



Michaelmas Term

[2010] UKSC 54

On appeal from: 2009 EWCA Civ 1058

JUDGMENT

The Child Poverty Action Group (Respondent) v Secretary of State for Work and Pensions (Appellant)

before

Lord Phillips, President

Lord Rodger

Lord Brown

Lord Kerr

Sir John Dyson, SCJ

JUDGMENT GIVEN ON

8 December 2010

Heard on 25 October 2010

Appellant
James Eadie QC
Andrew Henshaw
(Instructed by DWP/DH
Legal Services)

Respondent
Richard Drabble QC
Richard Turney
(Instructed by Child
Poverty Action Group)

LORD BROWN

1. This appeal is all about the Secretary of State's right to recover certain social security benefits. As everyone knows, a large amount of public money is spent upon a whole range of such benefits. Entitlement to these in all cases requires first a claim and then an award. Inevitably on occasion overpayments occur. Sometimes more is paid than the sum awarded. For example, following an award, say, of £60 a claimant may be sent by mistake a cheque for £120 or two cheques each for £60. These cases present no difficulty. Everyone agrees that unauthorised payments of this kind are recoverable by the Secretary of State as money paid by mistake. The problem arises rather when overpayments are made in accordance with an award but the award itself is higher than it should be. It is common ground that before any question can arise as to recovering the sums overpaid in these cases the mistaken award must first be revised. And it is common ground too that following such revision the Secretary of State is entitled to recover any overpayment resulting from misrepresentation or the non-disclosure of a material fact. All this is expressly provided for by section 71 of the Social Security Administration Act 1992 (the 1992 Act). But does section 71 provide an exclusive code for recovery? That is the question.

2. In short, what is in issue in this appeal is whether in other cases of mistakenly inflated awards – most obviously in cases arising from “official error” (as it is called in Regulations to which I shall come) – the Secretary of State is entitled to recover the sums overpaid. This question arises, for example, where a claimant has notified a change of circumstances (such as that he has begun full-time work or that his child has left the household) and by mistake the Department overlooks (or delays actioning) the notification and continues making benefit payments at the same rate; or, indeed, where there is simply an erroneous calculation of the award. In cases like that is the Secretary of State permitted to seek recovery of such overpaid benefits at common law or is the exclusive route to recovery that provided by section 71 of the 1992 Act?

3. The judge at first instance, Michael Supperstone QC, sitting as a deputy High Court Judge, found in favour of the Secretary of State – [2009] EWHC 341 (Admin), [2009] 3 All ER 633. The Court of Appeal (Sedley, Lloyd and Wilson LJJ) [2009] EWCA Civ 1058, [2010] 1 WLR 1886 – allowed the Child Poverty Action Group's appeal and declared:

“where a benefit falling within section 71(11) of the Social Security Administration Act 1992 is paid pursuant to the machinery contained

in Part I Chapter II of the Social Security Act 1998, it can only be reclaimed from the claimant under section 71 of that Act (or some other specific statutory provision).”

The Secretary of State now appeals to this Court.

4. The circumstances in which the question arose for decision can be briefly told. At some unspecified date (seemingly in about 2006) the Secretary of State adopted a practice of writing to benefit claimants who he considered had been overpaid, but where there had been no misrepresentation or non-disclosure, indicating that the Department had a common law right of action to recover the overpayment. The letters were in substantially standard form accompanied by a document headed “Questions you might have about the overpayment” and asserted essentially that a mistake had been made, that too much of the relevant benefit had been paid and that “the law allows us to ask you to pay back money that should not have been paid” (or words to like effect). From March 2006 to February 2007 some 65,000 such letters were sent. Although no common law claim for repayment was ever in fact brought in the courts, the letters led, we are told, to the recovery of substantial sums – for example, just over £4m in the year 2007/8. The Child Poverty Action Group, however, an organisation with a long history of bringing legal test cases on behalf of social security claimants, thought the letters were based on a false legal premise and so brought this challenge to seek appropriate declaratory relief. Thus it was that the issue came before the courts.

5. It is convenient at this point to set out the more material parts of section 71 of the 1992 Act (as amended). Section 71 appears in Part III of the Act under the title *Overpayments and Adjustments of Benefit – Misrepresentation etc*:

“71. – *Overpayments – general.*

(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.

(2) Where any such determination as is referred to in subsection (1) above is made, the person making the determination shall in the case of the Secretary of State or the First-tier Tribunal, and may in the case of the Upper Tribunal or a court –

(a) determine whether any, and if so what, amount is recoverable under that subsection by the Secretary of State, and

(b) specify the period during which that amount was paid to the person concerned.

(3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it....

(5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under section 9 or superseded under section 10 of the Social Security Act 1998....

(8) Where any amount paid, other than an amount paid in respect of child benefit or guardian's allowance, is recoverable under –

(a) subsection (1) above;...

it may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits.

(9) Where any amount paid in respect of a couple is recoverable as mentioned in subsection (8) above, it may, without prejudice to any other method of recovery, be recovered, in such circumstances as

may be prescribed, by deduction from prescribed benefits payable to either of them.

(10) Any amount recoverable under the provisions mentioned in subsection (8) above –

(a) if the person from whom it is recoverable resides in England and Wales and the county court so orders, shall be recoverable by execution issued from the county court or otherwise as if it were payable under an order of that court; . . .”

Section 71(11) lists the various benefits to which the section applies. It is unnecessary to reproduce it here.

6. It is important to note that when the 1992 Act was passed, indeed at all times before 1998, the adjudication of awards and the payment of awards were constitutionally separate functions. Adjudication officers (and, before them, other independent officers) were responsible for all decisions concerning the making of awards, the Secretary of State for their payment. By sections 1 and 8 of the Social Security Act 1998 (the 1998 Act), however, the functions of adjudication officers were transferred to the Secretary of State who thereupon became the primary decision-maker in relation to the making of awards as well as remaining responsible for their payment. Prior to this merger of functions there had been provision for the revision of awards on a review (as well as the reversal or variation of awards on appeal). The 1998 Act introduced new provisions enabling the Secretary of State (by section 9) to revise, and (by section 10) to supersede, his section 8 decisions. This explains the language of section 71(5A). Essentially the same provision, however, had been made in section 71(5) which it replaced. As already noted, there could be no question of the Secretary of State ever seeking to recover an overpayment until the relevant award in one way or another had been formally corrected. These sections can be seen to reflect other provisions too in the governing legislation: regulation 17(1) of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) which imposes a statutory duty on the Secretary of State to pay the benefit awarded “for an indefinite period”, and section 17 of the 1998 Act by which the Secretary of State’s decision is declared to be final.

7. The next matter to note is that the 1992 Act was a consolidating statute. The immediate forerunner of section 71 had been section 53 of the Social Security Act 1986 which in turn had replaced both section 20 of the Supplementary Benefits Act 1976 governing the recovery of overpayments of the main non-contributory

benefits and section 119 of the Social Security Act 1975 which governed the recovery of overpayments of contributory benefits. Section 119 had provided a defence if the claimant showed that he had exercised “due care and diligence to avoid overpayment.” All the other provisions had adopted the test of misrepresentation or failure to disclose that is now re-enacted in section 71(1).

8. The final point to note from the statutory material is the express provision made by regulation 3(5)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) (“the 1999 Regulations”) for a decision of the Secretary of State under section 8 or 10 of the 1998 Act to be revised with retrospective effect at any time if, inter alia, it “arose from an official error”.

9. Against this basic statutory background the Court of Appeal reached essentially the following conclusions. The statutory scheme provides for the revision of awards of benefit ab initio and once an award has been revised it is final in its revised form. Downward revision shows that the claimant was not, in fact, entitled to the whole of the payments received. It is rational for the legislature to make provision for the consequences and it is by section 71 alone that it has done so. Under section 71 no amount is recoverable unless the relevant determination has been successfully appealed, revised under section 9 or superseded under section 10. Section 71(1) then sets out the (sole) circumstances in which the Secretary of State is entitled to recover an overpayment made pursuant to an award. These include only cases where the original award was obtained by misrepresentation or non-disclosure, and exclude cases of receipt – even knowing receipt – of an overpayment due to a mistaken award. When section 71 was enacted, adjudication was separate from administration. The established statutory scheme had always been understood to be exhaustive of the rights, obligations and remedies of both the individual and the state, and both then and since, awards have been conclusive of the obligation to pay and of the right to receive payment. In such a context it is unsurprising that the power of recovery when an award is modified should be prescribed by Parliament and not at large. Section 71 has not excluded any power of recovery that was previously available but has created a power of recovery where otherwise there is none.

10. Mr Eadie QC for the Secretary of State disputes those conclusions. He contends that the Crown’s common law right to recover benefits overpaid by mistake of fact or law is not excluded by the legislation either expressly (so much is clear) or by necessary implication. There is, submits Mr Eadie QC, nothing inconsistent between the express right of recovery in cases of misrepresentation and non-disclosure provided for by section 71(1) and the common law right to seek recovery in other cases. The statutory right applies only to a limited class of cases and, where it does apply, it confers greater rights on the Secretary of State than would be available at common law. It does not allow the recipient of the

benefit to rely (as would a common law claim) on a defence of change of position. And it allows recovery (a) from the person who misrepresented the fact or failed to disclose it (section 71(3)), (b) by deduction from prescribed benefits (section 71(8)), and (c) in certain circumstances from the prescribed benefits payable to either member of a couple (section 71(9)). All this is no doubt understandable: it is logical for Parliament to prescribe an easier route to recovery of overpayments against those actually responsible by misrepresentation or non-disclosure for the making of the mistaken awards in the first place. But non constat that this should be the only route to recovery. After all, the misrepresentation or non-disclosure might have been entirely innocent and the moral case for repayment against the recipient of an award inflated by official error might actually be stronger. The error might have been plain, obvious and major and the recipient well aware of it but determined to take advantage of it none the less. Such a view is supported too by regulation 3(5)(a) of the 1999 Regulations. Why make provision for the retrospective revision of mistaken awards arising from official error if it is not possible then to remedy the mistake? True, if the error disadvantages the claimant and he is underpaid, the error can be remedied retrospectively. But if the error leads to overpayment and the Child Poverty Action Group are right, there can be no recovery against the recipient. This would represent a lacuna in the scheme.

11. Mr Eadie in addition seeks to pray in aid what he submits is the analogous decision of the House of Lords in *Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs* [2006] UKHL 49, [2007] 1 AC 558 (“DMG”) by which the taxpayer was held entitled at common law to recover an overpayment of tax notwithstanding a statutory provision comprehensively dealing with overpayments in the case of anyone “who has paid [income tax or capital gains] tax charged under an assessment” (section 33 of the Taxes Management Act 1970). Given that section 33 did not apply in that case because there had been no valid assessment, the taxpayer was held permitted to bring a common law restitution claim. It is Mr Eadie’s submission that by the same token, given that the Secretary of State here cannot recover under section 71(1) save in cases of misrepresentation or non-disclosure, he should in other cases be entitled to seek recovery at common law.

12. I have not found this an altogether easy case and, like Sedley LJ in the court below, regard the arguments as “closely balanced”. In the end, however, with Mr Drabble QC’s help, I have come to the same conclusion as the Court of Appeal, namely that section 71 constitutes a comprehensive and exclusive scheme for dealing with all overpayments of benefit made pursuant to awards. Essentially my reasoning is as follows.

13. As everyone agrees, no question of the recovery of any overpayment can arise until the award has been corrected. So far as recovery under section 71(1) is concerned, this indeed is expressly stipulated by section 71(5A) (and section 71(5) before it). But it would be surprising to find a common law right to restitution on

grounds of mistake to be similarly constrained and more surprising still to find no relevant provision (akin to section 71(1)) giving effect to such a right. As already noted, when section 71 was enacted, there was a division of functions between the adjudication of awards and their payment. Since the Secretary of State paid the benefit awarded pursuant to a statutory duty, there could be no question of his having made a mistake of fact or law in making the payment. Thus, as the Court of Appeal noted, section 71 and its predecessor sections created a power of recovery when otherwise there would have been none. This explains too why section 71 contains no express exclusion of any common law right of recovery: there simply was none and it is hardly surprising that no such exclusion was inserted in 1998 when the adjudicatory and payment functions merged. What, in short, is striking about section 71 is not its omission of an express exclusion of common law rights but rather its omission of any provision recognising or giving effect to any such rights.

14. As is well known, common law restitution claims are, at the best of times, far from straightforward. Not the least of their difficulties, a difficulty at its most pronounced in the context of social security benefit claimants, is the defence of change of position. Part III of the 1992 Act provides, of course, not just for an express entitlement to recover overpaid benefits in cases of misrepresentation or non-disclosure, but also for the whole process of determining the facts relevant to such entitlement, including making provision for appeals to a tribunal. 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. Could there, for example, be parallel recovery proceedings against the maker of the misrepresentation under section 71(3) and against the recipient of the benefit at common law in the courts? And in the event of successful claims, could there then be deduction from prescribed benefits under section 71(8) against the misrepresenter (or possibly against the other member of a couple under section 71(9)) as well as execution against the actual recipient under the ordinary processes of law?

15. With regard to Mr Eadie's point that a stronger moral argument for recovery of overpayments may exist in cases of the knowing receipt of mistaken awards than, say, in cases of innocent misrepresentation, I would pose these questions. First, this being so, why would Parliament not prescribe the same stronger recovery powers for these cases as for cases of misrepresentation and non-disclosure and include them within the statutory recovery scheme? Secondly, why would Parliament not make express provision for this separate category of cases, similarly prescribing the conditions for the Secretary of State's entitlement to recovery, such as that the claimant knew that he had been overpaid and/or that he

had not changed his position? The answer to both must surely be 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. Such a scheme is entirely rational. For better or for worse those benefiting from official errors are not subject to recovery proceedings. I am persuaded that section 71 does indeed necessarily exclude whatever common law restitution rights the Secretary of State might otherwise have. The title to Part III of the Act, *Overpayments and Adjustments of Benefit*, not merely suggests but to my mind provides for a comprehensive and exclusive scheme for both the correction and consequences of mistaken benefit awards.

16. As for Mr Eadie's reliance on the *DMG* line of cases with regard to the tax regime, for my part I find the suggested analogy unconvincing. This is not for the reasons suggested by the Court of Appeal (see in particular Lloyd LJ's judgment at paras 33-35), namely that *DMG* involved an overpayment *to* the state whereas the present case involves an overpayment *by* the state; that, I would agree with Mr Eadie, is neither a logical nor a principled distinction. Rather it is because, 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.

17. In the result, I would endorse the Court of Appeal's declaration and dismiss this appeal.

SIR JOHN DYSON SCJ

18. The issue that arises on this appeal is whether the Secretary of State is entitled to recover at common law overpaid social security payments that were made pursuant to a decision made under section 8(1)(a) of the Social Security Act 1998 ("the 1998 Act"), or whether the right to recovery provided for in section 71 of the Social Security Administration Act 1992 ("the 1992 Act") is the exclusive route to recovery. It is not in dispute that this raises a question of statutory interpretation. The answer to the question requires in the first place an understanding of the relevant statutory history.

19. The salient features of the history are these. The immediate precursor to section 71 of the 1992 Act (a consolidating Act) was section 53 of the Social Security Act 1986 ("the 1986 Act") whose terms were not materially different

from those of the later provision. Before 1986, the rule governing the recovery of overpayments of contributory benefits was contained in section 119 of the Social Security Act 1975 and the rule governing the recovery of the main means-tested non-contributory benefit (supplementary benefit) was contained in section 20 of the Supplementary Benefits Act 1976. Of critical importance is the fact that until the 1998 Act, there was a division between the adjudicating authorities responsible for fact-finding, decisions on legal issues and the quantification of the award on the one hand, and the body responsible for payment on the other. From 1986 onwards, the former was carried out by an adjudication officer and the latter by the Secretary of State. It was only in the 1998 Act that the Secretary of State was made responsible for both the decision on the claim for benefit and the payment of the amount of the award.

20. It follows that the interpretation of section 53 of the 1986 Act and section 71 of the 1992 Act must be considered against the background that at the time of those enactments there was no possibility of mistake on the part of the Secretary of State in the calculation of the award, since he played no part in its calculation. The only possibility of mistake on the part of the Secretary of State lay in the *payment* of the amount awarded to be paid. It is common ground (and rightly so) that, if the Secretary of State overpaid by mistake, the amount of the overpayment could be recovered by a common law claim in restitution. Section 53(4) of the 1986 Act and section 71(5A) as it now is of the 1992 Act show that the overpayments with which these statutes are concerned are those which result from changes to an award.

21. In deciding whether Parliament intended in 1986 and again in 1992 that the statutory provisions were to be an exhaustive code for recovery of overpayments by the Secretary of State, it is in my view relevant to recognise that at the time of those enactments there was no realistic possibility that the Secretary of State could recover overpayments of benefit in a common law action. By 1986, the law of unjust enrichment or restitution was by no means in its infancy. It was well understood that a person was in principle entitled to recover at common law money paid under a mistake of fact. But under the statutory scheme then in force, there would have been no relevant mistake on which the Secretary of State could have founded such a claim. Mr Eadie QC suggests that it might have been arguable in a case where there had been a mistake in the calculation of the award that a Secretary of State who paid such an award 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. I acknowledge that such arguments might be advanced today, although I doubt whether they would succeed even now, after the considerable developments that have taken place in recent years in this area of the law. But it seems to me highly unlikely that Parliament would have had such arguments in mind in 1986 or 1992. In my view, the correct premise on which to proceed is that section 53 of the 1986 Act and section 71 of

the 1992 Act were drafted on the basis that, as the law then stood, the Secretary of State was not entitled at common law to recover overpayments resulting from errors in the calculation of the award.

22. At first sight, therefore, one might think that this should lead to the conclusion that the statutory provisions for recovery of overpayments were intended to be exhaustive of the right to recovery. There was no common law right to recovery. A statutory right to recovery was introduced. By definition, therefore, the statutory right to recovery was intended to be exhaustive. That was the view of the Court of Appeal as expressed at paras 25 and 27 of the judgment of Sedley LJ and I agree with it. At para 27, he pithily summarised the argument that Mr Drabble QC has repeated in this court “which is not that section 71 has excluded any power of recovery that was previously available, but that it has created a power of recovery where otherwise there is none”.

23. But Mr Eadie has another string to his bow. He submits that, even if at the time of the enactment of sections 53 and 71 the Secretary of State had no right to recover at common law, it does not follow that, if there were a change in circumstances so that such a right to recover were to arise in the future, it would be precluded by the statutory provisions. As I understand it, Mr Eadie does not contend that the meaning of sections 53 and 71 could change over time. In this context, that would obviously be an untenable proposition. The position would of course be otherwise if section 71 were later amended expressly or by necessary implication. But that is not suggested here. Mr Eadie’s argument is directed to the true meaning of section 71 in its unamended form but he submits that it cannot be construed as having prospectively excluded by necessary implication a right which was not in contemplation at the time when it was enacted. In other words, Parliament cannot 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.

24. I cannot accept this argument. I proceed on the hypothesis that, as I have already said, at the time when the statutory scheme for recovery of overpayments was enacted, there was no non-statutory route for recovery. The statutory scheme was exhaustive at that time. It carefully delineated the boundaries. They were limited to recovery of payments made pursuant to an award by the adjudicating authorities which was in error by reason of a misrepresentation or failure to disclose any material fact. Simple error on the part of the adjudicating authorities was excluded. I would not go so far as to say that Parliament can be taken to have excluded the possibility of a common law right to recovery under a differently framed decision-making scheme. That would be to go too far, since it would depend on the terms of the differently framed scheme.

25. But I see no basis for holding that Parliament intended to allow a common law right of recovery in circumstances where the only material difference between the pre-1998 Act scheme and the 1998 scheme is that under the latter the Secretary of State determined the awards. Under the pre-1998 Act scheme, the section 71 code precluded common law claims for mistake, so that the Secretary of State could not recover overpayments where an award was erroneous for one of the statutory reasons. That code was continued after the 1998 Act without any material change. The only difference now was that the Secretary of State was responsible for the calculation of the award. The inevitable inference is that post the 1998 Act, Parliament intended the same exclusive code to continue. There is no basis for holding that the change in the identity of the decision-maker, which was not accompanied by any change in the statutory criteria for recovery of overpayments, was intended to open the door any wider to recovery than it previously had been.

26. In my view, that is sufficient to dismiss this appeal. But I need to deal with a further argument advanced by Mr Eadie. This proceeds on the basis that, contrary to the view that I have expressed, in 1986 and 1992 the Secretary of State had a common law right to recover overpayments under ordinary common law restitutionary principles. He accepts that this right could be displaced by statute, but that could only be done expressly or by necessary implication. It is common ground that there was no express abrogation of the right. Nor, Mr Eadie submits, was it abrogated by necessary implication.

27. There are many examples of cases where the court has considered whether the provisions of a statute have impliedly overridden or displaced the common law. In each case, it is a question of construction of the statute in question whether it has done so. *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 concerned a claim for compensation in respect of the payment of advance corporation tax which had been demanded contrary to the EC Treaty. One of the issues was whether section 33 of the Taxes Management Act 1970 excluded any common law claim on the grounds of mistake. Lord Hoffmann said at para 19:

“But the question is in the end one of construction. When a special or qualified statutory remedy is provided, it may well be inferred that Parliament intended to exclude any common law remedy which would or might have arisen on the same facts.”

To similar effect, at para 135 Lord Walker said:

“When Parliament enacts a special regime providing special rights and remedies, that regime may (but does not always) supersede and

displace common law rights and remedies (or more general statutory rights and remedies). Whether it has that effect is a question of statutory construction.”

28. A similar issue arose in *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] AC 1174. There the question was whether the statutory scheme for recovery of VAT under the Value Added Tax Act 1994 was exclusive so as to preclude the right at common law to claim damages for unlawful means conspiracy. The House of Lords were split as to the result, but not, I think, as to the correct approach to the problem. Lord Hope said at para 31 that the statutory scheme was “comprehensive and does not admit the use by the commissioners of means for collecting VAT which are not provided for by the statute”. Lord Scott at para 60 said that an intention to bar common law claims could not “be attributed to the legislature when enacting the VAT scheme”. Lord Walker (paras 105 to 110) did not agree that the statutory code was comprehensive and exhaustive of the commissioners’ powers of collection of VAT. Lord Mance (para 130) said that for a statutory scheme to supersede or displace common law rights and remedies, “the statute must positively be shown to be inconsistent with the continuation of the ordinary common law remedy otherwise available”. He concluded (para 136) that he saw no “inconsistency or even incongruity” between the statute and the common law remedy in tort. Lord Neuberger identified a number of features of the statutory scheme which both substantively and procedurally were inconsistent with the position in relation to a common law claim. In other words, he explicitly applied the same inconsistency criterion as Lord Mance but, on the facts, reached the opposite conclusion.

29. It will be seen that in these two cases, the court did not apply a test of necessary implication. Mr Eadie derives that test from the context of human rights or the principle of legality explained by Lord Hoffmann and Lord Steyn in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115. He relies, for example, on *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, where the question was whether section 20 of the Taxes Management Act 1970 overrode legal professional privilege. The House of Lords held that it did not do so. Lord Hoffmann emphasised that legal professional privilege was a fundamental human right long established in the common law. At para 8 he said that an intention to override fundamental human rights “must be expressly stated or appear by necessary implication.” He referred to the discussion of this principle by Lord Steyn and himself in *Ex p Simms* and other cases. Lord Hobhouse made the same point. Having referred to *Ex p Simms*, he said (at para 44) that the principle of statutory construction stated in that case was not new and had long been applied “in relation to the question whether a statute is to be read as having overridden some basic tenet of the common law”. The protection given by the common law to those entitled to claim legal professional privilege is a basic tenet of the common law as

had been reaffirmed by *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428. It is in the context of such a common law right that the passage at para 45 which is relied on by Mr Eadie is to be understood. Lord Hobhouse said:

“A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 481. A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.”

30. In the case of *B (A Minor)*, the question at issue was whether liability for an offence contrary to section 1(1) of the Indecency with Children Act 1960 was strict or required the proof of mens rea. It was held by the House of Lords that mens rea was an essential element of every criminal offence unless Parliament expressly or by necessary implication provided to the contrary. In so holding, they were doing no more than applying a well-established common law presumption or requirement. Lord Steyn explicitly referred at page 470F to this presumption as the “paradigm” of the principle of legality.

31. The context in the present case, however, is quite different. The question whether the Secretary of State can recover overpayments of benefit does not involve any fundamental human rights of the Secretary of State nor does it engage the principle of legality. I do not accept the submission that the respondents have to surmount the high hurdle erected by Lord Hutton in *B (A Minor)* or Lord Hobhouse in *Morgan Grenfell*. Rather the question is whether, as a matter of statutory interpretation, section 71 is an exclusive code for recovery of overpayments. That question is to be answered not by applying any presumptions or by saying that the common law remedy in restitution is not displaced unless, in Lord Hobhouse’s words, as a matter of logic, it cannot co-exist with the statutory regime for recovery.

32. The importance of the tax cases is that they show that the test is whether in all the circumstances Parliament must have intended a common law remedy to co-exist with the statutory remedy. Lloyd LJ sought to distinguish the tax cases to which I have referred on the grounds that payments by the state to a person have nothing to do with the tax regime. He said that the difference between recovery of a social security benefit wrongly paid to a claimant on the one hand and of tax paid

by a taxpayer on the other is “substantial and significant”. Of course, I accept that they are different, but like Lord Brown I do not consider that the difference is material to the question whether Parliament intended a statutory code to displace common law rights and remedies. There is nothing in the reasoning in the tax cases to indicate that the courts were applying a rule which was peculiar to tax cases. Indeed, for example, Lord Mance at para 130 of *Total Network SL* referred to non tax cases such as *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42 and *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518 as being illustrative of the principle that he had articulated.

33. If the two remedies cover precisely the same ground and are inconsistent with each other, then the common law remedy will almost certainly have been excluded by necessary implication. To do otherwise would circumvent the intention of Parliament. A good example of this is *Marcic* where a sewerage undertaker was subject to an elaborate scheme of statutory regulation which included an independent regulator with powers of enforcement whose decisions were subject to judicial review. The statutory scheme provided a procedure for making complaints to the regulator. The House of Lords held that a cause of action in nuisance would be inconsistent with the statutory scheme. It would run counter to the intention of Parliament.

34. The question is not whether there are *any* differences between the common law remedy and the statutory scheme. There may well be differences. The question is whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme. The court should not be too ready to find that a common law remedy has been displaced by a statutory one, not least because it is always open to Parliament to make the position clear by stating explicitly whether the statute is intended to be exhaustive. The mere fact that there are some differences between the common law and the statutory positions is unlikely to be sufficient unless they are substantial. The fact that the House of Lords was divided in *Total Network SL* shows how difficult it may sometimes be to decide on which side of the line a case falls. The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended by co-exist with it.

35. I agree with Lord Brown that, for the reasons he has given, section 71 was intended to be an exhaustive code. Some of the difficulties that he has highlighted at para 14 of his judgment are similar to those mentioned by Lord Neuberger in *Total Network SL*. As Lord Millett put it in *Unisys* at para 80 of his speech, “the co-existence of two systems, overlapping but varying in matters of detail...would be a recipe for chaos”. That is a powerful reason for supposing that Parliament intended the statutory code contained in section 71 of the 1992 Act to be exhaustive.

36. For these reasons, as well as those given by Lord Brown, I would dismiss this appeal.

LORD RODGER

37. As Lord Brown and Sir John Dyson have explained, until 1998 there was no real possibility of the Secretary of State making a mistake in the calculation of an award that would have founded a common law claim for money paid under a mistake. Precisely for that reason, when originally enacted, section 71 of the Social Security Administration Act 1992 (“the 1992 Act”) could never have been intended to exclude such a claim. It is therefore, at first sight, surprising if that section has the effect of excluding a claim of that kind which might otherwise have become available when the system was altered in 1998.

38. When it enacted section 71 in 1992, Parliament intended it to be the only basis for the Secretary of State to recover a benefit payment that had been wrongly calculated. The question is whether, when it enacted the Social Security Act 1998, it changed its view. The only provision in that Act which suggests that Parliament may have changed its mind is section 9(3). It provides that, where the Secretary of State revises a decision, the decision is to take effect “as from the date on which the original decision took (or was to take) effect.” If the respondent’s approach is correct, in a case where the revision is downwards in favour of the Secretary of State, Parliament’s decision to give the revision retroactive effect seems to have no practical effect. That consideration has caused me real difficulties.

39. Section 9(3) creates the problem, however; it does not solve it. If, by enacting section 9(3), Parliament intended the Secretary of State to be able to bring a common law claim for restitution, realistically, it could have been expected to amend section 71 of the 1992 Act. It did not do so. If, on the other hand, Parliament overlooked the possibility of such a claim, then the appropriate conclusion must be that section 71 was to continue to provide the only basis for recovering a benefit that had been wrongly calculated. With some hesitation, therefore, I have come to the conclusion, for the reasons given by Lord Brown and Sir John Dyson, that section 71 should be interpreted as excluding a common law remedy in this situation. Whether a remedy should be available in these cases is a matter for Parliament, not for this Court.

LORD PHILLIPS

40. For the reasons given by Lord Brown and Sir John Dyson, which are in perfect harmony, I would dismiss this appeal.

LORD KERR

41. I have read and agree with the judgments of Lord Brown and Sir John Dyson. For the reasons that they have given I too would dismiss the appeal.