R. (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions

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Case Analysis


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Benefit overpayments—common law restitution—whether statute provides exclusive code for recovery

Introduction

This case concerns the Secretary of State’s right to recover overpaid social security benefits. Section 71 of the Social Security Administration Act 1992 provides that overpaid benefits may be recovered where they arise from misrepresentation or non-disclosure of a material fact. As Lord Brown put it, the case raised the question as to whether s.71 provides an exclusive code for recovery of overpayments made in accordance with an award of benefit.¹

Decision

The case arose from the fact that, as part of its strategy to address overpayments, the Department of Work and Pensions (DWP) had, beginning in 2006, written to about 65,000 claimants who had received overpayments (not covered by s.71, i.e. not involving misrepresentation or non-disclosure) asserting a common law right to recover the amounts involved.² In short, the letters stated that a mistake had been made, that individuals had received more of the relevant benefit than they had been entitled to, and that the law allowed the DWP to ask the claimant to pay back money that should not have been paid. CPAG brought proceedings to challenge this policy, a challenge which was upheld by the Court of Appeal which held that, properly construed, s.71 did not displace a right to recover at common law but rather provided for a right to recover overpaid benefits where none would otherwise have existed.³ The Supreme Court agreed.

¹ R. (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions [2010] UKSC 54 at [1]. Overpayments may also arise where a correct award has been made but an incorrect amount is paid. Although the issue was not formally before the court, Lord Brown stated that “[e]veryone agrees that unauthorised payments of this kind are recoverable by the Secretary of State as money paid by mistake”. See also Sir John Dyson at [20].
² See M. Cousins “Benefit overpayments, the common law and human rights” (2010) 17 J.S.S.L.211 for a more detailed discussion of the context and background to the case. See also an update from CPAG as to the position after the Supreme Court decision at http://www.cpag.org.uk/welfarerights/overpayment-recovery/default.htm [Accessed January 18, 2011]
The Court based its analysis on the fact that at the time s.71 was enacted, the adjudication of awards and the payment of awards were constitutionally separate functions. Adjudication officers were responsible for all decisions concerning the making of awards, while the Secretary of State was responsible for the payment of the relevant amount. The statutory scheme provided that once an award had been made no amount was recoverable unless and until the relevant determination had been appealed, revised or superseded. The Supreme Court took the view that, at the relevant time, there would have been no right of recovery at common law. Although the adjudication system was altered in 1998 with the functions of adjudication officers being transferred to the Secretary of State, there was no indication that Parliament intended to alter the position as regards recovery of overpayment. Counsel for the Secretary of State rather hopefully suggested that even if there was initially no right of recovery at common law, Parliament could not “be taken to have excluded the possibility of a common law right to recovery arising in the future under a differently framed decision-making scheme.” Sir John Dyson shortly rejected this argument insofar as the only relevant change which had been made in the legislation was that the Secretary of State became responsible for adjudication.

The Secretary of State also sought to rely on the House of Lords’ decision in Deutsche Morgan Grenfell (DMG) in which the taxpayer was held entitled at common law to recover an overpayment of tax notwithstanding a statutory provision comprehensively dealing with overpayments. The Court of Appeal had rejected this argument on the basis that DMG involved an overpayment to the state whereas the present case involved an overpayment by the state. The Supreme Court agreed with the Secretary of State that this distinction was neither logical nor principled. The correct basis for rejecting this argument was that, “whereas section 33 of the Taxes Management Act 1970 only purported to deal with overpayments of tax charged under an assessment, leaving other overpayments to be dealt with outside the statutory scheme, section 71 deals with the overpayment of benefit pursuant to erroneous awards in all cases and, by necessary implication, deals too with the conditions for the recovery of such overpayments.”

Sir John Dyson took a similar approach stating that what the tax cases showed was that,

4 Lord Brown at [13]; Sir John Dyson at [21]; Lord Rodger at [37]. The Secretary of State suggested that it might have been arguable that a Secretary of State who paid an award based on a mistake in calculation was operating under the mistake that the award was correct and/or that an analogy could properly be drawn with the position that applies where a court judgment is reversed. Sir John Dyson (at [21]) doubted whether such arguments would succeed even today and felt that it was “highly unlikely that Parliament would have had such arguments in mind in 1986 or 1992.”

5 As quoted by Sir John Dyson at [23].


“the test is whether in all the circumstances Parliament must have intended a common law remedy to coexist with the statutory remedy.”

**Discussion**

The Supreme Court decision is a welcome clarification of the position concerning recovery of overpayments and, at least as regards benefits paid as a result of an award, now excludes common law claims for recovery by the DWP. Given that, as Lord Brown pointed out, common law restitution claims are “far from straightforward”, it would seem highly undesirable, from a policy point of view, to complicate further an already complicated area of law by allowing such a remedy. It should, however, be recognised that the argument advanced by CPAG and accepted by the Supreme Court was a rather narrow one. It was not that the enactment of a specific right of recovery in s.71 by implication displaced all common law rights of recovery as regards social security benefits, but rather that the specific terms of the legislation (including the separation of adjudication and payment functions prior to 1998) meant that a common law right to recovery did not exist. Therefore, the common law right of recovery subsisted as regards payments not made as a result of an award.

Interestingly, although he clearly adopts the narrow argument, Lord Brown also stated that:

“It seems to me inconceivable that Parliament would have contemplated leaving the suggested common law restitutionary route to the recovery of overpayments available to the Secretary of State to be pursued by way of ordinary court proceedings alongside the carefully prescribed scheme of recovery set out in the statute. Such an arrangement, moreover, would seem to me to create well-nigh insoluble problems.”

Sir John Dyson too, in his consideration of the argument by analogy to the DMG line of cases, gave extensive consideration to whether “Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme”, agreeing with Lord Brown that it could not. However, he made it clear that this was in response to the Secretary’s argument and on the basis that, contrary to what he had concluded, the Secretary of State did have a common law right of recovery.

While the (albeit obiter) views of the Supreme Court on overpayments not arising as a result of an award are clear, it would appear desirable that the right to recovery in relation to such overpayments should be put on a statutory basis rather than relying on the vagaries of the common law (as highlighted in the judgments).

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12. Lord Brown at [1]; Sir John Dyson at [20].
It should also be noted that s.71 has been broadly construed by the courts so as to allow the Secretary of State to recover overpaid benefit where a claimant failed to disclose a material fact whether or not that disclosure was reasonably to be expected.\(^{15}\) The \textit{CPAG} case did not address the human rights implications of the recovery of overpayments. However, a number of recent decisions of the European Court of Human Rights raise issues as to whether the current UK provisions as to recovery (including recovery—whether on foot of an award or otherwise—where there is no moral “fault” on the part of the claimant) are fully compatible with the provisions of the Convention on Human Rights.\(^{16}\) At the time of writing, the case of \textit{B v United Kingdom} is still pending before the Court of Human Rights and the Court’s ruling may help to clarify the human rights aspects of the overpayment provisions.\(^{17}\)

\(^{15}\) \textit{B v Secretary of State for Work & Pensions} [2005] EWCA Civ 929. Although note Lord Brown’s statement in \textit{CPAG} at [15] that ‘in the case of recipients of social security benefits Parliament from first to last has taken the view that only those who themselves brought about the overpayments should be liable to reimburse them and that in their cases reimbursement should be made easily enforceable.’


\(^{17}\) App. No. 36571/06, \textit{B v United Kingdom}. A statement of facts (including questions to the parties) was issued by the Court in March 2009.