IN THE UPPER TRIBUNAL **Upper Tribunal case No.** CCS/3813/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

DECISION:

The decision of the First-tier Tribunal (16 August 2016, file reference *SC 188/12/04024*) involved the making of an error on a point of law. The Tribunal' s decision is **SET ASIDE** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Under section 12(2)(b)(ii) of the 2007 Act, I **RE-MAKE** the First-tier Tribunal' s decision as follows:

The appeal brought by Mrs E (the parent with care and the second respondent in the present Upper Tribunal proceedings) against the Secretary of State' s decision of 12 March 2012 is **DISMISSED**. The Secretary of State did not agree, under section 28A of the Child Support Act 1991, to vary the usual rules by which a maintenance calculation is made. I dismiss the appeal because I am not satisfied that any statutory ground for variation applies.

REASONS FOR DECISION

Introductory comments

1. After six years, three decisions of the First-tier Tribunal and two appeals to the Upper Tribunal, this child support dispute concludes. Some cases will always take longer to deal with than others and inevitably errors on points of law will be made. Even with the best will in the world, cases will arise that take a frustratingly long time to be resolved. Delay does not necessarily indicate fault. In this case, however, I wish to record my concerns about the dynamics of the First-tier Tribunal proceedings which, in my view, led to unnecessary delay.

2. The First-tier Tribunal was faced with an appeal brought by a parent with care against the Secretary of State' s refusal to vary the usual child maintenance calculation rules. So it was the parent with care' s appeal. While the First-tier Tribunal has an inquisitorial function, it cannot turn a respondent into an appellant – the appellant makes a case and the respondent responds. In this case, the distinction between appellant and respondent became so blurred that, had I not known the proceedings began as an appeal brought by the parent with care, I would have assumed the non-resident parent was the appellant charged with persuading the tribunal of the merits of his case.

3. Nor can the First-tier Tribunal's inquisitorial function properly be exercised so as to both introduce *and* pursue a new issue in a manner akin to a party. In this case, the First-tier Tribunal decided without explanation to turn the appeal into an appeal against the correctness of the child maintenance calculation made in respect of the non-resident parent. No one asked the tribunal to do this. Furthermore, the parent with care was never asked to set out her case on the correctness of the maintenance calculation. The show, as it were, was being run entirely by the tribunal.

4. In re-making the First-tier Tribunal's decision, I decline to follow the course taken by that tribunal. The parent with care has failed without explanation to comply with Upper Tribunal case management directions requiring her to set out her position in writing. It was made very clear to the parent with care that the Upper Tribunal, if it allowed the appeal, might re-make the First-tier Tribunal's decision rather than remit to that tribunal for it to give a fourth decision on her appeal against the refusal to agree to a variation. I am not going to construct and prosecute a case on behalf of the parent with care. How could I while continuing to appear independent? The parent with care bears the risks associated with the strategy she has adopted.

Background

5. On 12 March 2012 the Secretary of State's predecessor decided that Mr E (the non-resident parent for the purposes of the Child Support Act 1991) was liable to pay £24 per week in child support for three children, who lived with their mother Mrs E (the parent with care). That was on the basis that Mr E's weekly earnings were £143.17, the salary he drew from a company he controlled and whose business was consultancy and training services. Either 86% or 100% of the shares in the company were issued to Mr E (the evidence is not clear on this point and it is possible that the shareholdings altered during the life of the case).

6. Mrs E applied for a variation of the usual child maintenance income calculation rules. She argued that Mr E had additional finances in the form of company dividends. Ultimately however, as explained below, the matter was finally determined by the First-tier Tribunal simply applying the maintenance calculation rules without variation.

7. Mrs E's application was refused and she appealed to the First-tier Tribunal. Her notice of appeal stated that Mr E's finances must have been greater than declared because his monthly outgoings were unaffordable on his declared income.

8. On 3 November 2012 Mr E supplied the tribunal with bank statements, which he argued showed he had no spare cash for child maintenance. He added that he left as much profit

as possible in the company for business development reasons and only took enough of a dividend to meet his basic monthly financial commitments.

9. On 13 November 2012 the Tribunal issued directions requiring the parties to supply any further documentary evidence on which they wished to rely " as soon as possible" .

10. Mr E informed the Tribunal that he was paid a salary from the company " based on the personal tax allowance" as well as " advanced dividend payments when appropriate" but these might have to be repaid in whole or in part once the company' s accounts were finalised. As a result, argued Mr E, " the dividends can only be regarded as income once the accounts are finalised" .

11. Mr E supplied a copy of his income tax return for 2011/12 which indicated £3166 in dividends / salary from a personal service company, during the year. Separately, the return declared pay from employment of £7475.

12. Mr E also supplied company accounts for 2011/12 which gave a turnover of £40,828 and an operating profit of £4726 after deduction of £7018 for ' cost of sales' and £29,082 in administrative expenses. After further deductions for interest charges etc. the accounts gave an after-tax profit for the financial year of £3215. The company balance sheet indicated net assets of £7304.

13. On 22 May 2013 the First-tier Tribunal heard and allowed Mrs E' s appeal. Out of the blue, the tribunal decided that the company' s administrative expenses were in fact Mr E' s earnings. In other words, it decided the appeal as if it were an appeal against a maintenance calculation. On 13 June 2013 Mr E wrote to the Tribunal arguing it incorrectly included the company' s administrative expenses as his earnings and took a mistaken approach to the categorisation of dividends. In response, the tribunal set aside its own decision and gave case management directions, which, amongst other things, required Mr E to supply within 28 days his complete tax returns for 2010/11 and 2011/12, company accounts for 2010/11 and 2011/12 and " a copy of movements on any director' s loan account for the above periods" . I note that much of this evidence had already been supplied.

14. The above directions were issued on 5 July 2013. In time, Mr E supplied documentation including:

- a ' dividend pay back ledger' for 2012/13 with an opening balance of £6350 and closing balance of £5254.91;
- company accounts for 2010/11 which gave turnover of £56,695, an operating profit of £9,352 (deductions having been made for overheads including £33,982 in administrative expenses) and after-tax profit of £8786;

- the company' s 2010/11 balance sheet which stated creditors were owed £9670 and net assets stood at £4089;
- certain details of his personal debts and a schedule of salary and dividend payments received between 30 May 2011 and 26 May 2012. That period was the company' s financial reporting year.

15. On 4 October 2013, the First-tier Tribunal adjourned a hearing and gave further case management directions, which required Mr E to supply within 28 days certain documentation including: a full and unabbreviated set of accounts for the company for 10/11 and 11/12; the fixed asset register for the company for those years; a personal income and expenditure record for February 2012; and schedules of indebtedness for December 2011 and February 2012. The directions were issued on 4 October 2013.

16. Mr E supplied a quantity of documentation in response to the above directions which seem to have been acceptable to the tribunal (it did not say otherwise).

17. On 7 January 2014 the Tribunal allowed Mrs E' s appeal and varied the usual rules for calculating income for child maintenance assessment purposes. This tribunal clearly appreciated that it was dealing with an appeal against a refusal to agree a variation.

18. On 3 October 2014, Upper Tribunal Judge Mesher allowed Mr E' s appeal against the First-tier Tribunal' s decision and set the decision aside. Judge Mesher decided that the First-tier Tribunal erred in law in the following respects:

> (a) by failing to make deductions from Mr E' s income, as determined by the First-tier Tribunal under the variation rules in regulation 19 of the Child Support (Variations) Regulations 2000 (" 2000 Variation Regulations"), for income tax and N.I. contributions;
>
> (b) the tribunal found that Mr E had diverted his income but made no finding as to whether the diversion involved wages or dividends. Dividend payments did not attract a N.I. contribution liability nor an additional income tax charge if an individual is not a higher rate tax payer (Mr E was not). If dividend income was diverted, there should have been no deduction for tax and N.I. contributions from Mr E' s income as varied. If the entire diversion was comprised of dividend income, the tribunal' s failure to make deductions would not have made any difference but, as it was, it was unclear from the tribunal' s reasons which type of finances had been diverted;
>
> (c) Judge Mesher doubted whether the tribunal had given adequate reasons for rejecting Mr E' s argument that there was a good explanation for the absence of dividend payments from the company' s financial statements;

(d) the tribunal gave inadequate reasons for its finding that the company' s payments of ' advance dividends' / loans before January 2012 (when Mr & Mrs E separated), amounted to an unreasonable diversion of income since, during that period, " child support support liability would not have been on the horizon" (as the Secretary of State had put it in his written submissions). The tribunal should have made findings as to the date/s on which the diversions occurred;

(e) the tribunal failed to make findings as to whether the ' non-salary payments' / advance dividends / loans were, in reality, payments of income.

19. Judge Mesher gave directions for Mrs E' s appeal to be remitted to the First-tier Tribunal for re-hearing. On 7 April 2015, Mr E supplied that tribunal with a written submission, the contents of which:

(a) included a statement that there were no additional accrued profits, for accounting years 10/11 and 11/12 out of which the company could have paid him dividends " other than those declared in my personal tax returns" ;

(b) stated that the company accounts for 10/11 and 11/12 mistakenly omitted dividend payments declared on Mr E' s personal tax returns. Mr E wrote that he had corrected the accounts accordingly and that the dividend payments were £2,571 for 10/11 and £3166 for 11/12;

(c) expressed concern that previous First-tier Tribunal panels had mistakenly assumed that " revenue is gained before associated expenses are incurred" when the reality for his business was the opposite;

(d) the company' s business model was in fact a simple one and previous tribunal decisions had unnecessarily complicated matters;

(e) the break-even point for his business was turnover of £38,000 so that it should have been obvious that, on a turnover of £41,000, he could not realistically have diverted any income;

(f) Mrs E' s assertions that there was an unexplained disconnect between his lifestyle and declared income were baseless.

20. Mr E also supplied company accounts for 2012/13. The First-tier Tribunal adjourned a hearing on 15 April 2015 and gave case management directions (issued on 23 April 2015) that required Mr E, within 28 days, to supply a significant amount of new evidence including a range of bank statements, details of personal indebtedness, company bank accounts and other financial information including invoices, an explanation of his altered share-holding in the company and how that related to his rights to receive dividends, his monthly expenses, details of the business carried on by the company, a breakdown of the creditor and debtor

figures given in the company accounts, details of the director' s loan account and the mechanism for paying ' advance dividends' .

21. On 19 May 2015, Mr E supplied much of the information required together with a letter expressing exasperation at the time taken to conclude this matter (not an unreasonable sentiment, it seems to me). What he did supply seems to have satisfied the First-tier Tribunal (it did not say otherwise). Mr E also supplied further written submissions which:

(a) argued the only ground for a variation would be a defensible finding that the company had available undeclared profit which could have been paid as income;

(b) argued the payment of dividends was subject to legal controls, such as those provided for in the Companies Act 2006, and so he was not free to deal with the company finances in any way he wanted;

(c) argued that dividends can only be paid after deduction of corporation tax which would therefore need to be taken into account were the tribunal to conclude that additional dividends could be paid from company profits;

(d) argued that the ' non-salary payments' could not be classified as income.

22. The First-tier Tribunal, comprised of a tribunal judge and a financial member, decided Mrs E' s appeal on 16 August 2016. Inexplicably, the tribunal' s statement of reasons recorded that " the sole issue on this appeal was the level of Mr [E' s] earnings to be taken into account for maintenance purposes" . The variation issue had disappeared. The Tribunal allowed Mrs E' s appeal and decided that, for the purposes of Mr E' s child maintenance calculation, his weekly earnings from employment were £381.25 (less income tax and National Insurance contributions).

23. The First-tier Tribunal' s statement of reasons included the following findings and conclusions:

(a) Mr E was an employed earner. His employer was the company he controlled;

(b) under the Child Support (Maintenance Calculations and Special Cases) Regulations 2001 (" 2001 Maintenance Calculation Regulations") Mr E' s earnings were " any remuneration or profit" derived from his employment;

(c) normally, earnings to be taken into account are those for the 8 weeks before the relevant date (the date of Mrs E' s variation application). However, that period can be adjusted where a calculation over 8 weeks would not reflect the normal level of earnings;

(d) the period taken into account by the tribunal was not the 8 weeks before the relevant date. It was the year that ended on 12 March 2012. In that year, Mr E withdrew his weekly salary of £143.75 " and other moneys totalling £12350" (the

‘ other moneys’ seem to have exceeded the ‘ advance dividends’ for financial year 2011/12 because the tribunal took into account a 12 month period that ended before the financial year);

(e) Mr E argued the sum of £12,350 was comprised of dividend payments and loans. The tribunal accepted that Mr E had pledged a share of the anticipated proceeds of sale of his home to the company. However, the tribunal found that Mr E “ did not, in fact, take more from the company than it could afford to pay him” . The Tribunal also relied on Mr E’ s evidence that his main reason for pledging an equity share in his home to the company was his belief that the company would only be taxed on any debit balances appearing in the company’ s director’ s loan account;

(f) The tribunal concluded that Mr E drew from the company the same amount as he would have drawn had he been a sole trader. The sum of £12350 was earnings for the purposes of the 2001 Maintenance Calculations Regulations but a notional deduction should be made to reflect the tax and N.I. contributions that would have been due had the sum been treated for accounting purposes as earnings.

24. It can be seen that the Tribunal did not apply the variations legislation. It simply applied the Maintenance Calculations Regulations in determining the appeal.

Legal Framework

25. This is what is known as a ‘ 2000 Rules’ case.

Variations

26. The Child Support Act 1991 (“ 1991 Act”) provides a default set of rules for the calculating the income to be used in a non-resident parent’ s maintenance calculation. Before Mrs E’ s variation application, these rules were applied to determine Mr E’ s child maintenance liability.

27. Section 28G(1) of the 1991 Act provides that an application for variation of the usual income calculation rules may be made where a maintenance calculation is in force. An application for a variation “ must say upon what grounds the application is made” (section 28A(4)).

28. In determining whether to agree to a variation, the “ general principles” in section 28E(2) of the 1991 Act, including the principle that parents should be responsible for maintaining their children whenever they can afford to do so, must be taken into account, as well as such other considerations as are prescribed in regulations.

29. Section 28F of the 1991 Act provides that:

(a) a variation may be agreed to if the decision maker is satisfied the case is of a type specified in regulations or in Schedule 4B to the Act; and

(b) in the opinion of the decision maker, it would be just and equitable, in all the circumstances of the case, to agree to a variation. Factors to be taken into account in determining whether it would be just and equitable to agree to a variation are set out in regulation 21 of the 2000 Variations Regulations. The effect on the welfare of any child of agreeing to the variation must also be taken into account (section 28F(2)(b)).

30. The variation cases set out in the 2000 Variations Regulations include (in summary):

(a) where the non-resident parent has the ability to control the amount of income he receives from a company and the decision-maker is satisfied that the parent is receiving weekly income of over £100 from the company which would not otherwise fall to be taken into account (reg. 19(1A))

(b) where the non-resident parent has the ability to control the amount of income received and the decision-maker is satisfied the parent has unreasonably reduced the amount of income which would otherwise fall to be taken into account by diverting it to other persons or for purposes other than the provision of income for the parent (reg. 19(4));

(c) the decision-maker is satisfied that the income taken into account for the purposes of the maintenance calculation is substantially lower than the level of income required to support the non-resident parent' s overall lifestyle (reg. 20).

31. Where a variation is agreed, the decision maker must determine the basis on which child support maintenance is to be calculated and effect must be given to that determination in a decision taken under section 11 of the 1991 Act (section 28F(4)).

32. In deciding an appeal, section 20 of the 1991 Act provides that the Tribunal " need not" consider any issue not raised by the appeal and " shall not take into account any circumstances not obtaining at the time when the Secretary of State made the decision" . If the Tribunal allows an appeal, it may itself make such decision as it considers appropriate or remit the case to the Secretary of State.

Relevant maintenance calculation rules

33. A non-resident parent' s assessable income is calculated by reference to the patient net income, calculated or estimated in accordance with regulations (Schedule 5(1)) to the 1991 Act). The relevant regulations are the 2001 Maintenance Calculations Regulations.

34. Under the 2001 Maintenance Calculation Regulations, a non-resident parent' s " net weekly income" means the aggregate of the net weekly income provided for by the Schedule to the Regulations (paragraph 1 of the Schedule). In the case of an employed earner, net weekly income shall be earnings provided for in paragraph 4 less the deductions

in paragraph 5, which are to be calculated or estimated by reference to the relevant week as provided for in paragraph 6(3).

35. In the 2001 Maintenance Calculation Regulations, " employed earner" has the same meaning as in section 2(1)(a) of the Social Security Contributions and Benefits Act 1992 (regulation 1(2)). Section 2(1)(a) defines an employed earner as " a person who is gainfully employed in Great Britain either under a contract of service, or in an office…with earnings" . A person holding the office of, and being paid earnings as, a director is therefore an employed earner.

36. In the 2001 Maintenance Calculation Regulations " earnings" , for an employed earner, means any remuneration or profit derived from that employment and includes any bonus or commission (Schedule 1, paragraph 4(1)). Dividends are not included. Earnings do not include the items specified in paragraph 4(2), including any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment, any payment in kind, any advance of earnings or any loan made by an employer to an employee.

Proceedings before the Upper Tribunal

37. I granted Mr E permission to appeal to the Upper Tribunal against the First-tier Tribunal' s decision on two grounds:

(1) Arguably the tribunal gave inadequate reasons for its finding that the company did not pay Mr E more than it could afford. I noted that the tribunal did not explain this finding by reference to any particular feature of the company account or the nature of its business;

(2) Arguably the tribunal failed to deal with Mr E' s argument that he repaid the director' s loan debit balance from equity released by the sale of his home. This ground embraced Mr E' s argument that the Tribunal overlooked the director' s loan account credit entries.

38. Those grounds related to the First-tier Tribunal' s income calculation, rather than any variation issue, since that was the basis on which the tribunal made its decision. However, the grant of permission to appeal made it very clear that the appeal actually brought by Mrs E was a variation appeal.

39. Case management directions required both respondents – Mrs E and the Secretary of state – to supply the Upper Tribunal with a written response to Mr E' s appeal, within one month of the date on which the directions were issued on 25 April 2017. The directions notice also informed the parties that, if Mr E' s appeal succeeded, I was minded to re-decide the appeal brought by Mrs E rather than remit the case to the First-tier Tribunal in order for it to determine the appeal (for the fourth time). The parties were invited to comment on that proposals in their responses and replies. Both Mr E and the Secretary of State agreed with that proposal. Mrs E did not supply any written submissions.

40. The Secretary of State supplied a written response in support of Mr E' s appeal. The Secretary of State' s representative argues:

> (a) the First-tier Tribunal' s statement of reasons failed adequately to explain what the tribunal made of the company accounts and why they, in effect, disregarded them and treated Mr E entire income as being derived from employed earnings within the meaning of the 2001 Maintenance Calculation Regulations;
>
> (b) the tribunal failed adequately to explain why it felt able to treat financial withdrawals from the company as " being what he would have taken had he been trading unincorporated" ;
>
> (c) the tribunal failed to deal with the director' s loan account argument advanced by Mr E.

41. In accordance with the directions I gave when granting permission to appeal, the Secretary of State' s response was supplied to Mr & Mrs E in order for them to supply written replies. Mr E wrote in reply that he had no further comment to make. Mrs E provided no reply. Mrs E has therefore declined to take any active part in these proceedings.

Decision on the appeal

42. I decide that the First-tier Tribunal' s decision involved errors on points of law, as described in the grounds of appeal, which neither of the parties who have participated in these proceedings dispute. I set aside the First-tier Tribunal' s decision.

Decision in re-making the First-tier Tribunal' s decision

43. Rather than remit Mrs E' s appeal to the First-tier Tribunal for it to decide her appeal for the fourth time, I decide to re-make the tribunal' s decision. No party has objected to that course. While there is a financial dimension to this case, and I am not an accountant, I am satisfied I can fairly decide the appeal even though I do so without the assistance of a financial member. The company' s financial structure is not complex and I am satisfied that I have sufficient experience of cases of this type fairly to decide the appeal despite my lack of any formal accounting expertise.

44. No party requests that the Upper Tribunal holds a hearing before making a decision. I am satisfied that a hearing is unnecessary. The appeal papers contain all of the relevant financial evidence I am ever likely to get.

45. The appeal to the First-tier Tribunal was brought by Mrs E against a refusal to agree a variation of the usual child maintenance income calculation rules. The tribunal decided the appeal on a completely different ground. One might assume that the Tribunal relied on its power under section 20 of the 1991 Act to consider an issue not raised by the appeal. However, there must be doubt as to whether the Tribunal consciously exercised that power

because the statement of reasons records " the sole issue on this appeal was the level of Mr [E' s] earnings to be taken into account for maintenance purposes" .

46. At this point, I should record that I am not comfortable, taking into account the proceedings on all three First-tier Tribunal decisions, with the way in which the proceedings were conducted, or to put it another way the dynamics of that process. The tribunal was dealing with an appeal brought by Mrs E yet the papers give the impression that it was Mr E who was being required to make good his case. During the First-tier Tribunal proceedings, Mr E supplied, in response to First-tier Tribunal directions, some 1,000 pages of documentary evidence and submissions. By contrast, Mrs E' s documentary input was limited to no more than 10 pages or so comprising vaguely expressed arguments and assertions, much of which concerned the non-issue of shared care, and a handful of receipts for meals purchased during Mr E' s holiday in West Wales (which Mr E claimed were improperly obtained).

47. Now I am fully aware that the First-tier Tribunal has an inquisitorial function but that does not permit it to transform a respondent into a *de facto* appellant. I am concerned that this may have happened in this case. At no point did the First-tier Tribunal require Mrs E, nor for that matter the Secretary of State, to set out a case concerning the correct calculation of Mr E' s income for the purposes of his child maintenance calculation. Mr E asserts that Mrs E is a business studies lecturer and she did not dispute this. And she was previously an officer of the company. In those circumstances, it would not have been unreasonable for the tribunal to require her to set out her case on the calculation of Mr E' s income. As it was, the lines of engagement on this issue were drawn solely between Mr E and the tribunal.

48. I have to begin by considering the appeal that was actually made to the First-tier Tribunal, i.e. Mrs E' s appeal against the refusal to agree a variation.

49. How, I ask myself, should I proceed? On one side, I have Mr E who has complied with all Upper Tribunal case management directions, set out detailed arguments in support of his case and clearly devoted significant time and resources to supplying reams of supporting documentary evidence. On the other side, I have Mrs E who has failed both to comply with Upper Tribunal directions and offer an explanation for non-compliance. The upshot is that I have very little idea what her case is. I am not going to construct a case for Mrs E, over and above that which she put to the First-tier Tribunal, and require Mr E to meet it. The Secretary of State is also a party. Like Mr E, the Secretary of State has complied with the Upper Tribunal' s directions but her stance is now essentially neutral regarding the merits.

50. It appears that Mrs E applied for a variation by telephone. Child Support Agency (CSA) call records indicate:

- 3.3.12: during a telephone call about shared care arrangements, " [Mrs E] also states that [Mr E] receives an income from dividends. Taken as verbal application for a variation" ;
- 14.3.12: the CSA were awaiting dividend information from Mr E, and Mrs E " will gather evidence in case she needs to apply under lifestyle inconsistent" ;
- 14.3.12: " she has received a letter stating her variation has failed. She wasn' t sure what a variation was…explained that we have looked into [Mr E] receiving dividends but based on 10/11 tax return they cannot be used as they do not pass threshold for income taken into account…She wanted to take the dispute further…she doesn' t think she will have any evidence but would like the form sending to her" .

51. Mrs E' s notice of appeal to the First-tier Tribunal, dated 6 April 2012, stated:

> " My husband' s income from his business must be inaccurate. His monthly costs total approx.. £2,371.51. I find it difficult to see how he is maintaining his current lifestyle on such a low income."

52. In a subsequent letter to the First-tier Tribunal, dated 5 September 2012, Mrs E wrote:

> " I have appealed against the decision on the basis of my husband' s lifestyle for the following reasons:
>
> - He is currently paying a mortgage of over £900 per month plus bills.
> - He went on holiday for a week in June with his girlfriend and spent more money on dining out than he does paying for his 4 children (photocopies of receipts enclosed);
> - He has joined the Virgin Active Gym…costing approx.. £50 per month;
> - He has made two payments to his girlfriend of over £200 (and doing some work in his business);
> - He has increased his costs by taking on another large dog;
> - He has recently started an additional revenue stream by selling our possessions on ebay;
> - He took 2 of the girls to the Olympics in London to see the hockey travelling by train and staying overnight in a hotel;
> - He took 3 of the girls to the Olympics for the day to watch the hockey" .

53. That is the sum total of Mrs E' s written arguments in support of her appeal.

54. I decide that none of the variation cases are made out and therefore dismiss Mrs E appeal against the Secretary of State' s predecessor' s refusal to agree to a variation.

55. The variation cases in regulation 19 of the 2000 Variations Regulations direct attention to Mr E' s financial situation in 2012.

56. Mr E' s income tax self-assessment returns for 2011/12 indicated:

- He received £3166 as the total amount withdrawn from a personal service company in dividends and salary. Given the separate entry for pay in a later part of the return, I presume the figure of £3,166 was intended to refer to dividends;
- He received " pay" of £7475 (less tax paid of £249).

57. It appears to me that the entire dividend payments were treated as chargeable dividend income by HMRC albeit they did not give rise to an actual tax charge. This was to be expected (at least before the dividend tax rules changes on 6 April 2016). Normally, since corporation tax is paid on a company' s profits, a notional tax credit of 10% was available to the dividend recipient to avoid double taxation, to be offset against the income tax otherwise due on the dividend income received. In such cases, the gross dividend, which is chargeable to tax, was therefore the net dividend multiplied by 10/9. For basic rate taxpayers like Mr E, however, no further tax was payable on dividends because the basic dividend tax rate and tax credit were both 10% and so cancelled each other out.

58. The abbreviated company accounts for the year ending 31 May 2012 indicated:

- Turnover: £40,828;
- Cost of sales: £7,018;
- Gross profit (turnover less cost of sales): £33,810;
- Administrative expenses: £29,082 (I note the ratio of expenses to turnover was fairly consistent with the ratio for the previous year);
- Operating profit (gross profit less administrative expenses): £4,728;
- Taxable profit: £4,069 (operating profit less interest and similar charges);
- After-tax profit: £3,215;
- The balance sheet entry for debtors, within current assets, rose to £16,977, from £9,016 the previous year;
- Cash at bank rose to £12,317, from £2,945 the previous year.

59. In a letter dated 13 June 2013, Mr E wrote that the company' s administrative expenses were made up of his salary, Regus office hire fees, depreciation, professional and training fees, computer equipment and supplies and business travel expenses. At p.278 of

the First-tier Tribunal bundle is a spreadsheet which contains a monthly breakdown of company expenses for the year ending May 2012. The most significant sums are training materials (£6,674), wages (£7,650), depreciation (£3,362) and travel expenses (£5,664). Further documents supplied by Mr E gave a further breakdown of different heads of expenditure, e.g for depreciation and business travel. He also supplied copies of scores of invoices issued by the company during the relevant period.

60. Now, the dividends issue. The evidence here was comprised of:

- The 2011/12 self-assessment return which indicated receipt of £3,166 in dividends. However, a spreadsheet supplied by Mr E in September 2013 indicated that, during the 2011/12 financial year, dividend payments totalled £8,350;
- A letter written by Mr E, dated 21 March 2013, which stated:

  " throughout the year I pay myself a salary based on the Personal Tax Allowance plus advanced dividend payments when appropriate. These advance dividends are subject to confirmation when the company accounts are finalised and may have to be repaid in part of whole. Therefore the dividends can only be considered as income once the accounts are finalised and submitted to Companies House and my personal tax return is submitted to HMRC" ;
- At a hearing before the First-tier Tribunal on 7 January 2014, the record of proceedings indicates that Mr E gave the following evidence:

  " declare a dividend and then pay it back at end of year if necessary. If co. could not afford dividend, disallowed dividend. The difference between payment and eventual dividend is a debt I owe the business"

  That tribunal subsequently held that what Mr E described as ' advance dividends' were in fact drawings on a director' s loan account. That tribunal' s decision was subsequently set aside by Upper Tribunal Judge Mesher;
- On 7 April 2015, Mr E wrote that there were no additional accrued profits, other than those declared in his personal tax return. He conceded that the 2011 & 2012 company accounts failed to " mention the dividend payments declared on my personal tax returns" but he had now corrected the accounts.

61. Regarding dividends, Mr E argues that the difference between the sum described as dividends in his personal tax return for 2011/12 and the sums paid out to him during the course of that financial year, purportedly as dividends, represented either advance dividends or a form of loan to himself from the company, which he subsequently repaid. I am not certain whether advance dividends have a legal basis. I shall therefore discount that possibility. This leaves the possibility of a loan. I do not consider Mr E' s argument that the

sums were a form of loan implausible and, in the absence of any counter-argument, accept it. He had a number of personal financial commitments and the only realistic means available to him of meeting them as they became due, apart from obtaining a loan from a financial institution, was through the company' s finances. I accept that the sum in question (the difference between the dividends declared in Mr E' s personal tax return and the amounts purportedly paid out as dividends) was a form of loan made to Mr E by the company.

62. Regulation 4(2)(e) of the 2001 Maintenance Calculation Regulations provides that, in the case of an employed earner, earnings do not include " any loan made by an employer to an employee" . Accordingly, a loan does not form part of the earner' s income for the purposes of regulation 3 of the 2001 Regulations.

63. The variation case provided for in regulation 19(1A) of the 2000 Variations Regulations cannot apply. It requires that a non-resident parent " is receiving income from that company…which would not otherwise fall to be taken into account under the [2000 Regulations]" . Since on my findings there is no such income, regulation 19(1A) cannot apply.

64. The variation case in regulation 19(4) does not apply either. One of the essential regulation 19(4) conditions is that the non-resident parent has unreasonably reduced the amount of income that would otherwise fall to be taken into account " by diverting it to other persons or for purposes other than the provision of such income for [the non-resident parent]" . I accept Mr E' s argument that the loans were necessary for him to meet his in-year financial commitments. It follows that he did not unreasonably reduce his income. In any event, I am not convinced that the sums in question exceeded the weekly minimum of £100 that is required in order for regulation 19(4) to apply. I also have doubts as to whether, at March 2012, any reduction in income could have been for the purpose referred to in regulation 19(4) since, at that date, the parties had only been separated for two months and the financial arrangements in question had been in place for some time before then.

65. The variation case provided for by regulation 20 of the 2000 Variation Regulations does not apply. I am not satisfied that Mr E' s income was substantially lower than the level of income required to support his overall lifestyle. Mrs E' s written case, set out in her notice of appeal to the First-tier Tribunal and subsequent letter of 5 September 2012 is unpersuasive:

> (a) Mr E' s mortgage and household bills would not in my judgement have exceeded the sums he received from the company;

(b) a week's holiday in West Wales, just down the road from Mr E's home, in which meals were taken at mid-price restaurants, says nothing of relevance about overall lifestyle;

(c) the gym membership cost must have been relatively insignificant, although the precise sum is disputed. The sum said to have been paid to Mr E's girlfriend was also relatively insignificant;

(d) a dog, even if 'large', does not cost more than a few pounds a week to feed;

(e) two visits to London to watch Olympic sporting events can scarcely be regarded as evidence of a lifestyle that could not be funded from Mr E's declared finances.

66. So the appeal actually made by Mrs E is dismissed. What, then, of the underlying maintenance calculation? I have a discretion to consider this issue even though its accuracy was not raised as an issue by Mrs E's appeal. I decline to do so. Mrs E was fully aware that the Upper Tribunal, if it allowed Mr E's appeal against the First-tier Tribunal's decision, might re-decide her 2012 appeal to the First-tier Tribunal. Despite that, she set out no case on the correctness of the maintenance calculation. In those circumstances, why should I introduce it as an issue? The Secretary of State's maintenance calculation does not contain any arguably glaring errors. If I were to re-decide the maintenance calculation, I would be introducing, for Mrs E's benefit, an issue on which she has declined to put forward any coherent case herself despite being capable of doing so. I decline to address the underlying maintenance calculation. I am quite satisfied that the interests of justice, and the requirements of fairness, do not require me to do so.

67. The ultimate outcome, then, after six years of legal proceedings involving three decisions of the First-tier Tribunal, all of which have been set aside, and two appeals to the Upper Tribunal, is that nothing has changed. The 2012 maintenance calculation stands.

(Signed on the Original)

E Mitchell

Judge of the Upper Tribunal

9 April 2018