HOUSE OF LORDS SESSION 2004–05

[2005] UKHL 16

on appeal from: [2003] EWCA Civ 138

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Hinchy (Respondent)

v.

Secretary of State for Work and Pensions (Appellant)

ON

THURSDAY 3 MARCH 2005

The Appellate Committee comprised:

Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond

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Hinchy (Respondent) *v.* Secretary of State for Work and Pensions (Appellant)

[2005] UKHL 16

LORD HOFFMANN

My Lords,

1. Miss Maureen Hinchy lives in Islington. For many years she has been paid income support, a benefit payable under Part VII of the Social Security Contributions and Benefits Act 1992 ("the Benefits Act") and the Income Support (General) Regulations 1987 (SI 1987 No 1967). Her entitlement, which is governed by regulation 17 and Schedule 2, depends upon a variety of factors, including her entitlement to certain other benefits. In some cases, entitlement to another benefit, such as child benefit, results in a reduction in income support. In other cases, it results in being paid a premium. In the latter category is disability living allowance ("DLA"), payable under Part III of the Benefits Act to people who are in need of care in various degrees because they are severely disabled. A person who is awarded DLA for care appropriate to the highest or middle category of disablement will also be entitled to a premium on his or her income support.

2. In 1993 Miss Hinchy, who suffers from irritable bowel syndrome, was awarded DLA in the middle category. Such awards may be indefinite or for a fixed period. Miss Hinchy's was for 5 years and expired on 13 October 1998. She applied for a renewal but was refused. She appealed but the appeal was dismissed. When the award expired, she ceased also to be entitled to the premium payments on her income support. Her weekly payments should have gone down from £96.15 to £57.65.

3. Unfortunately, the person responsible for determining Miss Hinchy's entitlement to income support at her local Social Security

Office in Hackney did not realise that her DLA award had expired. For nearly two years the office went on sending her order books, containing weekly orders to present at a Post Office for payment, in amounts which included the premium. Eventually a spot check revealed the mistake and her payments were reduced to the correct amount from 3 July 2000. By that time, she had been overpaid £3555.40.

4. The question in this appeal is whether the Secretary of State can claim the money back. He has a statutory right of recovery under section 71 of the Social Security Administration Act 1992 ("the Administration Act"):

> "(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) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
>
> 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…
>
> (3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the facts or failed to disclose it."

5. The Hackney Social Security Office claimed that the requirements of this section were satisfied because Miss Hinchy had failed to disclose a material fact, namely that her DLA had expired. In consequence of that failure, she had been paid £3555.40 which she would not otherwise have received. Miss Hinchy appealed to an Appeal Tribunal. She accepted that she knew that her DLA award had expired. Nor was it disputed that this was a material fact; the person who made the decision, if he had known about it, "would have wished to supersede and reduce the amount of [the income support] award." Likewise, it was conceded that if Miss Hinchy had told the office about the expiry of the

award, then, on a balance of probability, the overpayment would not have occurred.

6. There were two grounds of appeal. The first was that Miss Hinchy had made disclosure. She said she thought she had mentioned it on the telephone. But the Tribunal said that the absence of any record of such a communication at the Social Security Office made it more likely that she had not done so. The second ground was that in all the circumstances disclosure could not reasonably have been expected of her. The reasons she gave were that she was not in good health and did not understand the benefit system. The Tribunal rejected these excuses. In so doing, it relied upon the instructions printed on the standard order books issued to Miss Hinchy. They have yellow pages at the back with notes headed: "These notes are important, please read them carefully." In addition, each order contains a declaration which the claimant must sign when he or she presents it for payment:

> "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."

7. The instructions included the following paragraphs:

> "**9 Remember**
>
> The amount of money that you are entitled to is based on what you told us when you claimed. If things change and you do not tell us, you might get the wrong amount of money and you could be breaking the law.
>
> **10 How to tell us about changes**
>
> You must get in touch with the Social Security Office as soon as you can. The address is on the front cover of this order book.
>
> - Send them a letter or give details on the Form A9 that we have sent you….Explain what has happened….
>
> or

- Take your order book along to the Social Security Office and explain what has happened.

There is information on the next pages about the following changes:…

13 Any benefit goes up or down

You must send us a letter or form A9 if this happens to your money…If you have already told us that your benefit is going up or down and the amounts on the orders in this book change to take account of this, you do not need to tell us again."

8. Form A9, which is issued to everyone on income support, is headed "Telling us about changes". It lists the various changes which have to be notified. Under the heading "Changes to do with other money coming in" it says "Tell us if you…start to get a different amount of benefit…Remember to include things like social security benefits."

9. The Tribunal said that the direction in paragraph 13 of the notes, to tell the office if any benefit goes up or down, was a "simple instruction" and, in the absence of medical evidence about Miss Hinchy's mental state, the Tribunal did not accept that she was incapable of understanding it or taking appropriate action. If, as she claimed, she had not read the notes, it would be reasonable to expect her to have done so. This finding of fact is, I think, inconsistent with a submission that Miss Hinchy did not have to make disclosure because she could not be expected to realise that a change in her DLA position would affect her entitlement to income support.

10. The two questions which were in issue before the Tribunal – whether Miss Hinchy had told the office and whether she could reasonably be expected to have done so – were questions of fact against which there is no appeal. Miss Hinchy's advisers conceded that, as the law then stood, there was no other ground on which she could resist having to repay the money. The relevant principles had been laid down in a well-known decision of the Tribunal of Commissioners in 1986 (*R(SB) 15/87*), reaffirmed by another Tribunal in *CG/4494/99*. But Miss Hinchy applied to the Commissioner (Mr P L Howell QC) for permission to appeal and the Commissioner gave permission in order to

enable her to test the correctness of the Tribunal decisions in the Court of Appeal. He dismissed the appeal without giving further reasons and gave leave to appeal to the Court of Appeal.

11. Before I come to the decision of the Court of Appeal, I shall summarise the effect of the earlier jurisprudence created by the decisions of the Commissioners. They have had to deal with various forms of the argument that a failure by a claimant to make disclosure to the official responsible for making an overpayment did not matter because that official already knew, or should have known, or was deemed to know, the relevant facts. It is seldom if ever possible to show that the relevant official actually knew (otherwise why should he have made the overpayment?), but it was said either that, as a matter of good administration, the necessary systems of communication to provide him with the information should have been in place, or that, as a matter of law, the information as to decisions made by other officials about other benefits was deemed to be known to the Secretary of State or the relevant decision maker. The argument does not appear to have been carried to the extent of asking for the Secretary of State to be deemed to have knowledge of all decisions made on behalf of the Crown in other departments, although it is hard to see why not, because the office of Secretary of State is in theory one and indivisible: see *Harrison v Bush* (1855) 5 E & B 344, 352 and Halsbury's Laws of England, 4th ed (1996), Vol 8(2), para 355.

12. This argument was advanced in relation to various elements of the claim under section 71 and its predecessors. In its purest form, it was said that "disclosure" to a person who already knew or was deemed to know was conceptually impossible: see *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606; *Condon v Commissioner of Taxation* [2000] FCA 1291 (Federal Court of Australia). Secondly, it was said that "failed to disclose" implies that there had been an obligation to disclose. Such an obligation exists only when it would be reasonable to expect the claimant to make disclosure. And it would not be reasonable to expect someone to disclose facts which she could reasonably expect were already known. Or, thirdly, it was argued that if the true facts were already known, then a failure to disclose them could have no causal effect and it could not be said that, but for the failure to disclose, the Secretary of State would not have made the overpayments.

13. The Commissioners have dealt with these arguments in a practical way, first by considering how the administration of the social

security system actually works and secondly, by trying to discern the policy of the statutory scheme of which section 71 forms a part.

14. How does the system work? By way of background, the Secretary of State submitted a memorandum to the Court of Appeal:

> "[The Department] administers some 24 different benefits, the cost of which in 2002 was £110 billion, one third of all government spending. The spend on DLA in 2002 was £6.5 billion, with 2,329,000 beneficiaries. The numbers for IS were £9.6 billion and 2,227,000 beneficiaries. Organisationally, the Department is not monolithic. In 2002 (following merger with the employment service of the old Department for Education and Employment) it employed 122,687 people. These civil servants are organised in discrete structures, although those structures may change from time to time. For example currently there are four agencies – Jobcentre Plus, the Pensions Service, the Child Support Agency and the Tribunals Appeals Service…DLA and IS are separate benefits (with separate legislation and indeed different rules, eg as to duration of the award.) Further, DLA has always – since its introduction in the early 1990s – been a centrally administered benefit whereas IS is locally administered, through several hundred local offices. The civil servants administering DLA and IS have always been geographically separate, with separate 'files'. There has never been a computer link between these two systems."

15. Counsel for the Secretary of State appears to have told the Commissioner in this case that there was no communication whatever between the DLA and IS systems. But this turned out to be a mistake; true, there is no computer link, but the DLA office, when making an award, normally sends by post a card to notify the appropriate local Social Security Office. If the award is for a limited period, the Social Security Office should diarise the expiry date, so that, five years later or whenever, the relevant official will be reminded that, in the absence of another card arriving, the claimant's DLA is about to cease. In this case it appears that at some point the system failed.

16. The result is that officials administering one benefit may or may not know from internal sources about the other benefits which the

claimant is receiving. Whether they do or not depends upon the departmental or inter-departmental information systems in place and the efficiency with which they operate.

17. The one person who can usually be depended upon to know all the benefits which a claimant is receiving is the claimant himself. And he is usually also in the best position to know about the benefits which are received by other people, such as his wife and children, which may affect his own entitlement. The legislative policy for dealing with this potential imbalance of information is expressed in the Administration Act and its subordinate regulations. Section 5(1) of the Administration Act confers broad rule-making powers on the Secretary of State, including the power to make regulations—

> "(h) for requiring any information or evidence needed for the determination of [a claim to income support] or of any question arising in connection with such a claim to be furnished by such person as may be prescribed in accordance with the regulations;….
>
> (j) for notice to be given of any change of circumstances affecting the continuance of entitlement to such a benefit or payment of such a benefit."

18. Pursuant to these powers, the Secretary of State has made the Social Security (Claims and Payments) Regulations 1987 (SI 1987 No 1968) as amended. Regulation 7(1) deals with the duty to provide information at the time of the claim:

> "every person who makes a claim for benefit shall furnish such certificates, documents, information and evidence in connection with the claim, or any question arising out of it, as may be required by the Secretary of State…"

19. Regulation 32 deals with the on-going duty to provide information while in receipt of benefit:

> "(1)…every beneficiary and every person by whom…sums payable by way of benefit are receivable

> shall furnish in such manner and at such times as the Secretary of State…may determine…such information or facts affecting the right to benefit or to its receipt as the Secretary of State…may require…and in particular shall notify the Secretary of State…of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, or to its receipt, as soon as reasonably practicable after its occurrence, by giving notice in writing (unless the Secretary of State…determines in any particular case to accept notice given otherwise than in writing) of any such change to the appropriate office."

20. The Commissioners have treated these regulations as placing upon the claimant the primary duty to inform the relevant decision maker of the material facts, including if appropriate the amount of the other benefits which he is receiving. As the Tribunal said in *R(SB) 15/87*, at para 13:

> "It is well settled that responsibility for keeping the Department informed of any change in a claimant's circumstances rests and remains upon the claimant…"

21. The practicalities of administration to which I have referred mean that such a policy would be seriously undermined by treating the person to whom disclosure must be made as the Secretary of State, as a constitutional entity, and then deeming the Secretary of State to know everything known to all officials of the department or even, more modestly, all decisions taken in his name by officials of the department. The Commissioners have therefore consistently rejected attempts to introduce a theoretical or constitutional dimension into the question of whether disclosure has been made for the purposes of section 71. They have accepted that that the notion of a failure to disclose connotes an obligation to disclose. They have found this obligation either in regulation 32 or, by implication, in section 71 itself. But they have rejected the submission that disclosure must be to "the Secretary of State", whatever that may involve. Instead, they have concentrated upon what the claimant has done to convey the information to the official who makes the actual decision about the amount of his benefit. In *R(SB) 15/87* the Tribunal said, at paras 26-28:

> "26 …. To whom is there this obligation to disclose? We are concerned here with breaches of the obligation which have the consequence that expenditure is incurred by the Secretary of State; and, in our view, the obligation is to disclose to a member or members of the staff of an office of the Department handling the transaction giving rise to the expenditure….28 We accept that a claimant cannot be expected to identify the precise person or persons who have the handling of his claim. His duty is best fulfilled by disclosure to the local office where his claim is being handled, either in the claim form or otherwise in terms that make sufficient reference to his claim to enable the matter disclosed to be referred to the proper person….But…there can be other occasions when the duty can be fulfilled by disclosure elsewhere. This can happen, for instance, if an officer in another office of the Department of Health and Social Security or local unemployment benefit office accepts information in circumstances which make it reasonable for the claimant to think the matters disclosed will be passed on to the local office in question."

22. The theme which runs through this and similar passages is that the claimant must do what a person in his position would reasonably regard as sufficient to communicate the information to "the proper person" in the relevant office. If one regards the obligation as arising by implication from section 71 itself, then this is the kind of disclosure implied. If one regards it as arising from regulation 32, the matter is even clearer. The first part of the regulation imposes a duty to furnish "in such manner…as the Secretary of State may determine…such information or facts affecting the right to benefit or to its receipt as the Secretary of State may require". The Secretary of State has specified by the notes in the order book what information (including changes in other benefits) must be furnished and that it must be done by sending it to the office named on the cover of the book. The second part of the regulation imposes a duty "in particular" to give notice in writing of a change in circumstances to "the appropriate office".

23. Disclosure, then, must be made to the relevant official and not to the Secretary of State as an abstract entity. What assumptions can be made about what the relevant official already knows? The Commissioners have on the whole resisted arguments that the relevant official must be assumed to know, or that the claimant is entitled to assume that he knows, anything about his other benefit entitlements which cannot be described as common knowledge. It is not for the

claimant to form views about what may go on behind the scenes in the Social Security or other benefit offices. His duty is to comply with the instructions in the order book. A disclosure which would be thought necessary only by a literal-minded pedant (see, for example, *CSB/1246/1986*) need not be made, but the safest course is to resolve doubts in favour of disclosure.

24. Some doubt was cast upon this doctrine by the decision of Commissioner Howell QC in *CIS 5848/99* in which he found as a fact that because it was the practice of the child benefit officer to notify the relevant Social Security Office of child benefit awards, the latter office must be taken to have known of an award which was not disclosed to them by the claimant and that the non-disclosure was therefore not the cause of an overpayment. The Commissioner then went on to say, obiter, that in modern conditions, with the availability of computer systems, claimants might be entitled to assume that information had been communicated between officials of the department and that disclosure was therefore unnecessary. But this decision was overruled and the obiter remarks disapproved by the Tribunal of Commissioners in *CG/4494/99*.

25. These were the principles applied by the Appeal Tribunal in the present case. Miss Hinchy had failed to make disclosure to her local Social Security office. She had done nothing to communicate the information to the relevant decision maker. He was not deemed to know about the cessation of her DLA merely because it was known to, or a decision by, another office of the department. Nor was there any basis for assuming that, on the facts, the non-disclosure had no causal effect because the relevant official had received the information by internal lines of communication. The inference of ignorance from the fact that he made the overpayments was far stronger than the possibility that he knew from a card on the file that the DLA award had in fact ceased.

26. The Court of Appeal reversed this decision. Aldous LJ said, at para 25, that he accepted "the thrust" of *R(SB) 15/87*, that is to say, that the person who whom disclosure needs to be made is not that abstract entity, the Secretary of State. "If there is to be disclosure" said Aldous LJ:

> "then it has to be in circumstances where it would be reasonable to believe that it would reach the decision-makers."

Ms Hinchy had of course done nothing by way of disclosure which it would be reasonable to believe would reach the income support decision-makers. But Aldous LJ went on to say, at para 28, that disclosure was unnecessary because of what she, or possibly the court, was entitled to assume the decision-makers already knew. She knew that the relevant information was:

> "within the knowledge of the Secretary of State acting through the decision-makers in the [DLA] office…. It was reasonable to believe that the knowledge would reach the Secretary of State acting through his decision-makers in the relevant Income Support Office."

27. Anything else, said Aldous LJ, would be maladministration. Therefore there was no need for the appellant to give the information to the relevant "Income Support Office".

28. Carnwath LJ agreed with this reasoning but added by way of additional reason, at para 37, that "the Secretary of State cannot disclaim knowledge of his own decisions." Whether information of other kinds known to officials should be attributed to the Secretary of State was a more difficult question but he must be deemed to have knowledge of decisions (such as the refusal to renew Miss Hinchy's DLA award) which were taken in his name.

29. As will be apparent, this reasoning involves a rejection of the principles developed and applied by the Commissioners over a number of years. In particular, the reasoning of Aldous LJ adopts and indeed extends the obiter opinion of Mr Commissioner Howell in *CIS 5848/99* which was rejected by the Tribunal in *CG/4494/99* and the reasoning of Carnwath LJ applies theoretical constitutional principles which have been consistently rejected by Commissioners since *R(SB) 15/87*.

30. My Lords, I think that the Court of Appeal was wrong to overturn the decisions of the Commissioners. They have practical experience of the day-to-day working of the benefit system and I think that the principles they have devised to give effect to the legislative scheme dealing with overpayments are entitled to great respect. No doubt the Court of Appeal thought, as did Mr Commissioner Howell in *CIS 5848/99*, that in denying recovery to the Secretary of State, they would provide an additional impetus to improvement in the department's

internal computer systems and thereby reduce the hardship for claimants who, through ignorance or fecklessness, omit to disclose information about other benefits and lay themselves open to repayment claims when the department's back-up systems fail. But this, in my opinion, is not a policy which is open to the courts. It is contrary to the legislative policy which remains unaltered in the current Act and regulations, namely that the primary onus of keeping the "appropriate office" informed rests upon the claimant.

31. Carnwath LJ, after citing the memorandum which I have quoted about the way the benefit system is administered, said at para 42:

> "I do not think that it affects the legal analysis in any way. The claimant is not concerned with the internal administrative arrangements of the department."

32. I quite agree. The claimant is not concerned or entitled to make any assumptions about the internal administrative arrangements of the department. In particular, she is not entitled to assume the existence of infallible channels of communication between one office and another. Her duty is to comply with what the Tribunal called the "simple instruction" in the order book. It seems to me, however, that this proposition of Carnwath LJ completely undermines the reasoning of Aldous LJ, based upon what Miss Hinchy was entitled to assume about what would amount to "maladministration", with which Carnwath LJ said he agreed. For my part, I would approve the principles stated by the Commissioners in *R(SB) 15/87* and *CG/4494/99*. The duty of the claimant is the duty imposed by regulation 32 or implied by section 71 to make disclosure to the person or office identified to the claimant as the decision maker. The latter is not deemed to know anything which he did not actually know.

33. It remains to mention two matters. First, Mr Howell QC submitted for Miss Hinchy that as a matter of construction of the notes on the order book, she was not obliged to notify the cessation of her DLA. Her benefit had not gone "up or down" but had simply ceased in accordance with its terms. In my opinion this is a construction which would only occur to a lawyer. The instruction in the order book is not concerned with the terms upon which the benefit is payable but with the amount of money coming in. Miss Hinchy's weekly DLA payments had gone down to zero and that in my opinion was a notifiable change of circumstances.

34. Secondly, the Tribunal decided the case on the basis that the Secretary of State had to prove that, in all the circumstances, Miss Hinchy could reasonably have been expected to make disclosure. As the Tribunal found in favour of the Secretary of State on this point, I have said nothing about it. The concept is, however, not without its difficulties; in particular, how it can be reconciled with the terms of the disclosure obligation imposed by regulation 32 and the extent to which it involves an objective standard or whether matters personal to the claimant can be taken into account. Some of these questions are explored in a recent decision of the Tribunal of Commissioners (*CIS/4348/2003*) which your Lordships were told is under appeal to the Court of Appeal. I express no views about them.

35. I would allow the appeal and restore the decision of the Commissioner.

LORD HOPE OF CRAIGHEAD

My Lords,

36. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for all the reasons that he has given I too would allow the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

37. I find, to my regret, that I am unable to concur in the opinion of your Lordships that this appeal by the Secretary of State should be allowed. I have had the advantage of reading in advance the opinion prepared by my noble and learned friend Lord Hoffmann and gratefully adopt his exposition of the factual and statutory background to this appeal. I need not repeat what he has fully and clearly set out.

38. The issues that arise on this appeal all raise, in one way or another, questions of construction of the words "failed to disclose" in section 71(1) of the Social Security Administration Act 1992 (set out by Lord Hoffmann in para 4 of his opinion). The Secretary of State is seeking to recover from Ms Hinchy the sum of £3550 odd. Over the period 13 October 1998 to 3 July 2000 she was paid by way of income support a greater sum than that to which she was entitled. The £3550 is the excess that was paid to her. The Secretary of State says that the £3550 was paid because she had "failed to disclose" that the disability living allowance ("DLA") that she had been awarded in October 1993 for a fixed five year period, and that had had the consequence of a "serious disability premium" being added to her weekly income support payment, had ceased to be paid on the expiry of the five year period. The addition to her income support payments of the serious disability premium ought also to have ceased on the expiry of the five year period. But, due to administrative inefficiencies, the premium continued to be added until July 2000. The Secretary of State, relying on section 71(1), is seeking to recover the money from her.

39. The critical issue in this case, in my opinion, is whether Ms Hinchy was under an obligation to disclose to the Hackney office that dealt with her income support payments the fact that her DLA payments had come to an end. In their submissions before your Lordships both Mr Drabble QC for the Secretary of State and Mr Howell QC for Ms Hinchy were in agreement that the concept of a failure to disclose, for section 71(1) purposes, imported the notion that a duty to disclose had been broken. I think this must be right. One would not normally describe a person as having "failed" to do something that the person in question had no reason to do. "Failed" or "failure" both in the context of section 71(1), and in normal speech, has a tendentious quality. It implies that something has not been done that should have been done. In Decision R (SB) 21/82 Mr Commissioner Edwards-Jones QC said, at para 4(2), 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…"

This passage has been the subject of criticism, most recently in Decision CIS/4348/2003 (which I understand is pending appeal to the Court of Appeal) and I would not accept that, for section 71(1) purposes, the

failure to disclose could be based on breach of no more than a moral obligation to disclose. The coherence of the statutory scheme requires, in my opinion, that the failure to disclose be based on breach of an obligation to disclose imposed by the statutory scheme itself. For present purposes the obligation must, I think, be founded either in section 71(1) or in regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987.

40. Mr Drabble told your Lordships that he was agnostic as to whether the obligation on Ms Hinchy to disclose that her DLA payments had ceased derived from section 71, via an implied term, or from regulation 32(1). For my part I think he should be converted to a reliance on regulation 32(1). I do not see how the requisite term could be implied into section 71, bearing in mind that "any person" in section 71(1) is not confined to the person entitled to the benefit in question (see section 71(3)). The implied term imposing the duty to disclose would have to apply across the board to "any person" who had "failed to disclose". It could not possibly be said that mere knowledge by some person of the material fact imposed the duty to disclose. There would have to be some other connection between the claimant of the benefit and the person with the knowledge to justify imposing a duty to disclose on the latter. I think it would be impossible to construct an implied term that could cope with the difficulty of distinguishing between those with the requisite knowledge and a duty to disclose and those with the requisite knowledge but no duty to disclose. So I think the requisite duty to disclose must be found elsewhere. Regulation 32(1) is the obvious candidate for present purposes. No other regulation has been suggested.

41. Regulation 32(1) is set out in para 19 of Lord Hoffmann's opinion. It imposes two duties on persons such as Ms Hinchy. First it requires her to:

> "furnish in such manner and at such times as the Secretary of State may determine … such information or facts affecting the right to benefit or to its receipt as the Secretary of State may require …"

Second, it requires her to:

> "notify the Secretary of State of any change of circumstances which [she] might reasonably be expected to know might affect the right to benefit, or to its receipt, as soon as reasonably practicable after its occurrence …"

42. As to the first of these two duties, the contention of the Secretary of State is that the contents of the order book, by means of which Ms Hinchy obtained her weekly income support payments, required Ms Hinchy to inform the Hackney office that her DLA payments had ceased. The relevant contents of the order book are set out in paras 6 and 7 of Lord Hoffmann's opinion. The requirement is said to be imposed by paragraph 13 of the notes at the back of the order book. The paragraph is headed "Any benefit goes up or down" and says "You must send us a letter or form A9 if this happens to your money". The form A9, a copy of which would have been issued to Ms Hinchy, has a heading "Changes to do with other money coming in" and says "Tell us if you … start to get a different amount of benefit". Is this language adequate to constitute a requirement by the Secretary of State that Ms Hinchy inform the Hackney income support office that her DLA payments had come to an end? In my opinion, it is not. It may be assumed that Ms Hinchy knew that the five year period for which she had been awarded DLA had expired. After all, she had applied for its renewal and had unsuccessfully appealed against a refusal. But so far as DLA was concerned she had not started to get a different amount of benefit. Her DLA had not gone "up or down". It had simply terminated at the end of the period for which it had been granted and had not been renewed. Lord Hoffmann has stigmatised this approach to the paragraph 13 note as a construction that would occur only to a lawyer. With respect, I think not. I think that the ordinary person in receipt of income support who read paragraph 13 would think that he or she would need to inform the income support office if some other benefit was being paid at an increased level or at a reduced level. And that, evidently, is how the author of form A9 read the requirement – "Tell us if you … start to get a different amount of benefit" conveys, not only to lawyers but to anyone able to read, a quite different message from "Tell us if payment of any other benefit ceases". If the Secretary of State is to rely on the first duty imposed by regulation 32(1) his requirement for information or facts must, in my opinion, be expressed in terms that clearly cover the information or facts of which non-disclosure is alleged. Paragraph 13 on the order book does not, in my view, make clear that Ms Hinchy was required to inform the Hackney income support office that the five year period for which her DLA had been awarded had expired.

43. The second regulation 32(1) duty required Ms Hinchy to notify the Secretary of State "of any change of circumstances which [she] might reasonably be expected to know might affect …" her right to income support. Why should Ms Hinchy be expected to have known that the termination of her DLA payments would produce a knock-on reduction to the amount of income support to which she was entitled? The Tribunal made no finding on this issue. The Tribunal's notes of evidence given by Ms Hinchy contain one or two relevant entries e.g.

> "The person I spoke to on the phone didn't think my IS would be affected by DLA";
>
> "I've been on benefits for many years. I don't understand the benefits system"; and
>
> "I didn't understand how IS worked and that part was dependent on DLA".

In the face of this evidence, and in the absence of any finding by the Tribunal that Ms Hinchy ought to have known that the termination of DLA would affect her income support payments, the Secretary of State cannot rely on the second regulation 32(1) duty.

44. In my opinion, therefore, the statutory scheme created by the 1992 Act, regulation 32 of the 1987 Regulations and the instructions to Ms Hinchy contained in the Notes to her order book, read in conjunction with form A9, did not impose on her the obligation to inform the Hackney income support office that her five year DLA entitlement had expired. I conclude, therefore, that the Secretary of State has not established that she "failed to disclose" that material fact and, for reasons different from those given by the Court of Appeal, I would dismiss this appeal.

45. I am happy to be able to come to this conclusion although I would readily accept that if Ms Hinchy had told the Hackney office that her DLA had come to an end the probability is that the severe disability premium would not thereafter have been added to her income support payments. But the more important reason why the premium continued to be added was sheer inefficiency in the Hackney office. Unfortunately the Tribunal decided this case under a factual misapprehension for which the Department was responsible. The Tribunal was told that at the relevant time, 1993 to 1998, there was no system in place for the transmission of information about DLA from the office administering Ms Hinchy's DLA to the Hackney office administering her income

support. The Tribunal made their findings of fact on that footing. It was a false footing. A letter dated 20 August 2002 from the Secretary of State's solicitor to the Child Poverty Action Group ("CPAG"), who had taken up the cudgels on behalf of Ms Hinchy, corrected the misapprehension. The letter made clear that there had been a manual process in operation at the material time for the transmission of information from the DLA office to the Hackney income support office. The letter explained that:

> "This system … was in use at the relevant time. The … system should operate as follows. When an award of DLA is made, the DLA office should send a card notification to the relevant IS office by normal internal post. The card provides a breakdown of the components of the award, the period and type of award…If the award is revised or superseded for any reason, a further card should be sent from the DLA office to the relevant IS office which should contain the details of the changes. No further notification is sent to the IS office when the award of DLA comes to an end automatically. When these card notifications are received by the IS office, the action by the IS staff should be to record the details of the award and to alter the amount of benefit payable accordingly. A case control should also be set for six weeks before the award is due to end. This only applies when the award is for a fixed term …"

The fact that following the DLA award in 1993 a severe disability premium was added to Ms Hinchy's income support payments shows that the requisite card must have been sent by the DLA office to the Hackney income support office. But the Hackney office presumably failed to set the requisite case control entry. If the case control had been set, as the system required, the severe disability premium would not have continued to be added to the income support payments after the five year DLA period had expired.

46. It is, of course, a matter of regret that the information contained in the Department's 20 August 2002 letter was not available to the Tribunal. The letter shows, first, that there was a very sensible Departmental system in force which, if it had been followed, could be expected to have prevented the overpayments to Ms Hinchy. It shows, also, that, on a high balance of probabilities, the Hackney office had in 1993 been sent by the DLA office a card containing the details of Ms

Hinchy's five year DLA award. In attributing knowledge to the Secretary of State that Ms Hinchy's DLA award was for a five year period expiring on 12 October 1998 it is not necessary to rely on knowledge of officials in the DLA office. The same knowledge had been communicated to the Hackney income support office but, when October 1998 arrived, had been forgotten or overlooked. For the reasons cogently given by Lord Hoffmann I would not wish to base my conclusion in this case on the proposition that there could have been no failure to disclose because the Secretary of State, via his officials, already had the information in question. But it seems to me apparent that the Secretary of State is seeking by his section 71(1) claim against Ms Hinchy to remedy the consequences of the inefficiencies of his own Departmental officials. I regret that what I regard as a strained construction of a paragraph of the notes at the back of Ms Hinchy's order book should enable him to succeed in doing so.

LORD WALKER OF GESTINGTHORPE

My Lords,

47. I too agree that this appeal should be allowed for the reasons set out in the opinion of my noble and learned friend Lord Hoffmann, with which I am in complete agreement.

BARONESS HALE OF RICHMOND

My Lords,

48. The benefits system is there for anyone who has or may have a claim upon it. In practice that is almost everyone. This is not just law for the poor. Many claimants are wholly dependent on benefits and have no other resources available to them. Many are old, ill, disabled or struggling to bring up children on their own. Benefits are there to guard against the eventualities which make it difficult for people to be self-sufficient. But they do this in a number of different ways, by a mixture of universal, contributory and non-contributory, non-means-tested and means-tested benefits or tax credits. This means that almost everyone at some time in their lives will have a valid claim to some form of benefit.

We are all potential claimants as well as contributors. This means that it is in all our interests that the system be well designed and well administered so that everyone receives what they are properly entitled to, neither more nor less. It also means that the system is enormously complicated. Few people can be expected to understand even their own entitlements and how these have been worked out, let alone the system as a whole.

49. The issue in this appeal is whether in the circumstances the respondent failed to disclose any material fact to the Secretary of State for the purpose of section 71 of the Social Security Administration Act 1992 in consequence of which he made a payment which he would not have made but for that failure. The size and complexity of the system is relevant to that issue in at least three ways. First, if the specialist judiciary who do understand the system and the people it serves have established consistent principles, the generalist courts should respect those principles unless they can clearly be shown to be wrong in law. Second, there is nothing intrinsically wrong in relying on the claimant to give the Secretary of State the information he requires to make his decisions, provided that this is information which the claimant has and that the Secretary of State has made his requirements plain. Nor is it intrinsically wrong to include in these requirements information which is already known in one part of the system but not in the part that needs to know it to make the decision in question. (It is different, of course, if the claimant does not know and cannot reasonably be expected to know but the department does and can: see *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 1 WLR 1372.) In an ideal world, administrative systems might be so efficient that any official in one office might at a few clicks of a mouse be able to retrieve all the information about a particular claimant held everywhere else in the system. But many would find such efficiency sinister. It is certainly not yet with us. Third, however, the way in which claimants and others are required to give their information should reflect the respective knowledge and expertise of those who administer the system, on the one hand, and of the claimants who have to deal with it, on the other. The fact-finding process is a co-operative effort in which both have a part to play.

50. Until recently, the social security commissioners had established a consistent approach to the recovery of overpaid benefits under section 71 of the Social Security Administration Act 1992 and its predecessors. On the one hand, they have consistently rejected the attempts of Mr Howell and Mr Drabble, and others before them, to persuade them that what is known in one part of the system is deemed to be already known

throughout and thus need not be disclosed again. On the other hand, they have interpreted section 71 in such a way as to place reasonable rather than unreasonable burdens upon claimants. There are good reasons for this. The section gives the Secretary of State a statutory right of recovery which is more favourable than an action for money had and received. There is, for example, no defence of change of position. It also gives him an easy method of recovery through deduction from future benefits: see section 71(8). Further, section 71 tightened up the law, by applying to all benefits the rule which before 1986 had been applicable only to means-tested benefits. The differences were explained by Lord Woolf in *Plewa v Chief Adjudication Officer* [1995] 1 AC 249, at 253 to 255. In particular, the defence of due care and diligence to avoid overpayment, previously available for people who had been overpaid non-means-tested benefits, but not for those who had been overpaid means-tested benefits, was no longer available to anyone. Even so, the section does not give an absolute right of recovery of all overpaid benefit. The over-payment must have been the result of misrepresentation or failure to disclose a material fact. Simple non-disclosure is not enough. It must be in breach of a duty to disclose.

51. The original statement of this principle, by Mr Commissioner Edwards-Jones QC in R(SB) 21/82, at para 4(2), was as follows:

> " . . . 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 . . . '"

This was picked up by a Tribunal of Commissioners in R(SB)15/87 (see also Tribunal decisions CG/4494/1999 and R(IS) 5/03 and numerous individual Commissioners' decisions), at para 26:

> ". . . The section uses the phrase 'fails to disclose' and not 'does not disclose' and one Commissioner said in Decision R(SB) 21/82 at paragraph 4(2) (in a passage that has frequently, e.g. in Decision R(SB) 28/83 at paragraph 11 and R(SB) 54/83 at paragraph 13(3), been cited with approval by other Commissioners) that a failure imported

> the breach of some obligation such that the relevant non-disclosure occurred in circumstances in which, at the lowest, disclosure by the person in question was reasonably to be expected. To whom is there this obligation to disclose? We are concerned here with breaches of the obligation which have the consequence that expenditure is incurred by the Secretary of State; and, in our view, the obligation is to disclose to a member or members of the staff of an office of the Department handling the transaction giving rise to the expenditure."

52. Although it had been consistently stated by Commissioners for many years, the principle that 'disclosure by the person in question was reasonably to be expected' has recently been disapproved by another Tribunal of Commissioners in CIS/4348/2003. That decision turned on whether the individual characteristics of the claimant were relevant to whether she was in breach of the duty to disclose. It is currently under appeal to the Court of Appeal. We are concerned with a different issue and nothing in this case should be seen as prejudicing the outcome of that appeal.

53. All of these decisions are consistent, however, in requiring that there be some breach of a duty to disclose. Indeed, in CIS/4348/2003 the Tribunal of Commissioners disapproved of the idea that there might be only a moral duty to disclose. In my view they were right to do so. Failure to disclose has legal consequences which may be very serious for the person concerned; a breach of a moral duty, even if disclosure is reasonably to be expected in the circumstances, should not suffice. Furthermore, section 71(1) permits recovery from the person who misrepresented or failed to disclose the fact, rather than from the person who received the overpaid benefit. It could not be right to require such third parties to pay back money which they had never received unless they were in breach of a legal duty to disclose the information in question. Section 71(1) clearly presupposes the existence of a legal duty to disclose the fact in question and failure to disclose refers to a breach of that duty.

54. What is the source and content of that duty? One obvious source (although there may be others to which our attention has not been drawn) are the regulations under which claimants and others may be required to furnish information to the Secretary of State. The vires for such regulations are contained in section 5 of the 1992 Act (quoted by my noble and learned friend, Lord Hoffmann, in paragraph 17 earlier).

The relevant regulation at the time was regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987 (quoted by Lord Hoffmann, in paragraph 19). The beneficiary "shall furnish in such manner and at such times as the Secretary of State…may determine such certificates and other documents and such information or facts affecting the right to benefit or to its receipt as the Secretary of State…may require…, and in particular shall notify the Secretary of State…of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, . . ."

55. This is commonly regarded as imposing two duties: a duty to give the information and supporting evidence required by the Secretary of State and a further duty to notify changes which the claimant might reasonably be expected to know might affect the right to benefit to the appropriate office. It is not entirely plain whether the second duty is merely a particular instance of the first, so that the Secretary of State must have required such changes to be notified, or whether it is a free-standing duty. In my view, nothing turns on that difference here. In the first case, it is incumbent upon the Secretary of State to make it crystal clear what it is that he needs to know and in the second case the claimant cannot reasonably be expected to know that something might affect his claim to benefit unless the Secretary of State has made it clear what sort of changes might do so.

56. I say this because this regulation has to be interpreted and applied in its factual context. Those administering the system on behalf of the Secretary of State have to understand all its ramifications and interactions. Claimants cannot be expected to do so. They cannot be expected to guess all the information which may be relevant to their claims. They do not know the conditions of entitlement or how their right to one benefit may affect their right to another. It is incumbent upon the Secretary of State to make it clear what information he requires. This has to be made particularly clear where any reasonable claimant might not think that it was relevant at all. It should also be made particularly clear where it might not occur to any reasonable claimant in this day and age that the relevant office did not already have the information in question. In this context, there is a difference between matters which only the claimant can know and matters which someone in the benefits system knows or ought to know. The claimant cannot be expected to guess who needs to know the information required. It is incumbent upon the Secretary of State to make it plain to whom the information is to be given or the change in circumstances notified.

57. Whether Ms Hinchy was in breach of her duty to disclose therefore depends upon how one reads the instructions in her Order Book (quoted by Lord Hoffmann at paragraph 7). The Appeal Tribunal thought that the instruction to tell the Social Security Office if "any benefit goes up or down" was "a simple instruction". I have at least three reasons for doubting that. First, it clearly does not mean exactly what it says. Read literally, claimants would have to send in Form A9 or write to the office every time the benefit rates changed. This would definitely not be welcomed in hard pressed local offices up and down the land. But how can claimants be expected to know whether they are supposed to be literal minded pedants or to take a relaxed view of information which is common general knowledge in the benefits world? How are claimants to know whether the Secretary of State is such a pedant? Second, two highly literate and intelligent Law Lords have interpreted it differently. How can a poor claimant be expected to know what it means? Third, the particular fact in issue here is within the knowledge and expertise of the Secretary of State rather than the claimant. A reasonable claimant might well think that if the local office knew enough about her disability living allowance to add on the premium at the outset it would know enough to take it off when the award expired. A reasonable claimant might well not understand the inter-action between the two benefits: in many cases where another benefit goes down, the means-tested benefit goes up. A reasonable claimant might not realise that if benefit A is lost, she will also lose some of her means-tested benefit B. In this case, removal from one category of disability living allowance led to a double loss of sums which mean a great deal to people living at the margins of subsistence.

58. For those reasons I have serious reservations about the factual conclusion reached by the Tribunal in this case. But they were applying a principle which was at least as favourable to the claimant as those which we are applying. They also see far more claimants than we do and are far better equipped to make these sorts of judgments than are we. They have reached the conclusion that these instructions were clear enough for the claimant to understand and I do not think that it is open to us to disagree. With some reluctance, therefore, I would allow this appeal.