DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeals by the Secretary of State.

The decision of the London Fox Court First-tier Tribunal dated December 4, 2015 under file references SC242/15/03746 and SC242/15/03748 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is in a position to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> (1) *The claimant's appeal against the Secretary of State's entitlement decision dated January 19, 2015 is dismissed.*
>
> *The claimant is not entitled to income-related employment and support allowance (ESA) from February 28, 2013 because he possessed capital in excess of the prescribed upper limits. As a result the claimant has been overpaid income-related ESA.*
>
> (2) *The claimant's appeal against the Secretary of State's overpayment decision dated January 22, 2015 is dismissed.*
>
> *On February 28, 2013, the claimant misrepresented a material fact, namely the value of his capital, and is accordingly liable to repay an income-related ESA overpayment in the sum of £5,033.34 for the period from March 3, 2013 to January 21, 2015 (both dates included) which would not have been paid but for the misrepresentation.*
>
> *The Secretary of State's attention is drawn, as regards the exercise of his discretion to recover the overpayment, to the observations in paragraphs 68-74 of the Upper Tribunal's reasons.*

This decision is given under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction and summary of the Upper Tribunal's decision

1. This case concerns what are technically two appeals by the Secretary of State against a combined decision of the First-tier Tribunal ("the Tribunal"). To avoid any confusion I refer in this decision to the Respondent in these Upper Tribunal proceedings as simply "the claimant". There has been no request for an oral hearing of this case. I am also satisfied the matter can be dealt with fairly and justly without an oral hearing, the issues having been extensively canvassed in the written submissions. I conclude that the Tribunal's decision involves an error on a point of law. For that reason I allow the Secretary of State's appeals and set aside the Tribunal's decision.

2. I must make it clear at the very outset that nobody doubts the claimant's honesty in this case. Rather, the appeal concerns the legal consequences of certain facts which are not in dispute.

3. By way of context, I also recognise that, leaving aside the present social security appeals, the claimant has had the misfortune to be involved in a series of protracted court proceedings, relating to building defects in his apartment, and to employment tribunal proceedings concerning his dismissal from his previous job. He has also had the further misfortune to suffer from severe mental health problems, which have doubtless been aggravated by all these various legal proceedings.

4. In summary, the claimant was in receipt of both contributory and income-related employment and support allowance (ESA). At the time in question he had capital (in a Newcastle Building Society fixed rate bond) well in excess of the upper limit of £16,000. As the Tribunal found, and as is not in dispute, the claimant did not tell the Department for Work and Pensions (DWP) about that capital "because these funds were earmarked to pay for costs in civil litigation in which he had been involved and in which he had been unsuccessful" (statement of reasons at [4]). I repeat, again, there has been no suggestion of fraud.

5. In these appeals the Tribunal concluded that the claimant's omission to inform the DWP "was not a failure to disclose a material fact because the funds in his Newcastle account were not material to his application because they were 'in trust' for the court ordered costs to be paid" (statement of reasons at [19]). For the reasons that follow, the Tribunal erred in law in arriving at that decision.

The appeals before the First-tier Tribunal

6. The Tribunal was faced with two appeals by the claimant.

7. The first appeal was against the entitlement decision dated January 19, 2015. This was to the effect that the claimant was not entitled to income-related ESA from February 28, 2013 until January 18, 2015 as he had capital over the prescribed limit of £16,000.

8. The second appeal was against the overpayment decision dated January 22, 2015. This was to the effect that he had misrepresented a material fact, namely the value of his capital, and he was accordingly liable to repay an income-related ESA overpayment in the sum of £5,033.34 for the period from March 3, 2013 to January 21, 2015.

The background to these appeals

9. The appeals have a complex factual background which I can only summarise here in the following chronology.

10. On November 11, 2011, the Central London County Court entered judgment against the claimant in proceedings relating to his apartment brought against him by a firm of chartered surveyors (presumably his landlord's or the developers' managing agents and so for convenience simply "the developers" from now on).

11. On February 10, 2012, the Central London County Court ordered that the claimant pay the developers the sum of £1,630.31 in damages with (at that stage unspecified) costs to be assessed. The damages were paid immediately. During negotiations the claimant was given to understand that the total costs were likely to be in the order of £70,000.

12. On December 19, 2012 the Central London County Court issued a charging order in relation to the claimant's apartment.

13. On February 28, 2013, and shortly after being dismissed from his employment, the claimant applied for ESA. He declared savings of just over £11,000 in ISAs and so the income-related element of his ESA was awarded subject to the tariff income rule. He did not declare the Newcastle Building Society fixed rate bond, the account for which was in credit by some £50,000.

14. On June 19, 2013 the Central London County Court issued a final charging order that the claimant's property be charged in the sum of £11,068 (being the sum owed under the judgment of November 11, 2011) plus £3,000 in assessed costs. The claimant paid this sum immediately and informed the DWP that he had used his savings in two ISA accounts to pay that debt.

15. On July 18, 2013 a DWP decision-maker decided that the claimant had no choice but to use his capital to meet the court debt (i.e. to discharge the final charging order) and so he had not deprived himself of the capital in the ISA accounts for the purpose of increasing his entitlement to income-related ESA.

16. On August 28, 2013 the solicitors for the developers or managing agents duly acknowledged receipt of payment in full of the sum of £11,068 plus £3,000 in costs (after allowing for some funds held on account) and confirmed that they would apply for the relevant charge to be removed from the Land Registry.

17. On January 9, 2014 the Central London County Court issued a default costs certificate to the effect that the claimant was liable to pay the total sum of £48,768.27 in costs, payable within 14 days. As the claimant's funds were tied up in the fixed rate bond, his brother-in-law paid the sum in question by cheque on his behalf, effectively by way of an informal loan, pending an application to have the costs order set aside.

18. On August 14, 2014 the developers agreed to reduce the premium on a lease for the right to use car parking and storage space from £10,000 to £3,650, the difference of £6,350 representing the costs incurred by the claimant "for alternative accommodation and subsistence as a result of works undertaken to the apartment".

19. On December 12, 2014 the Central London County Court refused to set aside the costs order. Also in December 2014 the DWP learnt that the claimant had the fixed rate bond with the Newcastle Building Society with an account credit balance of just over £75,000. On January 8, 2015 (or thereabouts) a DWP Investigating Officer

suspended payment of the claimant's ESA. The official very reasonably decided not to interview the claimant formally under caution, given the claimant's mental health difficulties, and dealt with the matter informally.

20. The claimant explained that just over £66,000 of the funds in the Newcastle Building Society fixed rate bond were already accounted for, including the repayment of the loan to his brother-in-law as well as other legal costs. The claimant also explained that he had to give 120 days' notice to access the funds in question, with no possibility of early redemption at a penalty. He accepted that he might have to pay back tariff income on the funds held in excess of £6,000. The officer essentially accepted that account (stating in his memorandum that "I sought advice from my manager and the decision makers who stated that money that is subject to a court order is disregarded") and referred the file to a decision-maker for a formal decision.

21. On January 19, 2015 a decision maker made the entitlement decision summarised at paragraph 7 above. He accepted the facts as set out in the Investigating Officer's report but concluded that "until evidence is provided that he has repaid his brother-in-law the capital held is what is within the evidence provided as per schedule". In other words, the claimant was seen as owning excess capital throughout the period in question.

22. On January 22, 2015 a decision maker made the overpayment decision summarised at paragraph 8 above.

23. On January 29, 2015 the claimant asked for a mandatory reconsideration, explaining again that the funds were held pending finalisation of the court proceedings to meet the costs for which he was liable.

24. On April 27, 2015 a different decision maker declined to revise the decision of January 19, 2015 as "you have not actually provided evidence that you have spent the capital in question". A mandatory reconsideration notice to that effect was sent on May 1, 2015.

25. On May 6, 2015 the claimant sent in further evidence. He added that he had not previously repaid his brother-in-law or settled his other debts as he was awaiting the expiry of the notice period on the account. He produced evidence that he had in fact since (in March 2015) both repaid his brother-in-law and settled a costs bill (£4,946.90) for the court hearing (on December 12, 2014). He calculated that he had just over £8,000 left from the Newcastle Building Society funds.

26. On June 2, 2015 a decision-maker reviewed the further evidence but confirmed the decision under challenge. The claimant appealed.

27. The DWP reviewed the evidence again and in its submission to the Tribunal proposed a new draft revised decision, dated June 18, 2015, although the outcome remained the same. The proposed decision was explained by the submission-writer in these terms in the final paragraph of the response to the appeal:

> "I submit that the bank statements show that [the claimant] had capital in excess of £16,000.00 for the period from 28.02.13 to 21.01.15 that he did not declare. For the period from 28.02.13 to 08.01.14 this capital was available to [the claimant] on application as there was no enforceable order on the capital. I accept that from 09.01.14 the £48,768.27 held in [the claimant's] account can be disregarded as it was held in trust on behalf of [the brother-in-law] who paid an enforceable order on [the claimant's] behalf. I submit that the capital paid to [the

> claimant] from his landlord of £6,350 can also be disregarded for 26 weeks as it was paid for damage to or loss of his home. I submit that even after all relevant disregards [the claimant] had capital in excess of the upper capital limit for the period from 28.02.13 to 21.01.15 and therefore [the claimant] is not entitled to Employment and Support Allowance Income related for this period".

28. The building society account statements show that the credit balance was nearly £53,000 until July 2013, when it increased to nearly £74,000. The balance then remained in the range between £73,000 and £76,000 until March 2015, when the series of payments outlined above brought the account balance down to £9,815.77. In summary, by the time of the Tribunal hearing the DWP's case was that the claimant had non-disregarded capital of £24,954.42 from January 15, 2014 (the date on which his brother-in-law paid the largest costs bill) falling to £20,041.72 from August 13, 2014 (the date he was credited with the lump sum by the developers). The DWP further concluded that the claimant only fell within the prescribed capital limit of £16,000 as from March 25, 2015. So, even with these adjustments in the claimant's favour, the DWP's case remained that he was over the capital limit throughout the relevant period of almost two years from February 28, 2013 to January 21, 2015.

29. In a further written submission to the Tribunal, the claimant argued that he had done the responsible thing by earmarking the Newcastle Building Society funds to pay his debts, predominantly the court costs for which he was liable, which had, as noted above, originally been estimated to be in the region of £70,000. His main contention was that his liability to pay costs was certain and immediate as from the date of the February 10, 2012 court order, even if in the event it took some time to finalise the precise figure for that liability. He argued in the alternative that any overpayment liability could not start as early as the date of claim in February 2013, as the earliest date he could have accessed the building society funds, having given the relevant notice, was with effect from July 1, 2013. The claimant developed those arguments in the hearing at the Tribunal on December 4, 2015.

The First-tier Tribunal's decision

30. The First-tier Tribunal allowed both of the claimant's appeals and so set aside the decisions of January 19 and 22, 2015. The Tribunal summarised its own decision as follows on its decision notice:

> "Having considered the totality of the evidence before me I am satisfied that the funds held by the appellant in the Newcastle Building Society were funds whose primary purpose was to pay the legal costs awarded against the appellant in the judgement made at the Central London County Court on 10 February 2012. I am therefore satisfied that this money should be disregarded for the purpose of calculating the appellant's capital in respect of his claim for ESA for the period 28/2/13-21/01/15. I am not persuaded that the appellant misrepresented a material fact to the respondent in his ESA application and consequently I find that he has not been overpaid ESA."

31. The Tribunal then produced a statement of reasons at the request of the Secretary of State. Having rehearsed the main points of the history of the matter, the Tribunal gave its reasons for its decision. It accepted at the outset that the claimant was a credible and reliable witness, and noted that at the hearing the presenting officer had not sought to challenge his credibility, but rather argued that the claimant should have disclosed the capital in question and let the DWP decide how much was relevant. The Tribunal gave three reasons for its conclusions.

32. The first was that when the claimant applied for ESA in February 2013 he was already subject to the February 2012 costs order, albeit that the level of costs had yet to be determined. Moreover "in his mind the funds in his Newcastle account were set aside for the paying of such" costs and therefore "the funds available to the appellant in his Newcastle account should be disregarded in assessing his capital for the purpose of his ESA claim" (at [17]). This led to the conclusion at [19], cited in paragraph 5 above. The Tribunal added that the full amount of the funds in the Newcastle fixed rate bond had to be disregarded until the claimant's final costs liability was determined in December 2014.

33. The second reason was that the DWP had acknowledged the claimant had several other debts which were not reflected in the schedule. The Tribunal found that the combination of these concerns meant it was probable that the claimant did not hold capital above the prescribed limit after December 2014 (statement of reasons at [21]).

34. The third reason, the Tribunal found, was that the funds were subject to 120 days' notice and so "they cannot therefore be said to be funds available to the appellant at that time" (statement of reasons at [22]).

The Secretary of State's application for permission to appeal

35. The Secretary of State applied for permission to appeal to the Upper Tribunal. His representative's argument was that the Tribunal had erred in law by failing to decide the appeals in line with the legal principles affirmed by the Court of Appeal in *Chief Adjudication Officer v Leeves* (reported as R(IS) 5/99). The Secretary of State acknowledged that the claimant had been acting prudently but argued that "it was only with the demand of 9 January 2014 (page 88 [i.e. the default costs certificate]) that the claimant came under an 'obligation of immediate repayment'". Until that date, "the claimant retained a 'proprietary right in the monies and no fiduciary obligation had been created' (paragraph 1 of Court of Appeal's judgement in *Leeves*) in respect of the savings in excess of £16,000". The Tribunal, it was argued, had accordingly erred in apparently holding that the funds in the Newcastle fixed rate bond account were somehow impressed with a constructive trust.

36. A District Tribunal Judge gave the Secretary of State permission to appeal, summing up his understanding of the legal position as follows:

> "… the Tribunal should have upheld the Secretary of State's decision and decided that all the disputed funds were [the claimant's] capital for the purposes of ESA until he actually paid them to discharge the sums due under the judgment. It should then have decided that the resulting overpayment was recoverable from him by virtue of the clear misrepresentation of fact [the claimant] made when he claimed."

37. In doing so, the District Tribunal Judge set out the general principle that a claimant's liabilities are not deducted from his capital when those assets are assessed for the purpose of means-tested benefits (see Commissioner's decision R(SB) 2/83 at paragraph 14). He further identified three exceptions to that general rule.

38. The first is the statutory requirement to deduct 10% if there would be expenses attributable to any sale (see Employment and Support Allowance Regulations 2008 (SI 2008/ 794), regulation 113(a)).

39. The second is that "the amount of any incumbrance secured" on the capital asset must be deducted (regulation 113(b)).

40. The third is the principle in *Chief Adjudication Officer v Leeves*; however, the effect of that exception was to prevent money that a person was under an immediate and certain liability to repay from becoming the person's capital in the first place. The District Tribunal Judge drew attention in that context to the decision of Mr Commissioner (now Upper Tribunal Judge) Jacobs in CIS/2287/2008.

41. Notwithstanding his certainty that the Tribunal had erred in law, the District Tribunal Judge raised a number of further actual or hypothetical questions on which the guidance of the Upper Tribunal was sought and accordingly gave permission to appeal.

42. The Secretary of State and the claimant have made a number of further written submissions on the matter. There has been no request for an oral hearing of the appeals and I am satisfied the case can be decided fairly without one.

The Upper Tribunal's analysis

Introduction

43. I must start by reiterating that nobody has called into question the claimant's probity. The claimant, perhaps understandably, is concerned that he has been accused of dishonesty or fraud. He has not. The Secretary of State has certainly at various stages referred to the claimant having made a misrepresentation about his capital assets when first claiming ESA. While in everyday parlance "misrepresentation" may carry connotations of dishonesty or fraud, it does not do so in legal terms, at least in the context of section 71 of the Social Security Administration Act 1992. It is well established that a misrepresentation under section 71 may be entirely innocent: see the Court of Appeal's decision in *Page and Davis v Chief Adjudication Officer*, reported as an appendix to Commissioner's decision R(SB) 2/92. A misrepresentation is simply a statement which is untrue, for whatever reason, good, bad or indifferent. In the present case the claimant, when making his ESA claim, declared his savings to be in the order of £11,000. He did not mention that he had the Newcastle Building Society fixed rate bond (albeit that had been earmarked for a particular purpose). If the Secretary of State is right about the nature of that asset, then a statement on his claim form that his capital amounted to £11,000 was a misrepresentation, albeit one made with no intention to deceive.

44. I also recognise that the claimant and indeed the Tribunal were not assisted in this case by the various divergent approaches taken by DWP staff at different stages of this case as to the proper analysis of the claimant's funds and liabilities in question. In particular, DWP officials demonstrated at best a shaky understanding of both trusts law and the legal principles to be derived from the case of *Chief Adjudication Officer v Leeves*. These are, of course, not straightforward matters.

The principle in Commissioners' decision R(SB) 2/83

45. The starting point here must be the fundamental principle recognised by the District Tribunal Judge when giving permission to appeal, along with the three exceptions to that general rule. In R(SB) 2/83, decided at a time when the capital limit was £2,000, the claimant had just over £2,000 in a building society account. He also produced a letter from his accountant confirming that the claimant's tax liabilities were in the order of £2,000. The claimant argued that liability should be deducted when computing his capital resources. The Department's argument was that "If a claimant had assets in excess of £2,000, but liabilities, which if paid, would diminish his assets below the £2,000 figure, then his remedy was to discharge his

indebtedness, at least to the extent necessary to bring his resources below this statutory limit" (R(SB) 2/83 at paragraph 12).

46. A Tribunal of three Social Security Commissioners readily acknowledged the force of the claimant's argument: "in the commercial world it would be regarded as the height of folly for anyone to compute his assets without taking into account his liabilities. … Moreover, if the man in the street were asked what his capital resources were, he would, in our judgment, have regard to his net worth and not to any artificial figure which takes no account of his liabilities. Accordingly, it is something of an affront to commonsense to construe 'capital resources' without regard to liabilities" (at paragraph 12).

47. Despite those reservations, the Department's case prevailed in R(SB) 2/83. The Tribunal of Commissioners took particular note of the statutory predecessor of what is now regulation 49 of the Income Support (General) Regulations 1987 and regulation 113 of the Employment and Support Allowance Regulations 2008, i.e. the provision allowing for the deductions of 10% for the expenses of sale and of any secured incumbrance. Given those express exceptions, there was nothing in the legislation to suggest that capital meant other than gross capital resources. Thus, "the draftsman had considered the question of indebtedness and had provided for deduction only in the circumstances mentioned in regulation 5(a)(ii)" (i.e. what is now regulation 49(b) of the 1987 Regulations and regulation 113(b) of the 2008 Regulations). It followed that capital resources meant the claimant's gross assets, not his net assets, and so the claimant's indebtedness to the Inland Revenue could not be deducted (at paragraphs 13 and 14).

48. The default position, therefore, in this case likewise was that the £75,000 or so in the fixed rate bond all counted as the Appellant's capital. Neither of the statutory exceptions in regulation 113 applied. There was no suggestion that any of the specific statutory disregards set out in Schedule 9 to the 2008 Regulations applied (other than a modest and temporary disregard of £6,350 for accommodation costs). It followed that there were only two other avenues open to the claimant to avoid being fixed with the full value of the bond. The first was an argument based on *Chief Adjudication Officer v Leeves* and the second was resort to the law of trusts.

<u>The argument based on *Chief Adjudication Officer v Leeves*</u>

49. The claimant has understandably seized on the notion of a "certain and immediate liability", a formulation derived from the Court of Appeal's decision in *Chief Adjudication Officer v Leeves*. Put shortly, his case was he had a certain and immediate liability to pay court costs, and so the capital in question did not count as his capital. However, the position is rather more complex than that. The claimant in *Leeves* had received a student grant from the local education authority which was repayable in the event that he abandoned his course. The Court of Appeal held that once such a request for repayment had been received, the claimant was under a "certain and immediate liability" to repay and the money in question no longer counted as his income. It has since been held that the principle in *Leeves* applies to capital as well as income. However, the limits to the principle must also be recognised: "as with income, it is relevant only to the classification of money or an asset as capital. It only applies if the capital never became a resource in the claimant's hands from the moment of receipt or attribution" (CIS/2287/2008 at paragraph 27). Furthermore, the principle in *Leeves*, as explained by the Court of Appeal applies only to <u>re</u>-payment; it does not cover the scenario where the liability is to a third party, as here.

50. Upper Tribunal Judge Mesher in *JH v Secretary of State for Work and Pensions* [2009] UKUT 1 (AAC) helpfully summarised the legal principles involved as follows:

> "29. A misunderstanding is involved in both those propositions relied on by the claimant. The principle about deduction of debts and tax liabilities is relevant only to the question of when a payment received as income ceases to have the character of income and turns into capital. The principle in relation to amounts that have acquired the nature of capital is that for the purposes of the specific legislation on means-tested benefits capital means the gross amount of capital, not the amount that would remain after taking account of liabilities (Tribunal of Commissioners' decision R(SB) 2/83, paragraph 12). The major exception to that, which is in effect a confirmation of the general principle, is the statutory rule (in regulation 111(a)(ii) of the JSA Regulations) for deduction from the current market or surrender value of any capital asset of the amount of any encumbrance secured on it. If a claimant has capital assets and an immediately payable debt that is not secured on the assets the way to reduce the amount of capital taken into account is to pay the debt.
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> 30. There is a small further complication caused by the cases mentioned in a rather confusing way in paragraph 6.8 of the written submission to the appeal tribunal. R(IS) 5/99 is the decision of the Court of Appeal in *Leeves v Chief Adjudication Officer*. R(IS) 6/03 is the decision of the Court of Appeal in *Morrell v Secretary of State for Work and Pensions* [2003] EWCA Civ 526. One of the principles established by those cases, particularly *Leeves*, is that a sum received under a certain obligation of immediate repayment does not amount to income. The Court of Appeal did not need to say anything about whether a similar principle applies to capital and, if so, how that relates to the long-established principle for which R(SB) 2/83 stands. That nettle has recently been grasped by Mr Commissioner Jacobs in CIS/2287/2008. He held there that *Leeves* does apply to the classification of an asset as capital, but only at the moment of receipt or attribution of the asset in question. The principle only operates where, outside trust relationships, there is a certain obligation of immediate repayment or return of the asset to the transferor. It does not bite in cases where the recipient is under some liability to a third party. That is the case here. The principle of R(SB) 2/83 remains, that once an asset has become part of a claimant's capital, the mere existence of unpaid liabilities, even if payment is due, does not affect the calculation of the amount of capital for benefit purposes."

51. The well-established principle encapsulated in the final sentence of that passage is fatal to the claimant's argument in the present case. The capital in the fixed rate bond was plainly his: and "the mere existence of unpaid liabilities, even if payment is due, does not affect the calculation of the amount of capital for benefit purposes."

52. There is the added difficulty in this case, which was not present in e.g. R(SB) 2/83, that at the date the liability was imposed (February 10, 2012), the precise extent of the liability was unknown. So while the liability may have been certain, the actual extent of the liability was anything but certain. However, for the reasons explained in the previous paragraphs, the *Leeves* argument has in any event no purchase in the circumstances of the present case.

<u>The arguments based on the law of trusts</u>

53. A final possibility is that the law of trusts might come to the assistance of the claimant in some way. This has been put in two ways. Neither is convincing.

54. The first way is the suggestion in the DWP's draft revised decision (a suggestion which in the event was not adopted by the Tribunal). That decision-maker accepted that the costs liability had been fixed at £48,768.27 on January 9, 2014 and that this debt had been paid by the claimant's brother-in-law on his behalf as the claimant could not access the funds held in the bond within the required timescale. Both those findings of fact were plainly correct. However, the decision-maker then drew two inferences from these findings. The first was that £48,768.27 could be disregarded from that date "as an enforceable order had been issued for the payment of costs by the court". That is nonsense. There was no order directed to the funds held in the Newcastle fixed rate bond and there is no provision in Schedule 9 to the 2008 Regulations that provides for any such disregard. The second inference was that the claimant then held the sum of £48,768.27 "in trust" on behalf of his brother-in-law while he disputed the amount of the costs liability. Again, this is nonsense. The claimant did not receive any monies from his brother-in-law, who paid the developers' solicitors direct, and so there was no question of any implied or resulting trust. Nor was the claimant guilty of any unconscionable conduct such as might lead equity to impose a constructive trust. This was a straightforward debt; it did not in any way change the beneficial ownership of the funds held in the fixed rate bond.

55. The second way in which a trust has been suggested is in the Tribunal's decision. The Tribunal concluded that the funds held in the Newcastle fixed rate bond were (in some way) "in trust" for the court ordered costs to be paid. Two reasons were given for this finding.

56. The first reason was that "in his [i.e. the claimant's] mind the funds in his Newcastle account were set aside" for payment of those as yet indeterminate costs. This simply will not do. The law of trusts may be flexible but it does not extend to that type of thought experiment. If a person keeps a stash of notes under his mattress and thinks to himself that he must use that money to meet his upcoming HMRC self-assessment liability, no trust known to the law of England and Wales is created. The present case is in principle no different.

57. The second reason given by the Tribunal was that DWP policy was that money subject to a court order should be disregarded and the present case was analogous, even if the amount of the actual sum had yet to be specified. This reason needs unpacking somewhat. The Tribunal relied, somewhat tenuously, on the Investigating Officer's comment about the advice he received from his manager (see paragraph 20 above). It is by no means clear what was intended here. It may have been a garbled reference to the *Leeves* principle; however, for the reasons explained above, the notion of a "certain and immediate liability" based on *Leeves* cannot assist the claimant in this case. More probably, the advice was based on cases such as *SH v Secretary of State for Work and Pensions* [2008] UKUT 21 (AAC) and *CS v Chelmsford BC* [2014] UKUT 518 (AAC), which show that the effect of a court-imposed restraint or freezing order on an asset is that the resource remains the claimant's but has a nil market value. However, as the DWP's response to the appeal correctly noted, there was no court order directly restricting the claimant's use of the funds held in the fixed rate bond. A further but more remote possibility is that those giving the advice had in mind paragraph 43 of Schedule 9 to the 2008 Regulations. This provides that personal injury awards which are administered by the court are disregarded when calculating a person's capital. It does not say that a sum ordered by way of court costs is disregarded. Whatever the thinking for this second reason, it was confused. Even if the DWP had (correctly or otherwise) made a concession that the sum of £48,768.27 was properly to be disregarded, that did not address its other argument that the remaining funds still exceeded the £16,000 capital limit throughout the period in question.

58. This is a convenient juncture at which to deal with the Tribunal's apparent concern that there were miscalculations in the DWP's revised schedule as other liabilities had not been properly taken into account. The Tribunal only refers to two such liabilities. The first was that the DWP accepted "that the appellant also paid the £13,698.31 as required but this is not included in the schedule" (statement of reasons at [13]). The simple reason for this was that the claimant had already settled that debt in June 2013 from other funds (see paragraphs 14-15 above). It was irrelevant to the fixed rate bond. The other was that additional costs of £4,946.90 had not been included in the schedule (statement of reasons at [14]). This referred to the costs of the hearing on December 12, 2014. It was a straightforward debt and, under the principle confirmed in R(SB) 2/83, could not be deducted from the remaining capital funds.

The disregard of the payment for alternative accommodation costs

59. There may be a question-mark over the DWP's acceptance of the sum of £6,350 being disregarded for 26 weeks in respect of alternative accommodation whilst works were carried out. The DWP took the view that this fell within paragraph 12(a) of Schedule 9 to the 2008 Regulations, i.e. a sum "paid to the claimant in consequence of damage to, or loss of, the home or any personal possession and intended for its repair or replacement." The potential difficulty is that on closer analysis the claimant was, at least on a narrow reading, not actually "paid" £6,350 at all. Rather, the premium for a separate lease which would otherwise have been £10,000 was offered to him at a discounted price of £3,650. So in book-keeping terms the claimant was given a credit of £6,350 but he was not actually *paid* £6,350. However, this may be an unduly narrow approach, and it may be that "paid" includes the situation where a person gains a financial benefit in that amount by way of an offset against another liability. I have not had detailed argument on this point, which does not affect the outcome, and so need not decide the matter.

Conclusion on the Secretary of State's appeals

60. It follows that the Tribunal erred in law, for the reasons set out above. Its joint decision on the two appeals must be set aside. It matters not whether the debt under the judgment order is regarded as certain from the date of the original order (February 10, 2012) or from the date of the default costs certificate (January 9, 2014) or from the date the set aside application failed (December 12, 2014). The simple fact is that judgment debt was never secured on the funds in the Newcastle fixed rate bond. The developers, i.e. the judgment creditors, never had any proprietary interest in the claimant's savings such as to displace the claimant's sole legal and beneficial title. The developers were simply owed a (large) sum of money. True, if it had not been paid by the claimant's brother-in-law, there were various remedies open to the developers as regards enforcement; but the case never got to that stage. Before returning later to what must now be done as regards disposal, I should deal with some miscellaneous other matters raised on the appeals.

Other matters raised on the appeals

The effect of the 120 day notice period

61. The Tribunal gave as its final reason for allowing the appeal its finding that "the funds were subject to a 120 days' notice and they cannot therefore be said to be funds available to the appellant at that time". It is not entirely clear what was meant by "at that time". Presumably the expression was meant to mean the period after December 2014, as the Tribunal had already (in error) found that the fixed rate bond should be disregarded up to the date that the costs liability had been confirmed on the failure of the set aside application. Be that as it may, while the Tribunal was right

as a matter of fact to conclude that the 120 day notice period was absolute, that did not mean that funds were unavailable to the claimant.

62. The starting point is that capital is valued at its "current market or surrender value" (regulation 113 of the 2008 Regulations), which covers both the amount the asset could be sold for and the amount a claimant could borrow, using the bond as security. In the present case there seems no reason why the claimant could not have obtained a loan secured against the capital represented by the fixed rate bond. Indeed, that is effectively what happened, albeit informally, when his brother-in-law agreed to meet the court costs. Furthermore, as Mr G T Overrill, the Secretary of State's representative in these proceedings comments, as a general rule the value of a fixed term investment will gradually increase the closer it comes to maturity. In principle the precise valuation of a fixed term bond standing at some £75,000 on 120 days' notice would be a matter for expert valuation. That said, on any reckoning it was clearly going to be well above £16,000. It follows that the Tribunal erred in law by attributing no value to the fixed rate bond because of the notice period.

<u>The points raised by the District Tribunal Judge when giving permission to appeal</u>
63. The District Tribunal Judge raised a number of further issues when giving permission to appeal. However, these were all based on a mistaken premise – it was assumed that the claimant's flat was subject to a charging order in respect of the court costs of £48,768.27. But the charging order related to a previous court judgment and had in any event already been discharged. It follows that the points raised do not fall for decision.

<u>The appellant's point about his civil service pension</u>
64. In his final representations, the claimant has drawn attention to issues relating to his award of a temporary pension under the Civil Service Injury Benefits Scheme. The correspondence to which he refers all post-dates the date of the Tribunal hearing, let alone the date of the decisions under appeal before the Tribunal. Any such later developments cannot be taken into account now (see Social Security Act 1998, section 12(8)(b)). If the DWP have made any subsequent decisions about his ESA entitlement in the light of such matters, they will carry their own separate appeal rights.

The disposal of these appeals
65. Having set aside the Tribunal's decisions, I must either remit the case for re-hearing or re-decide the matter under appeal myself. There is nothing to be gained by a further hearing before the First-tier Tribunal when the facts are not in dispute and the law is clear, as stated above. I therefore proceed to decide the underlying appeals myself. I can deal with this shortly.

66. I have no option but to dismiss the claimant's entitlement appeal. As explained above, he enjoyed the sole legal and beneficial ownership of the funds in the Newcastle fixed rate bond throughout the period in question. He had, undoubtedly very prudently, set the money aside to meet the court costs liability. But the fact remained that it was in principle his money to do with as he wished. There was no trust or *Leeves* scenario such as to give a third party any proprietary interest in those funds. The 120-day notice period did not materially affect the value of the bond in terms of borrowing money. As the funds in the fixed rate bond were well in excess of £16,000 throughout, there was no entitlement to income-related ESA during the entire period in question.

67. I equally have no option but to dismiss the overpayment appeal. The Secretary of State may recover an overpayment of benefit where it has been caused by a

misrepresentation or failure to disclose. As explained above, a misrepresentation may be entirely innocent. By declaring in his original ESA claim that his savings were limited to £11,000, the claimant misrepresented the true position. The Secretary of State would not have paid income-related ESA had he known the true position. The overpayment is accordingly recoverable from the claimant.

The Secretary of State's decision as to whether to recover the overpayment

68. The Secretary of State's decisions as to the claimant's entitlement to ESA and liability for any resulting overpayment are decisions which may be (and have been) appealed to a Tribunal. The Secretary of State's decision as to whether in the circumstances of this case to proceed to effect recovery and, if so, on what terms, does not carry any right of appeal to a Tribunal. It is entirely a matter for the discretion of the Secretary of State. The only way in which it can be challenged is through an internal DWP complaints procedure or ultimately by way of an application for judicial review in the High Court.

69. In reaching that decision, the Secretary of State will doubtless take into account all relevant circumstances. Without prejudice to other considerations, four particular factors may be considered relevant.

70. The first is that there has never been any suggestion other than that the claimant was acting in good faith. He has not actively sought to deceive the DWP or to commit fraud.

71. The second is that because of delays in resolving the county court proceedings, it was some time before the claimant was aware of the precise amount of the costs debt that he owed. It was said in R(SB) 2/83 that, as regards a claimant holding funds above the capital limit, "his remedy was to discharge his indebtedness, at least to the extent necessary to bring his resources below this statutory limit". That remedy was not available to the claimant until, at the earliest, January 2014, although it was clear the liability for costs would be substantial.

72. The third is that (putting to one side his dealings with the DWP) the claimant in one sense acted extremely responsibly as regards his liability for the court costs. The developers had previously obtained a charging order against his property for an earlier judgment debt. If they had taken the same course of action with regard to the later and larger debt, then the claimant would have been at risk of repossession proceedings. He therefore discharged the debt as soon as it had been confirmed as final by the default costs certificate, in the short term at least via the good offices of his brother-in-law. If the claimant had lost his home, his mental health would doubtless have suffered further and there may well have been other substantial costs to the public purse.

73. The fourth – and for present purposes last but by no means least – is the claimant has clearly had to contend with very severe mental health issues for a number of years. It would be wrong to spell those difficulties out in detail here, but doubtless appropriate particulars can be provided in confidence to the Secretary of State.

74. There may be other factors which might amount to exceptional circumstances.

Conclusion

75. I conclude that the decision of the First-tier Tribunal dated December 4, 2015 involves an error of law. I allow the appeals to the Upper Tribunal by the Secretary of State and set aside the decision of the tribunal (Tribunals, Courts and Enforcement

Act 2007, section 12(2)(a)). I also re-make the decisions in the terms set out at the head of these reasons (section 12(2)(b)(ii)). My decision is also as set out above.

Signed on the original on 10 August 2017

Nicholas Wikeley
Judge of the Upper Tribunal