IN THE UPPER TRIBUNAL **Case No.** CCS/725/2016, CCS/726/2016
ADMINISTRATIVE APPEALS CHAMBER

Before E A L BANO

Attendances:

For the Appellant:	Did not appear
For the First Respondent	Mr Stephen Kosmin of Counsel, instructed by the Government Legal Department
For the Second Respondent:	Mr Paul Doxey

Decision: My decision is that the decision of the tribunal involved the making of an error on a point of law. I set aside the tribunal's decision and in the exercise of the power conferred on me by section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I re-make the tribunal's decision as follows:

> I direct a variation of the nil liability formula assessment made on 21 November 2006, effective from 10 November 2006, on the grounds that the non-resident parent had assets falling within regulation 18 of the Child Support (Variations) Regulation 2000 as follows:
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> a. From 10 November 2006, £1,132,388.40 comprising:
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> (i) 50% of the value of the shares in Polak Estates Limited calculated at £842,388.40 on the basis of the net shareholder's assets shown on the company's balance sheet dated 28 August 2006, less liability for corporation tax of £722,047.20;
> (ii) The value of Glebe Farm of £290,000.00, calculated as £890,000.00 less mortgage of £600,000
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> b. From 31 March 2007, £842,388.40.00, comprising the value of the non-resident parent's shares in Polak Estates Limited, calculated as above
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> c. From 15 October 2009, £631,528.00, being 50% of the net assets of Polak Estates Limited shown on the company's balance sheet of 28 August 2009.
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> For the reasons given by the tribunal, in calculating the weekly value of the income the Secretary of State is to apply an interest rate of 5% from 10 November 2006, reducing to 2% from 15 October 2009.
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> I do not agree to a variation on any other ground and adopt all other findings made by the tribunal.

I direct the Secretary of State to consider how his powers of supersession should be exercised to take into account the receivership of Polak Estates Limited since the time that the decsions which are the subject of this appeal were made.

REASONS FOR DECISION

1. Due to the extraordinary length of time that these proceedings have taken, the 'relevant children' in this case are now aged 25 and 23. The appellant is their father, who is the non-resident parent. The second respondent is their mother, who is the parent with care. I shall refer to them from now on as the father and mother respectively.

2. The father is a former miner who prior to July 2006 had been an equal shareholder with his new partner in a company which owned a large portfolio of rented houses. Shortly before the mother applied for child maintenance, the father resigned as a director of the company and transferred his shareholding to his new partner. It appears that a maintenance application, which resulted in a nil assessment, was made on 21 November 2006, with an effective date of 10 November. The mother applied for a variation and, although the actual variation application does not appear to be in the papers (now numbering over 4000 pages), there is a record of a telephone call on 19 January 2007 in which the mother inquired about 'progress' of her application. That suggests that the variation application had been made at some earlier date and since it has never been suggested that the application was made out of time I can only assume that it was made within the time limit permitted by regulation 4 of the Child Support (Variations) Regulations 2000. The grounds of the application are said to have been lifestyle inconsistent with income, income not taken into consideration, diversion of income, and assets. The application was refused on 15 February 2007,

3. The mother appealed against the decision of 15 February 2007, and that appeal was dismissed on 27 November 2007. The mother appealed against the tribunal's decision and, following an oral hearing, I allowed the mother's appeal under reference CCS/720/2008 on 21 October 2009 because, among other reasons, I considered that the tribunal erred in treating the father's shares in his company as assets used in the course of a trade or business, and because the tribunal did not deal properly with the father's reasons for disposing of his shares in the company. I remitted the case for rehearing before a fresh tribunal.

4. Shortly before my decision was issued, on 16 October 2009, the mother made a new variation application, on the grounds of lifestyle inconsistent with declared income and diversion of income. Since no maintenance assessment had ever been made, that application should probably have been treated as a supersession application, so that the effective date for any award resulting from the application would have been the first day of the maintenance period in which the application had been made, that is, 15 October 2009. After the application was refused on 10 December 2009, the mother appealed against the refusal on 29 December 2009. On 2 February 2010 the tribunal ordered that that appeal and the appeal which I had remitted earlier should be heard together. A hearing of both appeals took place on 5 and 6 October 2010, at which the tribunal allowed the remitted appeal only to the extent of treating the father's disablement pension and miner's pension as income to be taken into account in calculating his maintenance liability. Since those amounts should not in fact have been taken into account as forming part of the father's

income, at the instigation of CMEC (as the former Child Support Agency had become), the tribunal attempted to correct its error by invalidly purporting to review its decision.

5. The October 2010 tribunal again completely failed to grapple with the question of the value of the shares which the father had transferred to his partner, and I gave the mother permission to appeal against the tribunal's decision on 1 May 2012. In my determination, I set out the complicated procedural history of the case up to that point and made it clear (paragraph 7) that my grant of permission to appeal was only in respect of the appeal which I had remitted in my earlier decision. On 27 June 2013 I allowed the mother's appeal under reference *CCS/355/2012*, remitting the case to a fresh tribunal for the second time. I directed the tribunal to consider the following issues:

> a. Following the transfer of the shares in his company to his partner, did the non-resident parent still have the ability to control the shares? So far as I am aware this has not been disputed, but it is a matter on which the tribunal will have to make a finding.
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> b. If the non-resident parent still had the ability to control the shares, what was their value on 9 November 2006? The tribunal may decide that the shares had no value, but should take into account the value of the funds in the company-see paragraph 9 of my earlier decision.
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> c. Is it just and equitable to order a variation on the basis of the statutory interest rate of 8%, or at some other rate-see *RC v CMEC [*2011] AACR 38.a abano

6. The appeal was heard for a third time on 12 May 2015. The tribunal rejected the father's evidence that he ceased to have any active involvement in the company from 2006. It found (paragraph 14 of the statement of reasons) that his resignation as a director had had no effect on the day to day running of the company, that he had not relinquished any control in the company and that he continued to make all relevant decisions concerning the company during the relevant periods. The tribunal considered (paragraph 29) that the father's actions in giving up his shares and resigning his directorship were motivated by a desire to avoid or reduce his liability to child maintenance, and (paragraph 30) that his actions in giving up his shares and resigning his directorship were not *bona fide* acts. They therefore concluded (paragraph 31) that as at the effective dates of both the 2007 and the 2009 decisions the father had the ability to control the shares which he had given to his partner and that, accordingly, the shares were assets for the purposes of regulation 18 of the 2000 Variations Regulations.

7. The tribunal directed itself (paragraph 33) that it should value the shares on the basis of the company's August 2006 accounts. However, instead of taking the figure of £2,406.824 shown as the value of the shareholder's funds in the August 2006 balance sheet, the tribunal based its valuation of the shares on a figure of £4,589.461, which was the rough total value of the company's housing and other net

current assets, less mortgage liabilities. The tribunal also deducted the estimated corporation tax liability of £759,000 from the latter figure.

8. The tribunal also treated as a relevant asset a property called Glebe Farm which the father and his partner were renovating and which was subject to a mortgage. The father and his partner occupied part or all of the property from 31 March 2007, and the tribunal held that from that date it should cease to form part of the father's assets under regulation 18(3)(e) of the 2000 Variations Regulations. The date is important because it fell after the date of the first of the decisions refusing a variation application. The tribunal based its valuation of the father's former shareholding as at 15 October 2009 on the value of the company's net assets shown in the company's 28 August 2009 balance sheet.

9. On 15 October 2015 the father wrote to the First-tier Tribunal judge asking for the tribunal's decision to be altered to allow the regulation 18 assets to be based on the value of the shareholder's funds shown in the August 2006 accounts rather than the calculation of the value of the company's net assets. The letter concluded by asking for the letter to be treated as an application for permission to appeal to the Upper Tribunal if the request were not granted, and made no other complaint about the tribunal's decision. On 14 July 2016 I treated that letter as an application for permission to appeal, extended the time for appealing and gave permission to appeal for the following reasons:

> a. The tribunal focussed on the issue of whether [the father] had the ability to control the company, but as the tribunal acknowledged (at paragraph 33 of the statement of reasons), the issue which they had to decide was whether he had the ability to control the shares in the company. It is arguable that the tribunal gave inadequate reasons for concluding that he retained that ability after the transfer of the shares to his wife.
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> b. It is arguable that the tribunal gave inadequate reasons for treating the value of the shares as the book rather than the market value.
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> c. The tribunal stated that they were relying on the 2006 accounts, but in fact took into account the document at page 69, apparently consisting of a rough valuation of the properties owned by the company.
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> d. The tribunal appears to have deducted the estimated corporation tax liability of £759,000.00 from the net asset figure of £4,589,461.00 instead of the figure of £2,553,000.00 (presumably the 2006 value of shareholder funds).
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> e. In relation to Glebe Farm, it is arguable that the tribunal failed to give adequate consideration to whether that was an asset which it was reasonable to retain while it was being renovated and erred in disregarding it as the family's home when it did not become their home until after the decision under appeal was made.

f. It is arguable that the tribunal had no power to deal with appeal SC045/10/01207. That case was decided by the tribunal which sat in October 2010 and was never appealed.

10. In a written submission dated 29 November 2016, the Secretary of State supported the appeal on grounds c. d. and e., and on 16 May 2017 I gave a further direction stating that in order to prevent further delay I was minded to direct an oral hearing so that I could re-determine the case myself in the event that I allowed the appeal. All parties agreed to that course of action and on 4 July 2017 I directed an oral hearing accordingly. Most unfortunately, the father was too ill to attend, but I am extremely grateful to all the parties for their co-operation in enabling this very productive hearing to take place. Although the question of the decision which I should substitute logically arose only if I allowed the appeal, in order to prevent repetition of the same points I conducted the appeal as a single hearing.

11. Section 28F of the Child Support Act 1991 allows for the variation of a tariff maintenance assessment if it is just and equitable to do so and if the case falls within regulations made under Part 1 of Schedule 4B of the Act. The relevant regulations are the Child Support (Variations) Regulations 2000. Regulation 18 of the 2000 Regulations provides:

> "(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—
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> (a) in which the non-resident parent has a beneficial interest, or which the non-resident parent has the ability to control;
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> (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
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> (c) which has become subject to a trust created by legal implication of which the non-resident parent is a beneficiary.
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> (2) For the purposes of this regulation "asset" means—
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> (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;
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> (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(1), stock and unit trusts as defined in section 6 of the Charging Orders Act 1979(2), 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 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.

(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 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."

In applying those provisions, it is necessary to have regard to section 20(7)(b) of the Child Support Act 1991, which prevents a tribunal from taking into account any circumstances not obtaining at the time when the decision or assessment appealed against was made. That provision is important in this case because it prevents any account being taken of the collapse of the company and the father's deteriorating personal circumstances since the decisions under appeal was made.

12. Turning at last to the grounds of appeal, I agree with Mr Kosmin's submission that the tribunal did not misdirect itself in holding that the shares which the father transferred to his partner constituted an asset for the purposes of regulation 18 of the 2000 Variations Regulations. Those shares were an asset for the purposes of the Regulation by virtue of the definition in regulation 18(2)(c) and, notwithstanding the transfer of the shares by the father to his partner, they fell to be treated as his asset by virtue of regulation 18(1)(a) if he retained the power to control them after the transfer.

13. In *RC v SSWP* [2009] UKUT 62 (AAC) Carnwath LJ (as he then was) and Judge Jacobs held that 'control' for the purposes of regulation 19(1A) of the 2000 Variations Regulations meant effective, rather than legal, control, and there is in my judgment no reason to take a different approach when applying regulation 18. In paragraphs 22 to 29 of the statement of reasons the tribunal made detailed and careful findings with regard to the part played by the father in the running of the company after he resigned his directorship and transferred his shareholding to his partner, but those findings were given as reasons for rejecting the father's evidence that he ceased to have any involvement with the company after 2006. At paragraph 32 the tribunal directed itself correctly that the issue that they had to consider was the father's control, rather than influence over, the company's shares. The tribunal's finding that after the transfer the father continued to run the company was consistent with their finding that he remained in control of the shares, but in my view it is clear that in applying regulation 18 the tribunal correctly identified the shares in the company, rather than its business, as the asset with which it was concerned.

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."

15. Where the valuation of shares is in issue, it seems to me to be appropriate in the context of the child support scheme that the valuation should take into account the reality of the arrangements between those involved in the company. In particular, if a non-resident parent has the ability to control assets which can be utilised for the benefit of the relevant children; it seems to me to be inconsistent with the aims of the scheme for the value of the asset to be reduced or even extinguished to take into account the difficulties of a purely hypothetical sale of the asset to a third person. I therefore consider that the tribunal in this case adopted an entirely correct approach in basing the value of the shares which the father had the ability to control on the value of the shareholder's funds in the company.

16. It is however clear that the tribunal based their valuation on an erroneous figure. Although the tribunal stated (paragraph 33) that it was basing its valuation on the 2006 accounts, the figure of £4,589.461.00 which it in fact used was taken from a document showing a list of al the properties owned by the company. As the father stated in his letter of 15 October 2015, the correct figure was the figure of £2,406,824.00 shown as the value of the shareholder's funds on the August 2006 balance sheet. It follows that the tribunal deducted the figure representing liability for Corporation Tax from the wrong amount.

17. So far as Glebe Farm is concerned, it is necessary to consider whether the tribunal erred by failing to consider under regulation 18(3)(b) of the 2000 Variation Regulations whether that was an asset which was being retained for a purpose which was reasonable in all the circumstances of the case. The Secretary of State has resiled from his earlier position and, while accepting that the tribunal did not expressly address that issue, now contends that the tribunal was bound to conclude that Glebe Farm was not an asset that it was reasonable to retain.

18. I accept that submission. The property was not the father's main residence until he moved into it in March 2007, As Mr Kosmin has submitted, it appears to have been used as security for a mortgage, thereby providing the father with a source of funds. In the context of the child support scheme, I do not consider that it was reasonable to lock up capital for that purpose, rather than making it available for the support of the relevant children. I therefore consider that the tribunal's failure to refer to regulation 18(3)(b) was an immaterial error of law, but I would in any case have reached the same conclusion as the tribunal if I had had to re-decide the appoint myself.

19. The tribunal decided that under regulation 18(3)(e) of the Variation Regulations Glebe Farm ceased to be a relevant asset because as from that date it was the father's home. Mr Doxey did not pursue before me any arguments with regard to whether only part of the property was occupied as the father's home. However, since the father did not move into the property until after the date of the first decision, it is necessary to consider whether section 20(7)(b) of the Child Support Act 1991 prevented the tribunal from finding that the property ceased to be a relevant asset.

20. If the tribunal had jurisdiction over the decision of 10 December 2009, it could have decided that Glebe Farm ceased to be a relevant asset prior to that date. The question of whether the tribunal was concerned with the December 2009 decision is the subject of the final ground of appeal. However, for the reasons given in counsel's skeleton argument, I consider that on the balance of probabilities the tribunal had jurisdiction only over the February 2007 decision.

21. . In my view, it would however be unfair to deprive the father of the benefit of the tribunal's findings at this stage of the proceedings, particularly when it is impossible to be sure whether or not the tribunal had power to make that finding. I therefore propose to adopt the course helpfully suggested to me by the Secretary of State in counsel's supplementary submission by directing that the father's appeal be treated as an appeal against the decision of the October 2010 tribunal under reference 045/10/00818. I extend the time for appealing that decision and waive all procedural requirements so as to validate the appeal. There is a separate Upper Tribunal case file for that decision and by taking that course I can deal with all matters relevant to the second decision.

22. I have decided that the decision of the tribunal was in error of law in the respects set out in paragraph 16. I therefore allow the appeal and set aside the tribunal's decision.

23. For the reasons I have given, I have decided to exercise my power under section 12(2)(b)(ii) of the Tribunal's Courts and Enforcement Act 2007 to re-make the tribunal's decision. In doing so, I adopt all the findings made by the tribunal, as given effect to in the tribunal's decision notice of 14 May 2015, including what was decided by the tribunal in relation to the interest rates to be used to determine the father's variation income, except to the extent that I have indicated. The result is that the decision is altered only in the way requested by the father in his letter of 18 November 2016.

E A L BANO
19 February 2018