**Neutral Citation Number [2025] UKUT 049 (AAC)** **Appeal No. UA-2024-000418-CSM**

**IN THE UPPER TRIBUNAL**

**ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**AE**

**Appellant**

**- v -**

**The Secretary of State for Work and Pensions**

**First Respondent**

**PE**

**Second Respondent**

**Before: Upper Tribunal Judge Church**
**Decided on consideration of the papers**

**Representation:**

| | |
|---|---|
| **Appellant:** | Mr Smith |
| **First Respondent:** | Ms Foody |
| **Second Respondent:** | Not represented |

*On appeal from:*

| | |
|---|---|
| Tribunal: | First-tier Tribunal (Social Entitlement Chamber) |
| Tribunal Case No: | SC323/20/00999 |
| CSA Ref. No.: | 121008247496 |
| Tribunal Venue: | Basildon |
| Decision Date: | 24 July 2023 |

**RULE 14 Order**

**Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the Appellant or the Second Respondent in these proceedings, or their children. This order does not apply to: (a) the Appellant; (b) the Second Respondent; (c) any person to whom the Appellant or the Second Respondent discloses such a matter or who learns of it through publication by the Appellant or, as the case may be, the Second Respondent; or (c) any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the proper exercise of the functions.**

## SUMMARY OF DECISION

**CHILD SUPPORT (5)** *(5:13 maintenance assessments/calculations)*

Judicial summary: This appeal is mainly about the proper approach to variations in respect of assets exceeding a prescribed value under regulation 69A(2) of the Child Support Maintenance Calculation Regulations 2012.

The First-tier Tribunal decided it couldn't make a variation based on the non-resident parent's director's loan of nearly £750,000 (as an asset exceeding a prescribed value under regulation 69A). That was because it understood the wording of regulation 69A to mean that a variation could be made only if it was satisfied that requiring immediate payment of the asset (if money) or enforcement of the asset (if a chose in action) in full would be reasonable. It decided that, while it would be reasonable to require payment of, or to enforce, the director's loan in part only, doing so in full wouldn't be reasonable.

The Upper Tribunal allowed the appeal because the Tribunal had misunderstood regulation 69A. The Upper Tribunal decided:

- the director's loan was a "chose in action" falling under paragraph (h) of regulation 69A(2), and not "money" falling under paragraph (a);
- regulation 69A is applicable not only where payment or enforcement in respect of the whole of the asset is reasonable, but also where payment or enforcement in part would be reasonable (subject to a variation being just and equitable);
- when considering whether a variation under regulation 69A would be "just and equitable" it was necessary to consider not only the assets of the non-resident parent but also any associated liabilities. This required further fact finding.

***Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.***

## DECISION

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with this decision.

## REASONS FOR DECISION

### Introduction

1. The Child Support Act 1991 (the **"1991 Act"**) established a scheme for the calculation, collection and enforcement of periodical maintenance payments by certain parents with respect to their children.

2. This appeal is about the liability of the Second Respondent (to whom I'll refer as **"PE"** or the **"Father"**) to make maintenance payments to the Appellant (to whom I'll refer as **"AE"** or the **"Mother")** in respect of their son (to whom I'll refer as **"M"**).

3. Because M is a child, I have made an Order in the terms set out under 'Rule 14 Order' above. I have decided that he shouldn't be named in this judgment. Because identifying M's parents (and even his father's company) by name would risk identifying M, I have decided that they shouldn't be named either.

4. This appeal is mainly about whether the First-tier Tribunal misunderstood the law on making a variation in the calculation of the child maintenance that a parent who is a 'non-resident parent' for the purposes of the child support legislation must pay where he or she owns assets over a prescribed value.

5. In particular, it is about whether the First-tier Tribunal was wrong to decide that it wasn't entitled to make a variation in respect of the Father's loan to a company which he owns and controls (which I'll call **"M Limited"**).

### Factual and Procedural Background

6. PE and AE were previously married. M is their son.

7. PE and AE share care of M, but it is not in dispute that, for the purposes of the 1991 Act, AE is the 'person with care', PE is the 'non-resident parent', and M is a 'qualifying child'. It is also accepted that there is a 'relevant other child'.

8. Prior to the Secretary of State's decision to which this appeal (ultimately) relates, PE's liability to pay child maintenance in respect of M had been calculated based on his 'current income' (for the purposes of the Child Support Maintenance Calculation Regulations 2012 (the **"2012 Regulations"**)) for 2016 of £42,608. Unusually, and inexplicably even according to the Secretary of State's representative, that same income figure was used for four successive annual reviews. These previous decisions are not the subject of this appeal, so I need say no more about them.

9. On 26 August 2020 a decision maker at the Child Maintenance Service acting on behalf of the Secretary of State reviewed PE's liability to pay maintenance, again using the £42,608 'current income' figure from 2016. It was decided that PE was from 25 August 2020 liable to pay child maintenance in respect of M in the amount of £77.68 per week (the **"2020 Annual Review Decision"**).

10. AE appealed the 2020 Annual Review Decision to the First-tier Tribunal because she thought it failed to reflect PE's true financial position as a successful businessman.

11. PE is a property developer. He set up M Limited to acquire, refurbish and let properties. PE owns all the shares in M Limited and he is its sole director. PE lent money to M Limited to fund its acquisition and refurbishment of properties by way of a director's loan (the **"Director's Loan")**. At the effective date of the 2020 Annual Review Decision, M Limited owed PE £748,858 under the Director's Loan.

**Legal framework**

12. The 2012 Regulations provide that the income figure that is to be used for calculating a non-resident parent's child maintenance liability is either their "historic income" (being the figure notified by HMRC in respect of the most recent available tax year) or their "current income" (being the sum of the non-resident parent's income as an employee or office-holder, from self-employment, and from a pension calculated in accordance with regulations 38-42).

13. Gross weekly income must be based on historic income unless current income differs from historic income by an amount that is at least 25% of historic income,

or no historic income available or the Secretary of State is unable, for whatever reason, to request or obtain the required information from HMRC (see regulation 34).

14. The 1991 Act makes provision for variations to be made to the calculation of a non-resident parent's liability to make payments in respect of child maintenance. Section 28E sets out the matters to be taken into account when deciding whether to make a variation. It provides:

> **"Matters to be taken into account**
>
> **28E**.-(1) In determining whether to agree to a variation the Secretary of State shall have regard both to the general principles set out in subsection (2) and to such other considerations as may be prescribed.
>
> (2) The general principles are that-
>
> (a) parents should be responsible for maintaining their children whenever they can afford to do so;
>
> (b) where a parent has more than one child, his obligation to maintain any one of them should be no less of an obligation than his obligation to maintain any other of them,
>
> …"

15. Section 28F of the 1991 Act establishes the circumstances in which the Secretary of State may agree to a variation. It states:

> **"Agreement to a variation.**
>
> **28F**.-(1) The Secretary of State may agree to a variation if—
>
> (a) the Secretary of State is satisfied that the case is one which falls within one or more of the cases set out in Part I of Schedule 4B or in regulations made under that Part; and
>
> (b) it is the Secretary of State's opinion that, in all the circumstances of the case, it would be just and equitable to agree to a variation.
>
> (2) In considering whether it would be just and equitable in any case to agree to a variation, the Secretary of State—
>
> (a) must have regard, in particular, to the welfare of any child likely to be affected if the Secretary of State] did agree to a variation; and

(b) must, or as the case may be must not, take any prescribed factors into account, or must take them into account (or not) in prescribed circumstances…"

16. The Child Support (Miscellaneous Amendments) Regulations 2018 (S.I. 2018/1279), regs. 1(2), 2(2) inserted Regulation 69A into the Calculation Regulations. That regulation deals with variations where the non-resident parent has assets exceeding £31,250. It provides:

***"Assets exceeding a prescribed value***

**69A.**—(1) Where this paragraph applies, the other cases prescribed under paragraph 4(1) of Schedule 4B to the 1991 Act are cases where the Secretary of State is satisfied that there is an asset in which the non-resident parent has a legal or beneficial interest and the value of that interest exceeds the prescribed value.

(2) In this regulation "asset" means—

(a) money, whether in cash or on deposit, including any money which is due to a non-resident parent where the Secretary of State is satisfied that requiring payment of the monies to the non-resident parent immediately would be reasonable;

(b) gold, silver or platinum bullion bars or coins;

(c) a virtual currency which is capable of being exchanged for money;

(d) land or rights in or over land;

(e) shares within the meaning of section 540 of the Companies Act 2006;

(f) stock and unit trusts within the meaning of section 6 of the Charging Orders Act 1979;

(g) gilt edged securities within the meaning of paragraphs 1 and 1A of Part 1 of Schedule 9 to the Taxation of Chargeable Gains Act 1992; or

(h) a chose in action which has not been enforced on the date of an application for a variation under regulation 56 and where the Secretary of State is satisfied that such enforcement would be reasonable.

(3) In this regulation "asset" includes any asset which is subject to a trust where the non-resident parent is a beneficiary.

(4) Paragraph (1) does not apply in the case of any asset which—

(a) has been received by the non-resident parent as compensation for personal injury suffered by the non-resident parent;

(b) is being used in the course of the non-resident parent's trade or business;

> (c) the Secretary of State is satisfied could have been purchased from the gross weekly income of the non-resident parent which has been taken into account for the purposes of a maintenance calculation;
>
> (d) will need to be sold in order to meet any additional maintenance payment required as a result of a variation under paragraph 4(1) of Schedule 4B to the 1991 Act where the Secretary of State is satisfied that the sale of that asset would cause hardship to a child of the non-resident parent, or would otherwise be unreasonable having taken into account all relevant circumstances; or
>
> (f) is a legal or beneficial interest in land where the land in question is the primary residence of the non-resident parent or any child of the non-resident parent.
>
> (5) The "prescribed value" is £31,250.
>
> (6) In the case of an asset which is subject to a mortgage or charge, the value of that asset will be its value after a deduction is made for any amount owing under the mortgage or charge.
>
> (7) The Secretary of State shall calculate the weekly value of an asset by applying the statutory rate of interest to the value of the asset and dividing by 52.
>
> (8) For the purposes of this regulation—
>
> "statutory rate of interest" means interest at the statutory rate prescribed for a judgment debt or, in Scotland, the statutory rate of interest included in or payable under a decree in the Court of Sessions applicable on the date upon which the variation takes effect;
>
> "virtual currency" means a digital representation of value which is not issued by a central bank or a public authority; is accepted by natural or legal persons as a means of payment; and can be transferred, stored or traded electronically."

## The First-tier Tribunal's decision

17. A panel convened to hear the appeal and decided it in AE's favour, but PE appealed that decision to the Upper Tribunal and the Upper Tribunal found that that decision was materially in error of law and set it aside and remitted it to be reheard by the First-tier Tribunal afresh.

18. On 24 July 2023 a two-member panel of the First-tier Tribunal (the **"Tribunal"**) convened at Basildon for a remote oral hearing of the remitted appeal by CVP. AE did not attend, but was represented by her husband, Mr Smith. The Secretary of State was represented by Mr Fuller, a presenting officer. PE attended the hearing and represented himself.

19. The Tribunal allowed AE's appeal against the 2020 Annual Review Decision, ordering PE's maintenance obligation to be recalculated on the basis of a current income of £nil, and an income variation under regulation 69 of the 2012 Regulations in respect of

    a. rental income of £17,944 he received in respect of an investment property which he owns, and

    b. interest income of £2,320 he received in the 2019-2020 tax year.

20. While the Tribunal considered regulation 69A of the 2012 Regulations and whether to make a variation in respect of PE's assets (namely, the Director's Loan). However, it decided that in all the circumstances it wasn't open to it to do so.

21. The decision described in paragraphs 18-19 above is referred to as the **"FtT Decision"**. The FtT Decision is the subject of this appeal.

22. In paragraph 5(b) of its Decision Notice in respect of the FtT Decision the Tribunal explained:

> "[PE] has a Director's Loan Account with [M Limited]. That account stands at £748,858 which, if treated as an asset under Reg 69A, would at 8% create a notional income of £59,908.64. Even allowing for the reductions in respect of the relevant other child and for shared care of [M], that would still make a substantial difference to the maintenance assessment.
>
> i. We cannot make such a variation. This is not because we accept [PE]'s argument that it would not be just and equitable to do so because the loan consists of borrowings in his sole name which he has then reloaned to [M Limited]. It is rather because of the wording of Reg 69A.
>
> ii. We are not convinced that the DLA is a chose in action coming under Reg 69A(2)(h) rather than being money due to [PE] under Reg 69(2)(a). It does not matter as the same difficulty arise[s] under either regulation.
>
> iii. Both provisions require that enforcement of the chose or of the debt "would be reasonable". The issue that we confront is what does enforcement mean?
>
> iv. If the test is whether it would be reasonable to require [M Limited] to repay the whole of the DLA of £748,858, then the answer must be no. Repayment of such a sum would severely damage the company requiring the sale of some of its properties.

v. The alternate test is whether it would be reasonable to require [PE] to enforce the chose or the loan to the extent of facilitating the amounts required to meet the Child Maintenance Assessment for [M]. We have carefully examined the comments of Upper Tribunal Judge Poynter in *AB v Secretary of State for Work and Pensions and RS (CSM)* [2021] UKUT 129 (AAC) especially at paragraph 121. However, that decision is in respect of diversion of income under Reg 71 and we cannot extrapolate it to apply to the parts of Reg 69A under consideration here."

23. In its statement of reasons, after quoting the passage above from its Decision Notice for the FtT Decision, the Tribunal explained its decision making further as follows:

"64. UTJ Poynter said at paragraph 121 of *AB*,

"On the face of that evidence, the companies should have paid the necessary dividend to the Father and his fellow shareholders from the cash they had at the bank. Moreover, the calculation is a notional one. The Father would not in fact have to finance any variation by withdrawing money from the companies: it was only necessary for him to find (at most) slightly less than £10,000 to finance the actual amount of additional maintenance that would become due during the year to the next annual review. Given the high priority that is accorded to maintaining one's children when reasonableness is considered, the inference of unreasonableness would be compelling in the absence of further evidence from the father."

65. [PE] could not take the whole of his DLA from [M Limited]. It would require much more information than we had to make a finding of fact that [PE] could safely withdraw the deemed income from his DLA of £758,000 at the 8% contribution charge which in this case would be £59,908.64. On the accounts available, it seems improbable."

24. The Tribunal then set out a rudimentary calculation of what PE's liability to child maintenance would be if the Director's Loan were treated as an asset under Regulation 69A, concluding:

"67. That would give an annual liability of £5,465.84. Even allowing that our calculations may have some error, [PE] would be liable to pay something around £5,500. We have no doubt that [M Limited] could fund [PE] to that extent. [PE] said in evidence that [M Limited] had funded him 10,000 when he needed it.

68. The principle that UTJ Poynter sets out in paragraph 121 of *AB* could be construed as having universal application. All that is required of a non-resident parent is that they pay the

maintenance assessment and how they organise the remainder of their finances is a matter for them. The obstacle for us coming to that conclusion with regard to the DLA came in the wording of Reg 69A…"

25. The Tribunal considered the wording of regulation 69A (which I have set out in full under "'Legal Framework' above). That regulation provides that a variation may be applied in relation to money under regulation 69A(2)(a) only if immediate payment of the monies to the non-resident parent would be reasonable, and in relation to a chose in action falling under regulation 69A(2)(h), if such enforcement would be reasonable.

26. The Tribunal posited the question: "What is meant by 'requiring payment' and by 'enforcement'?" It explained its thinking thus:

> "70. Repayment and enforcement can only have two meanings in this context. Either it means repayment or enforcement of the whole sum due or the whole value of the chose in action. Alternatively, if the principle in *AB* applies, then repayment or enforcement means to the extent required merely to meet the maintenance liability.
>
> 71. We were unable to extrapolate UTJ Poynter's *dicta* as he was speaking in the specific circumstances of the case before him in a Reg 71 diversion appeal. It is certainly arguable that a more robust approach to finding the wherewithal to fund a maintenance assessment is appropriate in diversion appeals. Equally the larger the debt or the chose in action, the less reasonable it will be to require enforcement of the whole sum as, the larger the debt or the chose in action, the less likely that achieving full payment or enforcement would be. That could put the wealthier person with the greater asset in a better position to avoid a Reg 69A variation than someone with a small entitlement. That seems to run against the whole principle of the child support scheme as set out in section 1 of the [1991 Act] that every parent has a duty to maintain their child."

27. The Tribunal said that its 'inclination' was that a variation for the amount of the maintenance liability using Reg 69A would be appropriate if the principle set out by Judge Poynter in *AB* were applicable to regulation 69A, but they decided that it was not.

28. The Tribunal said there was no evidence of any diversion of income that could found a variation under regulation 71.

29. The Tribunal then went on to consider the position should it be wrong in its understanding that it was not permitted to apply the approach described by Judge Poynter in *AB* to regulation 69A:

> "75. As we were satisfied that the maintenance assessment under 69A could be funded by [M Limited] to the extent necessary to meet the required payment, we did not see any reason to apply a different rate to the 8% stipulated in Reg 69A. The amount assessed was affordable and will clearly benefit [M]. We were satisfied that no reduction in the percentage rate was appropriate.
>
> 76. For the avoidance of doubt, if we had interpreted *AB* as applying to Reg 69A, then we were satisfied and found as a fact that [M Limited] could meet the additional payments required of [PE]. In that circumstance, we were satisfied that making that variation would be just and equitable."

30. AE was unhappy with the FtT Decision. She applied to the First-tier Tribunal for permission to appeal. Her application was allowed by a District Tribunal Judge and the matter came before me.

**The grounds of appeal and the parties' submissions**

31. AE appealed on the basis that she said the Tribunal should have made a variation under regulation 69A of the 2012 Regulations in respect of the Director's Loan (as the panel of the First-tier Tribunal which heard the appeal previously had decided before being set aside by the Upper Tribunal).

32. AE argued that the Tribunal could, and should, have taken the approach described by Judge Poynter in *AB,* and its failure to do so was based on its misunderstanding of the law.

33. AE argued that while neither paragraph (a) nor paragraph (h) of regulation 69A(2) expressly permits partial payment/enforcement, neither do they expressly prohibit it. Both paragraphs involve a test of what is "reasonable" and it would be entirely reasonable for a paying party who could afford payments without causing damage to the asset to make such payments, and that was in accordance with the general principles set out in section 28E of the 1991 Act. AE says it is plain that PE would be able to afford the increased payments, because he was doing so in accordance with the previous First-tier Tribunal's decision until the Upper Tribunal set it aside.

34. AE asked me to set the FtT Decision aside and to treat the Director's Loan as a chose in action that should be taken into account for the purposes of calculating PE's liability to maintain M.

35. Ms Foody, on behalf of the Secretary of State, made written submissions resisting the appeal, arguing that the Tribunal was entitled to decide not to make a variation under regulation 69A in respect of the Director's Loan and that the FtT Decision involved no material error of law. Ms Foody agreed with the Tribunal that, because *AB* was a case about regulation 71 (which concerns diversion of income), it was not applicable to this appeal and the principles outlined by Judge Poynter in that case did not apply to regulation 69A.

36. PE made written submissions in response to the appeal. He argued that the Director's Loan should not be treated either as "money" under regulation 69A(2)(a) or a "chose in action" under regulation 69A(2)(h), but instead should be excluded from any assessment in accordance with regulation 69A(4)(b) as an asset that "is being used in the course of the non-resident parent's trade or business" much like the example of 'John's trucks' in the Secretary of State's guidance on its website.

37. He said that if the Director's Loan was not to be treated as excluded asset under regulation 69A(4)(b) then it was not reasonable to make a variation based on it. That was because the child support scheme is supposed to be based on the non-resident parent's actual income or on an assumed return from assets, and assuming a return on the Director's Loan to M Limited (an early-stage company with substantial losses and significant working capital needs) would mean his being forced to borrow to pay child maintenance. His maintenance calculation would therefore reflect not his income or investment returns, but rather his borrowing capacity. This, said PE, could not be what the law intended.

38. PE argued that it would not be reasonable to require repayment of the Director's Loan because M Limited had invested the proceeds of the loan in property assets which were not liquid, and which it would have been inefficient to dispose of as the disposal would trigger tax liabilities.

39. PE said his funding of his business by way of the Director's Loan had required him to borrow substantial sums. Further, had he not made the Director's Loan he would have paid off the mortgage on his primary residence. He argued that these factors meant that it was not just and equitable to make a variation in respect of the Director's Loan.

40. PE sought to distinguish the facts of this case from the facts of *AB*.

41. None of the parties required an oral hearing. I considered the paper file and the written submissions of the parties. I decided that the interests of justice didn't demand an oral hearing and the overriding objective of dealing with cases fairly and justly (see rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008) would best be advanced by my deciding the appeal on the papers and avoiding further delay.

## Analysis

What is the proper characterisation of the Director's Loan for the purposes of the Calculation Regulations?

42. The first question that arises from the FtT Decision is whether the Director's Loan is "money" falling under regulation 69A(2)(a), a chose in action falling under regulation 69A(2)(h), or an asset being used in the course of the non-resident parent's business falling under regulation 69A(4)(b)?

43. The Tribunal did not accept PE's argument that the Director's Loan was an excluded asset falling under regulation 69A(4)(b) because it was an asset being used in the course of his trade or business. This was on the basis that PE carried on his business not for himself as a sole trader but rather through a corporate structure, as the owner and director of M Limited, and because of M Limited's separate legal personality, its trading was not "the non-resident parent's trade or business". I don't need to determine this because even if the Tribunal was wrong to give the words a narrow interpretation, such error would not have been material because the Director's Loan wasn't an asset being used by M Limited: it was M Limited's liability, and PE's asset. The Director's Loan wasn't being "used" in the same way as John's truck in the Secretary of State's example. Rather, the advances made by PE had already largely been invested in the acquisition and refurbishment of properties. That doesn't entirely dispose of PE's arguments about it being unfair to expect him to obtain payment of money or to enforce on the Director's Loan in the context of a variation. However, those arguments fall to be considered in the context of the question whether a variation on the basis of the Director's Loan was "just and equitable". I address these questions under the heading "Just and equitable" below.

44. When it made the FtT Decision the Tribunal thought the Director's Loan was either "money" or a "chose in action", but it wasn't sure which. It wasn't troubled

by this because it said that the same issues arose whether it fell under regulation 69A(2)(a) or (h): it had to be "reasonable" to require payment or enforcement (as the case may be), and any variation had to be "just and equitable". By the time the judge came to write the statement of reasons in respect of the FtT Decision they had decided (based on Upper Tribunal authority that was invoked but not identified) that the Director's Loan was a chose in action.

45. For an asset to fall under regulation 69A(2)(a) it must be "money, whether in cash or on deposit, including any money which is due to a non-resident parent where the Secretary of State is satisfied that requiring payment of the monies to the non-resident parent immediately would be reasonable". The Director's Loan is clearly not "money" because a further step (or further steps) must be taken before any payment is due to PE: depending on the terms on which the loan was advanced, he must make a demand, or the loan must otherwise become repayable in accordance with its terms. It is clearly a "chose in action", and it is also clear that the chose was unenforced to the extent of the amount outstanding, so it was potentially capable of forming the basis of a variation.

Does regulation 69A(2) permit a variation in respect of a chose in action only if it is reasonable for it to be enforced in whole?

46. A variation in respect of an asset that is an unenforced chose in action may form the basis of a variation only if the Secretary of State (or a tribunal standing in the shoes of the Secretary of State) "is satisfied that such enforcement would be reasonable". The question that troubled the Tribunal was whether the requirement of reasonableness in respect of the enforcement of the chose in this context meant enforcement of the chose in action in full, or whether part of the asset could form the basis of a variation if it would be reasonable to enforce the chose in part. The Tribunal was clearly taken by the approach proposed by Judge Poynter in *AB* but felt it was not permitted to follow it because *AB* concerned a different provision (regulation 71). In paragraph 71 of its statement of reasons it commented:

> "It is certainly arguable that a more robust approach to finding the wherewithal to fund a maintenance assessment is appropriate in diversion appeals."

47. I disagree. Regulation 71 applies where, on the one hand, a non-resident parent has the ability to control (directly or indirectly) the amount of income they receive, or the amount of income that is taken into account as their gross weekly income, and on the other, the non-resident parent has "unreasonably reduced" the amount

of income which would otherwise fall to be taken in to account as gross weekly income, or as unearned income under regulation 69, by diverting it to other persons or for purposes other than the provision of such income for the non-resident parent.

48. Although this provision is applicable where a non-resident parent has arranged their affairs with the intention of reducing their liability to make child support payments, no such skullduggery is required.

49. Regulation 71 may also apply where a non-resident parent has arranged their affairs in a way that is perfectly proper, and not designed to avoid or reduce their responsibility to support their children financially, but which just happens to result in them receiving a low income. In those circumstances the scheme operates to ensure that the calculation of the non-resident's child support liability is adjusted to an appropriate level even though there is nothing "unreasonable" in the arrangements other than in their impact on the child support calculation. For these reasons, the Tribunal was wrong to say that a "more robust approach" was warranted in diversion appeals. The approach is the same, and that approach is informed by the principles set out in the 1991 Act, and especially Section 28E(2)(a)), which says that parents should be responsible for maintaining their children whenever they can afford to do so.

50. The Tribunal reluctantly interpreted regulation 69A(2)(a) and (h) as requiring that it must be reasonable to requiring payment of the whole of the sum of money, or to enforce the chose in action in its entirety. I find that a surprising interpretation.

51. There is nothing in regulation 69A(2)(a) or (h) that expressly restricts the condition that requiring payment of the money, or enforcing the chose in action (as the case may be) be found to be "reasonable" to payment of, or enforcement of, the whole.

52. Neither can I detect anything in the broader context in which those provisions appear that suggests that the drafter intended that those requirements should be so restricted. Nor am I aware of any authority that says that these provisions should be interpreted in such a restrictive way.

53. Looking at regulation 69A(2)(a), I can see no policy reason for restricting the "bite" of the provision to circumstances in which it would be reasonable for the non-resident payment to withdraw all the money he has in the bank might be. It would mean that variations in respect of money would be relatively common among those resident parents with balances just above the "prescribed value" of

£31,250, but vanishingly rare for those with millions in the bank. That result would be perverse and contrary to the principle that parents should be responsible for maintaining their children whenever they can afford to do so. It can't have been intended, and it is not what the regulation says.

54. The wording of paragraph (h) of regulation 69A(2) ("where the Secretary of State is satisfied that requiring such enforcement would be reasonable") tracks the wording of paragraph (a) ("where the Secretary of State is satisfied that requiring payment of the monies to the non-resident parent immediately would be reasonable"). That does not indicate that choses in action should be treated any differently from money.

55. Whether enforcement in part is reasonable may be a practical matter: while requiring the payment of monies due is a straightforward matter, the situation in relation to choses in action may sometimes be more complicated. There may be some species of chose in action that are incapable of being enforced in part, or particular circumstances that make enforcement in part impractical. In such circumstances, it would clearly not be reasonable to enforce in part. However, in most circumstances enforcement in part is likely to be both possible and practical, and the Secretary of State (or the tribunal standing in the Secretary of State's shoes) must then decide whether such enforcement is also reasonable.

56. In *TB v SSWP and SB (CSM)* [2014] UKUT 0301 (AAC), which concerned the predecessor regulations to the 2012 Regulations (the Child Support (Variations) Regulations 2000), Judge Mesher considered what "enforcement" meant, and it is apparent from what he said that he had no difficulty in principle with partial enforcement. In obiter comments he said:

> "46. … In my view … enforcement must take its meaning from the context of the type of chose in action in question in each particular case. Where the chose in action is a debt of the kind represented by the father's director's loan account in the present case, which he was apparently free to draw on at will just as he would have been able to do on a personal bank account, my view is that "enforced" must mean something more like "realised."
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> …
>
> 47. In my judgment, as at 1 January 2007 it was reasonable for the father not to seek to realise the entirety of the chose in action, by requiring repayment of the whole of his director's loan account … However, again it is not an all or nothing question, as shown in the context of assets and choses in action by decisions CSCS/1/2005 and DGH v SSWP (CSM) [2013] UKUT

> (AAC) … The father felt able to start drawing quite substantial amounts from his director's loan early in January 2007 (partly as a result of his choice to take an artificially low salary) and his accountants have explained how the cash was actually available for the withdrawals throughout the year. It was therefore, even at the beginning of January 2007, not reasonable for the father to be retaining some proportion of the chose in action. It could not be said at that point that it was reasonable to realise the whole of the year's drawings. That would depend on the cash flow during the year. So at each date through the period from 1 January 2007 to 26 September 2007, as the balance in the account reduced, it would have been reasonable for the father to have realised some additional amount that could realistically be regarded as available in the next few months."

57. What Judge Mesher says is obiter, and in any event it is about different provisions in a predecessor scheme. Therefore, his statements aren't authoritative, but that doesn't mean that I (or the Tribunal) can't agree with them. The same applies to Judge Poynter's dicta in *AB*. Since the Tribunal appears to have considered Judge Poynter's statements of principle to be compelling, I am not sure why it didn't follow his suggested approach, even though what Judge Poynter said wasn't binding on it.

58. I find that the Tribunal erred in law because it misinterpreted regulation 69A(2). Its misunderstanding was clearly material because it is clear from what the Tribunal said that it would have made a variation based on the reasonableness of a partial enforcement of the Director's Loan had it understood that course to be open to it.

"Just and equitable"

59. The Tribunal considered that it would have been reasonable for PE to have enforced the Director's Loan in an amount sufficient to meet the incremental liability to child support payments that would result from the variation that it would clearly have wished to make. It said that such a variation would be just and equitable.

60. However, part of PE's case was that he had had to borrow part of the funds he had lent to M Limited. Further, his evidence was that a substantial proportion of the funds lent to M Limited had come from the sale of his shares in his previous company, and had he not lent them to M Limited he would have been able to pay off the mortgage on his home. His argument was, in essence, that it would be unfair for the calculation of his child benefit liability to take into account his assets without taking into account "the other side of the equation", i.e. his debts.

61. In *DB v CMEC (CSM)* [2010] UKUT 356 (AAC) Judge Jacobs considered the duty imposed by Section 28(F) of the 1991 Act that agreement to a variation should be withheld unless the decision maker "is of the opinion that, in all the circumstances of the case, it would be just and equitable". He characterised it as a discretion that was (except insofar as express provision was made for compulsory considerations and exclusions in the regulations then applicable) was "without express limitation." I agree with Judge Jacobs.

62. If, for the sake of argument, a non-resident parent made a loan to a company (creating an asset), but funded 100% of that loan with borrowings from a third party (creating a liability in equal amount), it would clearly not be just and equitable to make a variation based on the asset without taking into account the corresponding liability.

63. The Tribunal didn't make clear findings of fact in relation to PE's evidence on the source of the funds that were advanced to M Limited by way of the Director's Loan, including how much he borrowed to fund making the Director's Loan or how much is now outstanding in respect of that debt.

64. That is a significant omission, because those matters must be relevant to a proper assessment of whether it is just and equitable to agree to a variation in respect of the Director's Loan. The Tribunal also needed to make clear findings on the terms of the Director's Loan, and in particular the circumstances in which it could be enforced, in order properly to decide whether enforcement was reasonable.

## Disposal

65. The Tribunal made a valiant effort to avoid the need for this case to be remitted back to the First-tier Tribunal even if it was wrong in its understanding that the law prevented it from following the approach described by Judge Poynter in *AB*. Although the Tribunal explained in clear terms that it considered that it would be just and equitable to make a variation in respect of part of the Director's Loan, it didn't make findings of fact on some material matters which mean that its consideration of whether the variation was just and equitable was incomplete.

66. I have considered whether I am able to remake the FtT Decision myself. However, because further facts need to be found, and because unlike the First-tier Tribunal the Upper Tribunal doesn't have the benefit of financially qualified expert members, I reluctantly conclude that the interests of justice require me to remit the matter for rehearing by the First-tier Tribunal.

## Conclusion

67. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new panel of the First-tier Tribunal.

**Thomas Church**
**Judge of the Upper Tribunal**

Authorised by the Judge for issue on 7 February 2025