[2019] AACR 13

(Green v Secretary of State for Work and Pensions and Adams (Interests in Trusts and Ability to Control Assets) [2018] UKUT 377 (AAC))

Judge Jacobs **CCS/2548/2252/2254/2259/2794/2800/2801/2802/2017**
14 December 2018

Child Support – interests in trusts – ability to control assets

The parents of a child, who was by the time of the appeal to the Upper Tribunal, seventeen years old, each appealed against three decisions of the Secretary of State concerning the non- resident father's liability for child support under the 2003 Child Support Scheme. The three decisions covered defined time periods between April 2009 and August 2013. The non- resident father was a beneficiary of a family trust which had been set up by his parents for the benefit of various family members and which held various assets which the parent with care mother argued were assets in which he held either a beneficial interest or had the ability to control within the definition in regulation 18 of the Child Support (Variations) Regulations 2000 (SI No 2001/156). The Upper Tribunal considered whether a beneficiary's interest under a discretionary trust was an asset for the purposes of regulation 18 and therefore capable of constituting a case in which a variation might be agreed for the purposes of paragraph 4 of Schedule 4B of the Child Support Act 1991.

Held, allowing the appeals, that:

1. that an interest in a trust is not an asset for the purposes of regulation 18 which does not treat the beneficiary's interest as an asset but treats the property transferred into the trust as such, disregarding the trust itself for those purposes (*Adams v Secretary of State and Green* [2014] UKUT 359 (AAC) not followed);
2. the beneficiaries under a trust do not have an interest in the assets held by the trust, they have a parcel of rights that protect their interests.

The judge remade the First-tier Tribunal's findings of fact and remitted the case to the Secretary of State to remake the decisions.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decisions of the First-tier Tribunal made on 19 April 2017 at Enfield under these references

SC242/11/07499
SC242/13/10298
SC921/13/02960 and
SC242/14/00425

involved the making of an error in point of law, they are SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decisions are to be RE-MADE by the Secretary of State in accordance with the findings of fact and analysis of just and equitable in paragraphs 84 to 108.

REASONS FOR DECISION

A. The parties

1. These eight appeals concern the child support liability of Mr Adams for his son Nicholas. Ms Green is Nicholas' mother and parent with care. I have decided not to make an anonymity order in respect of anyone involved, including Nicholas who is now 17. The Secretary of State for Work and Pensions is the other party.

B. The decisions and periods before me

2. It will never be possible to write a short history of the litigation between Mr Adams and Ms Green. Nicholas was born on 22 March 2001 when the couple were living together. They separated in 2002/2003 and have been litigating ever since. There have been cases in both the county court and the High Court. It was only in 2007 that Ms Green made an application for child support, which has led to a series of appeals to both the First-tier Tribunal and the Upper Tribunal.

3. The number of appeals before me creates an illusion, as both parents have appealed against four decisions of the First-tier Tribunal. Even that overstates the scale of the appeals, because two of the First-tier Tribunal's decisions concerned the same decision by the Secretary of State, both parties having appealed. So ultimately I am concerned with three decisions by the Secretary of State as decision-maker for the child support scheme. All concern the 2003 version of the scheme. I have already decided a ninth appeal that concerns the 2012 version: *Green v Secretary of State for Work and Pensions and Adams (Diversion of Income)* [2018] UKUT 240 (AAC).

4. These are the three decisions of the Secretary of State that have led to these proceedings.

CCS/2548 and 2794/2017

5. These are the parents' appeals in respect of a decision with the effective date of 24 April 2009. There were a series of revisions, the result of which is that the relevant date for the purposes of section 20(7)(b) of the Child Support Act 1991 is 16 July 2010: see *R(CS) 1/03.* The First-tier Tribunal reference was SC242/11/07499.

6. The First-tier Tribunal's first decision was set aside by Upper Tribunal Judge Turnbull in *Adams v Secretary of State and Green* [2014] UKUT 359 (AAC). Judge Turnbull decided that a beneficiary's interest under a discretionary trust was an asset for the purpose of regulation 18 of the Child Support (Variations) Regulations 2000 (SI No 2001/156). The First-tier Tribunal reheard the case on that basis and the other cases were decided accordingly.

CCS/2552, 2554, 2800 and 2802/2017

7. These are the parents' appeals in respect of a decision with the effective date of 16 December 2011. The relevant date for section 20(7)(b) is 20 March 2013. The First-tier Tribunal references were SC/242/13/10298 and SC921/13/02960.

CCS/2559 and 2801/2017

8. These are the parents' appeals in respect of a decision with the effective date of 5 July 2013. The relevant date for section 20(7)(b) of the Child Support Act 1991 is 24 August 2013. The First-tier Tribunal reference was SC242/14/00425.

The periods over which I have jurisdiction

9. That means that I have jurisdiction for three periods:

Period 1: 24 April 2009 to 16 July 2010

Period 2: 16 December 2011 to 20 March 2013

Period 3: 5 July 2013 to 24 August 2013

10. I have no jurisdiction in the gaps between Periods 1 and 2 and between Periods 2 and 3. Nor do I have jurisdiction from the end of Period 3 until the case was transferred to the 2012 Scheme. Having heard evidence, however, I have made findings of fact that relate to those gaps, which I trust the decision-maker who deals with the gaps between periods will find useful.

C. Regulation 18

11. The main issue in this decision is the interpretation and application of regulation 18 of the Child Support (Variations) Regulations 2000. It was made under the authority of paragraph 4 of Schedule 4B to the Child Support Act 1991:

Additional cases

(1) The Secretary of State may be regulations prescribe other cases in which a variation may be agreed.

(2) Regulations under this paragraph may, in particular, make provision with respect to cases where-

(a) the non-resident parent has assets which exceed a prescribed value; …

For convenience, this is the version of the regulation in force from 10 December 2012:

18 Assets

(1) Subject to paragraphs (2) and (3), a case shall constitute a case for the purposes of paragraph 4(1) of Schedule 4B to the Act where the Secretary of State is satisfied there is an asset—

(a) in which the non-resident parent has a beneficial interest, or which the non-resident parent has the ability to control;

(b) which has been transferred by the non-resident parent to trustees, and the non-resident parent is a beneficiary of the trust so created, in circumstances where the Secretary of State is satisfied the non-resident parent has made the transfer to reduce the amount of assets which would otherwise be taken into account for the purposes of a variation under paragraph 4(1) of Schedule 4B to the Act; or

(c) which has become subject to a trust created by legal implication of which the non-resident parent is a beneficiary.

(2) For the purposes of this regulation ‘asset’ means —

(a) money, whether in cash or on deposit, including any which, in Scotland, is monies due or an obligation owed, whether immediately payable or otherwise and whether the payment or obligation is secured or not and the Secretary of State is satisfied that requiring payment of the monies or implementation of the obligation would be reasonable;

(b) a legal estate or beneficial interest in land and rights in or over land;

(c) shares as defined in section 744 of the Companies Act 1985, stock and unit trusts as defined in section 6 of the Charging Orders Act 1979, gilt-edged securities as defined in Part 1 of Schedule 9 to the Taxation of Chargeable Gains Act 1992, and other similar financial instruments; or

(d) a chose in action which has not been enforced when the Secretary of State is satisfied that such enforcement would be reasonable,

and includes any such asset located outside Great Britain.

(3) Paragraph (2) shall not apply—

(a) where the total value of the assets referred to in that paragraph does not exceed £65,000 after deduction of–

(i) the amount owing under any mortgage or charge on those assets;

(ii) the value of any asset in respect of which income has been taken into account under regulation 19(1A);

(b) in relation to any asset which the Secretary of State is satisfied is being retained by the non-resident parent to be used for a purpose which the Secretary of State considers reasonable in all the circumstances of the case;

(c) to any asset received by the non-resident parent as compensation for personal injury suffered by him;

(d) except where the asset is of a type specified in paragraph (2)(b) and produces income which does not form part of the net weekly income of the non-resident parent as calculated or estimated under Part III of the Schedule to the Maintenance Calculations and Special Cases Regulations to any asset used in the course of a trade or business; or

(e) to property which is the home of the non-resident parent or any child of his; or

(f) where, were the non-resident parent a claimant, paragraph 22 (treatment of payments from certain trusts) or 64 (treatment of relevant trust payments) of Schedule 10 to the Income Support (General) Regulations 1987 would apply to the asset referred to in that paragraph.

(4) For the purposes of this regulation, where any asset is held in the joint names of the non- resident parent and another person the Secretary of State shall assume, unless evidence to the contrary is provided to him, that the asset is held by them in equal shares.

(5) Where a variation is agreed on the ground that the non-resident parent has assets for which provision is made in this regulation, the Secretary of State shall calculate the weekly value of the assets by applying the statutory rate of interest to the value of the assets and dividing by 52, and the resulting figure, aggregated with any benefit, pension or allowance prescribed for the purposes of paragraph 4(1)(b) of Schedule 1 to the Act which the non-resident parent receives, other than any benefits referred to in regulation 26(3), shall be taken into account as additional income under regulation 25.

(6) For the purposes of this regulation, the 'statutory rate of interest' means interest at the statutory rate prescribed for a judgment debt or, in Scotland, the statutory rate in respect of interest included in or payable under a decree in the Court of Session. which in either case applies on the date from which the maintenance calculation which takes account of the variation takes effect.

The statutory rate of interest mentioned in paragraph (6) is 8%.

12. Regulation 1(2) provides that 'home' in regulation 18(3)(e) 'has the meaning given in regulation 1(2) of the Child Support (Maintenance Calculations and Special Cases) Regulations 2000 (SI No 2001/155):

> 'home' means-
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> (a) the dwelling in which a person and any family of his normally live; or
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> (b) if he or they normally live in more than one home, the principal home of that person and any family of his …

D. The grant of permission to appeal

13. I held an oral hearing of the applications for permission to appeal on 25 April 2018. In the course of the hearing, it became clear that the parents agreed that the decisions should be set aside and re-made, albeit for different reasons. I accepted that and gave permission to appeal, saying that I would re-make the decisions rather than remit them to the First-tier Tribunal for rehearing.

14. Although I was not persuaded by Judge Turnbull's decision, I accepted, for the purposes of the application for permission, that the First-tier Tribunal had been obliged to follow his decision. My reasons for setting the tribunal's decisions aside were:

> One error is in the finding that Mr Adams has a one fifth interest in the value of the trust property. I assume, although the tribunal did not say so, that it was relying on regulation 18(4) on the basis that there were five potential beneficiaries (Mr Adams and his four children). If it came to that finding in some other way, it did not say so. Paragraph (4) is only a starting point; it is subject to evidence to the contrary. In this case, it seems to me that on the evidence a finding of one fifth was not sustainable. Either Mr Adams' interest was worth more or it was worth much less. Just to take one point, it seems clear that Nicholas was never going to be allocated any share in the trust, so a division based on him having a one fifth share was wholly unrealistic.
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> Another error arises in relation to the finding about where Mr Adams was living. In part, evidence from Mr Craig would have been relevant to that. In the event, he was not called, as his evidence did not seem relevant given the focus that Judge Turnbull's decision had set for the hearing. It was unfair for the tribunal to draw the conclusions that it did without allowing for him to be called.
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> There is inevitably a potential cross contamination when a tribunal makes a finding on a person's credibility on one issue – it is probably unavoidable that that will have an effect in other aspects of a tribunal's reasoning. So the fairness issue has wider implications than the place where Mr Adams was living.

E. The oral hearing of the appeal

15. I held an oral hearing in order to re-make the decisions on 16, 17, 20, 21 and 22 August 2018. Ms Green was represented by Mr Holden and Mr Adams by Dr Pelling. The Secretary of State was represented by Mr Pritchard of counsel. I am grateful to them for their various contributions to the hearing.

F. Why Judge Turnbull's decision was wrong

16. I now explain why I was not persuaded by Judge Turnbull's reasons in *Adams v Secretary of State and Green* and why I consider that his decision was wrong.

Does regulation 18 apply to trusts?

17. I begin with the self-evident truth that the child support scheme is a bureaucratic scheme rather than a judicial one. It is operated by decision-makers in the name of the Secretary of State, albeit with access to legal advice in the more complicated cases. There is an appeal to the First-tier Tribunal and then, on a point of law, to the Upper Tribunal, but that does not detract from the basic point made by Mr Commissioner (now Upper Tribunal Judge) Rowland in *R(CS) 14/98* at [16] that the scheme was designed to be operated by relatively junior child support officers, as the decision-makers were then called. Only a very small number of cases come before tribunals. Just to give a snapshot of the work of the Upper Tribunal, it registered only 127 child support cases in 2017. That is a factor that suggests that the complexities attending the existence and valuation of interests under discretionary trusts may not have been part of regulation 18 as designed.

18. Judge Turnbull reasoned that a beneficiary's interest under a discretionary trust was an asset for the purposes of regulation 18. He was concerned only with discretionary trusts, but his reasoning must apply to fixed trusts as well.

19. The regulation makes two express provisions for trusts in paragraph (1). The first in paragraph (1)(b) deals with a blatant attempt at evasion of the scheme by transferring an asset into a trust. The second in paragraph (1)(c) deals with constructive and resulting trusts. The existence and terms of those provisions is not consistent with Judge Turnbull's analysis. As to the existence of the provisions, neither would be necessary if Judge Turnbull's analysis is correct, as the beneficiary's interest would clearly be an asset in any event. As to the terms of the provisions, they do not treat the beneficiary's interest as an asset. They treat the asset as the property transferred into the trust and, for the purposes of regulation 18, they disregard the trust itself.

20. It might be argued that paragraph (1)(b) and (c) are express provisions that were included for the avoidance of doubt. I would not accept that argument. First, if the beneficiary's interest is an asset (as Judge Turnbull decided), these provisions cause confusion by treating the asset as something else. Second, why do these particular instances of a trust justify being singled out for avoiding doubt? What doubt could there about either if Judge Turnbull is right? Paragraph (1)(b) would surely be an obvious case that would fall within his analysis. Third, why do these provisions disregard the trust and treat the asset as the property that was transferred into or became subject to the trust? I can think of no reason why they should be singled out and treated in this way, leaving only trusts that are created or arise in other circumstances to be covered by Judge Turnbull's analysis.

21. I now come to the definition of asset in paragraph (2). This is an exhaustive definition. The beneficiaries under a trust do not have an interest in the assets held by the trust. They have a parcel of rights that protect their interests. One way of looking at it is to say that, subject to the terms of the trust and its investment, they have an interest in the fund that contains the trust property. I would not expect a reference to particular types of property such as money or shares to include interests in a trust fund containing or consisting of such assets.

22. The definition does include beneficial interests in land. It might be argued that this shows that interests under a trust are covered, at least in the case of land held as trust property. I would not accept that argument. It would create a distinction between land held as trust

property and other types of property held on trust. Why should there be such a distinction? How would it operate in practice? The non-resident parent's interest would change as the trust property changed. How would the person with care know about that when even the non-resident parent might not be told by the trustee?

23. The reference to beneficial interests in land is easily explained. All co-ownership of land takes effect under a trust. It was necessary to include those interests to avoid an anomaly that would otherwise arise with the exclusion of joint ownership.

24. Regulation 18 requires a valuation. Paragraph (4) provides a starting point that the asset is held in equal shares, but that still requires a valuation of the whole. And if there is evidence, as there is in this case, that the interest would not be shared equally, there may be issues of apportionment as well as valuation. Given that interests under a discretionary trust are not generally recognised as beneficial interests, there is no experience at valuing them.

Judge Turnbull's reasoning

25. Judge Turnbull gave five reasons for his decision. I will now explain why I am not persuaded by them.

26. The judge's first reason was:

> 21. First, in contrast with the position in *Gartside*, the child support legislation would not be rendered impracticable or unworkable if a wide meaning were given. In the estate duty legislation it was necessary to know precisely the extent of the property in which an interest in possession subsisted. For the purpose of regulation 18, however, there is nothing unsatisfactory about saying that a discretionary beneficiary has a beneficial interest in the whole of the assets in respect of which a discretion to apply income or capital in his favour subsists. That is because the decision maker or First-tier Tribunal on appeal is in effect required to limit the amount of income which is added, by way of variation, to the non-resident parent's net income under reg.18 to the amount which is 'just and equitable': see s.28F of the Child Support Act 1991, as interpreted in *RC v CMEC and WC* [2009] UKUT 62 (AAC). Under that provision, when determining whether to treat the notional income (at 8% or some lower rate) of all or any part of the value of the trust assets as added to the non-resident parent's income, the decision maker or tribunal can take into account the likelihood of trust income or capital actually being paid to or applied for the benefit of the non-resident parent, and past history may obviously be important in relation to that. The decision maker or tribunal will also be able to take into account whether trust income or capital would be paid to or applied for the benefit of the non-resident parent, were he to ask for it.

I read this as saying that the non-resident parent had an interest in the whole of the fund along with the other potential beneficiaries. I do not read it as saying that he had an interest in the whole of the fund to the exclusion of the other beneficiaries. I agree that a decision-maker can limit the amount taken into account under the just and equitable provision. I do not understand how the suggested link between this and the likelihood of an interest actually being acquired would work in practice. What evidence would there be on which this exercise could be performed? How would a Departmental decision-maker undertake the assessment required? The complexities involved are to my mind a factor indicating that this is not how the regulation works.

27. The judge's second reason was:

> 22. Secondly, there is in my view no doubt that, in relation to assets which are held on trust in the particular situations specified in reg. 18(1)(b) and (c), an interest of the non-resident parent in those assets as a discretionary beneficiary is sufficient to bring those assets within the scope of a reg. 18 variation. That is because it is sufficient, under limbs (b) and (c), that the non-resident parent is 'a beneficiary' of the trust. It cannot therefore be argued that the legislature cannot have contemplated that it would be satisfactory or workable for assets to be included in a variation merely on the basis of an interest in those assets as a discretionary beneficiary.

I disagree because the judge does not consider why paragraph (1)(b) and (c) are included at all if his reasoning is right.

28. The judge's third reason was:

> 23. Thirdly, it has to be accepted that a fixed (as opposed to discretionary) beneficial interest in assets brings those assets within reg. 18(1)(a), even though that beneficial interest is of negligible value. For example, if property is held on trust for A for life, with remainder on various other trusts, with an ultimate remainder (if all the previous trusts fail) to B (the non-resident parent), then B has a beneficial interest in the trust assets even though he has no interest in income during A's life and even if it is virtually certain that he will never be entitled to anything at all. If, as must be the case, those trust assets are assets which would fall within reg. 18(1)(a) by reason of B's remote beneficial interest in them, it would be odd if trust assets whose income or capital may be applied in favour of B pursuant to a discretionary trust could not be the subject of a variation at all, however great the probability that the income or capital would in fact be so applied.

I disagree because it assumes that fixed trusts generally are within the scope of regulation 18.

29. The judge's fourth reason was:

> 24. Fourthly, it would have been known to the legislators that discretionary trusts are commonly used in situations where it is intended that all or a substantial part of the income will in fact be paid to A, but where it is desired that A should not be capable of being treated for tax purposes as having an interest in possession in any part of the income. There is no reason why the legislature should have wished that a non-resident parent who is able to avoid being treated as entitled to an interest in possession for tax purposes should also be able to avoid being treated as having an interest in the assets for variation purposes. As I have said, the degree of likelihood that the non-resident parent will, in the particular case, actually be paid income or capital is something which can be taken into account under the just and equitable provision in s.28F.

I disagree because this is but one factor to take into account and there is no reason why it should be a decisive one, even when taken together with the judge's other reasons.

30. The judge's fifth reason was:

> 25. Fifthly, although the structure of reg. 18(1)(a), (b) and (c) might at first sight suggest that some narrower meaning should be given to the nature of a beneficial interest which can bring the trust assets within limb (a), when the enacting history is taken into account I do not think that that is so.
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> 26. Reg. 18(1)(a) is a general provision relating to assets in which the non-resident has a beneficial interest, or which he has the ability to control. (b) and (c) relate to trusts arising in particular situations, namely either where the non-resident parent was the

> settlor and created the trust in order to reduce child support maintenance, or where the trust has arisen 'by legal implication'. In the case of (b) and (c) it is sufficient that the non-resident is a 'beneficiary of the trust' or 'a beneficiary'. Both those expressions would clearly in my view encompass the case of a discretionary beneficiary. That might suggest that the different wording 'in which the non-resident parent has a beneficial interest' in (a) must be intended to be narrower: if it is not then there appears to be no need for (b) or (c), because they would both fall within (a) in any event.
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> 27. However, one must take into account that the original wording of (a) was 'in which the non-resident parent has the beneficial interest'. The amendment to substitute 'a' for 'the' was made in 2002. The original wording was plainly unsatisfactory in that it would appear to have applied only where the non-resident parent was the absolute owner of the entire beneficial interest, and therefore not even in the situation where he had, say, a 50% absolute beneficial interest. Excluding the case of a bare trust, the effect of the original provisions was therefore that the jurisdiction under reg. 18 applied to assets in which the non-resident had a beneficial interest under a trust only in the case of trusts created in the specific situations set out in (b) and (c). But the effect of the amendment to (a) was undoubtedly to widen (a) so that it applied to beneficial interests under all trusts, whether express or arising by operation of law, and whether or not created in order to avoid child support maintenance. In that situation I do not find it surprising that the draftsman, when making the amendment, overlooked that his amendment had rendered limbs (b) and (c) unnecessary, and therefore did not remove limbs (b) and (c). There does not seem to me to be much force in a contention that, when making the amendment, it was intended that there should be a difference, in relation to the question whether assets which are the subject of discretionary trusts are covered, between the expressions used in (a), (b) and (c).

I disagree because the effect of the amendment was to take account of joint ownership. Except in the case of co-ownership of land, the amendment does not involve any implication that it brought all trusts within the scope of the regulation.

G. The limited relevance of Mostyn J's reasoning on the resources available to Mr Adams

31. On the morning of the first day of the hearing, Dr Pelling applied to strike out the part of Ms Green's case that related to the Pacific Trust on the ground that it had no reasonable prospect of succeeding (rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008). I would not normally include an analysis of such an application in a final decision. I have done so because it provides a convenient way to deal with Mr Holden's argument about the relevance of a decision by Mostyn J.

32. Dr Pelling argued that by the terms of the trust Mr Adams was not allowed to benefit. He quoted what Upper Tribunal Judge May said in *CS v CMEC and MS* [2010] UKUT 182 (AAC), [2011] AACR 2:

> 9. I accept Mr Bartos' submission that in terms of regulation 18(1)(a) it is not necessary for a non-resident parent to be the owner of the asset. He merely has to have the ability to control it. In relation to the two heritable properties which were taken into account in this case it is without doubt the fact that he had a beneficial interest in his own share of each property and this was an asset as defined by regulation 18(2)(b). I accepted Mr Bartos' submission that he did not however have a beneficial interest in the second respondent's share. It is clear that at the material time the second respondent had the ownership of her share and she accordingly retained the beneficial

> interest therein. The crucial question in this appeal, on the argument presented by Mr Bartos, was whether the appellant had the ability to control that share. The position of both Mr Bartos and the second respondent was that he had. In his written ground of appeal the appellant's position was that he did not. What Mr Bartos is asking me to accept is that as the court had ordered the second respondent to dispone the heritable properties to the appellant the result was that the appellant had an ability to control her share by making an application to the Sheriff Court, in the event of the second respondent having failed to grant a disposition, to get the Sheriff Clerk to do so in terms of section 5A of the Sheriff Courts (Scotland) Act 1907. *It does however appear to me that the ability to request a third party to do something with the asset negates the concept that one has the ability to control it. The ability to control imports the notion of independent control of it to sell it or otherwise deal with it.* I am satisfied that in these circumstances the tribunal erred in law in making a finding in fact that the appellant had a beneficial interest in and control of each of the heritable properties. It erred in law in proceeding to find a case made on that basis. There was no asset within the definition of regulation 18(2)(b) in respect of the second respondent's share of the heritable properties. The separation of the interests of the appellant and the second respondent is I think implied by the provisions in regulation 18(3).

I have italicised the passage on which he relied. As a fall back, Dr Pelling argued that since Mr Adams could not benefit from the trust, it would not be just and equitable to impose an 8% income under regulation 18(6).

33. Mr Holden argued that Mr Adams had acquired £450,000, only £151,000 of which was put into the Trust and that he had benefited as the Trust now paid what had been Mr Adams' share of Nicholas's school fees. He also referred to what Mostyn J said in *Green v Adams* [2017] EWFC 24 in Note 3 to paragraph 14 of his judgment:

> ……When considering whether a discretionary trust is to be treated in whole or in part as a resource of a party the single question is whether the court is satisfied that whether the trustee would be likely to advance the capital immediately or in the foreseeable future. See *Charman v Charman* [2006] 2 FLR 422, *Whaley v Whaley* [2011] EWCA Civ 617, *BJ v MJ (Financial Remedy: Overseas Trusts)* [2011] EWHC 2708 (Fam). In making the assessment the court is not constrained by the ipse dixit of the trustees: see *SR v CR* [2009] 2 FLR 1083. On the contrary, the court must adopt a position of worldly realism and ask itself whether the stance of the trustees declaring that they will not help their principal beneficiary is to be credited. This approach is tried and tested and stretches back over the centuries. In *N v N* (1928) 44 TLR 324, 327 Lord Merrivale P stated:
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> *'The ecclesiastical courts showed a degree of practical wisdom… They were not misled by appearances… they looked at the realities … The court not only ascertained what moneys the husband had, but what moneys he could have if he liked, and the term 'faculties' described the capacity and ability of the respondent to provide maintenance.'*
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> In this case I am completely satisfied that the position of the father and the trustees is one of artifice and that the trust assets would be made available to the father in whole or in part were he to seek them for whatever reason. But given the modest scale of the mother's claim it is hardly necessary for me to go that far.

Those comments were not made in relation to the property of the Pacific Trust, but I accept that they applied more widely than their particular context. Finally, Mr Holden argued that once a transaction had been found to be a sham it was a sham for all purposes.

34. Mr Pritchard argued that Ms Green had met the threshold of a reasonable prospect of success and that it would be better to make factual findings than to strike out the case on the Pacific Trust. Finally, he referred to regulation 18(2)(b) of the Child Support (Variations) Regulations 2000.

35. I decided that I would not strike out the case relating to the Pacific Trust. I am not so deluded as to believe that my decision will be accepted by all the parties as a masterpiece of the assessment of evidence, finding of facts, and legal analysis. I am sure that at least one of the parties will want to challenge my decision in the Court of Appeal, possibly more than one, maybe all three. In those circumstances, it is appropriate that I should make findings on the issue of control of the Trust. I will, though, make clear my view on the relevance of Mostyn J's findings.

36. Mr Holden asked repeatedly to know whether I was bound by the facts found by Mostyn J. He seemed unable to proceed without knowing the answer, so I felt obliged to set out by views in a short oral judgment on the point. What follows is a more formal statement of what I said then.

37. The answer to the question as posed by Mr Holden is: no. For a start, the findings were made in different proceedings and on different evidence (see the analysis in the Upper Tribunal's decision in the *Cart* litigation reported at [2011] AACR 38 at [51]-[58]). The real point, though, is a different one. The question is not whether or not I accept the judge's findings. The question is what they mean. That meaning can only be discerned from the legal context of the application of Schedule 1 to the Children Act 1989, and the powers that the judge was exercising.

38. Mr Holden argued that once a court had found that there was a sham that applies for all purposes and in all other cases. I do not accept that Mostyn J made a finding that there was a sham. Sham is a legal concept with a particular meaning. This is what Diplock LJ said in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802:

> As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham,' it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* (1882) 21 Ch D 309 and *Stoneleigh Finance Ltd. v. Phillips* [1965] 2 QB 537), that for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived. There is an express finding in this case that the defendants were not parties to the alleged 'sham.'

39. Mostyn J did not make an express finding that there had been a sham. He spoke of 'artifice', which has a range of meanings from fraudulent to cunning. If he had meant to find that there was a sham, I am sure he would have said so expressly and made findings that clearly supported that conclusion. There is nothing in his judgment that amounts to a finding that all those involved in the trusts were parties to an agreement that the trust documents and

the trusts that they created were intended by all parties to be a mere façade of legal powers, rights and duties.

40. Mr Holden argued that Mostyn J had found that the assets were those of Mr Adams. I do not accept that. It is true that there are some statements in the judgment that are expressed in that way, but I have to read the judgment as a whole and in the context of the legal issue the judge was dealing with. As I read the judgment, what the judge found was that Mr Adams would be able to obtain the funds necessary to meet any order the judge might make. In other words, he was treating Mr Adams as having available to him sufficient funds to meet any order. He was not saying and he did not find that the assets were Mr Adams', only that they should be treated as his for the purpose of identifying the resources available to him. That is all he needed to do in order to exercise his power under the Children Act 1989 in favour of Nicholas. He did not need to identify the assets as actually being Mr Adams'.

41. Mr Holden argued that as Mostyn J had found that the assets were those of Mr Adams, it was not necessary to show that they were under his control. I have just explained why I do not accept that argument. There is, though, a further point about control. One of the cases cited by Mostyn J was *Charman v Charman* [2006] 2 FLR 422. In that case, the Court of Appeal made it clear that control was not the issue. Wilson LJ said:

> 12. There has been some debate at the hearing of this appeal as to the nature of the central question which, in this not unusual situation, the court hearing an application for ancillary relief should seek to determine. Superficially the question is easily framed as being whether the trust is a financial 'resource' of the husband for the purpose of section 25(2)(a) of the Matrimonial Causes Act 1973, as substituted by the Matrimonial and Family Proceedings Act 1984, section 3. But what does the word 'resource' mean in this context? In my view, when properly focused, that central question is simply whether, if the husband were to request it to advance the whole (or part) of the capital of the trust to him, the trustee would be likely to do so. In other cases the question has been formulated in terms of whether the spouse has real or effective control over the trust. At times I have myself formulated it in that way. But, unless the situation is one in which there is ground for doubting whether the trustee is properly discharging its duties or would be likely to do so, it seems to me on reflection that such a formulation is not entirely apposite. On the evidence so far assembled in the present case, as in most cases, there seems no reason to doubt that the duties of the trustee are being, and will continue to be, discharged properly. In his written argument in this court Mr Pointer on behalf of the wife at one point referred to the possible 'unity of interest' between the husband and Codan; and in his written argument before the judge he tentatively described Codan as 'quasi-agents' of the husband. Both phrases imply that Codan is not asserting, or would not assert, the independence that its duties require of it; and in my view, on the present evidence, it was wise of Mr Pointer in oral argument to withdraw them. A trustee - in proper 'control' of the trust - will usually be acting entirely properly if, after careful consideration of all relevant circumstances, he resolves in good faith to accede to a request by the settlor for the exercise of his power of advancement of capital, whether back to the settlor or to any other beneficiary.
>
> 13. Thus in effect, albeit with one small qualification, I agree with the suggestion of Butler-Sloss LJ in this court in *Browne v Browne* [1989] 1 FLR 291, 293 D–E that, in this context, the question is more appropriately expressed as whether the spouse has 'immediate access to the funds' of the trust than 'effective control' over it. The qualification relates to the word 'immediate'. In that case the trial judge knew that, if he was to proceed also to order the wife to pay the husband's costs, she would be unable to

> comply with his orders for her swift payment of a lump sum and costs without recourse to the offshore trusts over which he found her to have 'effective control': see p 295 B–C. So the question in that case was whether her access to their funds was immediate. In principle, however, in the light of section 25(2)(a) of the 1973 Act, the question is surely whether the trustee would be likely to advance the capital immediately or in the foreseeable future.

That explains the way that Mostyn J expressed himself and the lack of relevance of his findings to the issue of control under regulation 18. Wilson LJ allowed for the possibility of a trustee being a mere cipher of someone else, but again Mostyn J did not expressly say that that was happening, he did not need to go so far to deal with the issue before him, and his findings as a whole do not support that conclusion.

42. I may as well deal here with the point about the payment of school fees for Nicholas being a benefit to Mr Adams and so contrary to the terms of the trust. This was allowed by a variation of the trust that was approved by Mostyn J on 25 February 2016.

H. Regulation 19

43. On the afternoon of the fourth day of the hearing, Ms Holden raised the possible application of regulation 19 of the Child Support (Variations) Regulations 2000. I decided that he could not raise that regulation at this late stage.

I. The plan of the following paragraphs

44. It is, at last, time to re-make the tribunal's decisions on appropriate findings of fact on the ability to control the assets in issue. I say first who the people involved are, then what assets are involved, before analysing the evidence of control. That just leaves the just and equitable test before a final answer to a question posed by Ms Green.

J. The people

45. Mr Adams is the son of Adam and Alicia Adams. He was married and had two sons and a daughter, Leigh, Craig and Melissa. After his divorce, he was in a relationship with, but never married to, Ms Green; together they had Nicholas. Three other people are relevant. They are or were all trustees: Mr Craig, Mr Breslaw and Mr Mandell. There was also a trust company called Sealgrove.

K. The assets

46. These are the assets that were discussed at the hearing.

47. *26 Edmunds Walk* is owned by the Adams Trusts, which are two trusts set up by Mr and Mrs Adams Senior, Mr Adams' parents. Mr Adams lived there from 1999, when it was acquired, until he moved to 18 Cedar Drive. Mr Craig and Mr Mandell were trustees.

48. *18 Cedar Drive* is owned by Mr Adams. It was rented out until he moved there after leaving 26 Edmunds Walk. When he moved is in dispute.

49. *16 Buckingham House* is owned by the Lattner Trust, which was set up under the will of Ms Inge Lattner, who was Mr Adams' aunt; he was her executor. It was her home until her death on 4 December 2007. After her death, the trust bought *22 Cedar Drive*. Mr Adams' son, Craig, lives there rent free. Mr Craig has been a trustee throughout. Mr Adams was a trustee until 12 February 2012, when he was replaced by Mr Mandell.

50. *1 Friern Park* was owned by the Atlantic Pension Fund until it was sold to the Pacific Trust on 11 March 2013.

51. The Atlantic Pension Fund is a small self-administered scheme. Mr Adams has made no contributions since 1992/1993. The beneficiaries are Mr Adams and Mr and Mrs Adams Senior. All three are trustees, but not the only trustees. Mr Adams became entitled to a pension under the terms of the pension scheme, but did not exercise his right to take a lump sum at the earliest date. The date from which he could draw a periodical pension was altered. The Fund had made loans to Mr Adams' company York Mill on an informal and unsecured basis.

52. The Pacific Trust was set up by Mr Adams in 2012 for the benefit of various relatives, among whom are his children and his parents. The original trustees were Mr Mandell and Mr Breslaw. Dr Pelling replaced the latter in 2013. When Mr Adams withdrew a lump sum from the Atlantic Pension Fund on 4 April 2012, £151,000 was paid into this trust. That sum provided the purchase price of 1 Friern Park. Under a variation of the Trust, it has paid what would otherwise have been Mr Adams' contribution to Nicholas' school fees.

53. *York Mill* is a company. Mr Adams is one of the directors and the sole shareholder. It has various assets: knitted ties, machinery, yarn, web addresses, and *17 Cedar Drive*, which is rented to Mr Adams' son, Leigh. There are two ways of looking at this. One way is to look at ownership: Mr Adams owns the shares. On this approach, the focus is on the value of those shares. The other way is to look at control: Dr Pelling conceded that Mr Adams had control of the company. On this approach, the focus is on the company's assets. In practice, these approaches merge. As Upper Tribunal Judge Bano explained in *P v Secretary of State for Work and Pensions and P* [2018] UKUT 60 (AAC):

> 14. I also agree that the tribunal was correct in basing the value of the shares on the book value of the company's net assets, without making any discount to reflect the difficulty in selling part of the shareholding in a private company. In *Ebrahimi v Westbourne Galleries Limited* [1973] AC 360 it was held that in some circumstances a limited company could co-exist with a 'quasi-partnership' between those involved in the company, for example, if the shareholders were bound by personal relationships involving mutual confidence, if the shareholders were in practice involved in the conduct of the business, and if the transfer of the shares was restricted. In *re Bird Precision Bellows Ltd.* [1986] Ch. 658 Oliver LJ held [674A] that in a 'quasi-partnership' case it was appropriate that: 'the shares of the company should be valued as a whole and that the petitioners should then simply be paid the proportionate part of that value which was represented by their shareholding, without there being made a discount for the fact that this was a minority shareholding.'

I have taken the same approach by analogy and concentrated on the company's assets.

54. *Cash and investments* held by Mr Adams at various times.

L. Proving control

55. There is no smoking gun here. No letter asking Mr Adams for instructions and no email giving them. As Mr Holden accepted, he had to make his case from a different angle. If control is to be established, it has to be shown through the characters of Mr Adams and the trustees, their behaviour, and the patterns in that behaviour.

56. Mr Holden had hoped to rely on Mostyn J's decision to show that Mr Adams owned the assets mentioned in the judgment. I have already explained why that argument does not work

as he hoped it would. I have considered whether Mostyn J's conclusion that Mr Adams had access to the funds necessary to comply with his judgment, a relatively modest sum, is nonetheless an indication that he was able to control all or some of those assets. I have decided that it is not. It is easy to see how Mr Adams may have acquired sufficient money to satisfy the judgment. It may have come from his parents or from his son, Leigh – he has lent him money before. Or the trustees of one of the trusts may have been willing to assist given the charging order that the judge had imposed and the pressing need for capital. Or Mr Adams may have assets of which I have no evidence.

57. The way that the assets have been dealt with does not show that Mr Adams has control. Everything I know about has been done within the terms of the trusts or other funds. Even putting the rent from Buckingham House into his own bank account was explained by Mr Craig's evidence: it is permissible conduct for an executor, provided that account is given to the estate, which was done.

58. I have considered whether the fact that Mr Adams and his other children have benefited from the funds rather than Nicholas shows control. The difficulty here is that there have not been many requests for funds for Nicholas. I asked Ms Green how many applications she had made. Her answer was not entirely clear. The only one I know of for certain was the request for funds for Nicholas to be represented before Charles J; he wanted to argue for restrictions on reporting Judge Turnbull's judgment. That application was made, I think, to the Adams, Lattner and Pacific Trusts and was refused. Refusing funds in those circumstances is understandable as the Secretary of State had adopted the same position as Nicholas. The refusal of this application does not show that the assets were under Mr Adams' control.

59. Mr Holden has been assiduous in pointing out contradictions, inconsistencies, omissions and changes of position in the evidence. He has persuaded me that the pension funds, trusts and company have not been run with the most scrupulous attention to proper procedures and that Mr Adams has not been as readily forthcoming as courts and tribunals have a right to expect. Sadly, this is not unusual. Families do not always have regard to the legal niceties of the arrangements they make and do not necessarily follow the correct procedures. Standing back from the detail, the family has taken an overall view of the best use of its assets. That is not surprising. But it has always operated within the proper scope of the trusts. The informality of the way things have been done, and the suspicions that that has inevitably caused, reflect the messy reality of how families often operate. This evidence is not sufficient to show that Mr Adams has the ability to control the assets in question. And there are good reasons why the evidence as a whole shows that that control does not exist.

60. In the end, I have decided that the most significant factor in showing the lack of control lies in the character of the trustees. I now turn to that.

M. My assessment of the trustees

61. Ms Green's case is that Mr Adams has the ability to control assets. To the extent that this would require him to control trustees, their characters are an important element in assessing Ms Green's case. This is my assessment of the people who were trustees at various times.

Mr Adam and Mrs Alicia Adams

62. Mr and Mrs Adams Senior are the parents of Mr Adams. Mr Adams signed a witness statement, but they were not called as witnesses. Mr Holden expressed reluctance to ask that they be summoned in view of their age.

63. Mr Craig gave evidence about the couple. I have more to say about him later, but for the moment what matters is his evidence about Mr and Mrs Adams. He is a solicitor who has known the family for 30-40 year as a legal adviser and, no doubt after so long, has become a family friend. He gave a vivid description of the couple and their relationship with their son. They are survivors of the Holocaust who have strong personalities and a feisty and argumentative relationship with each other and with their son. They are now frail physically but still in full possession of their mental faculties. They have long wanted to pass their wealth on to future generations, especially to their grandchildren. With this in mind, they have focused – too much, Mr Craig thought - on inheritance planning.

64. I accept Mr Craig's evidence about the couple. It was given by someone with long personal experience of them in a variety of circumstances. It was a plausible account given their history. Their concern for their family is also what I would have expected as the natural behaviour of a couple in their position.

65. I do not accept the suggestion that Mr Holden made at one point that, as they were now under the care of Mr Adams, he was able to bring pressure to bear on them to ensure that they acted in accordance with his wishes. There is no direct evidence to support that argument. It is not the picture conveyed so eloquently by Mr Craig. On the evidence, it would not be reasonable to infer that Mr Adams could control his parents. He may be able to persuade them, but that is not the same thing as controlling them.

Mr Adams

66. Mr Adams is incapable of answering yes or no to the simplest question. He was argumentative and combative when in the witness box. His answers always had a clear starting point but then followed a stream of consciousness that led him in various directions to the extent that he sometimes forgot where he had got to, where he was going, and even where he had started from. The result was a mass of detailed information from which it was necessary to extract whatever was relevant to the question. It rarely contained a complete answer to the question. This can create the suspicion of being evasive, although that may not have been his intention. It inevitably produced loose remarks that were not always entirely accurate and created further suspicion. All of this could give the impression that he was changing his story, but often different answers over time could be pieced together to make a coherent whole. The difficulty was to sift the relevant from the irrelevant and, the more difficult task, the reliable from the unreliable.

67. His divorce, at least the financial arrangements, left him determined not to put his money at risk in any relationship in future. He is a business man and this dictates how he thinks. Every answer that related to his finances involved a detailed explanation of the tax implications and why particular arrangements made sense in terms of financial planning. This explains, I think, why he has been so reluctant to use what personal assets he has access to for Nicholas, preferring to operate if he must through trusts. This seems to be a family trait.

68. Ms Green called Mr Adams a controlling man and that is how he came across in the witness box, even after making allowance for his irritation at Mr Holden's style of questioning. His argumentative and sometimes aggressive attitude before me was reminiscent of Mr Craig's description of Mr and Mrs Adams Senior; another family trait. Ms Green also told me of an incident when Nicholas was visiting his father and the neighbours called the police because their argument was so loud and aggressive. She must have heard that from Nicholas, so it is not evidence from someone with an interest in supporting Mr Adams.

69. I am sure that Mr Adams likes to have his own way and wants to retain his own assets. He has, though, chosen to operate through trusts and pension arrangements. My concern is not with his desire to control, but with his ability to control the other trustees. If he wants compliant trustees, he has not chosen well in Dr Pelling and Mr Craig.

Dr Pelling

70. Dr Pelling is Mr Adams' representative before the Upper Tribunal. There is no restriction on the rights of audience before this tribunal. I know of Dr Pelling by reputation and his involvement in family law cases, but my assessment is based on the only direct dealings I have had with him, which is in these cases as a representative and a witness. He is also a trustee of the Pacific Trust and has prepared trust accounts.

71. Mr Holden criticised Dr Pelling for adopting the dual roles of witness and advocate. That only arose because Ms Green introduced the Pacific Trust into the 2003 scheme proceedings after I had given permission to appeal. Previously, she had only raised it in the 2012 scheme proceedings. When she raised this Trust, Dr Pelling immediately volunteered himself as a witness for her. I regarded that as a piece of wilful gamesmanship and made it clear that, if he persisted in that offer and Ms Green did call him as her witness, I would bar him as a representative. In the event that was not necessary. Whatever my opinion of his tactical games with Ms Green and Mr Holden, I do not criticise him for acting in a dual role that was effectively imposed on him by the late introduction of the Pacific Trust. The only alternative would have been a postponement of the hearing with an inevitable and long delay while Mr Adams found a new representative who would need time to become familiar with the voluminous papers and the complex dealings.

72. Dr Pelling also gave evidence on his involvement with the Nicholas Adams Settlement. There was no suggestion that Mr Adams was able to control the asset of that trust, which is the home where Ms Green lives with Nicholas. Mr Holden's point was that it showed part of a pattern of behaviour under which Mr Adams was able to act through Dr Pelling. I was shown a number of judgments by Peter Jackson J, who found that Dr Pelling was effectively obstructing the purchase of a home for Nicholas and Ms Green. Dr Pelling explained to me why the home being considered was not suitable. The reasons were sensible ones, but then it is always possible to find reasons for not buying a property.

73. I need to say what I made of Mr Holden's argument and the evidence he relied on. I accept the judge's assessment of Dr Pelling; he had prolonged and closer dealings with him on that issue than I have had. But it is important to notice what the judge did not say. He was trenchant in his criticism of Dr Pelling, but he did not say that he was merely doing what he was told by Mr Adams. I am not going to give the neutral citation numbers for the judgments to which I am about to refer, because they were anonymised and are probably subject to anonymity orders. I refer first to the judgment dated 23 March 2011. At [38], the judge noted that Dr Pelling became agitated when Mr Adams tried to give him instructions during the hearing. And at [62], the judge found that Dr Pelling was acting in the interests of the father. Then, in the judgment dated 19 and 22 September 2011, the judge said at [29] that however seriously Dr Pelling took his duties as a trustee, his approach only served the interests of the father. I draw three conclusions from those passages that accord with my assessment of Dr Pelling. (a) He does not like being contradicted or distracted. (b) He does take his duties as a trustee seriously. (c) He has predispositions that mean he is not well disposed towards paying maintenance for Nicholas. But nowhere did the judge say that he was merely acting on Mr Adams' instructions. Some of what he said is not consistent with him being merely compliant with Mr Adams' wishes.

74. My assessment of Dr Pelling is that he is a methodical and meticulous man who insists on rigidly following a set procedure and does not tolerate easily, or perhaps even understand, those who do not take the same approach. Someone with a more relaxed attitude might call him pedantic and find him difficult to deal with. My view is that this is not an approach he adopts for tactical purposes, but an aspect of his character. It is an aspect that suits Mr Adams who wants to prevent his assets coming into the hands of Ms Green, either directly or through Nicholas. It is not that Mr Adams controls Dr Pelling. It is that they think alike and act with the same predispositions. He may share views with Mr Adams, but he has a rigid sense of what is proper and is temperamentally unsuited to being under anyone else's control.

75. Dr Pelling produced emails as evidence that he was not under Mr Adams' control. They referred to a unilateral alteration of a document, relating to the repayment of a loan to Leigh, that had been made by Mr Adams without consulting the trustees. Dr Pelling wrote to Mr Mandell, describing this as 'not acceptable' and saying that it 'is not something any trustee could accept. … This kind of behaviour seems to [be] getting more frequent and it simply adds to the work of the Trustees.' It is easy to say that the disagreement was staged or the documents concocted to support what Dr Pelling says, but I do not think that that is what happened. The disagreement is all of a piece with the characters of both men as I observed them.

76. Other judges have formed different opinions of Dr Pelling; this is my view on the issue I have to decide.

Mr Craig

77. I have already mentioned Mr Craig. He is a solicitor who has handled the trusts and other affairs of the family. He is a trustee of the Adams Trusts and the Lattner Trust.

78. No doubt, Mr Craig is generally sympathetic to the Adams family and would take proper account of their wishes, but that does not mean he is under their control. He is a professional man who acts properly according to his view of his duties and the interests of the beneficiaries of the trusts. He is not merely a cipher for the family. He does not share their fixation with inheritance planning and was prepared to disregard Mr Adams' wishes when talking to his son, Craig.

Mr Breslaw

79. Mr Breslaw was a trustee of the Pacific Trust. Ms Green asked me to issue a witness summons for him to attend. I refused to do so; she had not even had the courtesy to ask him if he would attend. Having had a chance to reconsider this during the hearing, I remained of the view that his evidence would not be helpful.

80. Mr Breslaw has a property letting business. He was appointed a trustee of the Pacific Trust and resigned for personal reasons on 6 June 2013. He made a witness statement of 24 June 2016 giving evidence in family proceedings in the Family Court. He described his trusteeship as temporary, said that he could only recall signing forms for his appointment and resignation, and was not involved in any material activity of the trust. He has no documents relating to the trust.

81. I consider it unrealistic to believe that his evidence would be helpful. He has no documents from which to refresh his memory; and that memory was clearly at fault when he wrote the statement over two years ago, because the papers contain documents bearing his signature. It is unlikely that the additional passage of time will have enhanced the value of

whatever evidence he could give. The general tone of his statement suggested to me that he did not want to become involved.

Mr Mandell

82. Mr Mandell is a trustee of the Adams Trusts, the Lattner Trust and the Pacific Trust. Ms Green asked me to issue a witness summons for him to attend. I refused to do so; as with Mr Breslaw, she had not asked him if he would attend. Having had a chance to reconsider this during the hearing, I remained of the view that his evidence would not be helpful. I was also told that he has recently had a hip operation.

Sealgrove

83. For a time, this company was a trustee of the Atlantic Pension Fund. There was no evidence that would allow me to find that Mr Adams was able to control Sealgrove.

N. When did 18 Cedar Drive become Mr Adams' (principal) home?

84. I now come to my findings of fact. I deal with this question separately, as it requires detailed analysis of the evidence. My conclusion on the balance of probabilities is that Mr Adams' principal home changed on 20 November 2011.

85. Dr Pelling referred me to the decision of Upper Tribunal Judge Markus QC in *ZS v Secretary of State for Work and Pensions and SN* [2017] UKUT 402 (AAC) and in particular to what she wrote in paragraph 18:

> The parties have not made submissions as to the legal test for determining either where a person 'normally lives' or what is the 'principal home', and it is not appropriate to undertake a detailed analysis of the phrases here. Where a person normally lives requires little if any elaboration, and is a question of fact to be determined on the evidence. In the child support context, the Mr Commissioner Mesher gave brief consideration to the test for 'principal home' in R(CS) 2/96. There is case law considering the same phrase in landlord and tenant legislation: see for instance Ujima Housing Association v Ansah (1997) 30 HLR 831. In both contexts, it is clear that a range of factors is relevant and the test is not directed at a simple counting of the amount of time spent at each home. Moreover, intention is to be determined not by the subjective intention or motives of the person claiming the principal home but by an objective assessment of that person's actions and intention. I also draw attention to Mr Commissioner Mesher's observation at paragraph 12 that the phrase 'principal home' is 'directed to ascertaining what is normal as at the date at which the calculation of housing costs is being made, which might exclude the consideration of some long-term considerations.'

86. As at 24 April 2009, Mr Adams lived rent free at 26 Edmunds Walk, a property owned by the Adams Trusts. He eventually moved to 18 Cedar Drive. He said that he had moved out of Edmunds Walk on 20 November 2011, but that he had to move out in stages, continued to stay there when Nicholas visited, and attended to help put the property into a state fit for the rental market. He notified the Secretary of State of his new address on 16 December 2011.

87. The council tax documentation shows that Mr Adams became liable for Cedar Drive and ceased to be liable for Edmunds Walk on 20 November, when the trustees for the Adams Trusts took over responsibility. That date is also consistent with the tenancy of Cedar Drive expiring at the end of September 2011. However, I accept that he moved from one property to the other in stages; this is consistent with Mr Craig's description of Edmunds Walk as being

like a 'bachelor pad' and as requiring considerable work. I did not hear detailed evidence of the stages in which the move and improvements to Edmunds Walk progressed; it would be unrealistic to expect that. I am, though, satisfied that it is more likely that the move took place in stages, with the result that Mr Adams was for a time living in both homes, than that he transferred from one home to the other on a single day.

88. I also accept that Nicholas continued to meet his father at Edmunds Walk; this is consistent with the approval of the trustees for this to happen and with Mr Craig's evidence that Nicholas continued to visit his father there for a year ending November 2012. Under the contact order, Nicholas was allocated 42% of his time with Mr Adams, but he did not always take advantage of being with his father. So he spent less than half his time at Edmunds Walk.

89. I have yet to mention the dressing gown incident. Mr Adams answered the door at Edmunds Walk at 7.30 am on 17 April 2013 wearing a dressing gown. He said that he had been asked by the trustees to fix a plumbing problem and had put on the dressing gown because it was cold. The First-tier Tribunal found that explanation laughable. Maybe, but my role as a fact-finder is not to make a judgment on the credibility of this piece of evidence in isolation. My role is to assess the evidence on the issue of where Mr Adams had his principal home as a whole. Taken in the context of the contemporaneous evidence, the oral evidence before me, and the explanations he has previously given, I do not regard the evidence of this incident as providing a definitive answer. It is an isolated incident with no evidence of how he was dressed apart from the dressing gown. It is merely one factor to be taken into account on the issue as a whole.

90. My conclusion is that Mr Adams changed his principal home from Edmunds Walk to Cedar Drive on 20 November 2011. That is when responsibility for council tax changed. It is consistent with the notification to the Secretary of State on 16 December 2011. Both could have been self-serving, but the date is consistent with the Cedar Drive tenancy coming to an end seven weeks earlier, and it marked a change that had an effect on the trust, which then became responsible. My assessment of the trustees is that they would not be party to outright deceit. It is consistent with at least the beginning of a phased change of residence. The legislation requires me to find where Mr Adams had his principal home. On the evidence, that changed on 20 November 2011.

O. Other findings of fact

91. Mr Adams has had no earned income and no dividend income. He has had two sevenths shared care of Nicholas.

92. The remaining findings relate to ownership and control. I accept that there is much that was unsatisfactory in the evidence. It is unclear what access Mr Adams has in practice to what funds. He is certainly able to lay his hands on – a deliberately colloquial expression – large amounts of money when he has to. His financial dealings are confusing at best and deliberately so at worst. Mr Craig has not been the most proactive of trustees and his evidence to me was not always consistent with the contemporaneous documents. It is not for me to decide how well anyone has discharged their duties as a trustee. What I have to decide is whether Mr Adams could control the trustees. As trustees have to act unanimously, that means that he has to be able to control all the trustees. If there is one trustee that he cannot control, he does not have the ability to control at all.

93. The Spanish property at Parcela 122, Urb. El Paraiso is owned by Mr and Mrs Adams Senior. My assessment of the couple's character and mental abilities is that Mr Adams does not have the ability to control their actions in respect of this property.

94. Mr Adams has never had the ability to control the Adams Trusts. Mr Craig has been a trustee throughout. I find that he was not the most proactive of trustees and his memory may not be accurate in all respects, but he is a professional who would not act contrary to his duties as trustee.

95. Mr Adams has never had the ability to control the Lattner Trust. Even when he was a joint trustee (until 2012), Mr Craig was a fellow trustee. I have given my assessment of him as a trustee of the Adams Trusts.

96. Mr Adams has never had the ability to control the Atlantic Pension Fund. That is certainly true for so long as Seagrove was a trustee, as there is no evidence about that company at all. It is also true for other times. Mr and Mrs Adams Senior are trustees and I have already said that Mr Adams cannot control them.

97. He did, though, have a right to take a lump sum of £437,500. Dr Pelling accepted that that was a chose in action. Mr Adams was entitled to take that sum only for part of the period, because the terms of the trust were changed to postpone the earliest date at which the sum could be taken. The issue is whether enforcement would have been reasonable. It would not. Mr Adams was in the age bracket where some people would wish to take their pension and others would not. It was not financially necessary for him to do so, as he has had access to sufficient funds for his purpose. The test has to be applied in the context of the child support legislation, but there are general and specific factors to take into account. An important general factor is that the timing for taking a pension is a personal matter; good reason is necessary before the Secretary of State could properly consider that it was unreasonable for the non-resident parent to postpone doing so. An important specific factor in this case was the uncertainty about the most opportune time for taking a lump sum under Her Majesty's Revenue and Customs' practice of setting standard lifetime allowances. Mr Adams was kept advised about that and the best time to take a lump sum.

98. Mr Adams has never had the ability to control the assets of the Pacific Trust. In practice, this means 1 Friern Park. I have already explained why he cannot control Dr Pelling. There is no evidence that he can control Mr Mandell and Mr Breslaw. Ms Green will say that that is because I would not issues summonses for them. I have explained why I did not do so. The result is that there is no evidence on which I could properly infer that Mr Adams could control either of them. It would, anyway, have been surprising if Mr Adams was trying to control this fund. Like his parents, he is concerned about inheritance planning. This fund would not be effective if it remained under his control. It would not be in keeping with Mr Adams' character to run that risk.

99. I should say two more things about the Pacific Trust for completeness. First, I am sure that everyone involved – family members and trustees - had agreed to and co-ordinated the arrangement about 1 Friern Park, but that is not the same as any one of those persons controlling any other. I am also suspicious about the low price for the property, but on the evidence as a whole it is not sufficient to show control. Second, 1 Friern Park figured in *Green v Secretary of State for Work and Pensions and Adams (Diversion of Income)* [2018] UKUT 240 (AAC). That case was decided on the basis of the facts found by the First-tier Tribunal. In this case, having set the First-tier Tribunal's decision aside, I have made my own findings. That accounts for any difference there may be between the decisions.

100. Mr Adams controls York Mill. The accounts say he does and Dr Pelling accepted that that was so. The assets of the company can be classified under three heads. (a) There are the remains of a failed venture with a Chinese company: a stock of knitted ties and yarn, and

some machinery. (b) Web addresses that Mr Adams hopes to exploit in connection with online betting. (c) 17 Cedar Drive.

101. Heads (a) and (b) are not assets, because they fall within regulation 18(3)(d). Head (a) are essentially left over from a failed venture. Head (b) was acquired for future development when the time is right. Both (a) and (b) may properly be described in the context of regulation 18 as 'used in the course of a trade or business', although they are not being actively exploited at the times I am concerned with. They are the sort of thing that many companies have.

102. Head (c) is 17 Cedar Drive, which does not fall within regulation 18(3)(d), because it consists of a legal estate in land. It falls instead under regulation 18(3)(b). It has been used for accommodation related to the business and as security for borrowing. It is now rented by Mr Adams' son Leigh. The rent has been the major source of income for the company since 1999. It provides some funds to keep the company ticking over and the capital is available as security if required. Those purposes are reasonable in all the circumstances of the case.

103. Mr Adams owns 18 Cedar Drive. Until 20 November 2011, it was an asset with a value of £265,000. From and including that date, it has been his home and, therefore, not an asset (regulation 18(3)(e)).

104. The cash and other investments, principally shares, held by Mr Adams from time to time have always been retained for reasonable purposes (regulation 18(3)(b)). The amounts have varied continuously. The easiest way to deal with this issue is broadly and in stages. Before Mr Adams paid his contribution into the Nicholas Adams Settlement for a home for Ms Green and Nicholas, he had six figure sums. To the extent that they were the future capital for the Settlement, they were held for a reasonable purpose and it was the only source of funds for day-to-day living expenses. It was certainly the only funds available to him for that purpose that I am aware of. Mr Adams took his lump sum from the Atlantic Pension Fund on 4 April 2012 and immediately transferred £151,000 to the Pacific Trust. He held it for a mere sliver of time, so short a period that it can be disregarded for practical purposes. He was ultimately left with £62,302. £15,000 of that went on a Bar Mitzvah for Nicholas. Again, the capital was used as funds for day-to-day living expenses, the only source for those on the evidence I have seen. That is inevitably a broad approach, but it is the most realistic analysis on the evidence I have.

Just and equitable

105. It is just and equitable to agree to a variation, even without knowing precisely how much it would increase Mr Adams' liability. It is appropriate for that liability to be based on the statutory interest rate of 8%. It would be wrong to agree to a variation and to fix liability at the maximum rate as some form of punishment for Mr Adams having arranged his affairs in a way that minimises his liability for child support. The legislation allows him to do that. But it is appropriate to take account of his ability to meet his liability and the judgment of Mostyn J shows that he can lay his hands on funds when he needs them. I also take account of the fact that my decision, like all variation decisions, will operate only for the finite period until the next calculation is made. In this case, it will end in any event with the transfer of the case into the 2012 child support scheme, which has no equivalent to regulation 18. There will, therefore, be a cap on his liability.

School fees

106. Dr Pelling referred to my decision in *DB v CMEC* [2010] UKUT 356 (AAC):

33. The payment of school fees might be taken into account as a voluntary payment under section 28J. The parents could also agree that the payments should be in discharge of the non-resident parent's maintenance liability. Or the parent with care could use the maintenance towards school fees. However, the legislation makes no specific provision for school fees to be taken into account. The explanation probably lies in the reasoning of the deputy Commissioner in *CSCS/0013/2007*. He decided that school fees paid by one parent could not be taken into account under the just and equitable requirement. He wrote:

> '16. … The CSA is designed to determine the amount of maintenance that should be paid for a child; ie a sum to cover living costs such as clothing, share of housing costs, pocket money and normal non fee paying school expenses etc. The PWC is generally the parent entitled to determine how the maintenance is to be spent on the child's behalf. If parents decide that a child should be privately educated that is a cost over and above normal maintenance costs. How those fees are paid is a matter for agreement between the parents or failing agreement either parent could seek a court order for payment of the school fees.'

34. I have not found it easy to decide whether the deputy Commissioner was correct that the amount of school fees paid by a non-resident parent cannot be taken into account in applying the just and equitable test. On the one hand, that test provides a largely unrestricted discretion to take account of the whole of the financial circumstances relevant to both the non-resident parent and the person with care. On the other hand, it must be applied within the context of the child support scheme, which expressly leaves to the court the issue of tuition fees. I have decided that the express legislative division of responsibility between the courts and the Commission indicates that school fees are a matter for the courts and not to be taken into account under the just and equitable test.

107. Dr Pelling argued that my decision was wrong. Mr Pritchard argued that the Secretary of State accepted my decision as correct and drew my attention to the fact that it had been followed by Upper Tribunal Judge Knowles QC (now Knowles J) in *SM v Secretary of State for Work and Pensions and BM* [2016] UKUT 245 (AAC), reported as [2016] AACR 47. At [27], she cited what I wrote in *DB* at [34]: 'the express legislative division of responsibility between the courts and the Commission [now the Secretary of State] indicates that school fees are a matter for the courts and not be to taken into account under the just and equitable test'. Later in her decision, she wrote:

> 42. The Agency submitted that payment of extras by the father not linked to A's schooling could be taken into account when determining whether it would be just and equitable to make a variation decision. This included extras falling into the specific category of voluntary payments as well as other extras. Neither party dissented from that submission.
>
> 43. I agree. There is nothing in the Act or the Variations Regulations to prohibit such items from being taken into account in a just and equitable determination. As Upper Tribunal Judge Jacobs commented at [34] of *DB v CMEC* (see reference above), the just and equitable test provides a largely unrestricted discretion to take account of the whole of the financial circumstances relevant to both the parent with care and the non-resident parent. However that test must be applied within the context both of the child support scheme as a whole and of the matters contained in section 28F, 28E of the Act and in regulation 21 of the Variations Regulations.

108. I accept Mr Pritchard's argument that I should follow my previous decision, which now has the support of Judge Knowles and, as a reported decision, of the judges of the Chamber generally. Payment of school fees is irrelevant to the just and equitable test.

P. What about Nicholas?

109. This is a question that Ms Green asked me repeatedly. It is a fair question and it deserves an answer, although I anticipate that she will not like it. This is the answer. Nicholas is entitled to the amount of child support that is payable under the child support scheme as correctly interpreted and properly applied. The scheme allows non-resident parents to arrange their affairs in ways that keep income or assets outside the scheme. That is the effect of the political judgment behind the legislation, which I have to accept. Despite Mr Holden's argument, it is not right to interpret the legislation in a way that it will not properly bear in order to ensure that Mr Adams' liability for Nicholas reflects the full extent of the funds to which he may have access in some way or another. The High Court may have the power to do that under different legislation. The First-tier and Upper Tribunals do not have that power under the legislation they apply.

Q. Note for clarification

110. Dr Pelling asked me to make some corrections and to clarify some points. I have made a number of corrections when I can properly do so, although not always in the way he sought. He is concerned that some things I have said may be used by Ms Green in later appeals. The point should not be necessary but, just to be clear, my comments about Mr Adams' ability to control his company (at [53] and [100]) apply to the time with which I was concerned in these appeals.