IN THE UPPER TRIBUNAL **Upper Tribunal case No.** CCS/2967/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (1 June 2016, file reference *SC 007/14/000803*) involved the making of an error on a point of law. The Tribunal's decision is **SET ASIDE** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Under section 12(2)(b)(ii) of the 2007 Act, I **RE-MAKE** the First-tier Tribunal's decision to the same effect:

(1) Mr T's appeal against the Secretary of State's decision to refuse his variation application under section 28F of the Child Support Act 1991 is dismissed;
(2) Mr T does not have a special expense in the form of a prior debt within the meaning of regulation 12 of the Child Support (Variation) Regulations 2000.

Terminology

1. In these reasons:

- "CSA" refers to the Secretary of State for Work & Pensions;
- "Miss A" refers to the parent with care;
- "Mr T" refers to the non-resident parent.

Decision-making history

What Mr T told the CSA

2. Mr T wrote (in February 2014) that, in early 2006, Miss A realised she could not "oust" him from their home and "approached me to ascertain what her position would be on separation" (p.48 of the First-tier Tribunal file). Mr T said he presented Miss A with two options:

(a) he could abide by their "original commitment when she first moved in" to restore her to the position, in home-owning terms, that she was in just before they started living together. That position was described as "a 50-50 arrangement with a housing association and if necessary take on the 50% share myself"; or

(b) he could provide a lump sum of £55,000 "in lieu of child maintenance that Miss [A] could use as deposit for a property" but, if she chose this option, she would have to accept "a modest child maintenance payment of £200" and if she sought to "forcibly amend" the agreement and "the advance payment was not considered as such" then "the entire amount would be repayable in full".

3. Mr T argued that Miss A's subsequent acceptance of the sum of £55,000 constituted agreement to the above terms.

4. In June 2006 the Alliance & Leicester informed Mr T that they had granted his application for a "further loan" of £55,000. In fact, this was a mortgage offer valid for 6 months. On 9 November 2006, Mr T took out a 22 year mortgage in the sum of £55,000 (p.29). The mortgage was secured on Mr T's home which, at this date, was also the matrimonial home although Miss A had no legal interest in it.

5. Mr T said that, towards the end of November 2006, the mortgage was converted to interest-only so that House 1 (see below) could be renovated without incurring further debt. A mortgage statement records an opening balance of £55,000 at 9 November 2006.

6. Written evidence about the intended purpose of this sum of £55,000, according to Mr T, included:

(a) a CSA telephone note of 7 February 2014 (p.60) recording Mr T's statement that Miss A verbally agreed to receive a £55,000 deposit for the purchase of a property. I shall refer to the property subsequently purchased as House 1;

(b) a CSA telephone note of 20 February 2014 (p.63) recording Mr T's statement that the payment was made in lieu of child maintenance payments but Miss A chose to use it as a deposit;

(c) a letter written by Mr T to 'Dear Sir or Madam', dated 13 November 2006 (i.e. 4 days after Mr T entered into a secured loan agreement with Alliance & Leicester), which stated under the heading "Re: Mortgage deposit for [Miss A]":

> "The £55,000 mortgage deposit is paid as part of a private settlement between myself and [Miss A]. The full payment being approximately fifty percent of the increase in the market value of the property we have shared since April 2000."
>
> The payment is made in good faith and in doing so I do not admit liability for this or any other payment."

This may be the solicitor's letter that Miss T reportedly mentioned during a CSA telephone conversation on 20 February 2014 (p.68).

(d) By letter dated 20 January 2014, Mr T stated the £55,000 was for the benefit of "the family" because "it was used in its entirety to partially fund the property which [Miss A] moved into when we separated and over which I had no interest";

(e) in a November 2014 CSA enquiry form (p.17), Mr T wrote that, in 2006, Miss A "agreed to a reduced monthly payment [of child maintenance] in return for an advanced payment of £55,000";

(f) in January 2014 (p.24 & p.28), Mr T stated the £55,000 transfer was a 'debt', in the form of a loan, further described as (a) incurred as part-payment for House 1 ("a property for the sole use of [Miss A] on our separation"); and (b) a "secured loan" used to partially fund House 1, into which Miss A moved on their separation and in which he had no interest.

7. The appeal papers indicate that Mr T did not address Miss A's claim that House 1 was originally purchased as an investment property (see below) until a letter of 7 September 2015 (p.124), written in connection with a previous appeal to the Upper Tribunal. Mr T wrote:

- Miss A's allegation that [House 1] was purchased as an investment property to prevent her obtaining rights in the matrimonial home "is completely unfounded";
- "In no way would the arrangement prevent [Miss A] making a claim against my property";
- The fact that [House 1] was not purchased as an investment property for Mr T was shown by Miss A's statement that the sum of £55,000 was not a gift but was instead provided so that she could pay a deposit for purchase of House 1;
- "if the £55,000 was my investment capital", why was a Trust Deed necessary to give him an interest in House 2 (the property Miss A subsequently purchased after selling House 1)?

8. Mr T wrote that between December 2006 and November 2008 he spent some £16,000 renovating and furnishing House 1 (itemised at p.44) and, in June 2009, £4,000 on improvements. The itemised list at p.44 describes payment of approximately £10,000 to Miss A for roofing works. The other entries were mainly described as expenditure at various D.I.Y. and furniture stores. Mr T has not supplied evidence that this expenditure was funded by debt.

9. A CSA telephone note of 6 February 2014 records Mr T's statement that he and Miss A split up in November 2008. In 2009, he re-financed "and [the 2006 mortgage] has been consolidated into his monthly mortgage payments (being in total £656 per month).

10. Mr T wrote that in February 2011 he made a £38,000 "investment" in House 2 and also incurred £7,000 "additional costs" as a result of Miss A's "action", plus other costs of £2,400 between March and September 2011 (p.26). A CSA telephone note of 7 February 2014 (p.60) records Mr T's statement that House 2 was purchased using the profit made on House 2 and he also contributed a deposit of £45,000.

11. On 4 February 2011, Mr T and Miss A executed an agreement by deed described as supplemental to their joint purchase of House 2 (p.51). The deed recorded:

- Mr T supplied £45,000 of the purchase price for House 2. Miss A supplied £59,000;
- The remaining £100,000 was funded by a "joint mortgage" (although that may not be what in fact happened);
- The property was held by Mr T and Miss A as tenants in common;
- Mr T was entitled to 20% of the proceeds of any sale with the time of sale to be decided solely by Miss A;
- In the event of a sale, Miss A was to discharge the mortgage.

What Miss A told the CSA

12. A CSA telephone note, dated 20 February 2014, records Miss A's statement that, at an early stage of her relationship with Mr T, he verbally agreed that, if they split up, her would provide her with "a home and money towards it" (p.67). Miss A made a similar statement in writing (p.87, 25 October 2014). The telephone note also records Miss A's statement that the

£55,000 provided in late 2006 could not have been for child maintenance because she and Mr T did not separate until 2008.

13. Miss A claimed in writing that Mr T forcibly removed her and their child from the former family home in 2008 (p.49, 12 February 2014). She went to live in House 1 which was originally purchased as an investment property for the two of them. Mr T did spend money renovating and furnishing the property, which was a 'shell', but Miss A disputed the sums claimed. She wrote that the properly needed to be decorated and furnished but at a cost of only £5,000. And, had Mr T let Miss A stay in the former matrimonial home, these costs would not have been incurred.

14. Miss A, by letter dated 1 August 2014, wrote that House 1 was purchased in 2006 as a rental property albeit never rented out (p.89). She fled there in 2008 but it was damp and she put it on the market when her daughter's health started to suffer. On 28 May 2015, Miss A again wrote that House 1 was initially purchased as an investment property (p.107).

15. Miss A, by letter dated 25 October 2014, wrote that no agreement was entered into between herself and Mr T in 2006 and the transfer of £55,000 was not a gift it was a deposit (p.88). She funded the remainder of the purchase price for House 1 by taking out a mortgage in her own name (CSA telephone note, 20 February 2014).

16. Miss A wrote that House 1 was part-exchanged for House 2 in 2011 for which she had always paid the mortgage (p.49, 12 February 2014). Mr T made a "small contribution" towards the purchase price.

CSA's decision

17. Miss A applied to the CSA for a maintenance assessment in respect of a single qualifying child. Using the Child Support Act 1991 terminology, she was the 'parent with care' and Mr T the 'non-resident parent'. The application fell to be dealt with under the 2000 child support rules.

18. On 31 January 2014, the CSA decided Mr T was liable to pay £83 per week in child maintenance, effective from 15 January 2014. Mr T's appeal against the decision was taken to include a request for a variation of the usual maintenance assessment rules. The CSA refused to make a variation, relying on regulation 12(3)(h) of the Child Support (Variations) Regulations 2000.

19. Mr T's grounds of appeal were that no account was taken of his 2006 agreement with Miss A nor of the sums he spent renovating and improving House 1. He also argued that he was not liable to make (or had a "reasonable excuse" not to make) any "further payment" until the 2006 'advance' was "exhausted" or refunded in full.

The First-tier Tribunal's decision

20. The First-tier Tribunal decided Mr T's appeal on 8 April 2015. Mr T succeeded but the First-tier Tribunal's decision was subsequently set aside by the Upper Tribunal. Mr T's appeal was remitted to that Tribunal for re-hearing. The only aspect of the Upper Tribunal's decision to which I need to refer is that reason why the appeal was allowed was that the First-tier

Tribunal gave inadequate reasons for its decision in that it did not explain whether it applied regulation 12(5) when finding that Mr T had made out his case for a variation on the prior debts ground.

21. The First-tier Tribunal re-heard Mr T's appeal on 1 June 2016. Both Mr T and Miss A attended the hearing and gave oral evidence. A CSA Presenting Officer also attended.

22. The Tribunal's record of proceedings (record of oral evidence) includes the following:

- Both Miss A and Mr T agreed she left the former matrimonial home in November 2008. Mr T agreed they were a couple until that date;
- Mr T said he provided £45,000 towards the purchase price for House 2;
- Mr T said that, despite the Trust Deed, Miss A always paid the mortgage on House 2;
- Mr T: "I believe the purchase of [House 1] was for a home for Miss [A]. Miss [A] states this p.87". And Miss A's response:
- Miss A: "My view is that it was bought as an investment for the family but there was no discussion about amount and values of property";
- Mr T: "The arrangement in November 2006 was in preparation for separation at that point. I didn't want to separate but Miss [A] had said she wanted to leave and wanted me to provide her with a property…[House 1] required extensive refurbishment. It was not habitable on purchase";
- Mr T: "Miss [A] chose the property all I did was state how much I could raise on a second mortgage and provide her with as a deposit. I had no other role other than carrying out some of the refurbishment". And Miss A's response:
- Miss A: "The purchase [was] arranged by Mr [T]. We agreed to purchase it as an investment. He wanted it in my name because I was complaining that I had no security because [the matrimonial home] was in his sole name";
- Miss A: "It was done as an investment. It was bought cheaply because it needed work but it had potential to be rented out";
- Mr T: "There was no change in our living arrangements between 9.11.06 and November 2008";
- A CSA Presenting Officer asked "You stated that investment for both but in Miss A's sole name. Why was that?" And in response:
- Miss A: "…because I was going to be solely responsible for paying the mortgage and the property gave me some security. We were still a couple until I left";
- And Mr T's response: "It wasn't an investment for both. It was property for Miss [A] as her home. Wasn't done as a rental property. It was in her sole name".

23. The Tribunal's findings included the following:

(a) Mr T took out an additional mortgage, secured on his own home, to provide Miss A with a £55,000 deposit for the purchase of House 1. Miss A took out her own mortgage, secured on House 1, for the remainder of the purchase price;

(b) House 1 was in a poor state of repair. Mr T's documentary evidence as to the sums spent on renovating the property was accepted;

(c) House 1 was not purchased as a home for Miss A but it was partly "for her benefit" – to give her a stake in the housing market. Nevertheless "the fact that they were a couple means that the debt was incurred for their joint benefit";

(d) Miss A's evidence that House 1 was purchased as an investment property "seems a more likely explanation". This passage is found not in the 'findings of fact' section of the statement of reasons but in the 'reasons' section. The 'reasons' section also states: "the debt was incurred to purchase a property which they hoped would increase in value and which was in no physical state to be anyone's home";

(e) In November 2008, Miss A and her child "left" the former matrimonial home and moved into [House 1]. Before this, the parties were a couple. The Tribunal noted Mr T's evidence that the "process of separation" began two years earlier but, taking into account his lack of supporting evidence, found separation did not occur until November 2008;

(f) In November 2009, Mr T redeemed the 2006 additional mortgage, and other mortgages, by taking out a single replacement mortgage;

(g) The Tribunal accepted the particulars concerning the purchase of House 2 as recorded in the Trust Deed;

(h) The 2006 'loan' was excluded by regulation 12(3)(h) of the Child Support (Variation) Regulations 2000, being a loan secured on property, and the exception to the exclusion could not apply because, at 15 January 2014 (presumably, this was assumed to be the date of Mr T's application for a variation), Miss A was not living in House 1;

(i) If the Tribunal was wrong about that, the relevant debt was the 2009 consolidated mortgage but that was excluded by regulation 12(1) since it was not a debt incurred before Mr T became a non-resident parent;

(j) If the 2011 debt referable to House 2 was relevant, this was excluded because Mr T was "joint owner and beneficiary of that property";

(k) The previous First-tier Tribunal (whose decision had been set aside by the Upper Tribunal) made a finding that the original debt had 'rolled over' but "it is not clear what this means";

(l) Regulation 12 is to be considered as at the date of an application for variation. Clearly, at the date of Mr T's 2014 application, the debt incurred in November 2006 did not qualify because the property that it was used to purchase had been sold.

24. Applying those findings, the Tribunal decided that none of the debts relied on by Mr T could support the variation sought. They were all excluded by regulation 12.

Legal Framework

25. The legal issue before the First-tier Tribunal was whether there should be a variation of the usual rules governing child maintenance assessments Section 28A of the Child Support Act 1991 ("1991 Act") provides that, where an application for a maintenance calculation is made, the non-resident parent (or person with care) may apply to the Secretary of State for the rules by which the calculation is made to be varied.

26. Section 28F of the 1991 Act provides:

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

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

27. Schedule 4B(2)(1) to the Act provides that a variation may be agreed to with respect to a non-resident parent's "special expenses". "Special expenses" are defined in the Child Support (Variations) Regulations 2000. Regulation 12 of the 2000 Regulations provides for a "prior debts" category of special expenses.

28. Regulation 12 begins with a general rule for identifying debts repayment of which shall constitute special expenses. The general rule applies if two conditions are met. One is concerned with the time the debt was incurred. The other is concerned with the person/s for whose benefit the debt was incurred.

29. The time condition, in regulation 12(1), requires the debt to have been incurred "before the non-resident parent became a non-resident parent" and when the parties "were a couple". In *R(CS) 3/03* Child Support Commissioner Turnbull held, in relation to a similarly worded provision under an earlier child support scheme, that regulation 12(1) applies only to debts incurred while the parties were "still living together" (i.e. as a couple).

30. Regarding the benefit condition, regulation 12(2) lists a number of persons for whose benefit the debt must have been incurred. At this stage, the regulation is not concerned with any other purpose for which the debt was incurred. The regulation 12(2) list includes:

(a) "for the joint benefit of the non-resident parent and the person with care" (regulation 12(2)(a));

(b) "for the benefit of the person with care where the non-resident parent remains legally liable to repay the whole or part of the debt" (regulation 12(2)(b));

(c) "for the benefit of the qualifying child" (regulation 12(2)(d)).

31. If a debt satisfies the time condition and the benefit condition, it does not inevitably rank as a special expense of the 'prior debt' type. Regulation 12(3) excludes repayment of a debt

falling within a number of categories, including:

(a) "where the non-resident parent has retained for his own use and benefit the asset in connection with the purchase of which he incurred the debt" (regulation 12(3)(a));

(b) "a debt incurred for the purposes of any trade or business" (regulation 12(3)(b));

(c) "amounts payable by the non-resident parent under a mortgage or loan taken out on the security of any property". However, this does not apply "where that mortgage or loan was taken out to facilitate the purchase of, or to pay for repairs or improvements to, any property which is the home of the person with care and any qualifying child" (regulation 12(3)(h)). "Repairs or improvements" is defined by regulation 12(6)(b).

32. Regulation 12(5) deals with what is sometimes referred to debt recycling. I doubt anyone has ever argued it is a model of legislative clarity. Regulation 12(5) provides:

> "Where an applicant has incurred a debt partly to repay a debt repayment of which would have fallen within paragraph (1), the repayment of that part of the debt incurred which is referable to the debt repayment of which would have fallen within that paragraph shall constitute expenses for the purposes of paragraph 2(2) of Schedule 4B to the Act."

33. On the face of it, therefore, an applicant who incurs a new debt "partly" to repay a debt "repayment of which would have fallen within [regulation 12(1)]" then repayment of that part of the new debt "referable to" the previous qualifying debt "shall constitute expenses".

34. In *R(CS) 3/03*, Social Security Commissioner Turnbull decided a "major purpose" of the provision was to cater for the case where a debt incurred after separation would have been caught by regulation 12(1) had it been incurred before separation. It followed that the general qualifying conditions in regulation 12 must be satisfied in order for a new debt to qualify under regulation 12(5).

35. Child Support Commissioner Henty, commenting on equivalent wording in earlier regulations in *R(CS) 5/03*, said the provision was "not, with respect, a masterpiece of the draftsman's art". Nevertheless, the Commissioner went on to say that "once one recognizes that the situation has to be judged **as at the date of application**, then the jigsaw falls in place". The provision could not be satisfied before a person attained the status of non-resident parent (or that parent's previous statutory incarnation as 'absent parent').

36. In *R(CS) 3/03*, Commissioner Turnbull held that (the forerunner of) regulation 12(5) was not limited to debts incurred "partly" to repay other debts. It also applies to debts incurred solely for the purpose of repaying an earlier qualifying debt. However, Upper Tribunal Judge Jacobs in *PR v Secretary of State for Work & Pensions & SE* [2015] UKUT 0406 (AAC) held that regulation 12(5) "operates as an apportionment provision" but only applies if "the loan was for a dual purpose". The reasons for Judge Jacobs' decision included:

> "9…If the father left the family before the consolidation took place, regulation 12 would apply to the three separate debts, which would still exist after the non-resident parent left. They would have been taken out while he was a member of the family and for the benefit of the whole family. They would not come within any of the exclusions in regulation 12(3).
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> 10. Now suppose that the non-resident parent only left after the consolidation had taken place. The original debts would have been repaid and no longer existed. Regulation 12 would not apply to them. There would now be a new debt, the loan, which would still exist after the non-resident parent left. That was taken out while he was a member of the family and for the benefit of the whole family, like before. But this time there would be a difference: the new debt is secured and therefore excluded by regulation 12(3)(h).
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> 11. The argument for the non-resident parent tried to avoid this outcome by relying on regulation 12(5). On its face, as the tribunal noted, it only applies to a debt that is taken out for different purposes. To continue my example from the previous paragraphs, suppose the father took out a new, but this time unsecured, loan in order (i) to repay the debts on the washing machine, the holiday and general living expenses, but also (ii) to raise money to buy expensive presents for his mistress. The latter would not be for the benefit of the family and, as such, it would be outside the scope of regulation 12. The effect of regulation 12(5) would be to split the loan between (i) and (ii). Only the part represented by (i) would be within regulation 12. To put it into legal terms, regulation 12(5) operates as an apportionment provision.
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> 12. It is now possible to see why regulation 12(5) only applies if the loan was for a dual purpose. There is no need for special provision if a new loan is taken out that replaces other loans that would all fall within regulation 12. As I have shown, in those circumstances the replacement loan will be for the benefit of the family and can itself qualify under regulation 12, provided that it does not come within any of the exclusions. The key is to identify which loan survives the separation of the family and to ask how regulation 12 applies to it. Regulation 12(5) cannot be used to effect the resurrection of debts that have already been discharged."

37. In *PR* Upper Tribunal Judge Jacobs was not referred to Commissioner Turnbull's decision in *R(CS) 3/03*.

38. Regulation 14 provides for a separate type of expense in the form of mortgage or loan repayments. Regulation 14 requires the property in question to have been the home of the applicant and the person with care when they were a couple and to remain the home of the person with care and the qualifying child (regulation 14(2)(a)(iii). On the undisputed facts of this case, regulation 14 cannot apply.

Proceedings before the Upper Tribunal

Grounds of appeal

39. I granted Mr T permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision. Permission was granted on limited grounds, as I explained in my reasons:

> "43. It is arguable that the First-tier Tribunal overlooked the 'debt recycling' provisions of regulation 12(5), as shown by its finding that the original debt could not count because it was satisfied on 5 November 2009.
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> 44. The Tribunal found that the debt was originally incurred for the benefit of Miss A but, unfortunately, did not make a finding as to whether its original purpose was to secure a rental property (the reasons simply observe the "more likely explanation" was that House 1 was purchased as an investment property)…
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> 45. If the debt was incurred for Miss A's benefit or for the parties joint benefit (without being incurred for the purposes of any trade or business), then it seems it would probably have fallen within the class of debts that, in principle, count under regulation 12(2). Accordingly, the subsequent redemption and incurring of a new debt had the potential to be maintained as relevant, for child support purposes, by regulation 12(5). In failing to consider the potential applicability of regulation 12(5), arguably the First-tier Tribunal erred in law and I grant Mr T permission to appeal to the Upper Tribunal on that ground.
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> 46. A further complication concerns the [exception to the] mortgage repayment exclusion in regulation 12(3)(h). This excludes mortgage repayments unless the mortgage was taken out to facilitate the purchase of "any property which is the home of" the parent with care and qualifying child. The present tense is used. Is this relevant? It might be in this case. On the Tribunal's … findings, the [House 1] debt was not incurred to provide a home for Miss A. However, it subsequently became her home. Arguably, the First-tier Tribunal gave inadequate reasons for finding that regulation 12(3)(h) excluded the debt. I grant Mr T permission to appeal on that ground as well."

40. I gave case management directions. These required the respondents to provide the Upper Tribunal with written responses to Mr T's appeal and for him subsequently to provide a written reply. The directions also required the responses to set out the respondents' views on how the Upper Tribunal ought to dispose of the appeal in the event that it succeeded. Both Mr T and Miss A argued that the Upper Tribunal should re-decide Mr T's appeal against the CSA's decision rather than remit for a third decision by the First-tier Tribunal. Miss A and Mr T's written submissions advanced factual as well as legal arguments. All written submissions have been shared amongst the parties.

41. The case management directions provided for any party to request a hearing before the Upper Tribunal decided the appeal. Miss A argued forcefully against a hearing, adding "there is

sufficient information for the Upper Tribunal to make a final decision without attendance from either parties”. Mr T’s reply stated he would request a hearing if requested by the Judge.

Miss A’s case

42. Miss A argues:

- She and Mr T separated in November 2008. She left the former matrimonial home and moved to [House 1];

- “it is undisputed that the consolidation of the loan of £55,000 took place in November 2009, that being *after* the date on which Mr T became a non-resident parent”. As a result, Mr T’s application for a variation had to fail under regulation 12(1);

- Upper Tribunal Judge Jacobs’ decision in *PR* supported her case. It is “undisputed” that the original debt in her case “ceased to exist following the consolidation in November 2009”. Accordingly, “there is no continuity of the original debt” and regulation 12(5) cannot help Mr T;

- It follows that “the only debt in existence at the time of [Mr T’s] application, and which could be therefore be subject to any analysis under regulation 12, would be the consolidated debt, or at least any part of that debt which would itself fall to be considered under regulation 12”;

- “the consolidated loan was not taken whilst the couple remained a couple, nor had the family benefitted from any reduction in the repayment amount following a consolidation” and “additionally, the consolidated debt had not been incurred prior to the Appellant becoming the non resident parent”;

- “having failed to meet the conditions of 12(1)(a) and (b), there can be no amount that constitutes expenses for the purposes of paragraph 2 Schedule 4B to the Act, and no further consideration of regulation 12 is necessary”;

- On ground 2 Miss A “disputes [House 1] being considered as a home and maintains…the property was at all times an investment property” but the investment plan fell away when her relationship with Mr T ended. She only became a “tenant” “due to unforeseen circumstances and [House 1] was never taken to be a home”. A few weeks after moving into House 1, it was put on the market an act that was inconsistent with an intention that it should be her home. And the amount of work done on House 1, as described in Mr T’s evidence, further showed that it was not purchased as a home. Moreover, why would a ‘home’ be purchased for Miss T “at a time when the parties were in a stable relationship”.

The Secretary of State’s arguments

43. The Secretary of State does not support Mr T’s appeal.

44. On ground 1, the Secretary of State argues the debt in question is excluded by

regulation 12(3)(h) (mortgages or loans secured on property). The original debt was incurred when Mr T and Miss A were still a couple to provide a deposit for the purchase of House 1. But "it was not taken out to facilitate the purchase, repair or improvement to the home of Miss A and the qualifying child". Mr T effectively seeks to use regulation 12(5) to include a debt that would not have been included under regulation 12(2). Regulation 12(5) could not have applied and the First-tier Tribunal did not err in law by failing to consider regulation 12(5).

45. On ground 2, the Secretary of State draws attention to the following findings of the First-tier Tribunal:

- The exception to the regulation 12(3)(h) exclusion did not apply because, at 15 January 2014, Miss A was not living at House 1;
- Even if the First-tier Tribunal was wrong about that, the instant debt was the new consolidated mortgage. As the debt was incurred post-separation, it fell outside regulation 12;
- The debt incurred in connection with the purchase of House 2 fell outside regulation 12 because Mr T was joint owner and "beneficiary of that property".

46. On the question whether the use of the present tense in regulation 12(3)(h) is significant, the Secretary of State argues it is of significance:

> "[This] makes it clear that for the [exemption] from the exclusion of repayments to a mortgage or loans secured on property to apply, the property that the debt relates to must be where the parent with care is living with the qualifying child at the date of the variation application".

47. In support of that argument, the Secretary of State relied on Commissioner Henty's decision in *R(CS) 5/03*.

Mr T's arguments

48. Mr T argues:

- the decisions relied on by the respondents – *PR* & *R(CS)* 5(03) – are contradictory. One of them must be wrong. Mr T argues Commissioner Henty was wrong and Judge Jacobs' decision is generally to be preferred although one aspect of Judge Jacobs' decision is flawed and should not be followed;
- Commissioner Henty's decision is legally flawed because he "arbitrarily and without reason disregarded the position immediately after separation". Regulation 12 requires the parent with care to 'own' the debt and the non-resident parent to own the asset. This recognizes that "the [non-resident parent] has made a financial commitment to the child". But "from separation onwards the two are diverged". Since regulation 12(3)(a) restricts the non-resident parent from having any "retention over the asset" then "the

parent with care is free to do with it as they please". As a result:

> "to allow the parent with care's choices after separation to negate the relevant financial commitment of the absent parent is against all justice".

- The clear meaning of regulation 12 is that current debts are not relevant, rather "repayment of debts incurred before separation…is the allowable expense". In other words, what must be considered are debts in place "immediately after separation". That was held by Judge Jacobs in paragraph 9 of *PR*. It follows that "the absent parent must not be bound by how the parent with care chooses to manage the asset and the parent with care must not be bound by how the absent parent chooses to manage the debt";

- The correctness of that argument is revealed by considering the situation if "Mr [T] had not re-mortgaged and if Miss [A] instead of purchasing [House 2] had chosen to sell [House 1] and keep the proceeds". On Commissioner Henty's approach, Miss A could have abused "the opportunity of a technicality" and Mr T could do nothing to prevent this;

- On the footing that the Upper Tribunal accepted Mr T argument that "to preserve justice the situation must be judged immediately after separation", he would argue the debt in its consolidated form ranks as a special expense because:

  (i) The original debt was incurred before Mr T was a non-resident parent;

  (ii) The debt was incurred "for the benefit of the person with care" and qualifying child and he remained "legally liable to repay the whole or part of the debt" for the benefit of the qualifying child;

  (iii) The debt is not excluded by regulation 12(3). In particular, regulation 12(3)(h) does not apply because the debt was incurred to facilitate the purchase of a property which is the home of the person with care and the qualifying child.

- if the Upper Tribunal did not accept that Commissioner Henty's decision was wrongly decided, Mr T would argue that Judge Jacobs' finding in *PR* that "regulation 12(5) cannot be used to effect resurrection of debts that have already been discharged" should not be followed. It was a comment that had "no bearing" on the decision, it was unclear what was meant by 'resurrection of debts that have already been discharged' and inconsistent with other parts of the Judge's reasons. Mr T draws attention to paragraph 12 of *PR* and he argues, as I understand it, that in this paragraph the Judge finds that debt consolidation is caught by the main provisions of regulation 12 even if it occurs after the parties have separated. Judge Jacobs also misdirected himself in law by equating a loan with a debt, his error being revealed when one considers the notion of 'government debt' which cannot be equated with a loan. Debts have a separate existence to loans connected with them: "the loan used to service may change, but the debt, the obligation to pay, still remains".

- When Mr T applied for a variation, he had a debt of £108,000 incurred partly to repay a debt that would have qualified under regulation 12(1); the amount of that part stood at £70,399.13. To that extent, payments of this debt were a special expense.

Conclusions

49. While the full legal ramifications of regulation 12 may be obscured by the legislative drafting, the basic structure of the relevant legislation is clear:

(a) there are a standing set of general rules for carrying out child maintenance assessments;

(b) those rules may be varied if the ‘just and equitable’ condition in section 28F is met and another specified condition is met;

(c) one of those other conditions is that the non-resident parent has “special expenses”;

(d) one category of special expense concerns prior debts;

(e) the legislative identification of prior debts begins with the relatively broad provision made by regulation 12(1) , which incorporates both a time condition and a person condition. Subject to regulation 12(5), the time condition cannot be met if a debt was incurred post-separation (after the parties ceased to be a couple). I refer to a debt within regulation 12(1) and (2) as a potential prior debt;

(f) a potential prior debt ranks as an actual prior debt if is not excluded by regulation 12(3);

(g) a debt that survives the regulation 12(3) filter may give rise to a further prior debt incurred post-separation, if the ‘debt recycling’ provisions of regulation 12(5) are satisfied;

(h) regulation 12(5) cannot apply if, tracing matters back, the original debt did not rank as an actual prior debt.

50. I decide that the First-tier Tribunal erred in law by failing to consider an issue that arose on the appeal namely whether regulation 12(5) applied so as to constitute Mr T’s post-2006 consolidated debt as, in part, a prior debt. This was obviously an issue on the appeal since the previous Tribunal’s decision had been set aside by the Upper Tribunal for failing to give adequate reasons in respect of regulation 12(5). All the present Tribunal said on this point was that it was not clear what the previous First-tier Tribunal meant when it found that Mr T’s debt had “rolled over”.

51. Since the appeal is allowed on ground 1, I need not consider ground 2.

52. All parties agree I should re-make the First-tier Tribunal’s decision, rather than remit to that Tribunal for a third re-hearing. There is no need for a hearing. No party has requested a hearing and the parties have already made lengthy legal and factual submissions.

53. Mr T is right that, apart from regulation 12(5), regulation 12 only applies to debts in existence immediately after separation, that is debts incurred while the parties were a couple

and not discharged at the date of separation. However, not all such debts are caught by regulation 12.

54. I find that the 2006 debt was incurred for the purposes of a trade or business (Mr T has not disputed the CSA's and Miss A's argument that, if the debt was incurred to purchase a property for investment purposes, it was incurred for the purposes of a trade or business). As a result, it fell outside the regulation 12 net from the outset. There was nothing on which regulation 12(5) could bite so as to render any of Mr T's subsequent debts as prior debts for regulation 12 purposes. The outcome is that Mr T's appeal against the CSA's refusal to make a variation is dismissed.

55. I make the above finding for the following reasons:

(a) Mr T's argument that House 1 was purchased in order to provide a post-separation home for Miss A is inconsistent with the chronology. On Mr T's evidence, they did not separate until some two years after the debt was incurred and some 2 ½ years after Mr T's mortgage application was approved. In my view, it is inherently unlikely that the parties would have remained a couple for two years after purchasing a property as a post-separation home for Miss A which was also intended to be a form of advanced payment of child maintenance. Mr T's evidence might be consistent with the actions of a couple on the verge of separation but, here, separation followed some two years after the debt was incurred;

(b) on Mr T's case, he was effectively paying child maintenance for two years before his child ceased to live with him. This is improbable;

(c) the agreed evidence about the poor state of repair of House 1, when purchased, is consistent with Miss A's evidence that it was purchased as an investment with a view to renting out;

(d) the only contemporaneous piece of documentary evidence (the 'to whom it may concern' letter of 13 November 2006) is not consistent with Mr T's argument that House 1 was purchased as a home for Miss A in anticipation of their separation. The letter states the sum transferred to Miss A was intended to represent 50% of the increase in the value of the home they shared, of which he was the legal owner, since April 2000. This suggests that Mr T thought Miss A might have some sort of right in the equity of this property or, if not, some kind of moral claim. It does not suggest a payment in anticipation of separation in order to supply a post-separation home and meet, in advance, child maintenance liabilities;

(e) Mr T did not respond to Miss A's claim that House 1 was purchased as an investment property until an advanced stage of the proceedings. Miss A argued in February 2014 that House 1 was purchased as an investment property. Mr T did not respond to this argument in his formal notice of appeal dated 23 June 2014. In letters dated 1 August 2014 and 28 May 2015, Miss A again argued House 1 was purchased as an investment, with a view to renting it out. Mr T did not respond to the argument until his letter dated 7 September 2015. Mr T has not shown the same hesitation in responding to Miss A's other arguments;

(f) when Mr T did respond to Miss A's 'investment' argument he did not do so head on. His letter of 7 September 2015 stated the 2006 arrangement would not prevent Miss A from bringing a claim for an interest in the former matrimonial home. Here, Mr T was responding to Miss A's argument that House 1 was purchased as an investment property to stop her having any rights in the matrimonial home. But his response did not deny House 1 was purchased as an investment property, only that the 2006 arrangement would not prevent Miss A making any claim for an interest in the former matrimonial home. Mr T also made the odd remark that "I categorically deny entering into a conspiracy with Miss [A] to commit fraud by hiding investment gains" when no such allegation had been made. I consider it telling that, in this letter, Mr T did not clearly refute Miss A's claim that House 1 was purchased as an investment;

56. Applying a balance of probabilities, I find that House 1 was purchased as an investment property as Miss A claims and not, as Mr T claims, as a home for her in anticipation of their separation. The relevant debt was incurred for the purposes of a trade or business and falls outside regulation 12. Even if it meets the conditions in regulation 12(1) and (2), it is excluded by regulation 12(3)(b). Mr T's appeal against the CSA's refusal to make a variation is dismissed.

57. Mr T argues the 2006 financial transfer was part of an arrangement to meet or defray future child maintenance liabilities. I have rejected that argument on the facts. In any event, I very much doubt that, if there was an arrangement with that purpose, it would fall within the limited category of maintenance agreements recognized by the Child Support Act 1991 (see *SJ v Secretary of State for Work & Pensions* [2014] UKUT 0082 (AAC), referred to in the CSA's written submission on the first Upper Tribunal proceedings).

58. Any debt incurred by Mr T in connection with the purchase of House 2 cannot qualify as a prior debt. If for no other reason, this is because such a debt was not incurred when the parties were a couple and so falls outside regulation 12(1).

59. I think Mr T misunderstands Commissioner Henty's decision in *R(CS) 5/03*. The Commissioner was solely concerned with (the forerunner of) regulation 12(5). In holding that the position is to be considered at the date of application, the Commissioner was referring to the date of the application for a variation. Nothing in Commissioner Henty' decision suggests that debts incurred after separation are generally relevant. They are only relevant if they come within regulation 12(5).

60. In finding that regulation 12(5) cannot "resurrect" debts that have already been discharged, Judge Jacobs in *PR* was simply applying the wording of regulation 12(5). The key word here is 'resurrect' which I suspect Mr T has overlooked. Judge Jacobs, just before stating that regulation 12(5) cannot resurrect discharged debts, said "the key is to identify which loan survives the separation". The learned Judge was clearly well aware that debts incurred post-separation can only be taken into account if they fall within regulation 12(5)).

61. I am not certain of Mr T's underlying point when he argues Judge Jacobs misunderstood

the difference between a loan and a debt. He may be seeking to draw a distinction between indebtedness and debt. In any event, for the purposes of the 2000 Regulations a loan is simply a type of debt (see regulation 12(3)(h): “amounts payable by the non-resident parent under a mortgage or loan”). And the concept of government debt has no bearing on the interpretation of regulation 12.

62. Finally, there is Mr T’s argument that his expenditure on repairs and improvements for House 1 should be taken into account. Most of the expenditure was incurred pre-separation and it is likely that it was incurred as part of the original investment purpose. To the extent that it was not, Mr T has not provided evidence that the expenditure was funded by debt. In fact, he argued his 2006 mortgage was converted into an interest-only repayment mortgage to avoid incurring further debt. I decide that none of Mr T’s expenditure on repairs and improvements was funded by prior debt within the meaning of regulation 12.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
8 December 2017