



Neutral Citation Number: [2026] UKUT 61 (AAC)
Appeal No. UA-2024-000666-CSM and UA-2024-000690-CSM

**IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Between:

PB

Appellant

- v -

The Secretary of State for Work and Pensions

1st Respondent

-and-

CB

2nd Respondent

Before: Upper Tribunal Judge West, Upper Tribunal Judge Jones and Upper Tribunal Judge Butler

Hearing date: 16 October 2025
Mode of hearing: Cloud Video Platform

Representation:

Appellant: Frances de Navarro of counsel
1st Respondent: Richard Howell of counsel
2nd Respondent: Represented herself

On appeal from:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Panel: Judge J. McDade and Mrs J. Cummins
Tribunal Case No: SC946/22/01793 and SC946/23/00878
Digital Case No.: 1647-9421-6325-2349 and 1667-3911-0654-5069
Tribunal Venue: Manchester
Decision Date: 12 October 2023

Judicial Summary

In ***RC v CMEC*** (CSM) [2011] AACR 38 (“***Cart***”), a two-judge panel of the Upper Tribunal decided that the requirement in section 28F(1)(b) of the Child Support Act 1991 for variations to child support calculations to be just and equitable, precludes taking an all or nothing approach towards them. The Upper Tribunal decided in ***Cart*** that an assets variation may be agreed using a lower rate than the (8%) statutory

rate of interest given in regulation 18(5) of the Child Support (Variations) Regulations 2000. The decision in **Cart** has been followed and applied in a range of published Upper Tribunal decisions and in other decisions made by the Upper Tribunal. The 8% rate has been replicated in regulation 69A(7) of the Child Support Maintenance Calculation Regulations 2012.

A three-judge panel was convened to determine PB's appeals on the basis that the Secretary of State argued the line of authority established in **Cart**, was wrongly decided.

The three-judge panel confirms that had it been asked to decide the issue without the benefit of any prior case law, it would have interpreted section 28F of the Child Support Act 1991 and Schedule 4B to that Act as requiring an assets variation under regulation 69A of the Child Support Maintenance Calculation Regulations 2012 to be agreed applying the 8% statutory rate of interest, and not permitting an assets variation to be agreed applying a lower rate of interest.

The three-judge panel declines, however, to conclude that the approach established in **Cart** and followed in subsequent Upper Tribunal decisions, was wrongly decided; see **Secretary of State for Justice v RB** [2010] UKUT 454, **HMRC v Noor** [2013] UKUT 071 (TCC) and **Gilchrist v Revenue and Customs** [2014] UKUT 169 (TCC)). The three-judge panel therefore confirms that **Cart** should continue to be followed when considering variations for assets under regulation 69A.

The three-judge panel concludes that the First-tier Tribunal deciding the appeals about PB's child maintenance liability for his children made material errors of law by failing to address, in its decisions and Statement of Reasons, arguments raised at the hearing on behalf of PB and by CB. The three-judge panel remits the appeals to a new First-tier Tribunal for fresh determination.

Keywords

5. Child Support, Variation: other (5.8)

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 appeals. The decision of the First-tier Tribunal in each appeal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals Courts and Enforcement Act 2007, we set those decisions aside and remit the cases to be reconsidered by fresh tribunals in accordance with the following directions.

DIRECTIONS

- 1. The appeals are remitted to the First-tier Tribunal for consideration at an oral hearing.**
- 2. The new Tribunal should not involve any of the Tribunal panel members previously involved in considering these appeals on 12 October 2023.**
- 3. The new Tribunal must not take into account circumstances that did not apply at the time of the original decisions by the Secretary of State under appeal (06 October 2021, 22 April 2022 and 23 May 2022). Later evidence can be considered if it relates to the circumstances at the time of that decision: see *R(DLA) 2/01* and *R(DLA) 3/01*.**
- 4. The Tribunal hearing the remitted appeals is not bound in any way by the decision of the previous Tribunal. Depending on the findings of fact it makes, the new Tribunal may reach the same or a different outcome from the previous Tribunal.**
- 5. Copies of this decision and the written submissions provided by each party to the Upper Tribunal, shall be added to the appeal bundles and placed before the First-tier Tribunal hearing the remitted appeals.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber.

REASONS FOR DECISION

Introduction

- 1. These two appeals to the Upper Tribunal (“UT”) are linked appeals brought by PB against decisions of the First-tier Tribunal (“FTT”), consisting of a Tribunal Judge and a Financially Qualified Tribunal Member (“FQTM”), dated 12 October 2023.**
- 2. The FTT’s decisions related to three decisions by the Child Maintenance Service (“CMS”) acting on behalf of the Secretary of State for Work and Pensions, about PB’s liability for child maintenance for his children with CB, whose initials are “W” and “B”. CB was, at the relevant times covered by the three decisions, the person with care of W and B.**
- 3. CB was the Appellant before the FTT, having initially appealed CMS’s child maintenance decisions, but she is the 2nd Respondent to the UT appeals. CMS was the 1st Respondent to CB’s appeals at the FTT and to the appeals to the UT. PB, the non-resident parent to W and B, is the Appellant before the UT but was the 2nd Respondent at the FTT.**

4. On 23 April 2025, the Chamber President of the Upper Tribunal (Administrative Appeals Chamber) directed for PB's two appeals to be heard by a three-judge panel of the UT because they raise a question of law of special difficulty or an important principle of practice, namely:

“The application of the ‘just and equitable’ test in section 28F(1)(b) of the Child Support Act 1991 in the case of a variation prescribed by regulation 69A of the Child Support Maintenance Calculation Regulations 2012.”

5. The structure of our decision is as follows:-

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Circumstances leading to CB's appeals to the FTT

(a) Appeal SC946/22/01793: 1647-9421-6325-2349

6. On 23 April 2021, CMS carried out an annual review of PB's liability to pay child maintenance for W and B. CMS decided PB was liable to pay £242.67 per week in respect of W and B. There is a conflict in CMS's paperwork about whether the effective date of the calculation decision was 22 April 2021 (the date used in the letter dated 23 April 2021) or 13 May 2021 (the date listed as the effective date of the annual review in section 4 of CMS' Response to CB's appeal to the First-tier Tribunal).
7. On 13 May 2021, PB contacted the CMS, reporting his circumstances had changed because his income had reduced significantly. On 06 October 2021, CMS decided to change PB's child maintenance liability for W and B, reducing it to £117.44 per week. If the 2021 annual review decision applied an effective date of 22 April 2021, the decision dated 06 October 2021 superseded (changed) it from the date when PB reported his change of circumstances. If the 2021 annual review decision applied an effective date of 13 May 2021, the decision dated 06 October 2021 revised (changed) it from the effective date of the decision being changed, which was 13 May 2021.
8. CB asked CMS to reconsider its decision on 04 November 2021. Part of her request was considered as an application for CMS to agree to a variation to PB's child maintenance liability on the grounds of diversion of income and unearned income. On 04 February 2022, CMS issued its mandatory reconsideration notice, confirming the decision it had made on 06 October 2021.
9. On 09 March 2022, CB lodged an appeal with the First-tier Tribunal ("FTT"). CB argued it was unreasonable to vary PB's child maintenance based on the three months of payslips he had provided. She argued that PB was employed by numerous companies, had a company car, was receiving unearned income from company dividends and there might have been director's loans to allow PB to avoid CMS calculating his liability accurately but still increasing his income.

(b) Appeal SC946/23/00878: 1667-3911-0654-5069

10. On 25 April 2022, CMS carried out the next annual review of PB's child maintenance liability. It calculated PB's child maintenance liability as £117.44 per week, the same figure that CMS had reached in its decision dated 06 October 2021. CMS stated the effective date of its decision was 22 April 2022.
11. On 23 May 2022, CB asked CMS to reconsider its decision dated 25 April 2022. CB argued that there was diversion of income via PB's new partner as the company had given her a new car and she might have been employed by PB's parents (whose ownership included part of the company that employed PB). CB wrote that PB's father might be taking bonuses and gifting them to PB, and

also that PB's lifestyle did not reflect his income, based on PB being able to obtain a mortgage for a particular property in 2020. CB provided further information in support of her request on 24 May 2022.

12. On 16 September 2022, CB lodged a second appeal with the FTT. This was given appeal reference SC946/23/00878. CB lodged her appeal before CMS had issued its mandatory reconsideration notice for the decision dated 25 April 2022, which CMS later issued on 27 September 2022. CB's appeal form stated she was appealing the annual review CMS carried out for April 2022.
13. In her appeal form dated 16 September 2022, CB referred to her existing appeal SC946/22/01793, which had not yet been decided. CB asked for the appeals to be heard together. CB wrote that PB's income did not match his current two years' loss and yet he had purchased houses and a company car privately, so that his monthly expenses increased and his income was halved to avoid child maintenance. CB also stated that CMS had started an investigation into PB's sudden loss of £76,000 of income, but, because she had lodged appeal SC946/22/01793, CMS had not continued that investigation on the basis everything would be investigated within the appeals. She argued that CMS had effectively left all these matters to the FTT to sort out.
14. On 21 June 2023, the FTT made directions in respect of both appeals being decided together. The Directions Notice directed PB to provide specific financial information and for PB and CB to file any witness statement on which they wanted to rely. The Directions Notice confirmed appeal SC946/23/00878 was also validly made against a later decision CMS made on 23 May 2022 and for CMS to provide a supplementary response about it.

The FTT hearing and its decisions

15. The FTT held a face-to-face hearing of CB's appeals in Manchester on 13 October 2023. PB was represented by Ms de Navarro of counsel and CB represented herself. CMS was not represented at the hearing. The FTT panel comprised a Tribunal Judge sitting with a FQTM.

(a) The FTT's decision about appeal SC946/22/01793

16. The FTT decided to allow CB's appeal against CMS's decision dated 06 October 2021 (appeal SC946/22/01793). The FTT decided that at the effective date of 13 May 2021, PB's child maintenance liability should be based on income of £202,994 per annum, comprising £57,538 current income and a variation for assets under regulation 69A of the Child Support Maintenance Calculation Regulations 2012 ("the CSMCRs 2012") (SI 2012: 2677) of £145,456. The effect of this was that PB's income reached the statutory limit of gross weekly income of £3,000 that could be taken into account when calculating his child maintenance liability. See paragraph 10(3) of Schedule to the Child Support Act 1991 ("the CSA 1991").

17. The FTT decided it was just and equitable to apply a variation under regulation 69A of the CSMCRs 2012 and to apply the statutory (8%) rate of interest in calculating the variation. The FTT decided, however, that there should be no variation for diversion with effect from 13 May 2021.

(b) The FTT's decision about appeal SC946/23/000878

18. The FTT decided that CB's appeal SC946/23/000878 addressed two CMS decisions, one made on 22 April 2022 and the other on 23 May 2022. The FTT decided that it could properly decide the appeal against CMS's decision in May 2022, despite CMS not providing a written response in relation to it, and also the fact there was no presenting officer for CMS present at the hearing.

19. The FTT allowed CB's appeal SC946/23/000878 and set aside CMS's decisions dated 22 April 2022 and 23 May 2022. The FTT decided that in relation to both effective dates, which it stated were 22 April 2022 and 23 May 2022:

(a) PB's child maintenance liability was to be calculated on the basis of an income of £218,372 gross per annum. This was comprised of £57,538 current income and a variation for assets under regulation 69A of the CSMCRs 2012 of £160,934;

(b) It was just and equitable to agree to this variation, and it should be based on the statutory (8%) rate of interest; and

(c) There should be no variation agreed for unearned income (regulation 69) or diversion of income (regulation 71).

20. The FTT's decision about the overall level of CB's income that fell to be taken into account (paragraph 19(a) above) meant, once more, that PB's income had reached the statutory limit of £3,000 of gross weekly income that could be taken into account when calculating his child maintenance liability.

21. The FTT produced a Statement of Reasons for its decision on 22 December 2023. On 05 April 2024, the FTT Judge who chaired the panel refused PB permission to appeal to the Upper Tribunal. The FTT's decision was issued to the parties on 09 April 2024.

22. On 09 May 2024, the Upper Tribunal received an application from PB for permission to appeal against the FTT's two decisions. The application, which was treated as two applications, was stayed while the Upper Tribunal was dealing with an appeal UA-2023-000590-CSM in respect of which a three-judge panel had been convened to deal with the same issue as that summarised at paragraph 4 above. Although consideration of PB's applications was stayed awaiting determination of the other appeals, the appellant in those appeals ultimately withdrew his appeals to the Upper Tribunal.

PB's appeal grounds

23. In his applications to the Upper Tribunal, PB argued the FTT made the following errors of law in its decisions:
- (a) It miscalculated the value of PB's shareholding in two companies (called "Company M" and "Company S"), specifically failing to consider whether any minority discount should apply for the purpose of assessing the value of the shareholding for the purpose of regulation 69A of the CSMCRs 2012;
 - (b) The FTT decided it would be just and equitable under section 28F(1)(b) of the CSA 1991 to ascribe a notional income to the value of PB's shareholding in the two companies in circumstances in which:
 - (i) The FTT accepted PB has no control over the declaration of dividends from either company and his shareholding is a minority one in a private company, which cannot readily be sold. This was a rationally insupportable conclusion;
 - (ii) PB would be required either to sell his shares (held in a private company for which there is no market); or
 - (iii) PB would be required to sell or charge his home.
 - (c) The FTT failed to consider whether it would be just and equitable under section 28F(1)(b) of the CSA 1991 to ascribe a notional income at a rate of return of 8% to the value of PB's shareholding in Company M and Company S when valuations of private company shareholding are notoriously fragile; and
 - (d) The FTT failed to consider the risk of double counting in ascribing notional income to PB's shareholding in SMPH under regulation 69A of the CSMCRs 2012 when the income he received from a subsidiary company within the group was already taken into account in the assessment of his child maintenance liability.
24. On 17 March 2025, Upper Tribunal Judge Wikeley granted PB permission to appeal against the FTT's Decisions dated 12 October 2023. Within the grant of permission, Judge Wikeley observed that the issue on which the three-judge panel had been convened in UA-2023-000590-CSM was:

*"Whether the principles established in **RC v CMEC (CSM)** [2011] AACR 38 ("**Cart**"), including that the requirement for variations to be just and equitable precludes taking an "all or nothing" approach towards them, and an assets variation may be calculated using a lower rate than the statutory rate of interest in regulation 18(5) of the Child Support (Variations) Regulations 2000, apply in the context of the 2012 regulations, and in particular to regulation 69A (assets variations)."*

25. Upper Tribunal Judge Wikeley did not limit the terms of his grant of permission to appeal.

The Upper Tribunal hearing on 16 October 2025

26. PB's appeals were initially listed for hearing in Manchester on 16 October 2025 and 17 October 2025. However, at a later stage and having obtained the parties' views, the Upper Tribunal decided they could properly be dealt with in one day.
27. For logistical reasons, it became necessary, at short notice, to change the arrangements for the hearing of PB's appeals so that it became a remote video hearing with the Upper Tribunal panel taking part from a courtroom in London. We are grateful to the flexibility shown by all the parties in using that hearing method instead.
28. At the hearing, PB was represented by Ms de Navarro of counsel, who had represented him at the FTT hearing. Having not been represented at the FTT hearing, the Secretary of State for Work and Pensions ("the SSWP") was represented before us by Mr Howell of counsel. CB represented herself. We were grateful to all the parties for the thoughtful arguments they raised and for the helpful way in which they responded to our questions during the hearing.

Preliminary issue about the admissibility of the FA Report dated 11 September 2018

29. Through his legal representatives, the Government Legal Department ("GLD"), the Secretary of State ("the SSWP") made a written application on 26 September 2025 for permission to rely on a full report from a forensic accountant ("the FA Report") who produced a report used in the Family Court divorce proceedings between CB and PB. The FTT had received extracts of the FA Report but not the full version. The SSWP's application was, in terms, that in PB's appeal grounds and Counsel's skeleton argument, there was extensive reference to excerpts from the FA Report. The SSWP had not been provided with a full copy of the FA Report when providing his appeal response to the Upper Tribunal. CB had disclosed a full copy of the FA Report to the SSWP on 12 August 2025.
30. The letter requesting permission to rely on the FA Report submitted that the relevant GLD lawyer had twice (on 5 August 2025 and on 14 August 2025) sought confirmation from PB's representatives of the basis on which his shareholdings were valued in the Family Court proceedings. The letter submitted that PB had not denied the truth of CB's case before the FTT as to the basis on which the shareholdings were valued.
31. The GLD lawyer's letter argued it appeared that if the Upper Tribunal decided the FTT had made material errors of law in its decisions, PB would invite the Upper Tribunal to substitute its own decisions for the FTT's decisions. The letter argued that in these circumstances, the SSWP would contend the Upper Tribunal should not remake the FTT's Decision in the terms PB's counsel was

suggesting. The GLD lawyer's letter explained that to this end, the SSWP wanted to rely on the full FA Report and the correspondence concerning it between the GLD and PB's lawyers. The letter included a formal application under rule 6(2), read with rules 5(3)(d) and 15(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008, for permission to do so.

32. We dealt with this as a preliminary matter at the start of the hearing day. Ms de Navarro described making (only) light opposition to the application on the basis the evidence would fail the test applied in *Ladd v Marshall* [1954] 1 WLR 1489 about introducing new evidence on appeal. Ms de Navarro submitted PB had nothing to hide and argued that CB had only placed extracts of the FA Report before the FTT, and it had been open to the parties to make the full evidence available to the FTT. Ms de Navarro submitted the Upper Tribunal's role is to review the FTT's decisions, and the FA Report represented evidence that could have been made available to the FTT, but this was not done.
33. In response, Mr Howell emphasised the limited purpose for which the SSWP relied on the FA Report. Mr Howell explained he was not suggesting it was relevant to the question *whether* the FTT erred in law. The SSWP accepted the question whether the FTT had made an error of law must be assessed on the basis of the material that was before the FTT. Mr Howell reiterated that the purpose for which the SSWP would rely on the FA Report was limited to circumstances if (and only if) the Upper Tribunal decided the FTT made one or more material errors of law and was considering remaking the FTT's Decisions. Mr Howell also invited us to consider the alternative approach of making a decision on the issue *de bene esse* and addressing it when making our full decision.
34. When asked for her views, CB explained that she represented herself during the FTT proceedings, and the FA Report was 155 pages long. She chose the extracts merely to show PB had assets under regulation 69A of the CSMCRs 2012 and that at the time of their divorce, their value was assessed above the £31,250 threshold to be taken into account.
35. As we explained to the parties, we decided to admit the totality of the FA Report *de bene esse* and to rule on its admissibility in our final decision. The phrase "*de bene esse*" means, loosely, "for what it is worth" and allows a Tribunal to admit evidence on the basis that it will consider it should it become relevant to do so.
36. We decided the full version of the FA Report should be admitted on the basis of the following:
 - (a) No party was seeking to rely on it in order to demonstrate that the FTT had, or had not, made an error of law. Its potential relevance was limited to circumstances if, and only if, the Upper Tribunal decided it should remake the FTT's decisions;

- (b) No party objected to the substance of the report or its reliability as evidence, should it become relevant to consider it. Indeed, extracts from it had been provided to the FTT and it appeared those extracts had formed the basis of arguments by both CB and PB;
 - (c) Applying the principles in **Ladd v Marshall**:
 - (i) the FA Report could not, with reasonable diligence, have been obtained by the SSWP for use at the FTT hearing. The SSWP had never been provided with a copy of the full report. The only realistic and proportionate way to obtain it was via CB or PB. On 04 April 2023, the FTT had confirmed it was not making any directions for CMS to arrange to have a Presenting Officer attend the hearing of the linked appeals. The FTT had effectively signalled to the SSWP that there were no matters requiring him to be represented at the hearing of CB's appeals. It could not realistically be argued that the SSWP was placed on notice he might need to highlight that an unrepresented party was seeking to use an incomplete version of the report;
 - (ii) the new evidence, in the form of the FA Report, was such that if it had been before the FTT, it would probably have had an important influence on the result of the case. It went to an issue on which CB and PB disagreed (the value of his minority shareholding), and which was relevant to a variation ground the FTT needed to consider as one of the issues in the appeals. It was also relevant, potentially, to the assessment of PB's income for the purpose of his child maintenance liability; and
 - (iii) the FA Report was a Report independent of CB and PB, directed for production by the Family Court dealing with the resolution of financial matters in their divorce. It met the test of being apparently credible, even if not incontrovertible; and
 - (d) Ms de Navarro's objections were limited to those based on **Ladd v Marshall**, which we have dealt with at (c) above. They were not arguments about the substance of the FA Report. CB had no objections to the entire report being admitted for consideration.
37. On this basis, we therefore admitted the FA Report, on the understanding that it could be considered if: (a) we decided the FTT had made one or more material errors of law in its decisions, (b) we decided to set aside one or both of the FTT's decisions and (c) if so, in the event we decided to remake the FTT's Decisions rather than remit the appeals to a new FTT to decide.

Preliminary issue about there being no audio FTT record of proceedings

38. This had not formed part of PB's appeal grounds to the Upper Tribunal. Three times in 2025 (May, July and September), PB's legal representatives had contacted HM Courts and Tribunals Service ("HMCTS") and asked for a copy

of the audio recording that stands as the record of proceedings before the FTT. No copy of the recording had been provided. On 01 October 2025, PB's representatives made a renewed request to HMCTS about obtaining it. Ms de Navarro explained to us at the hearing that on 14 October 2025, two days before our hearing date, HMCTS had confirmed that it could not locate a copy of the hearing recording.

39. This chronology is borne out by the FTT's online administrative systems, which we have checked. In particular, we note the HMCTS entry for 14 October 2025 on appeal SC936/22/001793 is that the DSO (Digital Support Officer) confirmed there was no trace of any recording and the HMCTS staff member making the record on the administrative system had informed PB's representative of this.
40. On 01 April 2022, the then Senior President of Tribunals, Lindblom LJ, issued a practice statement called "Record of Proceedings in Social Security and Child Support Cases in the Social Entitlement Chamber on or after 31 March 2022.". The practice statement requires an FTT to preserve a record of the proceedings, sufficient to indicate any evidence taken and submissions made and any procedural applications. It may be in such medium as the relevant Tribunal member may determine.
41. We are aware the practice in the First-tier Tribunal (Social Entitlement Chamber) is to make an audio recording of all oral hearings that take place, and for this to stand as the record of proceedings indicated by the Practice Statement.
42. The notes on the FTT's online administrative appeals system confirm that on 21 May 2025, HMCTS contacted PB's representative advising that the request for a transcript of the hearing had been forwarded to a Tribunal Judge and a decision about providing it would be issued in due course. The notes confirm that on 18 July 2025, PB's representatives made a formal request for a copy of the audio recording of the hearing on 12 October 2023. On 24 September 2025, they provided the FTT case reference numbers, having already provided the Upper Tribunal case reference numbers to the FTT. On 01 October 2025, PB's representatives sent another email asking for the recording. As explained above, HMCTS's online appeals system confirms that it held no recording for the hearing.
43. A failure to provide a record of proceedings may, in principle, represent a procedural irregularity capable of affecting the fairness of proceedings. See the requirements of the practice statement by the Senior President of Tribunals and see also ***MCB v SSWP (PIP)*** [2025] UKUT 348 (AAC).
44. When applying to the Upper Tribunal for permission to appeal, PB did not raise the fact there might be no record of proceedings for the hearing on 12 October 2023. Similarly, no party appears to have approached HMCTS to ask whether the FTT Judge who chaired the panel on 12 October 2023 and would have taken a note of evidence, had kept those notes in order to preserve a record of the proceedings.

45. In the circumstances, however, we take into account that it was not until 14 October 2025 that HMCTS told PB's representatives there was no recording. Despite PB's representatives having requested a copy of the record of proceedings on several occasions over a period of 5 months, it appears HMCTS did not deal with the request properly and also did not place it before the relevant FTT judge to find out whether they could provide written notes of the hearing to stand as an adequate record of proceedings instead.
46. Ms de Navarro's arguments included that the FTT had failed to address arguments she had raised on PB's behalf at the hearing. The Secretary of State was not in a position to make representations on whether those arguments were made at the FTT hearing, because he was not represented at it. In consequence, Mr Howell was only in a position to make generalised arguments about whether it was likely the FTT had failed to deal with representations. He made those arguments in an appropriate way.
47. When asked, CB indicated that she herself made arguments to the FTT that it had not addressed in its Decisions. These were about whether PB had cash in bank assets to take into account under regulation 69A of the CSMCRs 2012.
48. We decided not to treat the absence of a record of proceedings as a freestanding appeal ground, since it had not been pleaded, and the parties were not all aware of this issue until the Upper Tribunal hearing. Instead, we considered it as part of the context for considering arguments raised by one of PB's existing appeal grounds. We considered this to be fair and just since we heard full argument from the parties on all those specific grounds, including reference to relevant senior court decisions.

Relevant legislative provisions

(a) The primary legislation

49. The CSA 1991 was amended by the Child Support Act 1995 ("the CSA 1995") to provide scope to agree to changes to increase or reduce the child maintenance liability generated using the other statutory provisions in the CSA 1991 and relevant regulations. The CSA 1995 inserted sections 28A to 28J and Schedules 4A and 4B into the CSA 1991 to deal with variations.
50. At the hearing, Mr Howell referred us to the White Paper: Improving Child Support (January 1995), which led to the enactment of the CSA 1995, as an aid to interpreting the purpose and meaning of section 28F and Schedule 4B within the 1991 Act. The introduction and summary to the White Paper states at paragraph 3 that the Government believes a formula approach to the assessment of child support maintenance was appropriate for the great majority of separated parents but had decided changes were needed to prevent undue hardship and to enable the Child Support Agency to operate effectively. The changes included the proposal to introduce what became section 28F of the CSA 1991 and related Schedules.

51. Section 28F of the CSA 1991 is relevant specifically to what we need to consider. It has itself been amended by subsequent Acts of Parliament, for example, the Child Support, Pensions and Social Security Act 2000 (c.19) and the Child Maintenance and other Payments Act 2008 (c.6).
52. The version of section 28F of the CSA 1991 that applied at the date of the FTT's Decisions states:

“28F Agreement to a variation.

- (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.
- (3) The Secretary of State shall not agree to a variation (and shall proceed to make a decision on the application for a maintenance calculation without any variation) if ... satisfied that—
- (a) the Secretary of State has insufficient information to make a decision on the application for the maintenance calculation under section 11, and therefore that the decision would be made under section 12(1); or
 - (b) other prescribed circumstances apply.
- (4) Where the Secretary of State agrees to a variation, the Secretary of State shall—
- (a) determine the basis on which the amount of child support maintenance is to be calculated in response to the application for a maintenance calculation...; and

- (b) make a decision under section 11 on that basis.
- (5) If the Secretary of State has made an interim maintenance decision, it is to be treated as having been replaced by the Secretary of State's decision under section 11, and except in prescribed circumstances any appeal connected with it (under section 20) shall lapse.
- (6) In determining whether or not to agree to a variation, the Secretary of State shall comply with regulations made under Part II of Schedule 4B."
53. Paragraphs 4 and 5 of Schedule 4B to the CSA 1991 are also relevant to what we need to consider. As with section 28F, they have been amended subsequently by the Child Maintenance and other Payments Act 2008.
54. The version of paragraphs 4 and 5 of Schedule 4B that applied at the date of the FTT's Decisions was:

**"SCHEDULE 4B
Applications for a variation: The Cases and Controls**

Additional cases

- 4(1) The Secretary of State may by regulations prescribe other cases in which a variation may be agreed.
- (2) Regulations under this paragraph may, for example, make provision with respect to cases where—
- (a) the non-resident parent has assets which exceed a prescribed value;
 - (b) a person's lifestyle is inconsistent with his income for the purposes of a calculation made under Part I of Schedule 1;
 - (c) a person has income which is not taken into account in such a calculation;
 - (d) a person has unreasonably reduced the income which is taken into account in such a calculation.

Part II Regulatory Controls

- 5(1) The Secretary of State may by regulations make provision with respect to the variations from the usual rules for calculating maintenance which may be allowed when a variation is agreed.

- (2) No variations may be made other than those which are permitted by the regulations.
 - (3) Regulations under this paragraph may, in particular, make provision for a variation to result in—
 - (a) a person's being treated as having more, or less, income than would be taken into account without the variation in a calculation under Part I of Schedule 1;
 - (b) a person's being treated as liable to pay a higher, or a lower, amount of child support maintenance than would result without the variation from a calculation under that Part.
 - (4) Regulations may provide for the amount of any special expenses to be taken into account in a case falling within paragraph 2, for the purposes of a variation, not to exceed such amount as may be prescribed or as may be determined in accordance with the regulations.
 - (5) Any regulations under this paragraph may in particular make different provision with respect to different levels of income.
 - (6) The Secretary of State may by regulations provide for the application, in connection with child support maintenance payable following a variation, of paragraph 7(2) to (7) of Schedule 1 (subject to any prescribed modifications)."
55. When the 2000 Act originally amended the CSA 1991, it provided conceptually for "*giving a departure direction*" from a child support calculation under the statutory formula. The amendments made by subsequent Acts of Parliament introduced the concept of "*agreeing to a variation*" to the child support or child maintenance calculation instead.
56. With this in mind, we consider it is relevant to reflect the original version of section 28F and the original provisions in Schedule 4B (which were in fact paragraphs 5 and 6 of Schedule 4B when it was introduced). This reflects the fact that Mr Howell referred us to the White Paper preceding the CSA 1995 as an aid to interpretation of what Parliament intended when it first amended the CSA 1991 to provide for changes to the standard child support formula.
57. The relevant provisions of the CSA 1991 in the form originally introduced by the CSA 1995 read:

"28F Departure directions.

- (1) The Secretary of State may give a departure direction if—

- (a) he 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 his opinion that, in all the circumstances of the case, it would be just and equitable to give a departure direction.
- (2) In considering whether it would be just and equitable in any case to give a departure direction, the Secretary of State shall have regard, in particular, to—
 - (a) the financial circumstances of the absent parent concerned,
 - (b) the financial circumstances of the person with care concerned, and
 - (c) the welfare of any child likely to be affected by the direction.
- (3) The Secretary of State may by regulations make provision—
 - (a) for factors which are to be taken into account in determining whether it would be just and equitable to give a departure direction in any case;
 - (b) for factors which are not to be taken into account in determining such a question.
- (4) The Secretary of State shall not give a departure direction if he is satisfied that the difference between the current amount and the revised amount is less than an amount to be calculated in accordance with regulations made by the Secretary of State for the purposes of this subsection and section 28B(2).
- (5) In subsection (4)—
 - “the current amount” means the amount of the child support maintenance fixed by the current assessment, and
 - “the revised amount” means the amount of child support maintenance which would be fixed if a fresh maintenance assessment were to be made as a result of the departure direction which the Secretary of State would give in response to the application but for subsection (4).
- (6) A departure direction shall—
 - (a) require a child support officer to make one or more fresh maintenance assessments; and

- (b) specify the basis on which the amount of child support maintenance is to be fixed by any assessment made in consequence of the direction.
- (7) In giving a departure direction, the Secretary of State shall comply with the provisions of regulations made under Part II of Schedule 4B.
- (8) Before the end of such period as may be prescribed, the Secretary of State shall notify the applicant for a departure direction, and such other persons as may be prescribed—
- (a) of his decision in relation to the application, and
 - (b) of the reasons for his decision.

Additional cases

- 5(1) The Secretary of State may by regulations prescribe other cases in which a departure direction may be given.
- (2) Regulations under this paragraph may, for example, make provision with respect to cases where—
- (a) assets which do not produce income are capable of producing income;
 - (b) a person's life-style is inconsistent with the level of his income;
 - (c) housing costs are unreasonably high;
 - (d) housing costs are in part attributable to housing persons whose circumstances are such as to justify disregarding a part of those costs;
 - (e) travel costs are unreasonably high; or
 - (f) travel costs should be disregarded.

Part II Regulatory Controls

- 6(1) The Secretary of State may by regulations make provision with respect to the directions which may be given in a departure direction.
- (2) No directions may be given other than those which are permitted by the regulations.
- (3) Regulations under this paragraph may, in particular, make provision for a departure direction to require—

- (a) the substitution, for any formula set out in Part I of Schedule 1, of such other formula as may be prescribed;
 - (b) any prescribed amount by reference to which any calculation is to be made in fixing the amount of child support maintenance to be increased or reduced in accordance with the regulations;
 - (c) the substitution, for any provision in accordance with which any such calculation is to be made, of such other provision as may be prescribed.
- (4) Regulations may limit the extent to which the amount of the child support maintenance fixed by a maintenance assessment made as a result of a departure direction may differ from the amount of the child support maintenance which would be fixed by a maintenance assessment made otherwise than as a result of the direction.
- (5) Regulations may provide for the amount of any special expenses to be taken into account in a case falling within paragraph 2, for the purposes of a departure direction, not to exceed such amount as may be prescribed or as may be determined in accordance with the regulations.
- (6) No departure direction may be given so as to have the effect of denying to an absent parent the protection of paragraph 6 of Schedule 1.
- (7) Sub-paragraph (6) does not prevent the modification of the provisions of, or made under, paragraph 6 of Schedule 1 to the extent permitted by regulations under this paragraph.
- (8) Any regulations under this paragraph may make different provision with respect to different levels of income.”

(b) the secondary legislation

58. The relevant secondary legislation applicable to CB’s appeals to the FTT consisted of the CSMCRs 2012. Within these regulations, the main provision relevant to what we have to consider is regulation 69A.
59. Mr Howell also referred us to parts of regulations 65, 68 and 73 of the CSMCRs 2012. We set out regulation 69A below in full, and the specific provisions of regulations 65, 68 and 73 to which Mr Howell referred us:

“Prior debts

- 65.—**(1) Subject to the following paragraphs of this regulation and regulation 68 (thresholds), the repayment of debts to which paragraph (2) applies constitutes special expenses for the purposes

of paragraph 2(2) of Schedule 4B to the 1991 Act where those debts were incurred—

(a) before the non-resident parent became a non-resident parent in relation to the qualifying child; and

(b) at the time when the non-resident parent and the person with care in relation to the child referred to in sub-paragraph (a) were a couple.

...

(3) Paragraph (1) does not apply to repayment of—

...

(l) any other debt which the Secretary of State is satisfied is reasonable to exclude.

Thresholds

68.—(1) Subject to paragraphs (3) and (4), the costs or repayments referred to in regulations 63 (contact costs) and 65 to 67 (prior debts, boarding school fees and payments in respect of certain mortgages etc.) are to be special expenses for the purposes of paragraph 2(2) of Schedule 4B to the 1991 Act only where they are equal to or exceed the threshold amount of £10 per week.

(2) Where the expenses fall within more than one description of expense referred to in paragraph (1), the threshold amount applies separately in respect of each description.

(3) Subject to paragraph (4), where the Secretary of State considers any expenses referred to in this Chapter to be unreasonably high or to have been unreasonably incurred the Secretary of State may substitute such lower amount as the Secretary of State considers to be reasonable, including an amount which is below the threshold amount or a nil amount.

(4) Any lower amount substituted by the Secretary of State under paragraph (3) in relation to contact costs under regulation 63 (contact costs) must not be so low as to make it impossible, in the Secretary of State's opinion, for contact between the non-resident parent and the qualifying child to be maintained at the frequency specified in any court order made in respect of the non-resident parent and that child where the non-resident parent is maintaining contact at that frequency.

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.”

Effect on the maintenance calculation – additional income grounds

- 73.—**(1) Subject to paragraph (2) and regulation 74 (effect on maintenance calculation – general), where the variation agreed to is one falling within Chapter 3 (grounds for variation : additional income) effect is to be given to the variation by increasing the gross weekly income of the non-resident parent which would otherwise be taken into account by the weekly amount of the additional income except that, where the amount of gross weekly income calculated in this way would

exceed the capped amount, the amount of the gross weekly income taken into account is to be the capped amount.

(2) Where a variation is agreed to under this Chapter and the non-resident parent's liability would, apart from the variation, be the flat rate (or an amount equivalent to the flat rate), the amount of child support maintenance which the non-resident parent is liable to pay is a weekly amount calculated by adding an amount equivalent to the flat rate to the amount calculated by applying Schedule 1 to the 1991 Act to the additional income arising under the variation."

60. Regulation 69A was introduced into the CSMCRs 2012 following a consultation by the then Government regarding: "*a range of proposals to continue to drive compliance, including addressing the small but determined group of parents that seek to use complex financial arrangements to evade their obligations to their children*" (Ministerial Foreword of The Child Maintenance Compliance and Arrears Strategy, Government response to the consultation - 12 July 2018).
61. When the CSMCRs 2012 were introduced, they did not replicate the effect of regulation 18 of the regulations dealing with variations in the previous child support scheme (the Child Support (Variation) Regulations 2000 (SI 2000:156) - "the 2000 Regulations").
62. Regulation 18 of the 2000 Regulations provided scope to make a child support case an additional case for the purpose of paragraph 4(1) of Schedule 4B to the CSA 1991. Regulation 18 provided for a case involving one or more asset to constitute an additional case where the value of the asset or assets in question exceeded £65,000.
63. Regulation 69A was introduced by the Child Support (Miscellaneous Amendments) Regulations 2018 (SI 2018:1279). We note that the version of regulation 69A introduced by those regulations appears to be missing subparagraph (e) of paragraph (4). This has not been considered previously by the Upper Tribunal, although it may be relevant to the proposition in paragraph 7.7(d) of the Explanatory Memorandum for the amendment regulations, which states that an asset already producing an income stream captured by the standard calculation or other variation provisions is disregarded to prevent income being generated twice for the asset. There does not appear to be any specific provision in regulation 69A to achieve this stated outcome. It does not fall to us, however, to us to determine this issue.

Submissions on behalf of the parties

(a) Submissions on behalf of PB

64. Ms de Navarro explained she represented PB before the FTT on 12 October 2023. She submitted that her written argument to the FTT provided in advance of that hearing flagged the issue of whether a minority shareholder discount should be applied to the valuation of PB's shareholding. Ms de Navarro also

submitted that her recollection of the hearing, and her notes of it, confirmed she made submissions on the issue of making a discount to the value of PB's shareholding to reflect his minority shareholding and the fragility of valuing minority shares in a private company.

65. Ms de Navarro submitted that within that context, the FTT made a glaring omission in failing to deal with this issue in its Statement of Reasons. She submitted this was a matter capable of making a material difference to the outcome of CB's appeals because if the minority discount had been applied, the levels of discount discussed in the extracts of the FA Report the FTT had available to it (which were 80% for one shareholding, 50% for another) would, or might, have taken PB's shareholding valuation to a level where if a variation were agreed, the figure would fall below the maximum income threshold of £3,000 per week. It would therefore change the assessment of PB's income overall if the FTT agreed it was just and equitable to make a variation.
66. Ms de Navarro submitted this matter was raised when PB asked the FTT for permission to appeal and the FTT was asked to review its decision. She argued it was open to the FTT at that stage to amplify its reasons, had it considered the point and rejected it, but the FTT never did. Ms de Navarro submitted the FTT therefore made an error of law because it was a material issue before the FTT that it failed to consider and deal with.
67. Ms de Navarro argued it is difficult to establish a quasi-partnership, as confirmed in ***Ebrahimi v Westbourne Galleries*** [1973] AC 360 at 379 (Lord Wilberforce) in terms of including one or probably more, of the following (non-exhaustive) elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence; (ii) an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business; and (iii) restriction on the transfer of the members' interest in the company, so that if confidence is lost or a member removed from management he cannot take out his stake and go elsewhere.
68. Ms de Navarro submitted that applying this principle to PB's circumstances, it was difficult to see how Company M could be a quasi-partnership. It was a company set up by PB's father, where 25% of the shareholding was transferred to PB as part of inheritance tax planning. PB had given evidence to the FTT that he did not have anything to do with the company, although he was notionally on the board of directors. Instead, it was very much his father's company. The FTT appeared to have accepted PB's evidence on this issue (see paragraph 28 of the Statement of Reasons, including: "*The Tribunal did not consider that it could be said that [Company M] formed any part of his [PB's] trade or business*"). Ms de Navarro argued that Company M did not have the characteristics of a quasi-partnership in terms of the shareholders working together. She argued there was no evidence before the FTT to allow it to come to the conclusion that Company M was a quasi-partnership. Ms de Navarro submitted that the FTT's Statement of Reasons did not say anywhere that it made a factual finding that Company M was a quasi-partnership. Had it done

so, she submitted, this would have been rationally insupportable on the evidence before the FTT.

69. In terms of Company S, Ms de Navarro submitted this was a holding company, with many subsidiaries within it. Ms de Navarro explained PB was a 6.8% shareholder in the holding company, a director of only two of its subsidiaries and drew a salary from one of them. Ms de Navarro submitted it was difficult to say PB was involved in the running of Company S, given he was not on the board of the company and where it had been established when he was a child, and where his father made all the decisions about remuneration. PB had worked his way up from working in a warehouse to his role as director of two subsidiary companies, but all decisions about the day to day running of the business were made solely by his father. Any future plans for succession did not reflect the position now, or at the effective date of the child maintenance assessments.
70. Ms de Navarro submitted that against this background, it was rationally insupportable to say Company S was a quasi-partnership. It clearly was not a classic quasi-partnership where a partnership had been converted to a limited company. PB was not on the board of directors at the top of the group. He did not have control of it. It was very clear in the evidence before the FTT that PB's father made decisions on behalf of the company and it was not a business that he and PB ran together. Ms de Navarro also argued that the fact the FTT refused to make a variation for diversion of income, and the nature of its findings of fact, did not support the FTT concluding PB was dishonest in any way, or that those parts of his witness statement were untrue.
71. Ms de Navarro submitted that in these circumstances, it was irrational for the FTT to conclude that no discount should be applied to reflect PB's minority shareholding of Company M and Company S.
72. We asked Ms Navarro about Mr Howell's argument that the FA Report assessed Company M had many of the attributes of a quasi-partnership, and while Company S did not operate as a quasi-partnership, a minority discount might not be warranted in circumstances where it would be sold to friendly purchasers (family members). Ms de Navarro argued that regarding Company M, the FA Report did not clearly reflect the case law about what constitutes a quasi-partnership. In terms of Company S, she agreed that a minority discount might not apply if PB's shareholding was sold to a friendly family member.
73. Ms de Navarro submitted that PB and CB's recollections differed about what happened in the Family Court proceedings. PB recalled the judge finding that the family business did not really come into the assets for division because it was set up by PB's father and illiquid. As a result, there was no determination in the Family Court whether there should be a minority discount. In any event, any determination would not have bound the FTT.
74. Ms de Navarro submitted that the question whether PB could sell his shares to friendly purchasers or family members, fed into the suggestion in the FTT's

Statement of Reasons that PB could sell the shares back to his parents. The difficulty with this, she submitted, was that to the best of her recollection and without being able to obtain a transcript, the FTT never asked PB during the hearing whether his parents or any other family member would buy shares back from him. There was no evidence before the FTT on that point because it was never put to PB as a matter inviting his comment.

75. Ms de Navarro submitted that had he been asked, PB would have explained his parents will not buy back his shares because they were gifted to him as an early inheritance, as part of his parents' estate planning. It made no sense to sell back shares that had been given to him. Furthermore, the whole purpose of his parents giving PB shares was to save tax. If PB's parents bought back the shares, he would face an immediate capital gains tax and, at a later date, would not avoid inheritance tax. Nor had the FTT received any evidence suggesting any other family member was waiting in the wings who would want to buy PB's shares or had the means to do so.
76. Ms de Navarro submitted the part of the FTT's decision that concluded PB could sell back his shares was rationally insupportable on the evidence, plainly wrong and could not stand. She argued this came back to the point that the only way PB would ever get the value of his shareholding without requiring a discount to reflect his minority shareholding, would be if his parents sold the business at a future point down the line. His parents had shown no indication they intended to do this, and it was entirely outside of PB's control. Ms de Navarro submitted that if any hypothetical purchaser decided to purchase PB's shares, they would do so at a significant discount because PB never had any control over the companies and they had never declared any dividends.
77. Ms de Navarro argued that a difficult question in the present appeals was at which stage would the illiquidity of shares be reflected – would it be at valuation stage or as a further court-based discount on the return rate to reflect the uncertainties? The latter had been identified in case law under the Matrimonial Causes Act 1973 ("the MCA 1973"). Ms de Navarro argued that the case law under the MCA 1973 could be cited by analogy in terms of how business valuations play out. She reminded us she had cited case law in her skeleton argument acknowledging business valuations are fragile, risk-laden and illiquidity issues apply. Ms de Navarro summarised this by relying on *HO v TL* [2024] 2 FLR 175 at 180a, which quoted Lewison LJ's explanation of the complexity of valuing private companies in *Versteegh v Versteegh* [2018] EWCA Civ 1050.
78. Ms de Navarro submitted the ultimate outcome that the matrimonial courts seek to achieve is one of fairness. She argued this is synonymous with the consideration within child support legislation that a variation must be just and equitable. She argued a just, equitable and fair outcome in PB's circumstances must reflect the fact his shareholding is completely illiquid, there is no realistic market for him to sell to a third party and there is no friendly purchaser in sight. Nor could PB force a sale of his shareholding to his parents. He received no income (e.g. dividends) from it either.

79. Ms de Navarro argued there should be a court-based discount of the valuation of PB's shareholding to reflect these matters. If the Upper Tribunal was not with her on that issue, Ms de Navarro argued that these matters must be taken into account when applying the just and equitable test in section 28F(1)(b) of the CSA 1991, and this is where the FTT deciding CB's appeals got it wrong. Ms de Navarro submitted that regulation 69A excludes equity in a non-resident parent's home being treated as an asset for the purpose of agreeing a variation. She argued that by analogy the FTT had undermined that principle, by deciding that although PB said his shareholding was illiquid, he could remortgage his home and release the equity that way. Ms de Navarro submitted this effectively treated PB's home as an asset by the back door, was unreasonable, and could not be maintained.
80. Turning to considerations of just and equitable, Ms de Navarro submitted these were interconnected to her argument about illiquidity. She submitted that regulation 69A was introduced into the CSMCRs 2012 to get around the situation where extremely wealthy parents choose to structure their assets in such a way to avoid paying tax and child maintenance. Ms de Navarro submitted that PB did not have this element of control over his shareholding and it was not something he had set up to avoid his child maintenance liabilities. It was not, she argued, reasonable to ascribe a notional income to that shareholding, when PB could do nothing with it.
81. The FTT had suggested in its written reasons that it was just and equitable to apply 8% to the notional income derived from the shares because companies do better than 8%. Ms de Navarro disagreed with this, because PB did not receive dividends and the question whether other companies do better or worse than his shareholdings was neither here nor there because he did not receive dividends and was not in control of whether they were declared. A classic argument supporting agreeing to an assets variation under regulation 69A was that if an asset is not income-producing and does not come within an income-producing variation ground, the non-resident parent can choose to deal with it in such a way that it produces income. For example, they can rent out a house or sell the asset to receive a return. However, these options were not available to PB because he could not do anything with his shares.
82. Ms de Navarro submitted that the effect of the FTT's assets variation upon PB had been catastrophic. In the two years dealt with by the FTT's Decisions, PB's current income was £57,000, but the assets variation granted had taken him above the maximum threshold, effectively trebling his income for the purpose of the child maintenance assessment. Ms de Navarro argued PB was having to burn through savings in order to pay the child maintenance the FTT had ordered.
83. We asked whether PB would have accepted the FTT only applying a discount in valuing his shareholding or was arguing for it to count under the just and equitable assessment as well. Ms de Navarro submitted her argument went to both issues. Ms de Navarro explained her primary case is that in PB's

circumstances, there should be no assets variation because he has illiquid assets and it is unfair to expect him to pay child support based on holding an asset he can do nothing with.

84. If the Upper Tribunal was against her on that primary argument, Ms de Navarro submitted the position should be to apply a discount to the shareholding at the valuation stage (an 80% discount for Company S and 50% on Company M) and to then consider whether the Upper Tribunal decision in **Cart** was correctly decided and whether the FTT was duty bound to use an 8% rate for identifying the notional income from the shareholding.
85. Ms de Navarro submitted that using the 8% figure reflected a question of fairness. If a non-resident parent has control of their assets and can make choices about how they deal with them (e.g. sell or rent out their non-residence property or invest a substantial sum held in the bank), the 8% represents a cumulative interest rate, with a degree of punishment for not choosing to structure one's affairs in that way. She argued that this did not apply to PB, and therefore the percentage rate should be reduced to reflect his circumstances.
86. Ms de Navarro argued that if, contrary to **Cart**, the Upper Tribunal concluded the 8% was a fixed rate, then her argument was that it was not just and equitable to agree any assets variation for PB based on illiquid shares.
87. Ms de Navarro submitted that whether the 8% figure could be varied or was fixed, depended on whether one took a broad or narrow view of the wording in the CSA 1991. Ms de Navarro submitted the use of "*may*" in section 28F(1)(b) imports an element of discretion. Furthermore, the wording: "agree to a variation" did not state "*the* variation" (emphasis added for both) and **Cart** had correctly identified this deliberate choice of wording as important. In **Cart**, the Upper Tribunal had confirmed a rigid interpretation was contrary to the spirit that a variation should only be agreed if it were just and equitable (which drives arriving at a fair result on the facts of the case). Ms de Navarro commended paragraph 42 of the Upper Tribunal's decision in **Cart**, and the emphasis it gave on avoiding an all or nothing approach that would, in practice, cause the opposite of just and equitable for non-resident parents and for children eligible for child maintenance.
88. Ms de Navarro referred to Mr Howell's skeleton argument. which argued that allowing for a lower notional value than 8% for assets variations made matters too discretionary and went against the intention when making the regulations. She disagreed with this and argued the whole point of the requirement for a variation to be just and equitable is that it provides a safety valve giving a level discretion in variation cases. Ms de Navarro submitted there will always be a level of uncertainty in variation cases. She drew an analogy with reasonable rates of return in investments in matrimonial cases. Ms de Navarro referred to the Duxbury Fund, and the fact that it presently assumes capital growth of 3.75%, and income yield of 3%, with inflation of 3%, giving a real rate of return overall of 3.75%. Ms de Navarro submitted that even with interest rates rising

from historic lows, they have not risen to 8%; the use of 8% represents a punitive step, because only a very shrewd investor could realise it. In those circumstances, she argued, PB should not be penalised for having an asset where he cannot control the rate of return from it.

89. Ms de Navarro explained her final appeal ground was that the FTT's approach may have involved a form of double counting because the shareholding used by the FTT for the assets variation was used in the business that gave PB an income and the manner in which he took that income was not in his control. Ms de Navarro acknowledged this was not double counting as a strict matter of form and black letter law because PB did not draw dividends from his shareholdings. She invited us to look past this to what she said was substance over form; PB was employed by the business and draws salaried income from it. PB cannot, however, control how he takes that income.
90. Ms de Navarro submitted that if PB's father had decided to declare a dividend of £10,000, it would count as unearned income for PB and the shareholding would not be treated as an asset under regulation 69A. Ms de Navarro confirmed she was not arguing the shareholding should be exempted under regulation 69(A)(4)(b) (assets used in the course of the non-resident parent's business). She argued that if one steps back, PB is receiving an income from the business, the shares are shares in that business and this is how double counting can potentially be identified. Ms de Navarro acknowledged that a person might receive dividends from a company that employed him or her, and both the unearned and earned income would potentially count for child maintenance purposes. She argued this should be distinguished from PB's situation because he had no control over the asset(s) falling to be taken into account.

(b) Submissions on behalf of the SSWP

91. Mr Howell argued that the SSWP and, in turn, a First-tier Tribunal ("FTT"), has a binary choice about whether to agree to a variation under regulation 69A of the CSMCRs 2012. He submitted the Upper Tribunal which decided **Cart** was wrong to decide otherwise.
92. Mr Howell submitted the clear purpose behind regulation 69A (and its predecessor, regulation 18 of the Child Support (Variation) Regulations 2000) is to deem high value assets as producing a notional income stream, whether or not they actually do so. Mr Howell argued the issue that subsequently falls to be addressed under section 28F(1)(b) of the CSA 1991 is whether it is just and equitable to agree to a variation that takes into account *that specific* income stream.
93. Mr Howell argued the statutory scheme requires the value of an asset to be ascertained objectively. This flows, not only from paragraph 4(2)(a) of Schedule 4B to the CSA 1991, but also from the wording of regulation 69A itself. Mr Howell submitted there is no case for an assets variation at all, unless the asset has a higher than prescribed value of £31,250. He argued that the value of the

asset must then be calculated as a weekly value by applying the statutory rate of interest to it and dividing the figure reached by 52 (see regulation 69A(7)).

94. Mr Howell submitted an FTT is familiar with the difficulty of applying valuations to assets, but these difficulties are inherent in any valuation process. He submitted that they do not provide any kind of reason for not undertaking the duty to value an asset that the CSA 1991 requires an FTT to undertake. Mr Howell submitted that provided an FTT undertakes a reasonable enquiry, it will not make an error in terms of the valuation it reaches.
95. Mr Howell submitted that the case law and approach taken towards matrimonial finance matters is not relevant to what an FTT has to decide under regulation 69A. The CSA 1991 was intended to impose calculations on a relatively clear, simple and predictable basis, where the majority of child maintenance decisions are taken by relatively junior officials. Mr Howell argued this emphasises the importance of taking a proportionate approach.
96. Mr Howell submitted the value of an asset must be dealt with first, before the just and equitable test is applied. He argued the just and equitable test is not a means to value an asset and does not allow it to be valued on a basis different to its true objective value.
97. Mr Howell submitted there were critical points of difference between him and Ms de Navarro in terms of whether the financial principles for matrimonial cases had any relevance to regulation 69A:
 - (a) In matrimonial cases there is no statutory requirement to value assets at all; the court has to take into account the resources of the parties, as part of its discretion. The court can permissibly conclude it is impossible to value or disproportionate to do so. In **Versteegh**, King LJ recognised that it may be more satisfactory if one does value assets but there is no absolute requirement under the MCA 1973 to do so. The Court of Appeal confirmed there were a number of options available as opposed to valuation (e.g., order the sale of the house or divide it in specie);
 - (b) The MCA 1973 is concerned with permanent division of the assets, and a clean break if this can be done fairly. Given this, it may be highly relevant who receives the “copper-bottomed” assets and who receives the less liquid ones. Under regulation 69A the decision-maker is not concerned with permanent division of assets at all but to value the asset(s) on a specific day. The child support scheme builds reconsideration of valuations from time to time (e.g. at annual review stage or through other supersessions, if changes occur);
 - (c) Under the CSA 1991, an FTT is only concerned with the assets and income of the non-resident parent, and regulation 60 of the CSMC regulations 2012 precludes taking into account the circumstances of the person with care. This is different to the matrimonial scheme, where both parties’ resources are considered;

- (d) Contrary to what the Upper Tribunal decided in **Cart**, the choice of deciding whether to agree to a variation under the CSA 1991 and the CSMCRs 2012 is binary; either it is made in the amount determined under those regulations or it is not made at all. Mr Howell argued this is a fundamentally different kind of discretion to the one in the MCA 1973, which he described as an entirely unfettered discretion other than principles; and
- (e) When valuing an asset under regulation 69A, the task for the SSWP or an FTT, is to arrive at a reasonable assessment of the objective value of the objective asset, not a hypothetical value.
98. In considering whether a variation is just and equitable under section 28F(1)(b) of the CSA 1991, Mr Howell submitted it is necessary to determine the right approach for how the child support scheme works, before examining the FTT's Statement of Reasons in CB's appeals. He also submitted it is difficult to understand the function of determining what is just and equitable without considering whether the decision in **Cart** is correct.
99. Mr Howell submitted the task of the FTT under rule 69A of the CSMCRs 2012 is to value an asset or assets and, if they exceed the prescribed value, apply the statutory rate of interest of 8%. The non-resident parent is treated as in receipt of income in that amount. Mr Howell submitted the deeming provision in regulation 69A therefore: "*deems fiction as fact*". Mr Howell argued there are many deeming provisions of this kind in statutory schemes.
100. Mr Howell submitted that regulation 69A is dealt with in the same way as variations under regulations 69 (unearned income) and 71 (diversion). All three are variations for additional income and dealt with under Chapter 3 of Part 5 of the CSMCRs 2012. Mr Howell submitted there is a binary choice for the SSWP or the FTT to take into account statutory income calculated under each of these variations. That choice turns on the just and equitable test. This is important but does not allow the valuation of the asset to be revisited, or to reconsider whether the statutory fiction deemed by the process is correct (irrespective of the income stream generated by the asset). Mr Howell submitted that if assets generate income they would be dealt with by regulation 69 of the CSMCRs 2012 (as unearned income).
101. Turning to **Cart**, Mr Howell submitted that sitting as a three-judge panel, the Upper Tribunal could depart from **Cart** if it considered it wrongly decided. He submitted that at paragraph 34 of **Cart**, the Upper Tribunal correctly rejected the SSWP's attempts to rely on internal DWP aids to interpretation. Mr Howell submitted there are two admissible aids to interpretation: the 1995 White Paper (Improving Child Support) for the changes proposed to the CSA 1991, and "The Child Maintenance Compliance and Arrears Strategy", the Government's formal response ("the 2018 Consultation Response") to the public consultation preceding the introduction of regulation 69A into the CSMCRs 2012.

102. Mr Howell argued that the White Paper emphasised the amendments proposed to the CSA 1991 were designed to give some discretion to depart from the maintenance formula assessment, but that the discretion would involve closely specified grounds for changing that formula (paragraph 4.a). The then Government emphasised it did not want to return to a discretion-based system, with its inconsistency and unfairness. The scope for agreeing a variation would be in a small minority of cases in which it would be right to take into account special circumstances, but which could not be reflected in a universal formula (paragraph 1.7 of White Paper). These could be taken into account in tightly specified circumstances and there would be no automatic process applied for them (paragraph 1.8 of White Paper). Mr Howell argued that paragraph 2.12 of the White Paper (method of departure) also indicated the expectation that there would be an arithmetical effect on the calculation.
103. Mr Howell submitted that the 2018 Consultation Response about introducing regulation 69A confirmed the government planned to continue with the proposed rate of 8% to strike the best balance between allowing the new power to have a meaningful effect on child maintenance liabilities without being overly punitive. Mr Howell referred us to paragraph 26 of the response, which acknowledged there were situations where the government believed non-resident parents had tried to use complex financial arrangements to evade their responsibility and that 8% was justifiable across this range of circumstances. The Government commented that this figure could also act as a nudge to encourage non-resident parents to consider how best to arrange their financial circumstances, in their interest and that of their children. Mr Howell described this as delivering a punitive effect and an element of rough justice for all non-resident parents caught by the provision.
104. Mr Howell also drew our attention to paragraph 27 of the 2018 Response, which confirmed the Government had considered a tracker rate but discounted it, for important policy reasons; it wanted a calculation method that was clear from year to year, so parents understood it, and to avoid administrative complexity. He submitted that paragraphs 29 and 30 of the 2018 Response confirmed the Government had given very careful consideration to ensure the interaction with the variation in regulation 69 (unearned income) worked effectively. The choice of an assets value above £31,250 and the 8% interest rate had been deliberately made to produce a figure reflecting the £2,500 threshold for unearned income variations already in use.
105. Mr Howell submitted that the wording of the 2018 Consultation Response was consistent with the statutory wording and made it crystal clear the 8% rate was to be used and there was no discretion given to vary that rate. He argued this was an admissible aid to construction that the Upper Tribunal did not have available when it decided **Cart**.
106. Turning to paragraph 36 of **Cart**, Mr Howell submitted that the Upper Tribunal had wrongly interpreted the statutory wording in section 28F(1) as giving a broad discretion as to the amount of the variation, as opposed to whether one could be made at all. The Upper Tribunal emphasised the following wording in

that provision: “The Secretary of State *may* agree to a variation if *it is his opinion* that, in all the circumstances of the case, it would be just and equitable to agree to a variation” (italicised emphasis reflecting that used in **Cart**).

107. Mr Howell submitted the fact that section 28F(1) gives a discretion about whether to agree to a variation tells us nothing about whether there is discretion about agreeing the amount of the variation.
108. Mr Howell also submitted that paragraph 36 of **Cart** highlighted an argument Ms de Navarro had made about the use of the definite article in section 28F(1). The Upper Tribunal had considered it relevant that section 28F(1) referred to “a” variation and not “the” variation. Mr Howell submitted that Ms de Navarro’s argument about the use of the definite article was a bad one.
109. Mr Howell argued the position must be read within the context and constraints of paragraph 5 of Schedule 4B to the CSA 1991. Mr Howell emphasised that paragraph 5(1) refers to “the variations from the usual rules for calculating maintenance”. He argued paragraph 5(2) is unambiguous (“no variations may be made other than those which are permitted by the regulations”). He emphasised that paragraph 5(3) confirms regulations could be made to treat a person as having more or less income than would be taken into account otherwise and for this also to result in having a greater or lesser liability.
110. Returning to the analysis in **Cart**, Mr Howell drew our attention to paragraph 38 of that decision. The second sentence of paragraph 38 reasoned that section 28F(6) imposes a general duty to comply with regulations made under Part II of Schedule 4B, specifically under paragraph 5.
111. Mr Howell observed that paragraph 5 of Schedule 4B comes directly under the heading: “*Part II Regulatory controls*”. He submitted that when read together, both section 28F and paragraph 5 of Schedule 4B to the CSA 1991 signify the importance of the regulatory controls being imposed. He argued that to the extent the Upper Tribunal in **Cart** considered section 28F(6) to be the only provision in the CSA 1991 imposing a duty to comply with the regulations, it failed to take into account the requirements in paragraph 5 of Schedule 4B. Mr Howell submitted that paragraph 5 of Schedule 4B clearly supported the SSWP’s construction that there is a binary choice to either make a variation in the terms set out by the relevant regulations, or to decide not to make it at all.
112. Mr Howell argued that looking at the remainder of paragraph 38 of **Cart**, the Upper Tribunal acknowledged regulation 18 of the Child Support (Variation) Regulations 2000 did contemplate a variation made would be for the specific sum arrived at by the calculation rather than allowing SSWP or an FTT to apply a discretion about to the amount of it. Mr Howell submitted the position was the same under the CSMCRs 2012.
113. Mr Howell also referred us to the argument in his skeleton argument that if section 28F(1) is to be read as giving a very general discretion as to the amount of a variation that might be agreed to as just and equitable, this would apply

generally to all variations. However, this interpretation of section 28F(1) was unworkable in the context of other regulations about variations, namely:

- (a) regulation 65(3)(l), which lists a type of repayment of prior debts that cannot be taken into account by way of a special expense variation (“*any other debt which the Secretary of State is satisfied is reasonable to exclude*”); and
- (b) regulation 68(3) in terms of the threshold for special expenses (“*...where the Secretary of State considers any expenses referred to in this Chapter [2] to be unreasonably high or to have been unreasonably incurred, the Secretary of State may substitute such lower amount as the Secretary of State considers to be reasonable, including an amount which is below the threshold amount of a nil amount*”)

114. Mr Howell argued it is not workable to have a discretion about the size of a variation to be agreed at both stages – meaning the identification of the amount of a variation, and the decision whether it is just and equitable to agree to it. He submitted this was a further factor that militated against the Upper Tribunal’s analysis in **Cart**.
115. Mr Howell submitted that while Ms de Navarro argued that an 8% statutory rate of interest was unrealistic and unattainable, this was, in effect, what regulation 69A is intended to do. Mr Howell argued applying regulation 69A involves an element of rough justice as to whether or not to make provision of this kind. The government decided to provide for it in the amendment it introduced to the CSMCRs 2012, representing a balanced legislative judgment it reached following a public consultation. It did not intend to introduce a legislative judgment to be balanced further by giving an additional discretion in individual cases. Mr Howell invited us to accept the 8% rate was chosen to provide predictability and certainty from year to year. The 8% was chosen in 2018 at a time when the base rate was 0.75%. Mr Howell submitted this rate was chosen as fixed rate, with the Government having rejected a tracker rate and it was designed to encourage non-resident parents to arrange their finances in particular ways.
116. Mr Howell also submitted that if one considers the list of assets provided in regulation 69A, this includes cash in hand (regulation 69A(2)(a)), which cannot, in that form, generate income. The list also includes shares and land, which are capable of generating income through dividends and rent respectively. They would be caught by a variation under regulation 69 (unearned income) if they did in fact generate an income of 8% per year. Mr Howell argued the fact that an asset assessed under regulation 69A does not generate an actual income is neither here nor there.
117. We asked Mr Howell whether it is relevant to the just and equitable test under section 28F(1)(b) to identify what the actual income generated by an asset would be. In response, Mr Howell argued that the true amount of income generated by the asset is irrelevant, because regulation 69A is a deeming provision. He argued we should apply the principles about deeming provisions

set out at paragraph 27 of Lord Briggs' judgment in **Fowler v Revenue and Customs Commissioners (Supreme Court, England)** [2020] 1 WLR 2951, including that one should not shrink from applying a fiction created by a deeming provision to the consequences that would inevitably flow from the fiction being real. Mr Howell put this as not coming to boggle at the state of affairs which the deeming provision requires one to assume.

118. We pressed Mr Howell about whether he was saying the actual income generated is irrelevant to the exercise of the just and equitable test in section 28F(1)(b) of the CSA 1991. We asked whether he was contending it would be an error of law to take into account the actual income generated in considering regulation 69A. Mr Howell submitted that it is irrelevant, and this point was recognised by Upper Tribunal Judge Rowland in **NT v SSWP (CSM)** [2015] UKUT 422 (AAC). Mr Howell argued that Judge Rowland was trying to apply the decision in **Cart** as best as he could, but his judgment illustrates some of the problems created by **Cart**. Mr Howell submitted that paragraph 20 of **NT** highlighted this. Mr Howell argued that once one sees the reasoning required by the structure of regulation 69A, it becomes impossible to see how an enquiry into real income can be made in practice, since there are no manageable standards by which it can be done.
119. Given how Mr Howell had put that submission, we asked whether the SSWP was arguing that a First-tier Tribunal cannot properly assess the level of income that the asset could realistically generate. In response, Mr Howell submitted the value of an asset is an objective question and regulation 69A simply requires an FTT to calculate it but also requires 8% to be attributed to it. Mr Howell argued that there are assets which cannot generate income, but the legislation deems them to generate income of 8%, and it was intended to capture all assets in the same way. Mr Howell confirmed he was not arguing that the 2012 Child Support Scheme (and in turn an FTT) cannot deal with complex financial matters.
120. Asked about applying regulation 69A to non-resident parents who do not arrange their affairs to avoid their child maintenance liability, Mr Howell submitted the policy was set out in paragraph 26 of the 2018 Consultation Response. If a parent holds high value assets in a way that is tied up so they do not generate income, the policy encourages them to rearrange their affairs to generate income and pay child maintenance from that. Mr Howell went on to argue that, if necessary, this issue could be considered in applying the just and equitable test in deciding whether to agree to a variation at all.
121. We asked Mr Howell about paragraph 25 of the 2018 Consultation Response, which he had not addressed in his submissions. This states:

“The CSA [Child Support Agency] had a similar power, and the figure of 8% was used to calculate a notional income from assets. The use of the figure for this purpose was also subject to scrutiny by tribunal and upheld”.

122. We asked whether the wording in paragraph 25 of the 2018 Response might refer to the decision to **Cart**. Mr Howell said he did not know, and he had sought to understand what that paragraph was doing. Mr Howell argued that he does not know of any case where the vires (legal power) behind the 8% has been challenged and therefore he did not know what “*scrutiny by tribunal and upheld*” was meant to mean. Mr Howell submitted that the policy intention behind regulation 69A is clear and, to the extent that it suggested there was a discretion to depart from the 8% figure, paragraph 25 of the 2018 Response was inconsistent with the remainder of the policy intention behind regulation 69A. He submitted the 2018 Response must be read as a whole and it was wrong to read paragraphs in isolation.
123. Asked whether the SSWP could have made the intended position clear in regulations made under paragraph 5 of Schedule 4B to the CSA 1991, Mr Howell submitted that it was not open to the SSWP to fix through legislation what had been decided wrongly in **Cart**. He submitted one must instead consider what the CSA 1991 meant, taking into account section 28F(1) and (6) and paragraph 5 of Schedule 4B.
124. Mr Howell argued that in **Cart**, the Upper Tribunal only really grappled with paragraph 5(2) of Schedule 4B at paragraph 43 of its decision, where the Upper Tribunal stated its approach was not excluded by paragraph 5(2). The Upper Tribunal referred to what Mr Commissioner Williams decided in **R(CS) 5/06** (that paragraph 5(2) prevents the SSSWP from agreeing to a variation to a greater effect than regulations allow). Mr Howell submitted this did reflect the substance of Mr Commissioner Williams’ decision but that he had not relied on paragraph 5(2) for his reasoning.
125. Mr Howell also argued that applying the reasoning in **Cart** ran the risk of depriving paragraph 5(2) of its clear intended effect. For example, if paragraph 5(2) does not preclude a tribunal agreeing to a variation to a lesser extent, why would it preclude a variation being made to a greater extent? Mr Howell argued that if the statutory provisions can be read to allow the SSWP / a tribunal to choose between a rate of 0% and 8% to apply when calculating an assets variation, one must ask why they cannot pick other figures instead of dividing the value by 52, or by using a multiplier of 7, or even the value of the asset itself? Mr Howell submitted that once one gets into that debate, the entire structure of the CSMCRs 2012 would be undermined.
126. We asked Mr Howell why, if the SSWP’s position was, and had always been, that **Cart** was wrongly decided, the SSWP had not challenged that decision when it was made. We also asked Mr Howell why the SSWP appeared to have gone further and actively invited the Upper Tribunal to apply **Cart** in subsequent decisions. Examples of this included:
- (a) **PB v SSWP (CSM)** [2013] UKUT 0149 (AAC), where at paragraph 8, Upper Tribunal Judge Mesher explained the Child Maintenance and Enforcement Commission (“CMEC”), which was the predecessor organisation to the CMS, supported the appeal to the Upper Tribunal. The CMEC had argued

that while the FTT had power to apply a reduced interest rate for an asset under the just and equitable test, it had erred in law by not making more detailed factual findings about what financial burden applying the statutory 8% would have imposed on the non-resident parent;

- (b) ***GL v (1) SSWP & (2) IL (CSM)*** [2014] UKUT 209 (AAC), which recorded the SSWP supported the appeal to the Upper Tribunal and had argued the FTT made errors of law including in not considering whether 8% was an appropriate interest rate to use under regulation 18(5) of the Child Support (Variation) Regulations 2000. Upper Tribunal Judge Turnbull explained the SSWP had referred him to the approach and reasoning of Judge Mesher in ***PB*** (above). At paragraph 41, Judge Turnbull concluded that in the circumstances, it would not be just and equitable to apply a rate as high as 8% in order to determine the additional income to be included by ownership of the relevant assets. He instead applied a lower rate of 5%;
- (c) ***NT v SSWP (CSM)*** [2015] UKUT 422 (AAC), to which Mr Howell had already referred us. In this decision, Upper Tribunal Judge Rowland recorded the SSWP's position was that the FTT may have confused the question whether a variation should be made at all with the question whether the 8% rate was appropriate. The SSWP had invited the Upper Tribunal to substitute its own decision (paragraph 15 of decision). It therefore appeared the SSWP considered the FTT should have considered whether a different rate to the 8% statutory rate should have been applied. Judge Rowland went on to draw his own conclusions about whether 8% was the appropriate rate to use in the calculation, and concluded it was (paragraph 22).

127. We asked Mr Howell about this, because these represented three published decisions where the SSWP had not only failed to challenge the approach set out in ***Cart***, but had actively invited the Upper Tribunal to adopt that approach as representing the correct way to proceed. As not all Upper Tribunal decisions are published, there were potentially more decisions where the SSWP had asked the Upper Tribunal to apply the approach set out in ***Cart***.

128. We also note the parties included in the authorities bundle the decision in ***Green v SSWP and Adams (Interests in Trusts and Ability to control assets)*** [2019] AACR 13. After an oral hearing of that appeal, Upper Tribunal Judge Jacobs, who had decided to remake the FTT's decision, explained it would be appropriate for the non-resident parent's liability to be based on the statutory interest rate of 8%. He reasoned it would be wrong to agree to a variation and to fix liability at the maximum rate as some form of punishment for the non-resident parent having arranged his affairs in a way that minimises his liability for child support as the legislation allowed him to do that. Judge Jacobs explained it would, however, be appropriate to take account of the non-resident parent's ability to meet his liability and that a judgment in family court proceedings confirmed he could lay his hands on funds when needed. The decision does not confirm whether the SSWP invited the Upper Tribunal to take this approach. It also does not indicate, however, that the SSWP opposed it.

129. The decisions described at paragraphs 126 and 128 above were ones where the applicable legislation was the Child Support (Variations) Regulations 2000. In *RR v SSWP and PR (CSM)* [2022] UKUT (AAC) 7, the Upper Tribunal considered an appeal involving the CSMCRs 2012. One of the grounds of appeal in *RR* was that the FTT Judge decided it was just and equitable to agree to a variation and followed that decision to where the evidence led her without giving further consideration to whether that particular variation was just and equitable. At paragraph 9 of his decision, Upper Tribunal Judge Wikeley recorded that the SSWP supported the appeal but had not addressed the ground about the just and equitable requirement in variations. Addressing that ground himself, Judge Wikeley drew on the analysis in *Cart* and concluded that the just and equitable requirement requires all relevant considerations to be taken into account (subject to those not expressly excluded by the CSA 1991 and the CSMCRs 2012).
130. In response to our question, Mr Howell acknowledged the case law was relevant but submitted that the SSWP wished to correct the position previously decided in *Cart* as a matter of administrative practice. He also submitted that the SSWP had not previously given consideration to whether the analysis in *Cart* was correct, but it had become an issue that the SSWP was asking the Upper Tribunal to resolve.
131. We asked Mr Howell whether the SSWP considered the *Barras* principle (after the decision of the House of Lords in *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402) might apply to the interpretation of the statutory provisions. This was on the basis it was arguable that regulation 69A of the CSMCRs 2012 had re-enacted a statutory provision (the terms of regulation 18(5)) that had been the subject of authoritative judicial interpretation. The implication of the *Barras* principle applying is that a court or tribunal would readily infer Parliament intended the re-enacted provision to bear the meaning already established in case law.
132. Mr Howell acknowledged there is scope for the *Barras* principle to apply as a relevant canon of construction. He argued, however, it would be concerned with the primary legislation (the CSA 1991) which had remained in the same material form, and that when introducing regulation 69A, Parliament had not considered whether or not to re-enact the Child Support scheme in light of the decision in *Cart*.
133. Turning to the specific criticism Ms de Navarro had made about the FTT's decisions in CB's appeals, Mr Howell submitted that as an appellate tribunal, we should exercise restraint when assessing the FTT's factual findings. He argued such an approach was consistent with the decisions in *R(Jones) v First-tier Tribunal (SEC)* [2013] UKSC 19, and *Volpi v Volpi* [2022] EWCA Civ 464. Mr Howell argued the mere fact something was not referred to in the FTT's Statement of Reasons did not mean it had failed to take it into account. Mr Howell submitted that it would require something compelling to suggest that

the FTT did not take into account something before it that was material to the appeals.

134. Mr Howell argued that the FTT's findings at paragraphs 11 to 16 of the Statement of Reasons were consistent with the evidence before it. He observed that the FTT had given PB the opportunity to file a schedule of assets (page 69 of the FTT core bundle). PB was professionally represented in the appeals to the FTT and had elected to give no evidence about the value of the shareholdings in his witness statement. Mr Howell submitted it was not being suggested to the Upper Tribunal that PB gave oral evidence on this issue. He invited us to consider what CB had stated in (the second) paragraph (iii) of her witness statement to the FTT, accompanied by a statement of truth, on page 78 of the core FTT bundle. This was that at the time of the divorce, PB's shareholdings were valued for a court by a forensic accountant and agreed by both parties at £113,000 and £1,027,000 respectively.
135. Mr Howell invited us to compare this with the further written evidence put before the FTT on 12 October 2023 (the email dated 02 October 2023 from PB's accountant at page 240 of the FTT core bundle). Mr Howell submitted this email did not deal with the question of the valuation of PB's shareholding.
136. Mr Howell also invited us to consider the written submissions Ms de Navarro had made, which he argued provided the best evidence of the oral submissions made in the absence of a recording of transcript of the FTT proceedings. Mr Howell argued these written submissions had dealt with arguments about double counting (and that regulation 69A should not be applied at all) and then that PB's shareholding was entirely illiquid. They had not, however, addressed whether CB had correctly argued that a specific valuation was agreed in the family proceedings. Mr Howell explained that arising from all this, he was submitting that: (a) PB had not challenged how CB said the family proceedings had valued the shareholding in the written documents he provided to the FTT, and (b) it had not been suggested that PB challenged this at the FTT hearing either.
137. Mr Howell submitted that looking at the appeals from the FTT's perspective, it had valuation evidence as to PB's shareholding and unchallenged evidence from CB about the basis on which the family court implemented it. Mr Howell argued the FTT was entitled to proceed on the basis of that evidence. He accepted it would have been better for the FTT to have set this out in terms in its Statement of Reasons but argued the case law does not require the FTT to set out every step.
138. Mr Howell argued that the scope for PB selling his shares to his parents was an important part of the FTT's reasoning about why it was just and equitable to agree to the assets variation under regulation 69A. He argued that if this finding was correct, it removed the argument that some additional discount should be given for illiquidity of the shares. This was because the FTT had made an actual factual finding that PB's shareholding would be purchased by his parents. Mr Howell argued that for this finding to be disturbed, we would have to be satisfied

it was irrational or perverse. He submitted that if it remains undisturbed, then it brings into sharp focus the issue of the minority discount (since PB's parents would give him full value for the shareholding as friendly purchasers).

139. Mr Howell argued that the arguments about PB's parents planning for inheritance tax were never developed before the FTT. He acknowledged the FTT had fairly limited evidence before it about whether PB had flexible remuneration available through his parents but invited us to conclude the FTT it had made enquiries it needed to make and drew reasonable inferences from that limited evidence.
140. Mr Howell argued that the FTT approached the question of flexibility in paragraph 38 of its Statement of Reasons. He submitted that while the FTT gave one example (a salary increase to cover a director's loan for PB to purchase a car), the FTT had not suggested this was exhaustive of the examples available. Mr Howell argued that CB had given other examples to the FTT in her written evidence, namely that extensive things were being run through the company and PB had received a director's loan for legal fees (page 81 of the FTT core bundle). Mr Howell argued that the car was therefore not the only example before the FTT of flexibility of remuneration being extended to PB, even if it was the only example used.
141. Mr Howell invited us to conclude that this was a situation in which it was undisputed that PB's parents had given him flexibility in the past regarding remuneration with companies they controlled, and this was the evidence before the FTT. Mr Howell argued that in these circumstances, the issue for us was whether it was irrational for the FTT to make the factual finding that "if push came to shove", PB would be able to sell his shareholding to his parents. He submitted the test for irrationality imposes a very high standard in an appeal on a point of law and PB had failed to meet it.
142. Dealing with the remaining arguments, Mr Howell submitted Ms de Navarro's assertion the FTT engaged in double counting had no merit. It made clear factual findings that PB was remunerated by the subsidiary company, which was separate from his shareholding. The FTT was entitled to make that factual finding, and it was largely consistent with the evidence before it. Mr Howell argued that PB's shares also did not fall within regulation 69A(4)(b) as an asset being used in the course of his trade or business.
143. In response to Ms de Navarro's arguments about the FTT concluding PB could raise a mortgage on his home, Mr Howell submitted this conclusion was open to the FTT to reach on the evidence before it. He argued that while regulation 69A(4)(f) confirms a variation cannot be agreed in respect of the primary residence of the non-resident parent; this exclusion is not engaged for PB because the asset being valued is shares. Mr Howell argued that at the stage of applying the just and equitable test under section 28F(1)(b), nothing precluded the FTT from taking into account all of PB's assets. He invited us to conclude that since it is not precluded by something specific in regulation 69A

nor by regulation 60 of the CSMCRs 2012 (which lists factors not to be taken into account under section 28F), it *can* permissibly be taken into account.

(c) Submissions by CB

144. CB told us she informed the FTT that during the divorce, PB had been removed from the list of beneficiaries in family trusts his parents had set up. She had argued that it was highly likely that PB would have been added back to the family trusts after the divorce was completed. CB believed this was because PB and his family had discovered that his assets could be taken into account for child maintenance under regulation 69A.
145. CB argued that while Ms de Navarro had argued PB's salary was only £57,000 this was incorrect, and it had not been at that rate for some time. She submitted that in 2021, PB had received a payment of around £100,000 of his inheritance, and she assumed that having those funds in his bank explained why he did not earn so much that year. CB told us that CMS had notified her in April 2025 that HMRC had recorded PB's income as around £138,000, so she assumed he had received a significant bonus in that period. CB disputed that PB was struggling to make the additional child maintenance payments. She argued the evidence had proved he had received various amounts of early inheritance, and she suspected he had been written back into the family trusts.
146. CB repeated to the arguments she made to the FTT that she believed PB's lifestyle was inconsistent with the income he was declaring. She also argued that she hoped we realised by all the evidence put forward that any change in PB's maintenance payments would never affect their lifestyle with PB but would only affect their lives at home with CB, so if their welfare were relevant to agreeing a variation, this should be taken into account.
147. CB told us PB had purchased a separate home in April 2023. She believed it was worth around £1 million and was purchased mortgage-free. CB acknowledged this was after the period covered by the FTT's decisions but argued that PB had not disclosed this asset to CMS and it only came up because they were in court in June and October 2023. CB also told us that PB had not declared the £100,000 inheritance he had received in 2021, and she only found out about it because he had been directed to disclose his assets to the FTT.
148. CB confirmed that although the Statement of Reasons did not refer to the FTT having considered whether to agree to a variation for cash assets, she had made arguments to the FTT that they should be taken into account, including the £100,010 deposit PB's father had made into PB's bank account on 28 June 2021 (which was marked as a gift).

Analysis

The failure to apply a minority discount to PB's shareholdings

149. In determining this issue, we face the inevitable difficulty caused by the absence of any record of proceedings but have no reason to doubt Ms de Navarro's account of what was argued at the FTT hearing. We are therefore satisfied the issue of making a discount to the value of PB's shareholding to reflect his minority shareholding was raised orally before the FTT. We also note there is an unresolved issue whether or not there was a determination in the Family Court proceedings about whether there should be a minority discount (although any such finding would not have bound the FTT on a child support appeal).
150. The problem, however, is that the FTT did not deal with that issue in its decision. Mr Howell was constrained to accept that it would have been better for the FTT to have set out its reasoning in its Statement of Reasons, although he submitted that we should exercise restraint when assessing an FTT's factual findings and the mere fact that something was not referred to in the FTT's written reasons did not mean that it had failed to take it into account.
151. We accept that an appellate tribunal should exercise restraint when assessing an FTT's factual findings. We also accept the mere fact that something has not been referred to in the FTT's written reasons does not necessarily mean it failed to take it into account. We have decided, however, that the FTT's failure to deal with this issue at all in its Statement of Reasons was an error of law. This is because the issue had been expressly raised in oral submissions at the hearing. It was potentially material to the outcome of the appeal in that, as Ms de Navarro submitted, if the minority discount had been applied, the levels of discount discussed in the extracts of the FA Report the FTT had available to it (80% for one shareholding, 50% for another) would, or might, have taken PB's shareholding valuation to a level where, if a variation were agreed, the figure would fall below the maximum income threshold of £3,000 per week. It would therefore potentially change the assessment of PB's income if the FTT agreed to an assets variation as just and equitable.
152. We are therefore satisfied that for this reason alone, the decisions of the FTT should be set aside. As we explain below there are also other reasons why we have decided the FTT's decisions should be set aside.
153. We have considered whether the decisions can be upheld on the basis that, by implication, the FTT rejected the application of a minority discount in paragraphs 29 to 34 of its Statement of Reasons. There is, however, nothing in the statement of reasons to indicate that in reaching those conclusions, the FTT grappled with the issue of any minority discount. We are satisfied that without any reference to the issue of a minority discount, the FTT's conclusions cannot stand.

154. We have considered whether it is open to us to remake the decisions in relation to this issue. We are, however, satisfied the appropriate course of action is to remit the matter to a fact-finding tribunal which will hear evidence from all parties (which we have not done) before deciding whether to make any discount to the value of PB's shareholding to reflect his minority shareholding.
155. It follows from this that, although we admitted the FA Report at the hearing before us *de bene esse*, that was on the understanding that it could be considered substantively if:
- (a) we decided the FTT had made one or more material errors of law in its decisions;
 - (b) we decided to set aside one or both of the FTT's decisions; and
 - (c) if so, in the event we decided to remake the FTT's Decisions rather than remit the appeals to a new FTT to decide.
156. We have decided that the FTT did make a material error of law in its decisions and that those decisions should be set aside, but we have decided to remit the appeals to a new FTT to decide rather than to remake the decisions ourselves. We have not therefore considered the FA Report substantively for ourselves, although the new tribunal must do so when rehearing the remitted appeals. The new tribunal must consider the FA Report in full, and not just in relation to the extracts before the FTT in October 2023.

The application of the just and equitable test in section 28F of the Child Support Act 1991

157. We begin by reference to the statutory provisions, both primary and secondary. The version of section 28F of the CSA 1991 that applied at the date of the FTT's decisions states, so far as material and with emphasis added:

"28F Agreement to a variation.

(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.

...

(6) In determining whether or not to agree to a variation, the Secretary of State *shall comply* with regulations made under Part II of Schedule 4B.”

158. The use of the word “*may*” in subsection (1) connotes that the decision of the Secretary of State to agree a variation is always a discretionary one and the discretion to make such a variation only arises if the Secretary of State is satisfied that two pre-conditions are made out: (a) 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) in all the circumstances of the case, it would be just and equitable to agree to a variation. Thus, in all cases it must be just and equitable to agree to a variation.

159. However, section 28F must be read as a whole. What section 28F(6) goes on to provide (with emphasis added) is that:

“(6) In determining whether or not to agree to a variation, the Secretary of State *shall comply* with regulations made under Part II of Schedule 4B.”

160. Thus, whilst the decision of the Secretary of State to agree a variation is always a discretionary one, in reaching that decision he must comply with regulations made under Part II of Schedule 4B to the CSA 1991. His compliance with the regulations is not discretionary. That is clear from the use of the word “*shall*” as opposed to the word “*may*.” We considered this an important context for applying the discretion whether or not to agree to a variation under the just and equitable test established in section 28F(1). We note that the wording of the original amendments to introduce section 28F into the CSA 1991 may have put the position even more emphatically, by using, at what was then section 28(7) (emphasis added): “In giving a departure direction, the Secretary of State shall comply with *the provisions of* regulations made under Part II of Schedule 4B.”. In our assessment, the successive amendments to section 28F to remove the wording we have emphasised in italics do not clearly remove that meaning

161. Ms de Navarro argued it was significant that the definite article (“*the*”) rather than the indefinite article (“*a*”) was used in section 28F(1). We agree with Mr Howell there is no particular significance to be attached to the use of the definite, as opposed to the indefinite, article. We agree with him that the position must be read within the context and constraints of paragraph 5 of Schedule 4B to the CSA 1991. Paragraph 5(1) refers (emphasis added) to: “*the*

variations from the usual rules for calculating maintenance”. We take into account the wording in which paragraph 5(2) of Schedule 4B is drafted, which we consider generally to be unambiguous, namely: “no variations may be made other than those which are permitted by the regulations”. To this extent, we disagree with the analysis applied by the Upper Tribunal in **Cart** at paragraph 36. We deal with this and with the decision in **Cart**, in further detail below.

162. We therefore turn to Part II of Schedule 4B which provides (again with emphasis added):

“Part II Regulatory Controls

5(1) The Secretary of State may by regulations make provision with respect to the variations from the usual rules for calculating maintenance which may be allowed when a variation is agreed.

(2) *No variations may be made other than those which are permitted by the regulations”.*

163. As is stated in the commentary regarding Schedule 4B to the CSA 1991 in the leading textbook on Child Support (Child Support: The Legislation, 16th ed., p153, with which we respectfully agree:

“The cases listed in the Variation Regulations are exhaustive of the variations that the Secretary of State may agree to. There is no residual power to agree to others. This is surely obvious and, anyway, repeats para 1(1)”.

164. We then turn to regulation 69A of the CSMCRs 2012 which was made under the power granted by the CSA 1991. So far as material (and again with emphasis added) this regulation provides:

“(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.

...

(5) The “prescribed value” is £31,250.

...

(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”.

165. It seems to us that the reference to “weekly value of an asset” in regulation 69A(7) must be interpreted as meaning “gross weekly income”, which is the relevant defined term used when identifying the effect on the maintenance calculation of variation for additional income (see regulation 73(1) of the CSMCRs 2012). The use in regulation 69A(7) of “weekly value of” (an asset) appears to represent an isolated repetition of a concept used in the predecessor Child Support Variation Regulations 2000 (see regulations 17 and 18). We received no arguments from the parties on this as part of these appeals. No party suggested regulation 69A(7) is rendered invalid or void despite what appears to be a carryover of a concept that makes sense in the context of the Child Support Variation Regulations 2000, but less so in the context of the CSMCRs 2012. We note that in making its decisions, the FTT applied regulation 69A(7) consistently with the manner in which we have construed it.
166. If we look at the matter simply as an exercise in statutory interpretation and shorn of any case law providing authority on the point, it seems to us the effect of these provisions is that if 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 of £31,250, the Secretary of State is obliged to calculate the weekly value of an asset by applying the statutory rate of interest (8%) to the value of the asset and dividing by 52. The terms in which that calculation are to be performed are mandatory, not discretionary. The stipulated rate of interest is the statutory rate of 8%. The Secretary of State must calculate the weekly value of the asset by applying the 8% rate to the value of the asset and dividing that sum by 52. There is no mechanism for substituting another rate of interest.
167. As a matter of statutory interpretation, the FTT correctly applied the 8% statutory rate of interest to the assets as required by regulation 69A(7) in paragraph 35 of its statement of reasons. It considered in the following paragraph whether to depart from that rate, but decided not to do so. If our view of the relevant legislation is correct, it was not open to the FTT to consider whether to depart from the statutory rate of interest, given the mandatory terms of section 28F(6) and paragraph 5(2) of Schedule 4B to the CSA 1991 and of regulation 69A(7) and (8) of the CSMCRs 2012. Given the FTT did not depart from the statutory rate, any such consideration it gave to departing from it, was not material to the outcome of the appeals.
168. We consider our interpretation of the statutory provisions is reinforced by considering admissible aids to construction, both the 1995 White Paper and the 2018 Consultation Response.

169. The introduction and summary of the 1995 White Paper state, at paragraph 4:

“4. The changes proposed are summarised below.

a. The introduction during 1996/7, following primary legislation, of some discretion to depart from the maintenance formula assessment in cases where the absent parent would otherwise face hardship or where certain property or capital transfers took place before April 1993. There will be closely specified grounds for the special circumstances that will be considered, and limits on the extent of the departure. Either parent will be able to apply for a departure, and both will be entitled to make representations”.

170. In the substantive text, the then Secretary of State explained:

“Introduction of discretion

1.7 The Government continues to believe that the principles underlying the child support system are best realised, in the main, through maintenance assessments based on an objective formula. There is no wish in Government or in Parliament to see a return to a discretion-based system, with its attendant problems of inconsistency and unfairness. But the Government recognises that there is a small minority of cases where there are special circumstances which it would be right to take into account but which cannot be reflected in a universal formula.

1.8 The Government therefore proposes to introduce a Bill discretion to provide for a limited discretion to depart from the strict formula assessment inappropriate cases. This should provide a safety valve for the genuine hard case. It is important, however, that discretion does not undermine the whole basis of the Act. The Bill will therefore provide for discretion to be exercised only in tightly specified circumstances: generally that the absent parent has necessary expenses not allowed for in the formula and that failure to take them into account would result in hardship. This will not be an automatic process: each case will be thoroughly examined, and departure will be allowed only where this is fair, taking account of the circumstances of both parents and the interests of the children. Parents with care will also be able to apply for a departure from the formula. The system of departures will also deal with property or capital settlements in certain cases”.

171. In the executive summary of the 2018 Consultation Response, it was stated:

“7. Respondents offered a range of views on our proposed new power to allow the CMS to derive a notional income from an asset for the purpose of varying a calculation.

8. There was no clear consensus on the percentage rate we should use to derive a notional income or the minimum value of assets this should be applied to. We have therefore opted to proceed with the 8% rate proposed in line with the Judgment Debts (rate of interest) Order 1993 and we will set the minimum”.

172. The 2018 Response then set out the proposed changes as follows:

“Calculation changes

19. The CMS already has access to a much wider range of information about a paying parent’s income than the CSA, which means for the vast majority of cases liabilities are being calculated quicker, and accuracy is higher.

20. We are aware however that there are a small number of cases where paying parents use complex financial arrangements to disguise their income and artificially lower their child maintenance liabilities. We want to take steps to prevent their children losing out from this behaviour.

21. As a part of this we consulted on the introduction of a new power to allow the CMS to calculate a notional income from assets held by a paying parent. This variation will allow us to more reasonably take into account the ability of parents to support their children financially. We consulted on specific technical aspects of this new power.

We asked

- Where an asset does not generate an income, a notional income would need to be determined. In previous schemes of maintenance this was at a set rate of 8% of the value of the asset. What notional income should be assumed?

You said

22. The majority of respondents were supportive of the introduction of the power, but we received a wide range of suggestions in relation to the rate of interest. One respondent suggested 6.75%, the highest of the responses received. Three respondents raised the idea of a tracker rate, set at 2% above the Bank of England Base Rate.

23. When considering the responses received there was no clear consensus on an alternative to our proposed 8% rate which is in line with the Judgment Debts (Rate of Interest) Order 1993, nor did the majority of respondents suggest that this rate was unreasonable.

What we are doing

24. We plan to continue with our proposed rate of 8%, as this strikes the best balance between allowing the new power to have a meaningful impact on child maintenance liabilities without being overly punitive. The National Association for Child Support Action (NACSA) stated that they felt the rate had created financial hardship for paying parents in the past.

25. The CSA had a similar power, and the figure of 8% was used to calculate a notional income from assets. The use of the figure for this purpose was also subject to scrutiny by tribunal and upheld.

26. This variation will be useful in a range of scenarios including where we believe paying parents have made an effort to use complex financial arrangements to evade their responsibility. We believe across such a range of circumstances the 8% figure is justifiable. It could also act as a nudge to encourage paying parents to consider how best to arrange their financial circumstances, in their interest and that of their children.

27. We considered the practicalities of introducing a tracker rate, but discounted this idea on the basis that we want our method of calculating child maintenance liabilities to be consistent from year to year. This is important to ensure parents can clearly understand how liabilities are calculated; and a tracked interest rate would add significant complexity.

We asked

- Do you agree that these measures strike the right balance between improving how we calculate maintenance for complex earners, while protecting tax payers' money by focusing on only those cases most likely to be affected?

You said

28. We received a range of suggestions for what the minimum value to an asset should be. While there was no clear consensus there was a trend towards a higher value. The Family Law Bar Association (FLBA) suggested an annual

notional income of £25,000 as a reasonable level, while the Law Society Scotland felt that £65,000 was acceptable.

What we are doing

29. Having considered responses received we have set a minimum aggregate value of assets at £31,250, after deductions have been made for mortgages or charges on the assets. When used in conjunction with a notional income rate of 8% this means we will only vary a calculation where can calculate a notional income of £2,500 or more.

30. This will align with our current approach to varying a calculation where unearned income is declared, creating a consistent approach to variations across a range of case circumstances.

31. Where we have identified that a paying parent possesses assets higher than the minimum amount we will calculate the notional income at the 8% rate, and then divide that figure by 52 to arrive at a weekly amount. This will then be used to vary the calculation. The resulting income will be used to create a liability either by itself or added to other income that has already been established”.

173. On the whole, we consider this wording consistent with Mr Howell’s argument that the then Government did not clearly state that the 8% figure would be departed from in individual cases. We deal specifically with the wording in paragraph 25 in paragraph 211 below, because we consider it undermines that argument.

174. We also note that the explanatory memorandum to the Child Support (Miscellaneous Amendments) Regulations 2018, which amended the CMCs 2012 by, inter alia, introducing regulation 69A, explained:

“Child maintenance calculation amendments

7.3 The Child Maintenance Calculation Regulations 2012 are being amended to go some way towards addressing the concerns of stakeholders that a small number of wealthy NRPs are currently able to use complex arrangements of assets to artificially lower their child maintenance liability, or avoid it entirely. The legacy schemes have provisions to determine a notional income from assets held that were not carried forward to the 2012 scheme, as the method of calculation on that scheme allowed for a more comprehensive range of income types to be taken into account – i.e. earned and unearned income (subject to taxation by HM Revenue & Customs).

7.4 With the maturity of the current scheme, we recognise that there are still some NRPs for whom adding a notional income from assets provision would lead to a more appropriate income figure being used to calculate a maintenance liability. These Regulations introduce this power for use in the 2012 scheme, to ensure our approach to the calculation of maintenance liabilities results in NRPs paying an amount that more accurately reflects their means.

7.5 The change enables a notional income to be taken into account where a NRP holds assets of a high value. We think this new provision will be particularly appropriate in situations where an individual has an affluent lifestyle, and a source of income cannot be identified but ownership of significant assets can be.

7.6 When an asset falls within this power, it will be considered to be producing an income according to a set percentage. Eight per cent has been chosen as the set percentage as it was used for this purpose on the 2003 scheme, and was subject to public consultation.

7.7 Protections within these Regulations are present to ensure the use of the power is proportionate.

a) To provide a minimum single value of £31,250 below which we would not use this power. This is to prevent large numbers of low value assets being targeted, as this would be difficult to administer (although, to be clear, where for example the NRP has a number of gold bars or a number of shares, these will be treated as one asset). It will also allow for the minimum level of notional income to be set at £2,500 per year. This is the same as the current threshold for variation based on unearned income, so ensures our overall approach remains consistent...”

175. As with the general statements in the 2018 Response (apart from in paragraph 25), the wording of the explanatory memorandum does not generally indicate the then Government intended to introduce a discretionary rate which might be 8%, or less than 8%, depending on the circumstances.

The relevance/importation of the discretion in the Matrimonial Causes Act 1973 to child maintenance calculations

176. We now address whether the child support legislation can be construed as importing a wide discretion, such as in the MCA 1973, allowing, for example, for a court-based discount for the valuation of PB’s shareholding. We do so, in the light of what we have said above about the statutory construction of the

primary and secondary legislation, with the benefit of the admissible aids to construction.

177. On this issue, we prefer Mr Howell's analysis, namely that no equivalent discretion exists in the child support legislation. In our judgment, the purpose behind regulation 69A (and its predecessor regulation 18 of the Child Support (Variation) Regulations 2000) is to deem high value assets as producing a notional income stream, whether or not they actually do so. The issue to address under section 28F(1)(b) of the CSA 1991 is whether it is just and equitable to agree to a variation that takes into account that specific income stream. In short, the value of an asset must be dealt with first, before the just and equitable test is applied. The just and equitable test is not a means of valuing an asset and does not allow it to be valued on a different basis from its true (or deemed) objective value.
178. The statutory scheme requires the value of an asset to be ascertained objectively. This follows, from not only from paragraph 4(2)(a) of Schedule 4B to the CSA 1991, but also from the wording itself of regulation 69A of the CSMCRs 2012. There is no case for an assets variation at all, unless the asset has a higher value than the prescribed figure of £31,250. We consider below the question whether the value of the asset can only then be calculated as a weekly value by applying the statutory rate of interest to it and dividing the figure reached by 52 (see regulation 69A(7)) or whether, in light of the authorities, it is possible to use some rate other than 8%.
179. We agree with Mr Howell that the FTT is familiar with the difficulty of applying valuations to assets falling within regulation 69A, but such difficulties are inherent in any valuation process. They do not provide any reason for not undertaking the duty to value an asset that the CSA 1991 requires the FTT to undertake.
180. In our judgment, the approach taken in matrimonial finance cases and the case law about the MCA 1973, are not relevant to what the FTT has to decide under regulation 69A. The CSA 1991 was intended to impose a formula-based approach to child support, where calculations are made using a relatively clear, simple and predictable legislative basis, and where most child support decisions are taken by relatively junior officials. This is an administrative process quite different to a judge sitting in court exercising an unfettered (in statutory terms) discretion in relation to the division of matrimonial assets.
181. In matrimonial cases, there is no statutory requirement to value assets at all. The court has to take into account the resources of the parties, as part of its discretion, but can permissibly conclude it is impossible to value or disproportionate to do so (see King LJ in *Versteegh* at paragraphs 134 to 139). In contrast, under the child support legislation, on an application for a variation, the decision-maker and the FTT are required, by the terms of the legislation, to value the assets in question.

182. We agree with Mr Howell that the MCA 1973 is concerned with permanent division of the assets and a clean break, if that can be done fairly. In that context, it may well be highly relevant who receives the “copper-bottomed” assets and who receives the less liquid ones. Under regulation 69A of the CSMCRs 2012, the decision-maker is not concerned with permanent division of assets at all, but with the entirely different exercise of valuing the asset(s) on a specific day. In contrast to the matrimonial finance legislation, the child support scheme builds in reconsideration of valuations from time to time (such as at the annual review stage or through other supersessions, should changes occur).
183. In addition, under the CSA 1991, the decision-maker and the FTT are only concerned with the assets and income of the non-resident parent, and regulation 60 of the CSMCRs 2012 precludes taking into account the circumstances of the person with care. This approach is fundamentally different to the matrimonial finance scheme, where the resources of *both* parties are, necessarily, considered.
184. In our judgment, the position under the child support legislation is correctly set out in the decision of Upper Tribunal Judge Mesher in **PB**. Judge Mesher addressed the predecessor regulation 18, but the same analysis applies to regulation 69A. Judge Mesher stated (with our emphasis added):

“23. The third qualification is that regulation 18 covers assets of many different types, with different scope for producing resources that could be used for the maintenance of children. For instance, a property that is rented out could well produce a return on capital of 8% or more even when Bank of England base rate is very low. On the other hand, it may in the short term be rather difficult to extract resources from a property that is not in a location or in a condition for renting out, short of sale of the property or borrowing against its security (which, incidentally, would immediately have the beneficial effect for the parent concerned of reducing the value of the asset for the future because of the deduction under regulation 18(3)(a) of any amount owing on a mortgage or charge on an asset, subject to the amount of capital received counting as a new asset in itself until disposed of). *Regulation 18, like so many parts of the child support scheme, involves some fairly rough justice, including the application of a standard figure to many different sorts of assets, thus reducing the need for time-consuming and expensive inquiries into the individual circumstances of particular assets once the exceptions in regulation 18(3) have been disposed of. It is then left to the “just and equitable” test to smooth off some of the rough edges, but without significantly changing the underlying shape.*”

185. It is also correctly set out in the decision of Upper Tribunal Judge Rowland in **NT**. He was, again, addressing the predecessor regulation 18 but it remains

applicable to regulation 69. Judge Rowland stated (again with our emphasis added):

“19. ... *the purpose of the Child Support Act 1991 is to ensure that parents who do not live with their children pay appropriate amounts for their support and I take as a starting point that amounts calculated under the 2000 Regulations will generally be appropriate unless, in the particular circumstances of the case, it can be demonstrated that requiring those amounts to be paid would be unreasonable or otherwise unfair.* Generally, the Act and regulations have regard only to income, but regulation 18, which is expressly authorised under paragraph 4(2)(a) of Schedule 4B to the Act as amended, permits regard to be had to assets exceeding the value prescribed in regulation 18(3)(a), presumably on the basis that a parent with such assets can be expected to provide income for the support of his or her children out of the assets.

20. *I do not accept the father’s argument that the amount to be paid in respect of an asset should be related to the income the asset generates or is capable of generating. Regulation 18 applies not just to real property but also to money, shares or a chose in action and paragraph (5) would be rendered a dead letter by such an approach.* Indeed, there is a stronger argument for deducting from the income to be taken into account applying the 8% statutory rate any actual net income generated by the capital that was already taken into account in the child maintenance assessment. However, in the present case, the relevant assets did not generate any profit to be taken into account in the assessment, although capital appreciation was no doubt to be expected. For this reason also, the point I raised about not taking away from a non-resident parent assets that provide an income upon which that parent can live and out of which child support maintenance can be paid falls away. On his figures, the father’s income would not in fact have been reduced had he sold his interest in the relevant properties. Moreover, as I have indicated, the sale of a property, or an interest in it, is not the only way of raising money from it. Money can be borrowed against it.”

Absence of dividends from PB’s shareholding

186. Ms de Navarro submitted that the FTT erred in applying the just and equitable test because PB’s shares were not income producing and because he did not control the declaration of dividends by the two companies.

187. We find this submission, however, to be misconceived. Had PB received dividends of £2,500 or more per annum from his shareholdings, this would have provided a basis in law for agreeing a variation on the ground of unearned

income prescribed by regulation 69(1), read with regulation 69(2)(a), of the CMCRs 2012. Regulation 69A provides a separate basis for agreeing to a variation that operates independently to regulation 69. Regulation 69 takes into account dividends that are issued in respect of shareholding(s) where these reach £2,500 or above. Regulation 69A attributes a notional income stream to shares that do not result in such dividends being issued.

188. This is consistent with how regulation 69A deems a notional income stream in respect of other assets defined in regulation 69A(2). It applies, whether or not an asset generates income. It also applies to assets which are incapable of doing so, such as gold, silver or platinum bullion bars or coins.
189. For the same reason, the fact that PB did not control the payment of dividends from his shareholding is also irrelevant. Variations on the ground that a person controls and can divert their income are dealt with by regulation 71 of the CSMCRs 2012. Regulation 69A is designed to occupy the space not taken up by other variation grounds. It follows that its application turns on whether a non-resident parent has an asset within the meaning given in 69A(2) that is valued at over £31,250.
190. We therefore agree with the remarks of Judge Rowland in **NT** at the beginning of paragraph 20 of his decision (as cited above).

Fragility of business valuations

191. We also reject Ms de Navarro's submission that the FTT erred in law by failing to consider the fragility of business valuations in applying the just and equitable test under section 28F(1)(b) of the CSA 1991.
192. The fragility or uncertainty of the valuation of private businesses is a matter referred to in several authorities in the family law context (such as **BR v BR** [2025] EWFC 88 per Peel J at paragraphs 80-81), but it has no relevance to the just and equitable test under section 28F(1)(b). By contrast with the matrimonial finance legislation, regulation 69A requires a staged approach. An asset must be valued, notwithstanding the difficulties or uncertainties of so doing before its weekly value is calculated.
193. The difficulties and inherent uncertainty of valuing shares in private limited companies, while potentially relevant to their value, do not provide a reason for not giving them a value (see Mr Commissioner Rice in **R(IS) 2/90** at paragraph 4). The just and equitable test under section 28F(1)(b) can only be applied once the value of a relevant asset has been ascertained.

The Upper Tribunal's decision in Cart

194. We turn to consider the decision of the two-judge panel of the Upper Tribunal in **Cart** in relation to the question of whether the decision-maker and the FTT are bound to apply a statutory rate of interest of 8% or whether it is permissible to adopt some other rate.

195. So far as material, what the panel decided in **Cart** was:

“F. Just and equitable

31. Does the just and equitable requirement allow the Commission (previously the Secretary of State) and tribunals to vary the amount that would otherwise be agreed to as a variation or does it allow them only to agree, or refuse to agree, to a variation of that amount? For convenience, we refer to these alternatives as the all or nothing and flexible approaches. This issue was decided, in favour of the all or nothing approach, by Mr Commissioner Angus in *CCS/2018/2005*. However, he later accepted that his reasoning was defective. As has been seen, the tribunal in this case decided that an all or nothing approach was required, but went on to find that it was “just and equitable” to agree the full amount. Assuming that conclusion to be tenable on the facts, the legal issue may be seen as academic. However, it is an issue of general importance, on which we have had full argument. It is therefore right that we should express our conclusion on it.

32. Mr Burrows argued for the flexible approach, seeking an outcome equivalent to the broad discretion given by section 25(3) of the Matrimonial Causes Act 1973:

“(3) As regards the exercise of the powers of the court under section 23(1)(d), (c) or (f), (2) or (4), 24 or 24A above in relation to a child of the family, the court shall in particular have regard to the following matters –

- (a) the financial needs of the child;
- (b) the income, earning capacity (if any), property and other financial resources of the child;
- (c) any physical or mental disability of the child;
- (d) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;
- (e) the considerations mentioned in relation to the parties to the marriage in paragraphs (a), (b), (c) and (e) of subsection (2) above.”

We refer to some of his more detailed arguments later.

33. Mr Scoon argued for the all or nothing approach, although he conceded that the legislation was susceptible to either

construction. He relied on the written submission on behalf of the Commission. He argued that the all or nothing approach represented the policy intention and that this was based on a need for simplicity. Again, we refer to some of his more detailed arguments later.

34. We reject Mr Scoon's argument (based on internal Departmental documents) of the alleged policy intention behind the legislation. That material is not admissible as an aid to the interpretation of the legislation. Without the support of any statements that would be admissible under *Pepper v Hart* [1993] AC 593, this argument is impossible to sustain.

35. Mr Burrows rightly emphasised the basic duties and principles under the Child Support Act that parents should maintain their children and that decision-makers should consider the welfare of children affected by the exercise of a power.

36. There is no dispute that the just and equitable requirement is discretionary. The issue is the scope of the discretion. The terms in which the Act imposes the requirement support Mr Burrows' argument for the flexible approach. Section 28F(1)(b) provides that "The Secretary of State may agree to a variation if it is his opinion that, in all the circumstances of the case, it would be just and equitable to agree to a variation". Those terms, especially the words we have emphasised, indicate a broad discretion that is not limited to any particular form of variation. If Mr Scoon's argument were correct, we would expect the section to have referred to agreeing to the variation rather than a variation.

37. The existence of a broad discretion is consistent with the Secretary of State's duty under section 28F(4) to determine how the variation is to be given effect and feeds it directly into the calculation decision under section 11.

38. The Act does not limit the specific duty under section 28F(4) by reference to the provisions of regulations. However, section 28F(6) does impose a general duty to comply with regulations made under Part II of Schedule 4B, specifically under paragraph 5. These are the only provisions of the Act that are capable of supporting Mr Scoon's argument for an all or nothing approach. He relied in particular on regulation 19(5) under which the "additional income" to be taken into account where paragraph (1A) applies "shall be the whole of the income ..."; and regulation 25 under which effect "shall be" given to the variation by increasing the net weekly income by the weekly amount of the additional income. On this interpretation of the

provisions, they require the Secretary of State to agree to a variation in the terms stipulated in the regulations or not to agree to one at all.

39. Unless driven to it, we would regard such a rigid interpretation as contrary to the spirit of the general requirement that a variation should only be agreed if it is “just and equitable”. This appears designed to enable the Secretary of State to arrive at a fair result on the facts of the case. More specifically, it appears inconsistent with the duty to maintain that is recognised by sections 1(1) and 28E(2)(a) and the duties to take account of the welfare of all children likely to be affected under sections 2 and 28F(2)(a). This can be illustrated by two examples.

40. Assume first that the parent with care applies for a variation on the ground that the non-resident parent possesses assets of at least £65,000 (regulation 18). The regulations provide for attributing to that parent income at the judgment debt rate, which has not changed since 1993 and is currently 8 per cent. The all or nothing approach puts the Secretary of State in the unenviable position of either agreeing to a variation at that unrealistic and unattainable rate or agreeing to nothing. The effect is even starker if the non-resident parent has another child in a new relationship. He is under a duty to maintain all his children and the welfare of all of them has to be considered. But on the all or nothing approach this can be achieved only if by chance it happens to be compatible with the maintenance calculation either remaining unaffected or being increased by the whole amount.

41. Assume second that the parent with care applies for a variation on a number of grounds and the conditions for all of them are satisfied. Mr Scoon argued that there was a single application for a single variation, so that they could not be severed with a variation agreed on some grounds but not on others. The effect is that the more grounds that are satisfied the more likely it is that their overall effect will not be just and equitable. The Secretary of State is again in an unenviable position, this time by having to decide whether to impose hardship on the non-resident parent or to deprive the parent with care and their children of any benefit from a variation.

42. These examples, which are not unrealistic and are taken from cases currently before the Upper Tribunal, show that the all or nothing approach changes a test of what is just and equitable into a crude instrument that is incapable of producing that effect and can cause the opposite. Mr Scoon argued that the benefit of his approach was simplicity. In the context of the

examples we have given, it produces simplicity at the cost of what is fair and equitable.

43. We do not think this approach is excluded by paragraph 5(2). It prevents the Secretary of State from agreeing to a variation in circumstances other than those permitted in the regulations, or to a greater effect than so allowed (as Mr Commissioner Williams decided could not be done in *R(CS) 5/06*). But it does not detract from the general requirement that no variation may be agreed save to the extent that it is “just and equitable”.

...

47. ... we do not consider that the statutory scheme needs to be read as imposing an all or nothing approach. As we have indicated, there is sufficient scope for flexibility in the overriding provisions of the statute. The regulations must be interpreted in a way that is consistent with the legislation as a whole.

48. In conclusion on this point, the tribunal misdirected itself that the just and equitable requirement imposed an all or nothing test. However, the tribunal gave an alternative reason for its decision on just and equitable, which we consider is sound. The starting point is the treatment of the dividend payment received by the non-resident parent. This issue was not discussed at the hearing, but it was subsequently the subject of the decision of the Court of Appeal in *Secretary of State for Work and Pensions v Wincott* [2009] EWCA Civ 113 (reported as *R(CS) 4/09*). When the judgments were given, we allowed 14 days for comment. In the event, although various points were raised by way of comment on the judgment, neither party argued that the way Mrs Street dealt with the attribution of the payment was inconsistent with the Court of Appeal’s analysis. It is unnecessary therefore for us to say anything more about it.”

196. Taken by itself, we would regard **Cart** as a relatively weak authority in favour of the approach advocated by Ms de Navarro in that:

- (a) what was said was obiter. As the Upper Tribunal explained in paragraph 31 of its decision, the FTT in that case decided that an all or nothing approach was required but went on to find that it was just and equitable to agree the full amount. Assuming that conclusion to be tenable on the facts, the legal issue might be seen as academic.
- (b) the Secretary of State in that case conceded (see paragraph 33) that that the legislation was susceptible to either the all or nothing or the flexible construction. Mr Howell, by contrast, made no such concession in this case.

- (c) at paragraph 34 of **Cart**, the Upper Tribunal correctly rejected the SSWP's attempts to rely on internal DWP aids to interpretation. By contrast, in the present appeals there are two admissible aids to interpretation: the 1995 White Paper (Improving Child Support) for the changes proposed to the CSA 1991, and "The Child Maintenance Compliance and Arrears Strategy", the public consultation preceding the introduction of regulation 69A into the CSMCRs 2012 (which we have described above as "the 2018 Consultation Response").
- (d) At paragraph 43 of **Cart**, the Upper Tribunal held that its approach was not excluded by paragraph 5(2) of Schedule 4B to the CSA 1991. It observed that paragraph 5(2) prevents the Secretary of State from agreeing to a variation *in circumstances other than those permitted in the regulations*, or to a greater effect than so allowed. The panel explained this was as Mr Commissioner Williams decided could not be done in **R(CS) 5/06**, but that it did not detract from the general requirement that no variation may be agreed save to the extent that it is "just and equitable". However, what Mr Commissioner Williams decided in that case at paragraph 14 was simply that (with emphasis added):

"While it is *arguable* that these provisions give the Secretary of State and a tribunal power to *reduce the actual weekly amount of child support maintenance to be directed* as a result of a variation – *and I do not take that argument further here* – it is in my view beyond question that Mr Bewley is right that there is no power to increase the amount of child support maintenance above the amount identified as justified by one or more grounds for variation."

- (e) So, whilst Mr Commissioner Williams regarded it as beyond question that there was no power to *increase* child support maintenance above the amount identified as justified by one or more grounds for variation, he only regarded it as being arguable that there was power to *reduce* the amount of child support maintenance and did not take the argument further.
- (f) whilst it is correct that the regulations must be interpreted in a way that is consistent with the legislation as a whole, as was said in paragraph 47, the primary legislation in section 28F(6) of the CSA 1991 provides that, in determining whether or not to agree to a variation, the Secretary of State *shall comply* with regulations made under Part II of Schedule 4B. As noted above, the wording originally introduced into the CSA 1991 by the CSA 1995 arguably provided even more emphasis to this requirement by using: "*shall comply with provisions of regulations*".
- (g) **Cart** is the decision of a two-judge panel, by which a three-judge panel is not bound, see **IC v Poplar Housing Association** [2020] UKUT 182 (AAC) at paragraphs 58 to 63, **Commissioner of the Police of the Metropolis v**

IC & Rosenbaum [2021] UKUT 5 (AAC) at paragraph 32 and *JA v DBS* [2023] UKUT 204 (AAC) at paragraph 11.

197. Set against this, however, we recognise the force of the overarching point made by the Upper Tribunal at paragraphs 39 to 42 of *Cart* that no variation may be agreed save to the extent that it is just and equitable, a point which has been taken in the post-*Cart* decisions to which we turn below. There is clearly a tension between the need for a variation only to be permitted to the extent that it is just and equitable and the obligation to calculate the weekly value of an asset by applying a fixed rate of interest to the value of the asset and dividing it by 52.
198. As the Upper Tribunal explained in *Cart*, the rigid interpretation advanced by the SSWP risks operating contrary to the spirit of the general requirement that a variation should only be agreed if it is “just and equitable”. (see paragraph 39 of *Cart*). We find ourselves unable to agree with the submission in paragraph 31 of Mr Howell’s skeleton argument that the effect of his construction of the relevant legislation does not give rise to any harshness or absurdity. We consider that the concerns identified in *Cart* represent the potential practical outcomes of a rigid application of regulation 69A in the way Mr Howell invited it to be applied. It seems to us this is largely inevitable in a context that relies on, as Mr Howell argued it, a conclusion that regulation 69A “deems fiction as fact” and includes a “punitive element” as well as an element of “rough justice”.
199. We recognise the harsher potential outcomes for a non-resident parent indicated in that use of language might be ameliorated or removed by the SSWP or FTT concluding it is not just and equitable to agree to a variation in an individual case. This appears, however, to preclude the ability to give full effect to section 28E(2)(a) of the CSA 1991, which states one of the general principles relevant to determining whether to agree to a variation is that parents should be responsible for maintaining their children wherever they can afford to do so. Applying Mr Howell’s argument, if the SSWP, or an FTT, concludes the non-resident parent could afford to maintain their child or children with an assets variation using a lower interest rate than 8%, but not at 8% itself, the inevitable conclusion must be it is not just and equitable to agree to a variation at all. It is perhaps difficult to see how section 28(2)(a) is satisfied in those circumstances.
200. For completeness, we should add that we were not particularly persuaded by Mr Howell’s argument about statutory interpretation drawing on regulations 65(3)(l) and 68(3) of the CSMCRs 2012. One way to read those provisions is that they simply provide for excluding categories of special expense on specific bases. This is uncontroversial in itself in a context where regulation 69A provides for a list of what is included as an asset (regulation 69A(2) read with regulation 69A(1) and (5)) and then for exclusions from what would otherwise count as an asset (regulation 69A(4)). Those exclusions are not framed by reference to reasonableness, but in our assessment, this does not prevent them from operating in broadly the same way, albeit with the SSWP given

additional discretion over the exclusions in regulations 65 and 68 of the CSMCRs 2012.

*The Upper Tribunal's decisions post-**Cart***

201. As explained in paragraph 126 above, we asked Mr Howell why, if the SSWP's position was, and had always been, that **Cart** was wrongly decided, the SSWP had not challenged that decision when it was made. We also asked Mr Howell why the SSWP appeared to have gone further and actively *invited* the Upper Tribunal to apply **Cart** in subsequent decisions such as **PB**, **GL** and **NT** (again, see paragraph 126 above).
202. As to the substance of those cases, Judge Mesher in **PB** cited **Cart** and its rejection of the all or nothing approach and continued:

“21. That last principle has a number of important implications in the present case. In relation to the use of the 8% rate under regulation 18 of the Variations Regulations the Upper Tribunal in *RC v CMEC* said this in paragraph 40 of its decision, by way of an example of why the “all or nothing” approach to the just and equitable test had to be rejected:

“The regulations provide for attributing to [the non-resident] parent income at the judgment debt rate, which has not changed since 1993 and is currently 8 per cent. The all or nothing approach puts the Secretary of State in the unenviable position of either agreeing to a variation at that unrealistic and unattainable rate or agreeing to nothing. The effect is even starker if the no-resident parent has another child a new relationship. He is under a duty to maintain all his children and the welfare of all of them has to be considered. But on the all or nothing approach this can be achieved only if by chance it happens to be compatible with the maintenance calculation either remaining unaffected or being increased by the whole amount.”

22. While that example supports an argument for a departure from the 8% rate, three qualifications are necessary. First, the decision in *RC v CMEC* was signed on 1 April 2009, at which time the Bank of England base rate was 0.5%. Since the Upper Tribunal was raising the matter as a general illustration I see no reason to think that its intention was to refer to the situation obtaining at the time of the decision that had been under appeal to the appeal tribunal (it appears 2005 or 2006). Second, the example does not say anything about what sort of departure from the 8% rate would be justified in any particular circumstances. It is not to be taken as authority requiring the adoption of rates currently available to ordinary savers, eg from

banks and building societies, on lump sum investments, and still less as requiring the adoption of the Bank of England base rate. The context of the statutory scheme, as emphasised elsewhere in *RC v CMEC*, must be considered. When the judgment debt rate was set at 8% in 1993, the Bank of England base rate was 5.87% and I think that market savings rates were in the 5% range. It appears, therefore, that the 8% rate was not intended simply to reflect market returns, but also to produce a penalty for keeping beneficiaries of court orders out of their money and an incentive

not to do so. When the Variations Regulations were made (in fact in January 2001), the base rate was 6%. The intention at that time in adopting the statutory judgment debt rate must also have

incorporated an intention to provide an incentive to non-resident parents to utilise substantial capital assets for the support of qualifying children, not just by obtaining income from them, but by using other means to release resources from them, such as by borrowing against the security of the assets or by dipping into capital itself.

23. The third qualification is that regulation 18 covers assets of many different types, with different scope for producing resources that could be used for the maintenance of children. For instance, a property that is rented out could well produce a return on capital of 8% or more even when Bank of England base rate is very low. On the other hand, it may in the short term be rather difficult to extract resources from a property that is not in a location or in a condition for renting out, short of sale of the property or borrowing against its security (which, incidentally, would immediately have the beneficial effect for the parent concerned of reducing the value of the asset for the future because of the deduction under regulation 18(3)(a) of any amount owing on a mortgage or charge on an asset, subject to the amount of capital received counting as a new asset in itself until disposed of). Regulation 18, like so many parts of the child support scheme, involves some fairly rough justice, including the application of a standard figure to many different sorts of assets, thus reducing the need for time-consuming and expensive inquiries into the individual circumstances of particular assets once the exceptions in regulation 18(3) have been disposed of. It is then left to the “just and equitable” test to smooth off some of the rough edges, but without significantly changing the underlying shape.

24. Thus, in my judgment the existence of a disparity between the 8% rate and Bank of England base rate or readily available rates of interest on savings of a similar order to that in place in 1993 and early 2001 does not in itself supply a good

justification for departing from the effect on the non-resident parent's net weekly income prescribed by regulation 18. Translating that to the period relevant in the present case, I would say that that applies not just down to 8 October 2008, when base rate went down to 4.5%, but until immediately before 6 November 2008, when it went down to 3%. After then the fall to 0.5% was rapid, with a reduction each month until the final stage of 0.5% from 5 March 2009. I think that it is reasonable to look at the whole period from 6 November 2008 together. In relation to that period the disparity between 8% and what return could be achieved in the market on an investment of the sum involved is so large as to throw doubt on the application of the 8% rate. Taking a very broad view of the extent of the incentives built in to the adoption of the statutory judgment debt rate, I would be prepared in the present case (without seeking to suggest that the same approach should be taken in other cases) to adopt a figure of 4%.

25. However, it is necessary to consider the nature of the asset concerned. As suggested above, that could sometimes produce a judgment that use of the 8% rate was appropriate even when Bank of England base rate was very low. That is not so in the present case. The father has argued (see in particular his letter to the First-tier Tribunal dated 2 September 2010 (pages 67 and 68), his oral evidence to the tribunal of 13 October 2011 and his comments dated 25 May 2012 (pages 224 and 225)) that the house in France was not suitable for renting out commercially as a holiday home or for long-term accommodation, but was suitable for business purposes for storage or short-term accommodation for people taking part in field experiments during the summer months, as well as for short-term family use. In so far as the father was seeking to bring into account changes of circumstances after 31 March 2010, I come back to that in paragraphs 33 and 34 below. I see no reason to doubt his description of the house. In those circumstances I would be prepared to apply a small discount to what could be described as the ordinary incentive rate under the previous paragraph, to take them to 7% and 3.5% respectively."

203. In the next case, Judge Turnbull held in **GL**:

"41. However, it is still in my judgment necessary, under the just and equitable heading, to consider whether 8% is an appropriate interest rate to be using under reg. 18(5), having regard to all the circumstances, but in particular prevailing market conditions. The First-tier Tribunal further erred in law in not considering this. I note the approach and reasoning of Judge Mesher in *PB v SSWP* [2013] UKUT 0149 (AAC), to

which the Secretary of State has referred me. In my judgment it would not be just or equitable to apply a rate as high as 8% in order to determine the additional income to be added by reason of Mr L's ownership of the relevant assets. In my judgment it would be fair to apply an overall rate of 5%, in all the circumstances.

42. Applying the 5% rate to the above figures gives an additional income from assets of £10,800 per annum, or £207 per week. Mr L's total income on that basis was therefore £207 plus £116 = £323 per week. 15% of that gives £48 per week, which after deduction of one-seventh for shared care gives £41 per week. In my judgment that is the appropriate maintenance calculation."

204. For his part, Judge Rowland held in **NT** that:

"22. The simple point in this case is that the father had a share in the equity of property (excluding his home) and that share was worth some £375,000. The total equity was jointly owned with his mother but was not otherwise tied up. He was not being asked to pay 8% of that sum to support his children each year. He was being asked only to pay £144 pw (a figure based on his other income as well as those assets), which is only £7,488 pa and therefore less than 2% of the value of his relevant assets. I can see no reason why it would not be just and equitable for him to pay that sum; he could plainly raise it if he was minded to do so. On the contrary, it is clearly just and equitable for a variation to be made so that he must support his children at a realistic rate."

205. Having asked Mr Howell why the SSWP was resiling from the position he had previously taken about **Cart**, we did not receive any substantive answer to our questions. We were, frankly, puzzled by the submission that the SSWP had not previously given consideration to whether the analysis in **Cart** was correct but will proceed on the footing that the SSWP now wishes to correct the position previously decided in **Cart** as a matter of administrative practice. The reason why it had now become an issue that the SSWP was asking the Upper Tribunal to resolve (and one of such importance to the SSWP) remained opaque.

The Barras Principle

206. In paragraph 52 of **Centrica Overseas Holdings Ltd v Commissioners for His Majesty's Revenue and Customs** [2024] UKSC 25, Lady Simler confirmed the principle established in **Barras v Aberdeen Steam Trawling and Fishing Co Ltd** [1933] AC 402 applies in the following terms:

"...where Parliament re-enacts a statutory provision which has been the subject of authoritative judicial interpretation, the

court will readily infer that Parliament intended the re-enacted provision to bear the meaning that case law had already established.”

207. The **Barras** principle provides a presumption of what it is reasonable to assume Parliament intended. In **B v SSWP** [2005] EWCA Civ 929, Sedley LJ, in the Court of Appeal identified limits to the **Barras** principle, which he also described as the theory of legislative adoption (see paragraph 35 of that decision). He acknowledged it was rated no higher than a presumption. Sedley LJ also observed that counsel for B was entitled to rely on the repeated adoption of his construction by the specialist Social Security Commissioners who daily interpreted and applied the legislation in question, while observing the adoption of that construction had not been uniform in the reported Commissioners’ cases.
208. More recently, in **Wathen-Fayed v Secretary of State for Housing Communities and Local Government** [2025] UKSC 32, when setting out the particular principles of statutory interpretation relevant to the matter being considered, Lord Hamblen, with whom the rest of the Supreme Court agreed, stated:

“62. Fifthly, settled practice is relied upon as an aid to interpretation. Whether and if so, how, settled practice is relevant to statutory interpretation has not been authoritatively determined. The position is expressed as follows in Bennion, Bailey and Norbury in section 24.20(2):

“Where the meaning of a statute has been considered by the lower courts and business or other activities have been ordered on that basis for a significant period of time, the courts may be slow to overturn settled practice and understanding. However, the extent (if any) to which settled practice is relevant to interpretation is presently unclear.”

63. In *R (N) v Lewisham London Borough Council* [2014] UKSC 62; [2015] AC 1259 Lord Carnwath expressed the view that settled practice may be a legitimate aid to statutory interpretation. At para 95 he stated:

“...settled practice may, in appropriate circumstances, be a legitimate aid to statutory interpretation. Where the statute is ambiguous, but it has been the subject of authoritative interpretation in the lower courts, and where businesses or activities, public or private, have reasonably been ordered on that basis for a significant period without serious problems or injustice, there should be a strong presumption against overturning that settled practice in the higher courts.”

64. In so stating he was reflecting views he had earlier expressed in *Isle of Anglesey County Council v Welsh Ministers* [2009] EWCA Civ 94; [2010] QB 163, para 43.

65. In *R (N)* Lord Hodge stated that in his view settled practice may be relied upon “where there is ambiguity in a statutory provision” (para 53). In their dissenting judgments, however, both Lord Neuberger of Abbotsbury (para 148) and Baroness Hale of Richmond (para 168) expressed strong reservations about whether there is a settled practice or customary meaning principle or rule. As Lord Neuberger stated at para 148:

“...a court should not lightly decide that a statute has a meaning which is different from that which the court believes that it has. Indeed, so to decide could be said to be a breach of the fundamental duty of the court to give effect to the will of Parliament as expressed in the statute.”

66. For reasons which are apparent below, this is not an appropriate case to address what amounts to settled practice and its relevance to statutory interpretation. If there is such a principle, there is much to be said for the view that its relevance is limited to providing evidence that the statutory words are capable of conveying the settled meaning and that that meaning is workable in practice – see D Bailey, “Settled Practice in Statutory Interpretation” (2022) 81 CLJ 28.”

209. We have considered the **Barras** principle, given that following the decision in **Cart**, the Upper Tribunal has applied a consistent meaning to section 28F of the CSA 1991 and how assets variations may be applied under regulation 18 of the Variation Regulations 2000. The relevant provisions of regulation 18, which are in paragraphs (5) and (6) were, to all extents material, replicated in regulation 69A(7) and (8) of the CSMCRs 2012, as we observed to Mr Howell during the hearing.
210. Furthermore, the Secretary of State, who has been the one party consistently participating in all the Upper Tribunal appeals listed at paragraph 126 above, invited the Upper Tribunal to apply the position set out in **Cart**, when dealing with other appeals abouts assets variations, involving the question of applying a flat rate of 8% or something else.
211. We have also taken into account that paragraph 25 of the 2018 Response states the use of the 8% figure to calculate a notional income from assets: “*was also subject to scrutiny by tribunal and upheld*”. While Mr Howell told us it was unclear what this wording meant, our assessment is this wording appears to acknowledge, and rely on, the case law decided by the Upper Tribunal. The scrutiny by the Upper Tribunal cannot be seen as excluding what was established by **Cart**, and followed, including at the SSWP’s invitation, in subsequent Upper Tribunal cases. Nor was Mr Howell able to identify

alternative case law that the 2018 Response could have had in mind, especially given it used the word “tribunal” rather than “the courts” or “legal scrutiny”.

212. We do not agree with Mr Howell’s submission that the **Barras** principle could only be relevant to the wording of the relevant provisions in the CSA 1991 (which had not changed). We have taken into account that the amendment introduced into the CSMCRs 2012 used wording that in material respects, was identical to the wording in the Variation Regulations 2000 that had been the subject of a number of Upper Tribunal decisions including, and applying, **Cart**. As explained above we consider it is likely that paragraph 25 of the 2018 Consultation Response was relying on the case law of, and following, **Cart**, as an endorsement of using 8% as the statutory rate. Such an endorsement would have to acknowledge the upholding by tribunal was “up to 8%”, not “at 8% only”. To rely on **Cart** and the successive case law in any other way would not reflect what had been upheld by the Upper Tribunal and therefore would have been misleading.
213. We do, however, take into account Lord Hamblen’s observation that a consistent past approach, on which individuals and bodies have based their actions in practice, may simply provide evidence that a proposed statutory interpretation is workable in practice by reference to a settled basis of interpreting it in that way.

Departing from long-established authority

214. As set out above, we have concluded that had there been no authorities addressing this issue, we would prefer the SSWP’s interpretation of s.28F(6) and paragraph 5(2) of Schedule 4B to the CSA 1991 and regulation 69A(7) to (8) of the CSMCRs 2012. In our view they tend to indicate Parliament provided an ‘all or nothing’ discretion to make a regulation 69A variation based upon a notional deemed income of 8% of the value of the asset where it would be just and equitable to do so. In our view, they do not tend to indicate Parliament provided a discretion to agree to a variation of a lesser amount. In the context of this case, our conclusion is not material to the appeals, first because we are allowing them on other grounds and second, because the FTT did not agree to a variation at a rate other than the statutory rate of 8%. We have expressed our view on the issue only because we have been convened as a three-judge panel to hear these appeals.
215. Further, we would only depart from the decision in **Cart**, the judgment of an Upper Tribunal of coordinate jurisdiction, if we considered it to be wrong. The Upper Tribunal may only depart from its own previous decisions where it is satisfied that the earlier decision is “wrong”. This principle is extracted from the Upper Tribunal decision in **Secretary of State for Justice v RB** [2010] UKUT 454, which confirmed the basis on which the Upper Tribunal is able to depart from previous decisions of the High Court. See [40]:

“40. On the other hand, for the reasons given below, it seems to us equally clear that where the Upper Tribunal is exercising a

jurisdiction formerly exercised by the High Court, it need not regard itself as formally bound by the decisions of the High Court. Subject to one qualification, we think the position should be the same as with the High Court as dealing with decisions of co-ordinate jurisdiction: “That you will follow the decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity ...”

216. This approach has been confirmed subsequently in *HMRC v Noor* [2013] UKUT 071 (TCC) and *Gilchrist v Revenue and Customs* [2014] UKUT 169 (TCC) at [92] to [94]:

“92. In applying this approach, and the approach of the Court of Appeal in *Social Security Commissioners v Leary* in the passage cited by Carnwath LJ, it may be noted that the appellate jurisdiction of the Upper Tribunal in tax matters, which accounts for the great majority of its tax cases, was previously exercised by the High Court on appeal from the Special or General Commissioners. High Court Judges continue to sit regularly in the Tax and Chancery Chamber of the Upper Tribunal. Although of course conceptually possible, it would be surprising if a decision of a High Court Judge sitting in the High Court would be binding on a High Court Judge sitting in the Upper Tribunal but not if sitting in the High Court.

93. *RB* was applied in *HMRC v Noor* [2013] UKUT 071 (TCC) in which Warren J and Judge Colin Bishopp (sitting in the Tax and Chancery Chamber of the Upper Tribunal) departed from the decision of Sales J sitting in the High Court in *Oxfam v HMRC* [2010] STC 686. They held that they were not bound by his decision and should not follow it.

94. Leaving aside any effect of *Cart*, it follows that the Upper Tribunal may depart from a decision of the High Court, if the Upper Tribunal is “convinced” (using the language at paragraph 40 of *RB*) or “satisfied” (using the language at paragraph 47 of *RB*) “... that [the High Court decision] is wrong.” We do not consider that there is any difference between “convinced” and “satisfied” in this context.”

217. This threshold would apply equally in respect of an Upper Tribunal departing from previous decisions of the Upper Tribunal (whether or not a High Court judge was part of the panel deciding the previous or new case or whether the panel consisted of one or more Upper Tribunal judges). In *Noor* the threshold was referred to as “plainly wrong” but we are satisfied there is no material difference.
218. Applying these principles, we are not prepared to go so far as decide that *Cart* was wrongly decided and should no longer be followed by the FTT. That conclusion would represent a high threshold, which we are not satisfied has

been met. In reaching this assessment, we take into account considerations of **Barras** and the limited principle of settled interpretation based on consistent past interpretation. There has been a long history, applied consistently across a range of Upper Tribunal decisions, of interpreting section 28F of the CSA 1991 as allowing for an assets variation to be agreed at a rate lower than 8%. Individuals and bodies, including the SSWP, have based their actions in practice on that approach.

219. We therefore make clear that the FTT should continue to apply **Cart** when considering regulation 69A variations. This is out of respect, not simply for judicial comity, including the distinguished constitution of that panel (including the former Senior President of Tribunals), but also for the fact that its construction of the provisions is tenable for the reasons it gave. Should the SSWP now wish to challenge the correctness or applicability of **Cart** it should do so before the Court of Appeal.

Sale of PB's home or raising equity against it

220. In paragraph 40 of its Statement of Reasons, the FTT found that PB had confirmed in his oral evidence that he had substantial equity in his home, which he had purchased from his father. At the time of the purchase in 2020, the deposit was said to be £300,000 against a purchase price of £460,000. The FTT considered that, as an alternative to selling his shares, PB would have been able to leverage that equity in order to meet his child maintenance liability.
221. Ms de Navarro submitted, correctly, that regulation 69A(4)(f) excludes equity in a non-resident parent's home being treated as an asset for the purpose of agreeing a variation. We do not, however, her argument that the FTT had undermined that principle by deciding that while PB said his shareholding was illiquid, he could release equity through remortgaging his home. That approach does not treat PB's home as an asset by the back door, as Ms de Navarro sought to argue.
222. The CSMCRs 2012 set out specific exclusions from what can be taken into account in deciding whether it is just and equitable to agree to a variation (regulation 60) or which assets can be the subject of a variation under regulation 69A (regulation 69A(4)). There is nothing in regulation 60 that precluded the FTT from taking into account that PB could release equity through mortgaging his home.
223. As Mr Howell correctly submitted, the regulation 69A(4)(f) exclusion is only engaged where the asset is a legal or beneficial interest in land. It does not apply where the asset being valued is shares. At the stage of applying the just and equitable test under section 28F(1)(b), nothing precluded the FTT from taking into account how PB might meet the additional amount of child maintenance liability created by agreeing to an assets variation under regulation 69A. Paragraph 69A(4) provides that paragraph (1) does not apply in the case of any asset which falls within the five listed sub-paragraphs. It is only if one of those five sub-paragraphs is applicable that the asset in question

is excluded from the valuation process under regulation 69A. There is no scope for expanding that excluded category of assets by arguing for exclusions in allegedly analogous cases.

The scope for PB selling his shares

224. In the absence of the hearing recording and having heard Ms de Navarro's stated position on what was discussed during the hearing, we accept the FTT did not ask PB during the hearing whether he would be able to sell his shareholding to his parents. We take into account that paragraph 38 of the statement of reasons sets out reasoning by reference to what the FTT considered PB could do in hypothetical terms, without reference to what he said he could do (and the FTT's assessment of whether that was likely to be the case). The FTT cited one example of flexibility in support of its analysis, namely PB taking a director's loan to purchase a car and his salary increasing to cover it. It did so, however, without confirming this example was put to PB for comment.
225. Mr Howell argued there were other examples of flexibility in PB's remuneration in the evidence and the FTT had not suggested the one example it used was exhaustive, even if it did not cite others. Mr Howell also argued that we had to decide whether it was irrational for the FTT to decide that PB could sell his shareholding to his parents and the threshold for this is very high.
226. We do not, however, agree with Mr Howell that the only scope for an error of law on this issue would be irrationality in the FTT's findings of fact. In our assessment, the essential difficulty with the FTT's approach was that it failed to invite PB to provide comments or evidence before it concluded he could dispose of his shares (and in a particular way). This was relevant to the statutory test the FTT had to apply of whether it was just and equitable to agree to an assets variation under regulation 69A. The FTT did not, of course, have to accept any evidence or comments PB provided about whether this was likely or even feasible. However, as a matter of procedural fairness, the FTT should have invited PB's observations about what it was theorising.
227. Alternatively, the FTT's reasoning on this issue is inadequate, because it cites one example of PB's parents showing him flexibility of approach in how he was remunerated, applying that flexibility to a different context that does not obviously support the conclusion the FTT reached. Increasing a person's salary to allow them to pay off a loan for a car represents flexible remuneration. It is not, however, axiomatic that this flexibility would extend to purchasing a shareholding the FTT had valued at over £100,000 (Company M) and over £1,500,000 (Company S).
228. While we have decided the FTT made these errors of law, we have, however, decided they are not material to its decisions. This is because as part of its reasoning about whether it was just and equitable to agree to the assets variation, the FTT expressly decided that as an alternative to selling his shares,

PB would have been able to leverage the equity in his home (paragraph 40 of Statement of Reasons). As explained above, we consider it was open to the FTT to conclude that PB could raise sums in that way. This makes any error of law about PB selling his shares, not one material to the outcome of the appeals.

PB's argument about double counting

229. As to the issue of double counting, the FTT dealt with that in paragraph 37 of its statement of reasons. Ms de Navarro argued that ascribing notional income to the shareholdings would not be just and equitable as it would result in double counting, since PB already received an income from the group in the form of his salary. The FTT rejected that argument on the basis that PB's salary was remuneration for his employment. That remuneration was separate from any investment which he held within the group. In addition, as no dividends had been declared in respect of his shareholdings, there had been no variation for unearned income. Had there been a dividend declared and a variation for unearned income applied, then there might have been a risk of double counting, but that was not the case at the effective dates of any of the decisions under appeal.
230. In our judgment, the FTT was entitled to take the approach that it did. The evidence before it was that PB was remunerated by the subsidiary company, and this remuneration was separate from his shareholding. The FTT was well aware of the potential for double counting, for example, if a variation under regulation 69A been made in the case of shares which were already producing dividend income taken into account under regulation 69. We are satisfied the FTT directed itself properly in law.
231. Ms de Navarro accepted, as we find she must, that her argument about double counting was not one of strict form and law, because PB did not draw dividends from his shareholdings. Ms de Navarro argued one should look past this and consider the matter as one of substance over form; PB was employed by the business and draws salaried income from it but could not control how he took that income. She submitted that, if PB's father had decided to declare a dividend of £10,000, it would count as unearned income for PB, and the shareholding would not be treated as an asset under regulation 69A. That argument relies, however, on PB's father taking a step he did not take. No dividends were declared and the FTT found as a fact that the remuneration was separate from the shareholding. This argument therefore falls at the outset.
232. For the sake of completeness, we should add that Ms de Navarro confirmed she was not arguing the shareholding should be exempted under regulation 69A(4)(b) (assets used in the course of the non-resident parent's business). That concession was rightly made. Regulation 69A(4)(b) applies to property used in the course of the trade or business carried on by a non-resident parent in his own right (i.e. as a sole trader). It does not apply to a trade or business being carried on by another person (such as his employer company). In any event the FTT found that PB's shares were not being used for the purposes of

the trade or business of either the subsidiary or the parent company. It was entitled to reach that finding on the evidence before it.

The money in PB's bank account

233. There is a further error of law in the decisions of the FTT in that it did not deal with the issue of the money in PB's bank account. This emerged from the submissions of CB. When she spoke with us, CB confirmed that, although the Statement of Reasons did not refer to the FTT having considered cash assets, she had made arguments to the FTT that they should be taken into account, including the £100,010 deposit PB's father had made into PB's bank account on 28 June 2021 (which was marked as a gift). Her submission was that, while Ms de Navarro had argued PB's salary was only £57,000, that was incorrect and it had not been at that rate for some time. CB argued that in 2021, PB had received a payment of £100,010 of his inheritance, and she assumed that having those funds in his bank explained why he did not earn so much that year.
234. The FTT failed to deal with the issue of the cash assets at all. It was an issue between CB and PB in the appeals and it needed to be addressed in the FTT's decisions. Given the size of the amounts in question, which should have triggered consideration under regulation 69A, this was a further error of law on the FTT's part. We take particular account of the fact that the FTT has not expressly acknowledged the arguments CB put forward or explained why it decided it did not need to address them. It may be that the FTT decided that its conclusion on the value of PB's shareholding took him beyond the maximum weekly threshold and the relevance of his cash assets fell away. However, we cannot conclude that this was the FTT's reasoning given it has not addressed this matter at all. We therefore find it made a material error of law in failing to provide adequate reasons to support its decision on an issue in the appeals, namely whether PB had cash assets that fell to be taken into account under regulation 69A and whether it was just and equitable to agree to such a variation.
235. Again, we have considered whether it is open to us to remake the FTT's decisions in relation to the cash assets but are satisfied the appropriate course of action is to remit the matter to a fact-finding tribunal which will hear evidence from all parties on the issue.

Conclusion

236. For these reasons, the decision of the Upper Tribunal is to allow the appeals. The decision of the First-tier Tribunal in each appeal involved errors of law that were material.
237. Under section 12(2)(a), (b)(i) and (3) of the Tribunals Courts and Enforcement Act 2007, we set those decisions aside and remit the cases to be reconsidered by a new Tribunal in accordance with the following directions:

- (a) The appeals are remitted to the FTT for consideration at an oral hearing.
- (b) The new Tribunal should not involve any of the Tribunal panel members previously involved in considering these appeals on 12 October 2023.
- (c) The new Tribunal must not take into account circumstances that did not apply at the time of the original decisions by the Secretary of State under appeal (06 October 2021, 22 April 2022 and 23 May 2022). Later evidence can be considered if it relates to the circumstances at the time of that decision: see *R(DLA) 2/01* and *R(DLA) 3/01*.
- (d) The Tribunal hearing the remitted appeals is not bound in any way by the decision of the previous Tribunal. Depending on the findings of fact it makes, the new Tribunal may reach the same or a different outcome from the previous Tribunal.
- (e) Copies of this decision and the written submissions provided by each party to the Upper Tribunal shall be added to the appeal bundles and placed before the First-tier Tribunal hearing the remitted appeals.
- (f) These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber.

Mark West
Rupert Jones
Judith Butler
Judges of the Upper Tribunal

Authorised by the Judges for issue on 06 February 2026