Michaelmas Term
[2011] UKSC 60
On appeal from: [2010] EWCA Civ 1431

JUDGMENT

Secretary of State for Work and Pensions (Appellant) *v* Payne and another (Respondents)

before

Lady Hale
Lord Brown
Lord Mance
Lord Kerr
Lord Wilson

JUDGMENT GIVEN ON

14 December 2011

Heard on 3 November 2011

Appellant
Clive Sheldon QC
Denis Edwards
(Instructed by Department for Work and Pensions Legal Services)

Respondent (Payne)
Richard Drabble QC
Desmond Rutledge
(Instructed by Edwards Duthie)

Respondent (Cooper)
Richard Drabble QC
Paul Stagg
(Instructed by Public Law Project)

LADY HALE (WITH WHOM LORD KERR AGREES)

1. The issue in this case is whether the Secretary of State for Work and Pensions can continue to recoup Social Fund loans and benefit overpayments by deduction from current benefit payments during the "moratorium" period after the making of a Debt Relief Order (DRO) under Part 7A of the Insolvency Act 1986. The present state of the law is untidy, to say the least. Cranston J in the High Court and a majority of the Court of Appeal (Smith and Toulson LJJ) have held in this case that the Secretary of State cannot continue to make these deductions: [2010] EWHC 2162 (Admin), [2010] BPIR 1389 and [2010] EWCA Civ 1431, [2011] 1 WLR 1723. But Keene J in the High Court has held that such deductions can continue to be made between the making of a bankruptcy order and the bankrupt's discharge from bankruptcy: *R v Secretary of State for Social Security, Ex p Taylor and Chapman* [1997] BPIR 505. The House of Lords has reached the same conclusion in the context of the rather different Scottish bankruptcy law: *Mulvey v Secretary of State for Social Security* 1997 SC (HL) 105. Once a bankrupt is discharged, however, the Court of Appeal has held that the liability to repay the Secretary of State is also discharged: *R (Balding) v Secretary of State for Work and Pensions* [2007] EWCA Civ 1327, [2008] 1 WLR 564.

2. The Secretary of State would like to introduce coherence into the scheme in two ways: firstly by assimilating the position during the moratorium after a DRO with the position after a bankruptcy order; and secondly by reversing *Balding*, so that the debt can continue to be recouped after a bankrupt's discharge. Ideally, the same would apply at the end of the DRO moratorium period. The claimants, on the other hand, would ideally introduce coherence by holding that the Secretary of State's deduction power does not survive the making either of a DRO or of a bankruptcy order. *Balding* was correctly decided and the same principle applies at the end of the moratorium period.

The facts

3. The facts of the two test cases before us are typical of many. Mrs Payne was made a Social Fund loan of £843 in September 2007 in order to replace her washing machine and cooker. The Secretary of State did not start to recover this by deduction from her benefits at that stage. But in August 2009, she obtained a DRO listing the loan among her qualifying debts. When she informed the Secretary of State of this, he began deducting £23.59 per week from her income support, although this was reduced in December to £11.64 per week. These proceedings for judicial review of the legality of the deductions were begun in March 2010. In

August 2010, the one year moratorium period came to an end and the debt was discharged.

4. Ms Cooper is in receipt of incapacity benefit and disability living allowance. In August 2009, the Secretary of State determined that she had been overpaid incapacity benefit in the sum of £1,195.07 and in December 2009 he began recovering this from her by deducting £128.44 from her benefits every four weeks. In January 2010, Ms Cooper obtained a DRO which listed the overpayment as one of her qualifying debts. In March 2010, she too began proceedings to challenge the continued deductions from her benefits. In January 2011, the one year moratorium ended and the debt was discharged.

The power to deduct

5. The Secretary of State is entitled to recover benefits which have been overpaid because of misrepresentation or non-disclosure: Social Security Administration Act 1992 (SSAA), section 71(1). Before he can do so, the erroneous award of benefit must have been reversed or varied on appeal, or revised or superseded by a fresh award under section 9 or 10 of the Social Security Act 1998: SSAA, section 71(5A). Amounts recoverable under section 71(1) "may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits": SSAA, section 71(8). All kinds of benefits, whether contributory or non-contributory, income related or payable irrespective of means, are prescribed: see Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 15. However, not only is this without prejudice to any other method of recovery, but it is also expressly provided that overpayments can be recovered by execution issued from the county court as if they were payable under an order of that court (and equivalent provision is made for Scotland): SSAA, section 71(10). Section 71 is also applied with modifications to overpayments from the Social Fund: SSAA, section 71ZA.

6. In the same way, if a Social Fund award is recoverable – that is, a loan – then "Without prejudice to any other method of recovery, the Secretary of State may recover an award by deduction from prescribed benefits": SSAA, section 78(2). Equivalent provision is made for the recovery of any amount of housing benefit paid in excess of entitlement: SSAA, section 75(4). Her Majesty's Revenue and Customs (HMRC) also have equivalent powers to recover overpayments of working tax credit and child tax credit by deduction from payments of any tax credit: Tax Credits Act 2002, section 29(4). We are told that considerable sums of money owed to HMRC, the Secretary of State and other public bodies are listed in DROs. The figures quoted to us were respectively nearly £9m to HMRC, nearly £8m to the Secretary of State, of which over £6m was in respect of Social Fund loans, and £20.7m to other public bodies. Whether these include other debts as

well as loans, overpaid benefits and tax credits was not clear. Nor were we told how much has currently to be written off at the end of the moratorium period.

Debt Relief Orders

7. To put it shortly, debt relief orders (DROs) are a new and simplified way of wiping the slate clean for debtors who are too poor to go bankrupt. As Toulson LJ explained in the Court of Appeal, they were the product of two consultation papers: the first was issued by the Department for Constitutional Affairs in 2004, entitled *A Choice of Paths – Better options to manage over-indebtedness and multiple debt*. This proposed a new scheme for people with "no income, no assets" who were unable to pay their debts. The second was issued by the Insolvency Service in 2005, entitled *Relief for the Indebted – An Alternative to Bankruptcy*, and suggested criteria for such a scheme and how it was intended to operate.

8. The new scheme was introduced into the Insolvency Act by the Tribunals, Courts and Enforcement Act 2007 and came into force in February 2009. Application is made, not to a court, but to the official receiver through a qualified intermediary (such as a specialist debt adviser): Insolvency Act (IA) 1986, section 251B. The debtor must fulfil certain prescribed conditions: IA 1986, section 251C(5), Schedule 4ZA, Insolvency Rules (SI 1986/1925), Part 5A, and Insolvency Proceedings (Monetary Limits) Order 1986 (SI 1986/1996), as amended. For example, her monthly surplus income must not exceed the prescribed amount, currently £50; the total value of her property (leaving out such things as clothes, furniture and household equipment, tools of the trade and a modest domestic motor vehicle) must not exceed the prescribed amount, currently £300; and her overall indebtedness must not exceed the prescribed amount (currently £15,000). To avoid people repeatedly running up debts and having them wiped out by an order, it is not possible to get another DRO within six years.

9. The DRO is made in respect of "qualifying debts". A debt qualifies if it is for a liquidated sum payable either immediately or at some certain future time and is not excluded: IA 1986, section 251A(2). It does not qualify to the extent that it is secured: IA 1986, section 251A(3). Excluded debts are those which are prescribed in the Insolvency Rules 1986, rule 5A.2. These include student loans but do not include Social Fund loans or overpaid benefits. It is not suggested that the liability to repay these is not a "debt" for the purpose of section 251A. The application has to list the debts to which the debtor is subject at the date of the application: section 251B(2)(a). The official receiver can ask for further information from the debtor but does not at this stage give notice to the creditors. When the order is made, it must list the debts which the official receiver is satisfied were qualifying debts at the application date: section 251E(3).

10. When the order is made, "a moratorium commences on the effective date for a debt relief order in relation to each qualifying debt specified in the order": IA section 251G(1). What does the moratorium mean? This is governed by section 251G(2):

> "During the moratorium, the creditor to whom a specified qualifying debt is owed –
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> (a) has no remedy in respect of the debt, and
>
> (b) may not -
>
> (i) commence a creditor's petition in respect of the debt, or
>
> (ii) otherwise commence any action or other legal proceedings against the debtor for the debt,
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> except with the permission of the court and on such terms as the court may impose."

11. During the moratorium period, the creditors may object to the making of the order, or the inclusion of a debt in the order, or the details of the debt specified in the order: IA 1986, section 251K. The official receiver has power to revoke or amend the order: IA 1986, section 251L. If the order continues throughout the moratorium period of one year (which may be extended in certain circumstances), "the debtor is discharged from all the qualifying debts specified in the order": IA 1986, section 251I(1). This does not apply to debts incurred as a result of fraud or if a court later revokes the DRO: IA 1986, section 251I(3), (5). Otherwise the slate is wiped clean.

12. On the face of it, then, as Social Fund loans and benefit overpayments have not been excluded from the qualifying debts, the creditor "has no remedy in respect of" them during the moratorium period and they are discharged after it has run its course. The issue, therefore, is whether recovery by deduction from benefits (or tax credits) is a "remedy in respect of the debt" for this purpose. To understand the argument that it is not, it is necessary to turn to the authorities under the bankruptcy regime.

The authorities

13. They begin with *Bradley-Hole v Cusen* [1953] 1 QB 300. The creditor was a tenant of rent-controlled premises who had been charged too much rent by his landlord. Section 14(1) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 provided that the overpaid rent was recoverable by the tenant and "may, without prejudice to any other method of recovery, be deducted by the tenant . . . from any rent . . . payable by him to the landlord . . ." The landlord went bankrupt and the trustee in bankruptcy claimed to be entitled to the full amount of the recoverable rent since the bankruptcy from the tenant. The trustee argued that the claim in respect of overpaid rent had been converted into a right to prove the debt in the bankruptcy – any other method of recovery was barred by the predecessor to what is now section 285(3) of the Insolvency Act 1986:

> "After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall –
>
> (a) have any remedy against the property or person of the bankrupt in respect of that debt, or
>
> (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose."

The Court of Appeal rejected that argument. The property passed to the trustee "in the same plight and condition in which it was in the bankrupt's hands" and that included the right of the tenant to live there rent free until the overpaid rent had been recouped. The tenant's rights included the right to be considered as having paid rent in advance up to the amount of the excess.

14. The argument was repeated in *R v Secretary of State for Social Security, Ex p Taylor and Chapman* [1997] BPIR 505. Like the respondents in this case, the applicants were respectively the recipient of a Social Fund loan and a claimant who had been overpaid benefit. Both were declared bankrupt. After that, the Secretary of State began to recover the loan and overpayment by deduction from their current benefits. They argued that he was unable to do so because of section 285(3) of the Insolvency Act: the right of deduction was a "remedy against the property or person of the bankrupt in respect of that debt". Keene J took the view that *Bradley-Hole* applied. The tenant was not exercising a remedy against the

property of the landlord but simply refraining from making a payment to which the pre-existing debt would be a defence if he were sued. Even if that were not so, the Secretary of State was not seeking to go against the property of the bankrupt. Their entitlement was only to the net amount of benefit after deduction of the loan or overpayment and not to the full amount.

15. *Taylor and Chapman* was decided after the decision of the Inner House in the Scottish case of *Mulvey v Secretary of State for Social Security* 1996 SC 8 and before the decision of the House of Lords in that case 1997 SC(HL) 105. Keene J saw considerable force in the approach of Lord Clyde, to the effect that the right to recover by deduction was but one element in the calculation of the benefit to which the claimant was entitled. This approach has been characterised by the Secretary of State in this case as the "net entitlement principle".

16. *Mulvey* was a case about loans from the Social Fund which were being repaid by deduction from the claimant's income support when her estate was sequestrated under the Scottish bankruptcy laws. The claimant argued that continuing to make the deductions amounted to an attempt to set off a pre-sequestration debt against a post-sequestration obligation, which was impermissible at common law. So their Lordships were not concerned with the interpretation of a statutory provision such as section 285(3) of the IA 1986. There appears to be no exact equivalent in the Bankruptcy (Scotland) Act 1985 and certainly none was discussed in either the Inner House or the House of Lords. Section 37 of the 1985 Act limits the rights of creditors shortly before and after the sequestration, but not in the same sort of terms as sections 251G and 285(3) of the IA 1986. Section 32(5) prohibits diligence against the debtor against the after-sequestration income, which is preserved for her under section 32(1), in respect of debts from which she will be released when discharged from the bankruptcy. In the House of Lords, Lord Jauncey remarked that "By no stretch of the imagination could the respondent's exercise of his statutory right be described as diligence for the purpose of the law of Scotland" (1997 SC (HL) 105, at 109F). Nor would it be right to apply the common law rule:

> "The deductions made by the respondent were not, as in the normal case of compensation in bankruptcy, a result of the bankruptcy, but were made in pursuance of a statutory scheme which was already in operation at the time of sequestration and with which the permanent trustee can have no concern. Prior to sequestration, the appellant had no right to receive by way of income support benefit more than her gross entitlement under deduction of such sum as had been notified to her by the respondent prior to payment of the award by the respondent. This was the result of the statutory scheme and she could not have demanded more."

Mr Sheldon QC, for the Secretary of State, understandably places some weight on the "net entitlement" principle there enunciated by Lord Jauncey.

17. For completeness, although it is concerned with what happens at the end of the process, we should consider *R (Balding) v Secretary of State for Work and Pensions* [2007] EWHC 759 (Admin), [2007] 1 WLR 1805, [2008] EWCA Civ 1327, [2008] 1 WLR 564, decided in the Divisional Court after the House of Lords' decision in *Mulvey*. Section 281 of the IA 1986 provides that (with qualifications which have no bearing on the case) ". . . where a bankrupt is discharged, the discharge releases him from all the bankruptcy debts, . . ." The question, therefore, was whether the claimant's liability to repay overpaid benefit was a "bankruptcy debt". Section 382(1)(a) defines this, *inter alia*, as "any debt or liability to which he is subject at the commencement of the bankruptcy". Section 382(3) gives a very wide meaning to "debt or liability", it being immaterial whether it is present or future, certain or contingent, liquidated or unliquidated, or capable of being ascertained by fixed rules or as a matter of opinion (compare the definition of a qualifying debt for the purpose of the DRO scheme, at para 9 above). Section 382(4), "except in so far as the context otherwise requires", defines "liability" to mean a "liability to pay money or money's worth, including any liability under an enactment . . . ".

18. Not surprisingly, both the Divisional Court and the Court of Appeal held that the liability to repay was a "bankruptcy debt". In doing so, Davis J had this to say of the "net entitlement" argument (para 46):

> "[Counsel's] approach in any event seems to assume that the individual is only ever entitled to the net benefit after deduction. But in my view that is not right. That will no doubt be so if the Secretary of State has actually elected – as he did in this case – to recoup the overpaid benefit by deduction at source from subsequent prescribed benefits. But the Secretary of State may in other cases decide to effect recovery by other means. . . . As I see it, the liability to repay cannot be said to be not a 'bankruptcy debt' (as defined) if one form of recovery . . . is adopted but can be a 'bankruptcy debt' if another form of recovery is adopted. The liability arising under section 71 of the 1992 Act, upon determination made prior to bankruptcy, either is or is not on a subsequent bankruptcy a 'bankruptcy debt', as defined. In my view, it is."

The Court of Appeal agreed for the same reasons. It followed that the debt was wiped out when the bankrupt was discharged.

The argument

19. For the Secretary of State, Mr Sheldon does not argue that the liability to repay under SSAA section 71(1) and its equivalents is not a qualifying debt (that point would in any event have been better taken by challenging its inclusion in the list before the official receiver and then the court). He argues that the right of recovery under SSAA section 71(8) is not a "remedy in respect of the debt" for the purpose of the moratorium in section 251G(2). He argues for a "coherent and harmonious" approach to the construction of the bankruptcy and DRO schemes, which are to be found within the same legislation. He points to a long list of similarities between the two regimes. The statutory power of deduction is not a "remedy" but an adjustment to the level of benefit which the claimant is entitled to receive. She is only ever entitled to the net sum. The overpayment is to be regarded as payment in advance of future benefit. *Bradley-Hole* and *Taylor and Chapman* were rightly decided and *Mulvey* reaches the same result. He also argues that *Balding* was wrongly decided. Where the Secretary of State elects to recover by deduction, it is not a "debt or liability to pay" but an adjustment to the amount of benefit to which she is entitled because of the "net entitlement principle". Lord Jauncey left the point open in *Mulvey* at p 109E. The broad definition of a liability in section 382(4) can be qualified because the policy imperatives mean that the context otherwise requires.

20. Mr Drabble QC, for the respondent claimants, challenges the so-called "net entitlement principle" as a heresy. Only if the overpayment is being recouped from current payment of the same benefit is it even possible to regard it as an advance payment of the current benefit. But loans and overpayments can be recouped from a wide range of wholly unrelated benefits, which may have come into payment long after the liability was incurred, of which the loan or overpayment cannot possibly be regarded as a payment in advance. The natural meaning of "remedy" clearly encompasses the power to deduct. If need be, bankruptcy can be distinguished. Firstly the wording of section 285(3) is different – it refers to "any remedy against the property or person of the bankrupt in respect of that debt". Secondly, the purpose of the moratorium in the DRO scheme is different from the purpose of the period between order and discharge in bankruptcy. In bankruptcy, the purpose is for the trustee to gather in all the assets of the bankrupt and distribute the proceeds equitably among the creditors. In the DRO, there is no trustee, there are no assets to be distributed, and there is no potential dividend for the creditors. The moratorium is simply there because the creditors have not had an opportunity to dispute the amount or the inclusion of their debt before the order is made and also because there may be other inquiries and challenges to the order. It was these distinctions which persuaded the majority of the Court of Appeal to uphold the decision of Cranston J to distinguish the two. Finally, *Balding* is clearly rightly decided. The same liability cannot either be a debt or not be a debt according to the method of recovery chosen by the creditor from time to time.

Whether or not there is a prescribed benefit from which to deduct the liability, whether or not the Secretary of State chooses to make those deductions, the Secretary of State is always free to enforce the liability by other means. If he does so, it is plainly a bankruptcy debt and will be wiped out when the bankruptcy is discharged. The liability is also a qualifying debt for the DRO scheme and also wiped out when the moratorium has run its course.

Discussion

21. This Court is in the fortunate position of being able to adopt a coherent approach which it would have been difficult for the courts below to achieve. In my view, there is no such thing as the so-called "net entitlement principle". The claimant to any kind of social security benefit has a statutory entitlement to the amount of benefit which she is awarded by the Secretary of State or a tribunal. The members of this Court are, for example, statutorily entitled to the state retirement pension should they choose to claim it. Some claimants may have a prior liability to repay previously overpaid benefits, whether of the same or an entirely different kind, or they may have taken out a Social Fund loan which they are liable to repay. By no stretch of the imagination does a Social Fund loan to buy a cooker amount to an advance payment of retirement pension to which the claimant later becomes entitled. It could more plausibly be regarded as an advance payment of future income support. But at the point when the loan is made and the liability to repay arises it cannot be known whether the claimant will continue to be reliant on income support. She may get a job, marry a rich man, or win the lottery. The liability to repay arises independently of her entitlement to any benefit from which the Secretary of State may later decide to recoup it.

22. In any ordinary use of language, the power to recover the debt by deduction from benefit is a "remedy in respect of the debt". Moreover, if self-help remedies such as this were not included in the concept of a "remedy", it is difficult to see why both section 251G(2)(b) and section 285(3)(b) specifically prohibit the use of court proceedings to enforce the debt. They would be otiose if the only remedies contemplated by the prohibition of any remedy were court proceedings. There is no sense in a scheme which prohibits recovery of the liability by one method but allows it by another.

23. Furthermore, I do not see any reason to distinguish between the DRO scheme and bankruptcy in this respect. There is a minor difference between the language of section 251G(2) and section 285(3) but this is readily explicable by the antiquity of the latter provision. It can be traced back to the time when remedies against the person of the debtor were universally applicable (and not restricted to certain statutory creditors as they are today). There is, as the majority of the Court of Appeal pointed out, a major difference between the purpose of the

waiting periods in each scheme. But this does not affect the analysis of the nature of the liability to repay and of the Secretary of State's power to recoup. It is just as much a remedy against the property of the bankrupt as it is a remedy in respect of a debt listed in a DRO. For my part, therefore, I would hold that *Taylor and Chapman* was wrongly decided. The Secretary of State loses the power to recoup overpayments and Social Fund loans on the making of a bankruptcy order just as he does on the making of a DRO.

24. This result is inconsistent with the result reached in *Mulvey*. But *Mulvey* depended on the Scottish common law of bankruptcy together with the Bankruptcy (Scotland) Act 1985, which has no exact equivalent of the English provisions with which we are concerned. In those circumstances, it cannot be for this Court in an English case to over-turn the decision of the House of Lords in a Scottish case. We can merely place a question mark against that element in the reasoning which has been referred to as the "net entitlement principle".

25. Nor is it necessary for us to question the decision of the Court of Appeal in *Bradley-Hole*. In that context, it makes some sense to regard the overpayment as giving the tenant the right to live rent-free in the property until the overpayment is exhausted, a right to which the landlord's and thus the trustee's right to the reversion is subject. The analogy was drawn with the deserted wife's personal right to continue to live in the former matrimonial home (a right recognised by the Court of Appeal in *Bendall v McWhirter* [1952] 2 QB 466 which survived the denial of her so-called equity against third parties in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175).

26. Finally, it is clear that *Balding* was rightly decided and that the principle applies equally to the DRO scheme. It is worth noting, therefore, that the impact of this decision is not as great as might have been thought. All those liabilities to repay overpaid benefits, tax credits and Social Fund loans listed in DROs (see para 6 above) will in any event be wiped out at the end of the moratorium period. We are talking about the power to continue to deduct during that period. The sums involved, though not insignificant, will be much less than the total of the liabilities involved. It would, of course, be open to the Government to promote delegated legislation to exclude these liabilities from the definition of "qualifying debts" in the DRO scheme altogether (and, indeed, to seek corresponding amendment to section 382 with regard to "bankruptcy debt"), but that would raise policy issues which are not for this Court.

27. I would therefore dismiss the appeal.

LORD BROWN

28. I am in full agreement with Lady Hale's judgment. Its logic appears irresistible and its conclusion inevitable. One might have preferred to arrive at the contrary view: as Lord Mance points out (para 44), larger social security benefits will now be payable to those made bankrupt or subject to a DRO scheme than they would otherwise have received – and, indeed, the Social Fund (a fund of limited resource designed to be replenished by repayment and thereby enabled to provide financial assistance to others in particular need) will be diminished. But a contrary view could only be reached by torturing the statutory language and by creating or reinforcing absurd and anomalous distinctions both between the DRO and bankruptcy regimes and between the debtor's situation respectively before and after the end of the moratorium period/discharge from bankruptcy.

29. As both Lady Hale (para 26) and Lord Mance (para 44) observe, it must now be for Government to consider whether or not to achieve a different result by amending legislation. It will hardly be surprising if they do.

LORD MANCE

30. It is with some misgivings that I concur in the dismissal of this appeal. Viewing the statutory provisions in the abstract, I would find no difficulty in doing this. Against the background of relevant prior authority, I do, however, doubt whether the legislator can have contemplated the result at which the Supreme Court now finds itself obliged to arrive. The result will create apparent anomalies as between different recipients of social security benefit and may cost the Exchequer, or potential beneficiaries of the limited Social Fund, quite dearly. It may necessitate legislative reconsideration for the future.

31. The relevant prior authority relates primarily to the context of bankruptcy. There is, as Lady Hale says at para 23, no real reason to distinguish between the provisions applicable in that context and in the present context of a debt relief order ("DRO"). For bankruptcy purposes, it is clear that a liability to refund an overpayment of social security benefits or to refund a Social Fund loan constitutes a "bankruptcy debt" within the extended meaning of section 382 of the Insolvency Act 1986. Under section 382(4) that meaning includes both debt and liabilities and in particular "any liability under an enactment", and so, on the face of it, covers a liability to repay overpaid social security benefits or a Social Fund loan.

32. The DRO scheme, introduced as section 251A et seq of the same Act by the Tribunals, Courts and Enforcement Act 2007, applies to a more limited class of

"qualifying debts", defined as meaning "a debt which is for a liquidated sum payable either immediately or at some certain future time" and which is not an excluded debt. However, as Lady Hale notes at paras 9 and 19, the Secretary of State has not suggested that a liability to repay an overpayment of social security benefits or to refund a Social Fund loan is not a qualifying debt within that definition.

33. On that basis, essentially the same question arises in respect of both bankruptcy and a DRO. Where the Secretary of State is recovering an overpayment or loan by deductions up to the permitted limits from future prescribed benefits as and when these become payable, is the Secretary of State able to continue to do so after the onset of bankruptcy or the making of a DRO? The argument against any such ability is that the making of any such deduction would involve the exercise of a "remedy in respect of the debt", contrary in the case of bankruptcy to section 285(3) or in the case of a DRO to section 251G(2) of the 1986 Act.

34. As a matter of language and logic, the argument is difficult to resist. In law, the making of deductions is no more than one way in which the Secretary of State may recoup such an overpayment or loan. The payment of future social security benefits depends on the circumstances from time to time, as does the making of deductions. The commencement of bankruptcy or the making of a DRO does not exclude all possibility that some other means of recoupment might become available. Each deduction is separate from any prior deduction, even if the Secretary of State has given prior notice of an intention to make continuing deductions from future payments of social security benefits. For this reason, viewing the statutory wording by itself, I agree that its natural effect is, as explained by Lady Hale, that in making each and any deduction the Secretary of State is exercising a remedy in respect of the debt constituted by the overpayment or loan.

35. However, the 1986 Act and the DRO scheme introduced in 2007 should be seen against the background of any relevant prior authority. In *Bradley-Hole v Cusen* [1953] 1 QB 300 the Court of Appeal was concerned with a tenant's right to recover overpaid rent. Section 14(1) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 made such overpaid rent recoverable "without prejudice to any other method of recovery" by deduction "from any rent payable by him to the landlord". The rent recoverable was clearly a debt. But the landlord went bankrupt, and the predecessor of section 285(3) of the 1986 Act precluded the tenant from having "any remedy … in respect of that debt" after the making of the bankruptcy order. Could the tenant continue to deduct the overpaid rent from the rent otherwise due after the making of the bankruptcy order? The Court held that he could, suggesting that the overpayment could be regarded as the payment of rent in advance.

36. As Lady Hale recounts in paras 14-15, in *R v Secretary of State for Social Security, Ex p Taylor and Chapman* [1997] BPIR 505, Keene J applied parallel reasoning under section 285(3) of the 1986 Act in relation to deductions from social security benefits in respect of prior overpayments of benefit and an unpaid Social Fund loan. Moreover, this was after Lord Clyde in the Inner House had in *Mulvey v Secretary of State for Social Security* referred to the right to recover by deduction as but one element in the calculation of benefit which the claimant was to receive: 1996 SC 8 (Ct of Sess), 15G-16A; and Lord Clyde's approach appears to me to have received full endorsement in the House of Lords at 1997 SC(HL) 105, 109F-H in the passage from Lord Jauncey's speech quoted by Lady Hale in para 16. It is of interest to note that Lord Jauncey went on expressly to invoke in support of his analysis the case of *Bradley-Hole v Cusen*: p 110A-B. Further, Lord Jauncey found it unnecessary in deciding the position during the bankruptcy to determine what the position might be when the bankrupt came to be discharged (p 109E).

37. In the light of these authorities, there is a considerable case for saying that Parliament, when it enacted the DRO scheme in 2007, must have had in mind that, during bankruptcy and by parity of reasoning during the running of a DRO scheme, deductions in respect of any prior overpayment or un-repaid Social Fund loan could continue to be made, as before, without infringing the rule that no remedy may be exercised in respect of any outstanding debt.

38. In reality, the Court of Appeal in *Bradley-Hole* was adopting a beneficent fiction, when it spoke of the overpayment there as a payment of rent in advance. The fiction had in that case the particular attraction that the overpayment was of rent, and it was being deducted from future rent. But in law the overpayment was a debt, which the tenant was free to recover in any way he could and which he could have recovered as a debt, even if for some reason it proved not to be covered by or capable of deduction from future rent. Nevertheless, the tenant's choice to make deductions on a continuing basis was sufficient to persuade the Court of Appeal to treat the overpayment as a payment of rent in advance.

39. So here also, it would be possible to say that the Secretary of State's choice to make deductions on a continuing basis entitles the court to treat the outstanding debts, arising from prior overpayments and unpaid Social Fund loan amounts, as payments on account of future social security benefits.

40. However, I do not think it either sensible or possible to focus solely on what might be a possible solution in relation to the position during the currency of a bankruptcy or a DRO. It seems to me necessary also to consider the position which would exist on discharge from bankruptcy and at the end of the moratorium period. In each case, that normally occurs after one year: see sections 279(1) and 251H(1)

respectively. The statutory language is in this context framed in terms of release or discharge from debts. In particular, on discharge of a bankrupt the bankrupt is released from all bankruptcy debts under section 281(1), and as at the end of the moratorium period a person subject to a DRO scheme is discharged from all outstanding DRO debts under section 251I(1).

41. Accordingly, unless it can be said that no such debt exists in either case, the position remains incoherent if the analysis set out in para 39 above is accepted. The debtor would remain subject to deductions during the currency of the bankruptcy or DRO scheme, but would be released or discharged from the outstanding balance after one year when it ended. I do not think that we can overlook the potential incongruity, even though the House appears to have been prepared to do so in *Mulvey*.

42. In *R (Balding) v Secretary of State for Work and Pensions* [2007] EWHC 759 (Admin), [2007] 1 WLR 1805, [2008] EWCA Civ 1327, [2008] 1 WLR 564, the Divisional Court and the Court of Appeal concluded that the existence of a bankruptcy debt could not depend upon whether or not the creditor was choosing to recover it by deduction from social security benefits. Further, in the present case, the Secretary of State has accepted that there is an outstanding debt within the scope of the DRO. We would have to overrule *Balding* and to hold that the Secretary of State's concession was wrong, before we could conclude that the right to deduct survived the discharge from bankruptcy or the end of the moratorium period under a DRO.

43. I see no real basis on which we would do this. The beneficent fiction of a payment in advance cannot be stretched to the point of a conclusion that no debt at all exists. Nor can a debt exist for some purposes (recovery other than by way of deduction), but not exist in so far as it is recovered by deductions.

44. A position whereby deductions can continue to be made during the currency of a bankruptcy or moratorium period, but the remainder of the outstanding debt is extinguished at its conclusion has little to commend it. I am forced to the conclusion that the natural meaning of the statutes must be given effect. I reach this conclusion with misgivings, as I said at the outset. It will mean that those who have received overpayments or failed to repay Social Fund loans, but have become bankrupt or subject to a DRO scheme, will now receive larger social security benefit payments - larger than they did prior to the bankruptcy or DRO and larger also than the social security benefits received by persons subject to such deductions who have avoided bankruptcy or a DRO scheme; it will also diminish the amount available in the limited Social Fund for the benefit of all potential claimants on that Fund. It must be questionable whether any of this is sensible or desirable, but that is a matter for the legislature to consider, if it wishes.

LORD WILSON

45. I agree that the appeal should be dismissed for the reasons given by Lady Hale but I wish also to associate myself with the remarks made by Lord Brown and Lord Mance in their concurring judgments.