R(SB) 2/92
(Page and Davis v. CAO)

Mr. J. J. Skinner **CSB/72/1990**
29.6.90

CA (Dillon, Woolf and Leggatt LJJ)
24.6.91

Recovery of overpayment – overpayment due to innocent failure to disclose a material fact – whether recoverable

A widow who claimed and received supplementary benefit failed to disclose to the local office of the Department of Social Security that she had received widows benefit. As a consequence there was an overpayment of supplementary benefit. It was accepted that her failure to disclose was wholly innocent The Commissioner rejected the claimant's argument that on its true construction section 53(1) of the Social Security Act 1986 does not catch innocent misrepresentation or innocent failure to disclose. On 24 June 1991 the Court of Appeal (Dillon, Woolf and Leggatt LJJ) dismissed an appeal by the claimant and *held* that:

> the wording of section 53(1) was plain and unambiguous and covers innocent as well as fraudulent misrepresentation and non-disclosure

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal is not erroneous in point of law and accordingly the appeal fails.

2. This is an appeal by the claimant against the decision of the Whittington House Western social security appeal tribunal given on 23 June 1988. I heard it in conjunction with two other appeals, CSB/942/1989 and CSB/73/1990, in which similar issues arose. At the hearing the claimant was represented by Mr. Michael Shrimpton of counsel as was the claimant in CSB/73/1990. Mr. English from the Free Representation Unit represented the claimant in CSB/942/1989. Mr. Parke from the solicitor's office of the Department of social security appeared for the adjudication officer in all three appeals. I am indebted to all three gentlemen for the clarity and depth of their submissions.

3. The claimant in this appeal is a widow. The overpayment arose because she was in receipt of widow's pension and because there had been a failure to disclose this to the local office of the Department of social security. It has been accepted by the Department at all times that the failure to disclose was wholly and entirely innocent. At the hearing before the tribunal the only issue was one of law, namely whether section 53 of the Social Security Act 1986 conferred a right to recover an overpayment of benefit, when the breach of the requirement to disclose a material fact was one which was made wholly innocently. The tribunal found against the claimant on this issue after hearing the full argument from Mr. Shrimpton and on behalf of the Department. The decision of the adjudication officer, issued on 12 February 1988, that supplementary benefit amounting to £433.05 had been overpaid and was recoverable from the claimant was confirmed by the tribunal. The members held that the *ejusdem generis* principle did not restrict the meaning of the words "or otherwise"

as used in the phrase "fraudulent or otherwise" in the section because of the absence of a *genus* They also considered the decisions of the social security Commissioners relating to section 20 of the Supplementary Benefit Act 1976 and took the view that they were bound by them.

4. This appeal raises an important point upon the true construction of section 53 of the Social Security Act 1986.1 must set out sub sections (1) and (2) of that section in full:

> "53-(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 -
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> (a) a payment has been made in respect of a benefit to which this section applies; or
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> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
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> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.
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> (2) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it."

Mr Shrimpton argues that the words "whether fraudulently or otherwise" are to be construed in accordance with the *ejusdem generis* rule and only bite where the failure or misrepresentation are fraudulent or culpable in a sense akin to fraud. Mr. Parke argues that the reference to "fraudulently or otherwise" extends the scope of that section beyond culpability to wholly innocent misrepresentation or innocent failure to disclose.

5. Up until the coming into force of section 53 there were two different sets of rules governing the recovery of overpaid benefit. Section 119 of the Social Security Act 1975 made overpayment of benefit under that Act recoverable where there had been a failure to use due care and diligence in avoiding the overpayment. In so far as supplementary benefit was concerned, the position was regulated by section 20 of the Supplementary Benefit Act 1976. I set out the material parts of section 20:

> "20. - (1) If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material fact, and in consequence of the misrepresentation or failure -
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> (a) the Secretary of State incurs any expenditure under this Act; or
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> (b) any sum recoverable under this Act by or on behalf of the Secretary of State is not recovered;
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> the Secretary of State shall be entitled to recover the amount thereof from that person."

It will be seen that section 53 of the 1986 Act is for all practical purposes identical with section 20, but of course the new section applies to all benefits under the Social Security Act 1975, child benefit, family credit and, subject to the provisions of

subsection (10A) of the section, to income support. In so far as means tested benefits are concerned the phrase used can be traced back to the National Assistance Act 1948, which dealt with recovery in cases of misrepresentation or non-disclosure, and it was again repeated in the Ministry of Social Security Act 1966, section 26. Prior to the enactment of the National Assistance Act 1948 the Poor Law Act 1930 dealt with the problem by way of the criminal law and section 20 of that Act provided that a person who did not make correct and complete disclosure was to be taken to be an idle and disorderly person within the meaning of the Vagrancy Act 1824. Since 1986 the supplementary benefit test has been applied as a common test.

6. I now turn to the decisions of the social security Commissioners interpreting section 20 of the Supplementary Benefit Act 1976. The earliest of such decisions was given in 1982 and it enunciated a construction which has been followed in later Commissioners decisions. In all six reported decisions have been cited to me in support of the proposition that the wording of the section catches a wholly innocent misrepresentation or failure to disclose. In addition to these six decisions (they span a period of five years) a great number of unreported decisions have followed the same principle of law and applied it. It is argued by Mr. Parke that all this represents a body of case law which should not be lightly set aside. I accept that there is a bulk of authority which, unless swept away, establishes the rule that a wholly innocent misrepresentation or failure to disclose will suffice to ground a claim for recovery of an overpayment. Mr. Shrimpton argues that the reported decisions of Commissioners were wrong and that all were given *per incuriam*; and further that they decided the question *obiter* and without the benefit of full legal argument.

7. R(SB) 21/82 related to the recovery of overpayments made to both a husband and wife during their lives. Benefit had been assessed and paid in reliance on statements signed by both husband and wife to the effect that neither had capital resources. Following the wife's death it was discovered that she had possessed significant capital resources and the Secretary of State sought to recover from her estate the benefit which had been overpaid, as a result of the non-disclosure of those resources, in accordance with section 20 of the Supplementary Benefit Act 1976. The administrator of the estate disputed that the Secretary of State was entitled to recover the overpayment and the question was referred to an appeal tribunal who determined that £2,955.08 was recoverable from the estate. The administrator appealed to a social security Commissioner. The principle point at issue before the Commissioner was whether the section enabled an overpayment to be recovered out of the estate of a deceased person from whom recovery would lie if he were still alive. The Commissioner answered this question in the affirmative and then went on to consider the general application of section 20 to the facts before him. He analysed the section and in paragraph 4 of this decision had this to say:

> "(2) In my judgment, 'any person' is quite clearly to be taken in its ordinary sense and extends to any person whatsoever provided that it is he or she who has made the material misrepresentation or failed to make the material disclosure; but while 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. non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected: see among

> the definitions of 'failure' in the Shorter Oxford English Dictionary: 'one ... non-performance, default; also a lapse ...'
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> (3) However, the reference to 'fraudulent or otherwise' necessarily extends the scope of the provision beyond fraudulent misrepresentation or failure to disclose to wholly 'innocent' misrepresentation or failure to disclose, for instance, by reason of forgetfulness."

I do not accept that what was said by the Commissioner in paragraph 4(3) was *obiter.* It was not the principle question before him but, in exercise of his inquisitorial jurisdiction, he had to be satisfied that the tribunal dealt correctly with the question of the non-disclosure by the husband and wife when they were alive. However it is clear that the Commissioner dealt with the question of the construction without reference to any canon of interpretation and it would appear that he did not hear argument on the point. He seems to have approached the construction on the basis that there was no ambiguity in the wording of the sub-section.

8. R(SB) 28/83 was a case where, on claiming supplementary benefit following his discharge from a psychiatric hospital, the claimant declared that his only capital was £173 in the Post Office. It was discovered later that he possessed capital of several thousand pounds, and that his financial affairs were dealt with by his brother (as receiver appointed by the Court of Protection) who at the time of the hearing was the deceased claimant's personal representative. The supplementary benefit officer determined that the sum of £1,641 was recoverable under section 20. On appeal the tribunal confirmed that decision. The claimant's appeal to the Commissioner was dismissed. The Commissioner at paragraph 10 said as follows:

> "In terms of section 20 of the Act of 1976, it is not necessary to show intention or malice or even negligence on the part of the deceased in failing to disclose at the relevant time his capital assets. In my opinion, it is necessary to show that the deceased either knew or with reasonable diligence ought to have known that he possessed such assets."

Again in that case it would appear that no argument as to the meaning of the statute was advanced before the Commissioner and it was construed on the basis that there was no ambiguity.

9. R(SB) 44/83 was a case where the personal representative of a deceased claimant sought leave to appeal to the Commissioner against the recovery of an overpayment, which was caused by the late claimant's failure to disclose an investment, on the grounds that the estate had been settled and the money from it spent. The Commissioner held that the contentions of the personal representative were not directed to the question whether there was a right to recover under section 20; he had proceeded on the basis that the right had become extinguished or unenforceable and the Commissioner held that this was not a question for the statutory authorities, but was an issue which the Secretary of State had to consider. He went on to say at paragraph 7:

> "For completeness, I should say that the appellant has also challenged the initial right to recover, but there is no substance in her grounds for so contending. In case it may be of some comfort to the appellant, recovery is required under section 20 even in the absence of fraud. A failure to disclose

> may be wholly innocent, but the consequence is that there is still a liability to repay."

Again in that case the Commissioner's *dictum* was given without hearing argument but on the basis there was no ambiguity. In R(SB) 54/83 a Commissioner explained what must be proved in order to recover expenditure on the grounds of failure to disclose a material fact. He explained *inter alia* that it must be shown that the person from whom it is sought to recover the expenditure knew the material fact and that such disclosure by the person was reasonably to be expected. He did not enter into the controversy of innocent failures to disclose other than in that limited sense, but it may be inferred from his decision that he accepted the correctness of the interpretation placed on the section by the Commissioner in R(SB) 21/82. R(SB) 18/85 is a case where the Commissioner adopted what was said at paragraph 4(3) of R(SB) 21/82. It was a case dealing with misrepresentation. The Commissioner had this to say, at paragraph 8:

> "It might well be that he honestly believes that his Army pension did not constitute either earnings or income, but this only went to the question of fraud. However, as the terms of section 20 clearly indicate, fraud or the absence of it was a wholly immaterial consideration (R(SB) 21/82 para. 4(3)), in so far as the tribunal regarded as reasonable the claimant's belief as to the effect of his Army pension, they were considering the wrong issue. Reasonableness or innocence had simply nothing to do with the matter in hand."

In that case the claimant was represented by counsel.

The construction was recognised by a tribunal of Commissioners in R(SB) 15/87. It was said at paragraph 14:

> "There is no suggestion of misrepresentation by the claimant and the adjudication officer accepted that the claimant's 'failure to disclose a material fact was wholly innocent', not that that relieves him of his duty to make such disclosure (see para. 4 of R(SB) 21/82)."

In addition to the decisions cited in argument there are other reported decisions where the same interpretation was placed on the section; see R(SB) 9/85, where it was held that a wholly innocent misrepresentation allowed a recovery under the section. In addition to the reported cases there are countless unreported decisions of Commissioners where the same meaning is given to the section as was given by the Commissioner in R(SB) 21/82.

10 There is a massive bulk of Commissioner authority which, unless swept away, establishes that the scope of the section goes beyond fraudulent misrepresentation or failure to disclose and extends to wholly innocent misrepresentation or failure to disclose. Mr. Shrimpton argues that all this was given *per incuriam* because the rules of construction were not argued before the Commissioners in the reported decisions, in particular that the *ejusdem generis* rule had not been relied upon. The *ejusdem generis* rule was not referred to in any of the decisions nor, indeed, were any of the other subordinate rules of construction. I think the reason for the omission was that it was unnecessary for the Commissioners to look to those rules of construction because they would only need to seek guidance from them in cases of ambiguity of meaning. The Commissioners, who decided these cases, were of the opinion that the wording

was unambiguous and clear and there was no need for them to interpret the section by using the subordinate principles of construction. It seems to me on analysis that Mr. Shrimpton' s argument depends on creating an equivocable meaning, by use of the *ejusdem generis* rule, where in fact the section is unequivocably expressed.

11. It is also to be borne in mind that the Court of Appeal, on at least two occasions, has accepted the interpretation placed on the section by the Commissioners, namely in *Duggan v. Chief Adjudication Officer,* a report of which appears as an appendix to R(SB) 13/89, and in *Cummock v. The Chief Adjudication Officer*, a transcript of that judgment is before me.

12. If the words of a statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in each case best declare the intention of Parliament. In my view that was the approach adopted by the Commissioners on section 20 of the 1976 Act in the cases to which I have been referred. The object of all interpretation of a statute is to determine what intention is conveyed, either expressly or impliedly by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it. I remind myself of what was said by Scott LJ at 280 in *Croxford v. Universal Ins. Co.* [1936] 2 KB 253:

> "Where the words of an Act of Parliament are clear, there is no room for applying any of those principles of interpretation, which are mere presumptions in case of ambiguity."

So my first task is to decide whether the words of section 53 of the 1986 Act are plain and bear one meaning only. I have read them again and again with care and in my view they are precise and unambiguous. I have borne in mind that they are a virtual re-enactment of section 20. In my judgment the only construction which can be placed upon them is that the misrepresentation or failure to disclose may be made either fraudulently or, in contrast thereto, innocently. It seems to me that such is the interpretation to be placed upon them when they are looked at in their natural and ordinary sense. When I look at them in the context which they are used, and in light of the words which surround them, I am reinforced in the view I have taken of them. There was one question which caused me concern. I asked myself why it was necessary for the draughtsman of the section to use the words "whether fraudulently or otherwise" at all. But it seems to me they must have been used for the avoidance of doubt and in order to emphasise that innocent and not only fraudulent misrepresentation or failure to disclose were to be caught and to make sure that a challenge to the section on that basis could be defeated. Because of the view which I have of section 53, it is unnecessary for me to enter upon an examination of all the points which have so diligently been taken by Mr. Shrimpton arising from the canons of construction. I bear in mind the words used by Lord Diplock in *Duport Steels Limited v Sirs* [1980] 1 All ER 529 at 541

> "..., the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judge to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral."

It is not to be supposed that I consider the consequences of the meaning, which I accept, to be inexpedient or unjust or immoral. But to introduce in this case the *ejusdem generis* rule, where the words are plain and unambiguous, would be to invent a fancied and forced ambiguity. It follows that I place a similar interpretation on section 53 of the 1986 Act to that placed by Mr. Commissioner Edwards-Jones on section 20 of the 1976 Act in R(SB) 21/82.

13. For the sake of completeness I must refer to other matters. Mr. Shrimpton contends that section 53 of the 1986 Act, like section 20 of the 1976 Act before it, is a penal section. Clearly it does not create an offence, as he concedes. But he argues that a claimant is deprived of money, much hardship is inflicted upon him and consequently the section provides for the recovery of a penalty. He goes on to contend that two consequences arise from this, first that the section must be construed strictly against the Department and in favour of the claimant, and second that the principal of doubtful penalisation is applicable. It is necessary to look to the object of the section. It deals with circumstances where a person has received money which he should not have been paid. Some person, not necessarily the person who receives the money, has misrepresented or failed to disclose a material fact and in consequence of that the payment was made. The amount recoverable is expressly specified by subsection (2) to be recoverable from the person who misrepresented the fact or failed to disclose it. I have considered whether the section might be said to be penal because the recovery of the money is not necessarily from the person who has received it, but from the person who has failed to disclose or misrepresented the material fact. It could be suggested that the object is to penalise a person who acts in that way. But in my judgment the object of the section is not punishment, but rather the compensation of the Department for the money which it has paid. It is to be borne in mind that the money, which can be recovered, is not fixed but has to be assessed by the statutory authorities. The section speaks of "recover". It does not seem to me that a statute which inflicts hardship or deprivation is because of that alone a penal statute. The object of the penal measure must be punishment and not compensation. Manifestly section 53 is designed to compensate the Department. I have derived assistance from the decision of the Court of Appeal in *Thomson v. Lord Clanmorris,* [1900] 1 Ch 718, where the Court considered whether section 3 of the Directors Liability Act 1890 gave rise to an action of a penalty. Lord Lindley MR said at 726:

> "What you find in the Directors Liability Act is a liability imposed - a liability to make compensation - and the money payable is obviously a compensation to the plaintiff for the loss which he has sustained. It must be estimated and awarded with reference to that. It does not in the least resemble a 'penalty, damages or sum of money' imposed by statute as a punishment without reference to the injury sustained by the person who sues for it."

It seems to me that like reasoning can be applied to section 53 of the 1986 Act and I hold that is not a penal section.

14. Mr. Shrimpton has raised the question of a violation of the claimant's human rights under Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. I find that argument unacceptable. The right to enjoyment of possessions may be derogated from under the provisions of the Article in the public interest. It is in the public interest that the state should recover money paid as a result of misrepresentation or failure to disclose, which

would not have been paid but for that. The recovery is provided for by statute and is subject to appeal to the statutory authorities.

15. I reject the argument advanced by Mr. English on *reddendo singula singulis* and my reasons for so doing are set out in CSB/942/1989.

16. I come to the jurisprudential reason why this appeal would have to be dismissed by me, even if I had taken a different view of the section. I turn to the doctrine of precedent in so far as Commissioner's decisions are concerned. Commissioners are all of equal status and have equal jurisdiction in deciding the question of law which comes before them. There decisions are of binding effect on social security appeal tribunals and other local tribunals as well as on adjudication officers. The leading case of R(I) 12/75 sets out a number of rules. Among these is the rule that if a decision decides questions of legal principle it must be followed by adjudication officers and tribunals in a case involving the application of that principle unless the case can be distinguished. It also held that a single Commissioner follows a decision of a tribunal of Commissioners unless there are compelling reasons why he should not do so and normally follows the decision of another single commissioner. The tribunal of Commissioners explained this at paragraph 21 of their decision as follows:

> "In so far as the Commissioners are concerned, on questions of legal principal, a single Commissioner follows a decision of a tribunal of Commissioners unless there are compelling reasons why he should not, as, for instance, a decision of a superior court affects the legal principals involved. A single Commissioner in the interests of comity and to secure certainty and avoid confusion on questions of legal principal normally follows the decision of other single Commissioners (see decisions R(G) 3/62 and R(I) 23/63). It is recognised however that a slavish adherence to this could lead to the perpetuation of error and he is not bound to do so."

The question before me is one of legal principle and I should follow the decision of the tribunal in R(SB) 15/87 unless there are compelling reasons why I should not do so, see R(U) 4/88. In the interests of comity and to secure certainty and avoid confusion, I should follow the decisions of another single Commissioner; I recognise that I am not bound to do so and certainly I should not slavishly adhere to the principle where I think a decision is wrong. However, the question of construction, which is at issue in the instant case, is not only one which has been decided by a single Commissioner or even by a tribunal of Commissioners. It is one which is well settled law and has received the acceptance of all Commissioners over the last eight years. I bear in mind the words of Lord Denning in *R v. National Insurance Commissioner* [1979] 2 All ER 278 at 282:

> ". .: if a decision of the Commissioners has remained undisturbed for a long time, not amended by regulation nor challenged by certiorari, and has been acted on by all concerned, it should normally be regarded as binding. The High Court should not interfere with it save in exceptional circumstances, such as where there is a difference of opinion between the Commissioners (see *R v. National Insurance Commissioner, ex parte Michael*). A recent decision is less binding."

That of course was said before appeal to the Court of Appeal had replaced judicial review, but it emphasises the need for a cautious approach where the law has been settled by the Commissioners.

17. It is to be remembered that there is not a single Commissioner's decision which shows a division of opinion on the construction to be placed on the earlier section. In addition to the single Commissioner's decisions there are the two cases which came before the Court of Appeal and which are binding upon me. It does not seem to me that it can be said that all these cases were decided *per incuriam*. It cannot be overemphasised that the decisions of the Commissioners and those of the Court of Appeal have been uniform and accepted the same interpretation of the section. I am in duty bound to follow them. I do so. This is an additional reason for dismissing the appeal.

Date: 29 June 1990

(signed) Mr. J. J. Skinner
Commissioner

The claimant appealed to the Court of Appeal. The decision of the Court of Appeal follows

DECISION OF THE COURT OF APPEAL

Mr. Michael Shrimpton, instructed by Messrs. Hillingdon Legal Resource Centre (Hayes, Middlesex), appeared for the Appellants (Plaintiffs).

Miss Genevra Caws QC, instructed by The Solicitor, Department of Social Security, appeared for the Respondent (Defendant).

LORD JUSTICE DILLON: These are appeals by two ladies, Mrs. Page, Mrs. Davies, pursuant to the leave of the social security Commissioner from a decision, in the case of Mrs. Page, of social security Commissioner Skinner, whereby her appeal against the decision of a social security appeal tribunal was dismissed.

The question that arises on each appeal is a question under section 53(1) of the Social Security Act 1986. That subsection provides as follows:

> "Where it is determined that, whether fraudulently or otherwise, person has misrepresented, or failed to disclose, any material fact an consequence of the misrepresentation or failure -
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> (a) a payment has been made in respect of a benefit to which this section applies; or
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> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
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> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose."

The wording of the subsection is invoked in the case of both these appellants for entirely innocent conduct, that is to say misrepresentation or failure to disclose a material fact which was in no way fraudulent but innocent.

The case put forward by Mr. Shrimpton on appeal is that on a true construction the section is to be construed only as applying to misrepresentation or failure to disclose which is fraudulent or affected by moral turpitude or deliberate, malicious or reckless. That is not intended to be a complete category of the interpretation he relies on but he says emphatically that innocent conduct is not caught and an innocent person is not to be penalised by being subjected to the recovery of overpaid benefit.

It is not in doubt that the benefits in question are the discretionary benefits which are paid to people with the least means. They are not benefits franked by contributions and it is submitted, and it is a submission I am not concerned to traverse, that this is in certain respects penal in the harshness of the effects it may have. It is a section which appears to give a discretion to the Secretary of State. With that, however, and the operation of the discretion we are not concerned. We have

been told by Miss Caws, for the Department, that the intention would be to recover by instalments from future benefits at a low rate and subject to review in the case of hardship, but we are not concerned with that, because the essential question raised is the question of construction of the provisions of the section.

Mr. Shrimpton argues that the words "whether fraudulently or otherwise" are to be construed in accordance with the *ejusdem generis* rule and so cannot be construed so as to cover innocent misrepresentation because that is not of the same genus as fraudulent misrepresentation. Alternatively, he puts the case on the *noscitur a sociis* maxim that the word is to be construed in its context with the words that go with it and otherwise is coloured by, and to be construed in order with, the context of the word "fraudulent".

In the connection with *noscitur a sociis* we were referred by Mr. Shrimpton in particular to the decision of the House of Lords in *London & North Eastern Ry. Co. v Berriman* [1946] 1 All ER 255. In his speech in that case at page 260E, Lord MacMillan referred to the collocation of the words as being significant, but he also, and to my mind in the present context it is of greater importance, said this at 260H:

> "It is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language. I quote and adopt the words of Alderson B in *Attorney General v Lockwood* (9 M & W 378 at 398):
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> > 'The rule of law, I take it, upon the construction of all statutes . . . is, whether they be penal or remedial, to construe them according to the plain, literal and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act or to some palpable and evident absurdity'."

In the same case Lord Simonds, at page 268F, referred to what he said he had "always understood to be a cardinal rule in the construction of statutes, which is nowhere better stated than in *Unwin v Hanson*", where Lord Esher "thus stated the principle [1891] 2 QB 115 at 119:

> 'If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words'."

In relation to *noscitur a sociis*, Mr. Shrimpton also referred us, as an illustration of the principle, to the case of *Stag Line Limited v. Foscolo, Mango And Company Limited* [1932] AC 328. There, a ship started from Swansea with a cargo of coal for carriage to Constantinople, but she deviated into St. Ives to land some engineers who were on board for a particular purpose and on leaving St. Ives and

before she had returned to her usual route she stranded on the Cornish coast and was lost with the whole cargo. It was sought to justify the deviation by a term under the bills of lading which gave the shipowners liberty to call at any ports in any order for bunkering or other purposes. Not surprisingly, it was held that the words "other purposes" were coloured by the context in which they appeared and did not confer any general licence to deviate. It is quite obvious that they were ancillary to the general purpose of carrying the cargo from Swansea to Constantinople.

In the present case the argument for the department as set out in the skeleton argument is simply this. In ordinary English language the phrase "whether fraudulently or otherwise" is used to mean simply "whether fraudulently or not"; and so the words "whether fraudulently or otherwise" have a plain and unambiguous meaning which leaves no room for the application of the various ancillary rules of construction. Many of the rules mentioned by Mr. Shrimpton in his skeleton argument, such as the maxim *aequum et bonum est lex legum,* and the submission he puts that the section, in its effect on poor people and the hardship it could involve, is to be regarded as tantamount to a penal act, are maxims which the court would gladly apply where there is a choice of two alternative constructions, one narrower one wider. The question in this case is whether there really is any choice.

Mr. Shrimpton puts his argument, essentially, on the *ejusdem generic* rule. He points out correctly that that is one of the first rules of construction which is taught to every student in matters of parliamentary construction. He adds, and I for my part would accept, that there is no reason why it should not apply where, as here, there is not a category of matters which are said to form the genus but one matter only. Therefore, especially as Miss Caws conceded that point, we did not find it necessary to call on Mr. Shrimpton to deal with certain observations by Lord Diplock in *Quazi v Quazi* But the question is whether it can, indeed, be fairly said that the *ejusdem generic* rule is to be applied. Mr. Shrimpton's submissions point out that of course it has been in other contexts in other Acts used where words such as "or otherwise" have been used in the Act. But it really seemed that his submissions came down to this: that Acts of Parliament and other legal documents are not to be construed according to the natural and ordinary meaning of the words used, but according to the rules of construction devised by lawyers over the centuries, which, while not strictly mandatory, are not easily to be pushed to one side or displaced.

Undoubtedly, the *ejusdem generic* rule is long established and very helpful in many contexts in enabling a phrase to be understood, be it in a statute or in a legally drawn agreement; and, as I have said, I do not regard its application as limited so as to exclude the case where there is only a single word used from which the category can be determined. But here, as it seems to me, the context in which the words appear shows that "whether fraudulently or otherwise" comes in connection with a person having, by misrepresentation or failure to disclose material facts, obtained a payment which he or she should not have obtained. In such a context, anyone would say that the money must be recoverable the Secretary of State must have power to recover it,

whether or not as a matter of discretion he exercises the power if the misrepresentation or non-disclosure was fraudulent.

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

Mr. Shrimpton referred us to other decisions. We discouraged him from referring to many decisions on other cases because in a case such as this other decisions do not help. One was the case of *Hadley v Perks* [1866] LR 1 QB 444, where Mr. Justice Blackburn was concerned to construe the word "having" as "having in his possession goods which may be reasonably suspected of being stolen or unlawfully obtained". That section was ancillary to a section in which the word "having" had been linked to "conveying" in the context of constables stopping, searching and detaining persons in, it would seem, the public highway and the word "conveying" was taken into account in construing the word "having". That seems plain sailing, if I may respectfully say so.

He also referred, as particularly helpful to him, to the decision of Mr. Justice Hamilton, as he then was, in the case of *The Attorney General v. Seccombe* [1911] 2 KB 688. That was concerned with the construction of the very well known phrase "to the entire exclusion of the donor or of any benefit to him by contract or otherwise" in section 11 subsection (1) of The Customs and Inland Revenue Act 1889 and therefore, by reference, in section 2(1)(c) of the Finance Act 1894. That was a section which was at the heart of an enormous part of the litigation over estate duty for very many years. There were also many other statutory provisions that came in. It was concerned with gifts where, in effect, it seemed that, without legal right but by acquiescence of the donee, the donor had retained all the benefits of the property given. The context is wholly different from the context in the present case, and I cannot regard what Mr. Justice Hamilton said in that case, which was in line with some observations in the Court of Session though there was always a certain amount of query whether it would stand up if challenged in a higher court, as governing the construction to be put on what, to my way of thinking, are plain and obvious words in the section with which we are concerned in the present case.

Mr. Shrimpton drew our attention also to the earlier legislative history of the phrase "fraudulently or otherwise" with which we are concerned, which is to be found in connection with the same discretionary benefits in section 45(1) of the National Assistance Act 1948. He also referred us to the wording in relation to certain insured and non-discretionary benefits in section 40 subsection (1) of the National Insurance (Industrial Injuries) Act 1946. That section was considered by a divisional court of the Queen's Bench Division in the case *of R v. Medical Appeal Tribunal (North Midland Region) ex parte Hubble* [1958] 2 All ER 374. The judgment was delivered by Mr. Justice Diplock. The subsection provides:

> "Any decision under this Act of a medical board or a medical appeal tribunal may be reviewed at any time by a medical board if satisfied by fresh evidence that the decision was given in consequence of the nondisclosure or misrepresentation by the claimant or any other person of a material fact (whether the non-disclosure or misrepresentation was or was not fraudulent)."

The Divisional Court held that the wording used there, "whether the nondisclosure or misrepresentation was or was not fraudulent", left no room for any *ejusdem generic* approach and plainly covered the case of an innocent non-disclosure or misrepresentation.

Mr. Shrimpton submitted, firstly, that the wording used in the 1946 Act, section 41, "whether the non-disclosure or misrepresentation was or was not fraudulent" was different from the wording used in the 1948 Act, "whether fraudulently or otherwise". Therefore, he submitted, there was a presumption, although the two matters were not dealing with precisely the same subject matter, that different intentions were intended to follow from the use of different words. For my part, I am unable to discern any different meaning in the words "fraudulently or otherwise" in respect of misrepresentation and non-disclosure, and the words "whether the nondisclosure or misrepresentation was or was not fraudulent" in the like context in relation to non-disclosure or misrepresentation.

I do not find it possible to construe Acts of Parliament by searching out such minutiae in differences of wording and attempting therefore to find a construction which is not the plain and obvious construction. Applying the general principles mentioned by Lord MacMillan and Lord Simonds in their speeches in the *London & North Eastern Ry. Co.* case, I find the wording of section 53(1) plain and unambiguous. It covers innocent as well as fraudulent misrepresentation and non-disclosure, and I would dismiss this appeal.

LORD JUSTICE WOOLF: I agree and there is nothing I can usefully add.

LORD JUSTICE LEGGATT: The respondents have been concerned to establish the governing principle. Having done so, it is to be hoped that they will exercise such discretion as they may have to refrain in the cases now before the court from actually proceeding to recover sums overpaid to the innocent recipients of their apparent bounty, especially having regard to the length of time for which the threat of recovery has been overhanging them.

To Mr. Shrimpton's arguments I will only add *Dis aliter visum,* for which he will not need the translation, "the gods thought otherwise".

I agree that the appeal should be dismissed.

Order: Appeal dismissed; legal aid taxation for the appellants; application for leave to appeal to the House of Lords refused.