounts, the award of income support was reviewed and the adjudication officer decided that the whole of the benefit paid was recoverable under section 71 of the Social Security Administration Act 1992. The claimant appealed to the tribunal but his appeal was dismissed and he now appeals against the tribunal's decision with the leave of a Commissioner.

4. The claimant alleges that the tribunal's decision was in breach of the rules of natural justice. However, the rules of natural justice are concerned only with procedural fairness and nothing has been advanced to show any breach by the tribunal. What is really suggested is that there are "mitigating circumstances" that I should take into account. The claimant and his son were under the misapprehension that I had greater powers than those of the tribunal. I have not. I can interfere with the tribunal's decision only if the tribunal erred in law and I have no more power to take account of "mitigating circumstances" than they had. I must therefore consider whether the tribunal erred in law.

5. The claimant's son did not suggest that the tribunal were wrong to hold that his mother was beneficially entitled to the money in the larger National Savings account and, in my view, the tribunal were clearly right so to hold. It follows that the amount of capital held by the claimant and his wife was such that he was not entitled to any income support during the relevant period. The claimant's son did not dispute the amount of the overpayment. In her written submission, the adjudication officer now concerned with the case suggested that the tribunal erred in not considering whether regulation 14 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988 operated so that only part of the overpayment was recoverable. However, Mr Hunt rightly pointed out that the amount of the claimant's wife's capital was such that the application of regulation 14 could not conceivably have made any difference and I take the view that the tribunal did not err in not referring to it. Therefore, the only question is whether the tribunal erred in holding that the overpayment was recoverable.

6. The claimant's son submitted that the overpayment had been due to two "mistakes" on the part of his mother: her failure to tell her husband of the existence of the accounts and her failure to put the larger account in the name of her grandson. He contrasted that with a considerable number of alleged errors on the part of the Department of Social Security. I am not persuaded that anything done, or omitted to be done, by the Department is of any relevance to the issues in this case. Nor am I persuaded that the "mistakes" of the claimant's wife are of

any relevance the question of whether the overpayment is recoverable from the claimant. However, the fact, accepted by the tribunal, that the claimant himself did not know of the accounts held by his wife does raise an arguable point of law.

7. Section 71(1) and (3) of the Social Security Administration Act 1992 provides:

> "(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure
>
> (a) a payment has been made in respect of a benefit to which this section applies; or
>
> (b) .....
>
> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made .... but for the misrepresentation or failure to disclose.
>
> (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."

By submit-section (11)(b), the section applies to income support.

8. Mr Hunt submitted that the claimant had made a clear misrepresentation when completing the claim form and that the fact that he was. not aware of his wife's National Savings accounts was not material. He referred me to clear authority for the proposition that knowledge was not relevant to the misrepresentation limb of section 71(1) as opposed to the failure to disclose limb.

9. The distinction between the two limbs was clearly drawn in R(SB) 21/82, a decision of Mr Ian Edwards-Jones QC under earlier, but indistinguishable, legislation. That was a case with marked factual similarities to the present case but in which the adjudication officer alleged that the overpayment was recoverable on the ground of the claimant's failure to disclose the fact that his wife possessed capital. No misrepresentation was alleged. In paragraph 4(2) of his decision the Commissioner said that:

> " ....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 ....'"

The Commissioner therefore concluded that it was necessary to determine whether the claimant had had knowledge of his wife's capital. However, in paragraph 24 of his decision, he said:

"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 any other cases be an easier ground to establish."

In R(SB) 9/85, a different Commissioner said, at paragraph 7 of his decision:

> "[The grounds of appeal] are directed to the claimant's ignorance of the change in his wife's earnings. That cock will not fight. Ignorance is crucial to the 'fails to disclose' limb of section 20. It is settled law that one cannot be held to have failed to disclose something of which one had no knowledge. With innocent misrepresentation, however, the case is - by very definition - quite otherwise. In the grounds of appeal to the Commissioner the claimant's representative wrote:
>
> > 'Further, the distinction between "misrepresentation" and "failure to disclose" is an artificial distinction leading to arbitrary and inconsistent interpretations of the section.'
>
> I beg to differ. Misrepresentation is founded on positive and deliberate action. In this case it was the action of signing declarations that there had been no change in the circumstances of the claimant's wife. If a claimant did not know whether there had or had not been any such change, he should not have signed. 'I do not know' or 'Not to my knowledge' would have put him beyond risk - and would, at the same time, have put the Department upon further enquiry. But he made no such qualification to his declaration. The system could not work if claimants could shelter behind their failure to make adequate enquiry into the accuracy of the facts declared by them."

In R(SB) 2/92, it was argued on behalf of the claimant that R(SB) 21/85 and R(SB) 9/85, among other cases, were wrongly decided because the legislation did not apply to innocent

misrepresentations or failures to disclose. That submission was rejected by the Commissioner and by the Court of Appeal (Page v. Chief Adjudication Officer, reported as an appendix to R(SB) 2/92). Dillon LJ said:

> "The whole burden of the phrase 'whether fraudulently or otherwise' must be, in my judgment, that it is to apply even if the misrepresentation is not fraudulent, in other words, if it is innocent. No other construction makes any sense, in my view, of this particular submit-section. Consequently, the ejusdem generis rule not being mandatory, it does not assist us on these plain words."

It is to be noted that in Page recovery was sought on the grounds that the claimant had failed to disclose that she was in receipt of widow's pension. It was not disputed that she had the requisite knowledge.

10. Nor was knowledge in issue in Jones v. Chief Adjudication Officer [1994] 1 W.L.R.62. In that case, the claimant had not disclosed the fact that, since the completion of his initial claim form for income support, he had started to receive unemployment benefit. An overpayment of income support occurred because the unemployment benefit was not taken into account. Recovery of the overpayment was sought on the grounds that the claimant had misrepresented a material fact when he signed declarations or. payable orders saying:

> "I declare that I have read and understand all the instructions in this order book, that I have correctly reported any facts which could affect the amount of my payment and that I am entitled to the above sum."

The Court of Appeal were divided as to whether that was a misrepresentation of a material fact, the majority deciding that it was. In so doing, both Stuart-Smith and Dillon LJJ stated that knowledge was relevant. Stuart-Smith LJ said:-

"First, on the facts of this case the declaration can probably be expanded by the inclusion of the words emphasised to read: 'I have correctly reported any facts known to me which could affect the amount of my payment, including the fact that I have received unemployment benefit...' In other words the greater and general any facts' must include the lesser and particular fact. Secondly, the statement 'I have correctly reported any facts which could affect the amount of my payment' is itself a statement of fact, and in my view a material fact since unless the statement is true the claimant is not entitled to the amount of benefit claimed.

In the absence of the declaration the Secretary of State could only rely on a non-disclosure of a material fact. Where the

declaration is signed, such non-disclosure is equally a misrepresentation and it is immaterial whether the Secretary of State claims to be entitled to recover the sum overpaid by reason of a misrepresentation or failure to disclose, provided the latter is established."

Dillon LJ said:-

"I read that declaration as a representation by Mr Jones, each time he signed such a declaration, that there were no facts known to him at the time he signed which could affect the amount of his payment but which he had not reported. The representation must be limited, as a matter both of common sense and law, to a representation that he had disclosed or reported or a material fact known to him, since he could not sensibly be expected to represent that he had disclosed all material facts that were not known to him."

Dissenting, Evans LJ drew a fine distinction, not relevant to the present case, between material facts and immaterial facts. He went on to say:-

"The need to make this hair-splitting distinction between the fact of non-disclosure and the material fact which is not disclosed arises solely because the D.S.S. claims repayment on the basis of misrepresentation rather than non-disclosure, doubtless in order to avoid the potential difficulties for the D.S.S. which were foreshadowed by Mr Commissioner Edwards-Jones and the Commissioners who have adopted his view. In my judgment, Mr Jones should succeed on this narrow ground, but I would also put the matter more broadly. This was essentially a case of non-disclosure, not one where misrepresented a material fact, and in my view the claim under section 53 [of the Social Security Act 19861 should be dealt with as such. If, contrary to this view, the declaration did contain a representation of material fact, then it would become necessary whether it is permissible for the D.S.S. to convert every case of failure to disclose into a case of misrepresentation by means of the declaration which would be made weekly before any payment is received, and therefore before any overpayment can be made. For the reasons given, this question, in my judgment, does not arise."

11. Mr Hunt submitted that the view of Stuart-Smith and Dillon LJJ that the standard order book declaration gives rise to a misrepresentation only when the claimant has had knowledge of the undisclosed fact was obiter, was inconsistent with the decision in Page and should not be followed. In making that submission, he adopted the reasoning of the Commissioner deciding CP/034/1993 in which he said:-

"9. If a person makes a statement knowing it to be untrue or recklessly, he is guilty of a fraudulent misrepresentation: if, on the other hand, he makes a statement in the honest belief that it is true, he will be guilty nevertheless of an innocent misrepresentation. See the well known passage in the opinion of Lord Herschell in Derry v. Peek (1889) 14 A.C.337 at p.374:

> 'Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false .... .. to prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth.'

See also Halsbury 4th Edition Vol.31, para 1064.

An innocent misrepresentation is therefore one that is made in honest belief, but if it turns out to be untrue it is nevertheless a misrepresentation, albeit innocent. Knowledge is not relevant as far as innocent misrepresentation is concerned.

However commonsense the approach of the Lords Justices [in Jones] might be, it seems to me that it leads to the conclusion that although the misrepresentation may be innocent, it is not to be an effective misrepresentation so far as section 71 is concerned if it is qualified by a term such as 'So far as the claimant knew or was aware' and that is tantamount to saying that unless the claimant knew what he had misrepresented was wrong. If you get that far, that brings the case perilously close to fraudulent misrepresentation. The essence of innocent misrepresentation is honest belief in the truth of the misrepresentation: if there is no honest belief then the misrepresentation may become fraudulent. However blameless a representator may be - and that is evidently what the Lords Justices thought he was in the Jones case - a blameless misrepresentation is nevertheless an innocent representation and, therefore, if untrue, a misrepresentation for the purposes of section 71 as a result of which, overpayment may be recoverable.

10. But in my view the truth of the matter is that the words of the declaration were clear and need no qualification. In Pace v. CAO, the Court of Appeal, as part of their ratio decidendi, held that these very words were clear and unambiguous, and they comprehended innocent as well as fraudulent misrepresentation. So far as innocent misrepresentation was concerned, knowledge was immaterial."

12. It is true that it was not strictly necessary for Stuart-Smith and Dillon LJJ to say what would have been the position had Mr Jones not had the knowledge he did have. However, what they said was an important part of their reasoning and in my view should be reconciled with other authorities if at all possible. It was an important part of their reasoning because it seems to me to be their answer to the point made by Evans LJ, which was that to construe the standard declaration as a representation of material fact was to convert all failures to disclose into misrepresentations. I think Evans LJ was concerned, not so much about the conversion of failures to disclose (in Mr Edwards-Jones's sense) into misrepresentations - which would make no difference - but the conversion of other non-disclosures which would substantially widen the Secretary of State's rights to recover overpaid benefit. In my view it is probable that Stuart-Smith and Dillon LJJ had that point in mind when they effectively held that non-disclosures had the same effect as misrepresentations only when the claimant had knowledge of the undisclosed fact.

13. In any event, I do not consider there is anything in Jones that is inconsistent with Page which was cited to the court in Jones and to which Evans LJ referred in his judgment. Stuart-Smith and Dillon LJJ were not suggesting that lack of knowledge of the material fact would mean that the person signing the standard declaration would be making an innocent misrepresentation; they were suggesting there would be no misrepresentation at all because the declaration was to be regarded as qualified so as to refer only to facts known to the claimant. They were not prepared to regard it as further qualified so as to refer only to facts which the claimant understood had to be reported (as had been held in CSB/790/88), Dillon LJ saying: "The actual words of the representation, any facts which could affect the amount of my payment, are too wide and clear to be limited even to what a reasonable man would think would affect the amount of the payment." Therefore, they did not regard knowledge as relevant because they regarded the distinction between fraud and innocence as being material, but because of the construction they placed on the declaration. On their construction of the standard order book declaration, a claimant who is not aware of the relevant fact is stating the truth when signing the order book, because he is declaring that he has correctly reported any facts known to him which could affect the amount of his payment.

14. In the present case, the adjudication officer was not relying on the standard declaration in the order book but on the information supplied on the claim form. In my view, that must be read with the declaration at the end of the claim form. When hearing Jones, the Court of Appeal also heard a separate appeal, Sharples v. Chief Adjudication Officer, and judgment in both cases was given together. In Sharples the claimant had not

disclosed capital of which he was unaware and he had signed the claim form below a statement in the following terms:

> "As far as I know, the information on this form is true and complete."

It was held by all three members of the court that the answers in the form were qualified by the statement and, because the information was true as far as the claimant knew, there was no misrepresentation. In the present case, the statement at the end of the claim form is not expressly qualified by the words "as far as I know". However, there arises the question whether the statements on the bottom of the claim form should be construed in the same way as the order book declaration considered in Jones. If so, it would follow from Sharples that all the answers on the claim form would be qualified by an implicit statement that they were complete only as far as the facts were within the claimant's knowledge.

15. I cannot see any distinction between a declaration that "information I have given is ..... complete" and a declaration that the claimant has "correctly reported any facts which could affect the amount of my payment". However, the declaration on the claim form does not refer simply to the information being "complete" but to it being "correct and complete". In my view, the issue is whether the declaration that "The information I have given on this form is correct and complete" is to be construed as meaning that the information is "complete in so far as I have knowledge of the material facts and correct to that extent" or as meaning that it is "correct in all respects where I have answered specific questions and otherwise complete in so far as I have knowledge of the material facts". I take the view that the latter construction is to be preferred and that the words "and complete" are really apposite only to parts of the claim form such as section 12 where the claimant is told:- "You can use this space to tell us anything else that you think we might need to know". Where a claimant is asked specific questions he guarantees the accuracy of the answers by his declaration and lack of knowledge on his part is no bar to recovery on the ground of misrepresentation if any of the answers is wrong. That is the position where similar declarations are signed on insurance forms (see Joel v. Law Union and Crown Insurance Co [1908] 2 K.B.863, to which Dillon LJ referred in Jones). It has long been accepted that the term "misrepresentation" has the same meaning in social security law as in insurance law.

16. In the present case, the claimant, having said that he and his wife had savings worth £2500 or more was asked how much they were worth. He answered "£6000" and declared that that information was correct. It was not correct and, accordingly, the claimant had misrepresented a material fact and the resulting overpayment was recoverable from him. In my view, the tribunal

reached the only conclusion open to them and I dismiss the claimant's appeal.

17. I would add that, while it was accepted that the claimant knew nothing of his wife's National Savings accounts, she obviously was well aware of them. It seems to me to be at least arguable that, in a case where a claimant's partner is aware of facts that are unknown to the claimant and knows that they are unknown to the claimant and that they are material to the claim, there is a duty on the partner to disclose those facts to the Department of Social Security. If that is so, a failure to disclose such facts may entitle the Secretary of State to recover any resulting overpayment from the partner, from whom the prospects of recovery may be greater than they are from the claimant.

(Signed) **M. Rowland**
Commissioner

(Date) 15 May 1995