THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2023-001064-HB

[2024] UKUT 222 (AAC)

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

ZA

Appellant

-v-

London Borough of Barnet

Respondent

Before: Upper Tribunal Judge Judith Butler

Hearing date: 17 June 2024

Representation:

Appellant:	Did not participate
Respondent:	Ms Helen Parry, Presenting Officer for the London Borough of Barnet

DECISION

As the decision of the First-tier Tribunal dated 16 January 2023 involved the making of an error of law, under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 it is SET ASIDE and REMITTED to the tribunal for rehearing by a fresh tribunal.

DIRECTIONS

A. The case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.

B. The new tribunal should not involve the tribunal judge previously involved in considering this appeal on 16 January 2023.

C. If the parties have any further written evidence to put before the tribunal, they should send it to the relevant HMCTS regional tribunal office within one month of the issue of this decision.

D. The tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome from the previous tribunal.

E. Copies of this decision, the decision granting permission to appeal dated 23 September 2023, Barnet's and ZA's responses to those directions, my directions dated 21 March 2024, Barnet's submission received on 14 June 2024 and the decision in *R(SB)57/83*, shall be added to the bundle for the next First-tier Tribunal.

These Directions may be supplemented by later directions by a tribunal judge, registrar or case worker in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

What this appeal is about

1. The Appellant in this appeal is "**ZA**". The Respondent in this appeal is the London Borough of Barnet ("**Barnet**"). It administers housing benefit where claimants are eligible to claim it. ZA first claimed housing benefit with Barnet on 26 January 2004.

2. References to "**JA**" are to ZA's husband. He is the director and a full shareholder in two companies, and a director and partial shareholder in the other company. Barnet took JA's income into account when calculating ZA's housing benefit entitlement. Barnet also took account of his position in the companies when making its decisions.

3. This appeal is about whether ZA was entitled to housing benefit under the Housing Benefit Regulations 2006 ("the 2006 regulations") or had, or should be treated as having, capital in excess of the prescribed limit for entitlement to it.

4. Section 134(1) of the Social Security Contributions and Benefits Act 1992 prevents a person being entitled to housing benefit if their capital or a prescribed part of it exceeds the prescribed amount.

5. Section 6 of the 2006 regulations deals with capital. Regulation 46 prescribes the amount of capital as £16,000 for the purpose of section 134(1). If a person has, or is treated as having, capital exceeding £16,000, they will not be entitled to housing benefit.

6. The detailed circumstances of ZA's appeal are set out in paragraphs 2 to 9 of Upper Tribunal Judge Ovey's decision dated 23 September 2023 granting permission to appeal to the Upper Tribunal.

7. In summary, at some point before Barnet made its decision to end ZA's entitlement to housing benefit, ZA became a shareholder of 15 shares in a company ("**CG**"). Her husband JA held 50 shares out of the 100 in that company. The other 35 were held by their children. JA was the sole director of CG. ZA was the secretary. Both were paid an hourly wage for working in the company. JA was not paid a director's

salary and no dividends were paid to any of the shareholders. That remained the position at the date of Barnet's decision.

8. Two further companies were incorporated before the date of Barnet's decisions ("**BV**" and "**WE**"). JA held, and continues to hold, all the shares in these companies. He is the sole director of BV, and he and ZA are both directors of WE. Again, no directors' salaries have been paid to JA or ZA and the companies have paid no dividends to JA.

9. It appears Barnet did not ask ZA to provide any information about companies or shareholdings. Having become aware of CG and its ownership, Barnet states that on 23 March 2021 it made two decisions about ZA's housing benefit. Barnet communicated those decisions to ZA in two letters dated 24 March 2021. Barnet decided:

(a) to revise ZA's entitlement to housing benefit to nil for the period from 03 April 2017 to 21 March 2021, and to supersede her entitlement to housing benefit with effect from 22 March 2021, so that she was not entitled to it from that date ("the 23 March 2021 entitlement decision"); and

(b) that ZA had been overpaid £103,986.50 of housing benefit between 03 April 2017 and 21 March 2021 and that this was recoverable from her under regulation 100 of the 2006 regulations ("the 23 March 2021 overpayment decision").

10. The basis of Barnet's entitlement decision was that there was retained profit in the shareholder funds of CG, which exceeded £16,000 throughout the period between April 2017 and March 2021.

11. On 12 April 2021, ZA made written representations to Barnet, which it treated as an appeal. On 17 December 2021, Barnet wrote to ZA stating it would not change its entitlement decision. Barnet stated it would write separately to ZA about the overpayment decision. On 27 December 2021, ZA wrote to Barnet stating she wished to continue her appeal to the First-tier Tribunal in relation to Barnet's entitlement decision (pages 1093-5 of bundle).

12. On 17 February 2022, Barnet wrote again to ZA (page 1098 of bundle). It headed the letter "*Housing Benefit Overpayment*". The letter stated that Barnet had reviewed the overpayment decision. It stated there were no grounds to revise an earlier entitlement decision from 03 April 2017, and even if there had been, the overpayment would amount to official error. The letter stated that ZA had therefore not been overpaid for the period 03 April 2017 to 21 March 2021 and "the decision dated 24 March 2021 was revised". The letter ended by stating:

> "*The Council has decided that you are still to be treated as having capital in excess of the prescribed limit of £16,000 for the reasons given in its letter dated 17/12/21, effective from 22/03/21*."

13. On 14 April 2022, Barnet forwarded ZA's letter dated 27 December 2021 to HM Courts and Tribunals Service, where it was registered as an appeal. ZA argued that Barnet had applied regulation 49(5) of the 2006 Regulations to calculate her capital by reference to the capital held in the three companies but should also have applied regulation 49(6) and disregarded that capital for as long as ZA and JA were undertaking activities in the course of the businesses.

14. In its Response to the appeal, Barnet stated it had revised its original decision on 17 February 2022 and that ZA's housing benefit was then superseded in accordance with regulations 7 and 8 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 ("the 2001 regulations") with effect from 22 March 2021, to treat ZA as having capital over the prescribed limit from that point.

15. Section 7 of Barnet's Response to the appeal set out submissions for the tribunal. Barnet stated it had decided to use its discretion and treat ZA and JA as not analogous to a sole owner under regulation 49(5) and therefore regulation 49(6) did not apply. Barnet stated at paragraph 10 of its submissions:

> *"The appellant and partner are therefore treated as possessing their share of the capital value of the company. That capital is treated as actual capital under regulation 43."*

16. Barnet proceeded to raise alternative arguments for the tribunal to consider as other grounds to uphold its decision. These were:

(a) if the tribunal decided ZA was analogous to a sole owner, then by reference to the Supreme Court's decision in ***Prest v Petrodel Resources Limited and others [2013] UKSC 34***, JA was the beneficial owner and controller of the three companies and regulations 43 and 47 applied. Barnet argued that ZA and JA had acknowledged they were the beneficial owners of the capital in CG and were taking advantage of the Housing Benefit scheme. Barnet argued that as the beneficial owner of the companies' capital, ZA / JA were not entitled to housing benefit in accordance with regulation 43 of the 2006 regulations (paragraphs 12 to 16 of submissions);

(b) if the tribunal decided ZA was not the beneficial owner and was analogous to a sole owner, regulation 49(1) of the 2006 regulations meant she was to be treated as possessing capital of which she had deprived herself for the purpose of securing entitlement to housing benefit. Given the amount of retained profit in CG, as its shareholders, ZA and JA were entitled to some of that profit, and by choosing not to distribute dividends, ZA was depriving herself of capital for the purpose of securing entitlement to housing benefit, in accordance with regulation 49(1). She should not be entitled to housing benefit under that provision (paragraphs 17 to 28 of submissions); and

(c) Regulation 42(9) of the 2006 regulations deals with housing benefit claimants who are paid less than the going rate for a job. Regulation 42(9) allows them to be instead treated as having whatever additional pay is reasonable under

the circumstances. Barnet stated that it reserved the right to make a decision under this provision should the appeal be upheld (paragraph 29 of submissions).

The First-tier Tribunal's decision

17. On 16 January 2023, a First-tier Tribunal (the "**tribunal**") heard ZA's appeal. ZA decided not to take part in the appeal. She asked for it to be decided in her absence. Ms Parry attended the tribunal hearing as Presenting Officer for Barnet.

18. The tribunal refused ZA's appeal, stating it confirmed Barnet's decision dated 17 February 2022. The tribunal decided ZA should be treated as having capital in excess of the prescribed limit of £16,000 with effect from 22 March 2021.

19. The tribunal decided ZA and JA were associated with CG, BV and WE. It listed the shareholding in these companies, together with the shareholder funds available for 30 April 2021 (CG - £318,051.00), 31 July 2020 (BV - £38,806.00) and 31 January 2021 (WE - £84,508.00).

20. The tribunal's decision notice stated that ZA argued the three companies' capital should be disregarded under regulation 49(5) and (6) of the 2006 regulations while she was undertaking activities in the course of the company's business. The tribunal agreed with Barnet that regulation 49(5) is discretionary and regulation 49(6) only applies if the discretion under regulation 49(5) has already been exercised. The tribunal stated that Barnet had decided not to exercise its discretion under regulation 49(5) because there was capital in excess of £16,000.

21. The tribunal issued a Statement of Reasons for its decision on 03 April 2023.

22. On 22 September 2023, Upper Tribunal Judge Ovey gave ZA permission to appeal against the tribunal's decision, on the basis it was arguable, with realistic prospects of success, that assuming regulation 49(5) is a discretionary provision, the tribunal had made an error of law in one or more of the following ways:

(a) Not considering whether Barnet made a valid discretionary decision not to exercise its discretion under regulation 49(6);

(b) Not considering whether Barnet dealt adequately with the calculation of ZA's actual capital, which would follow if the discretionary decision was valid; and

(c) The reliance placed on ***Prest*** supported the conclusion reached.

23. Judge Ovey did not limit her grant of permission to appeal. She made detailed directions for the parties to respond on specific issues.

The oral hearing of the appeal

24. Neither party asked for an oral hearing. Having considered the paper file and the response provided by Barnet, I decided to hold an oral hearing, to clarify Barnet's position, including its decision-making process and whether Barnet had calculated the capital ZA actually held or instead treated her as having it. I made directions on 21

March 2024 for the parties to attend a hearing and to provide further written responses before the hearing took place.

25. I held an oral hearing at the Upper Tribunal's London venue on 17 June 2024. Barnet was represented by Ms Parry. I am grateful to her for attending and clarifying the council's position about the decisions it made.

26. Although the Upper Tribunal received a written response from ZA dated 21 October 2023, it did not send a copy of it to Barnet. On behalf of the Upper Tribunal Office, I apologise to Barnet for this oversight. Having received Barnet's submissions for the hearing on 14 June 2024, I realised it had not seen ZA's response. I therefore arranged for my clerk to give Ms Parry a copy shortly before the hearing. She confirmed she had read it, albeit briefly. ZA's response relates to the benefit trap, one of the alternative arguments put forward by Barnet, which the tribunal stated it did not consider in detail in reaching its decision.

27. ZA did not attend the hearing. Her husband and representative, JA, contacted the Upper Tribunal on 02 May 2024 stating they preferred not to attend. He wrote that they could not afford legal representation and had found the tribunal process to be affecting their health. I made directions in response explaining ZA would not require legal representation at any hearing but also confirming she was not directed to attend. On 17 June 2024, taking account of the circumstances, Ms Parry's representations, and applying the overriding objective, I decided to proceed with the hearing. The decision under appeal is over three years old, and the focus of the hearing was on Barnet's position and decision-making, which Barnet, rather than ZA, needed to clarify and explain.

The legislative framework

The Social Security Contributions and Benefits Act 1992

28. Section 134 of the Social Security Contributions and Benefits Act 1992 provides at subsection (1):

> "**Exclusions from Benefit**
>
> **134**. - (1) No person shall be entitled to an income-related benefit if his capital or a prescribed part of it exceeds the prescribed amount."

The Housing Benefit Regulations 2006 ("the 2006 regulations")

29. Capital is dealt with in Section 6 of the 2006 regulations. Relevant regulations within Section 6 include:

> **"43. — Capital limit**
>
> For the purpose of section 134(1) of the Act as it applies to housing benefit (no entitlement to benefit it capital exceeds prescribed amount), the prescribed amount is £16,000.
>
> **44. – Calculation of capital**

(1) For the purpose of Part 7 of the Act (income-related benefits) as it applies to housing benefit, the capital of a claimant to be taken into account shall, subject to paragraph (2), be the whole of his capital calculated in accordance with this part and any income treated as capital under regulation 46 (income treated as capital).

(2) There shall be disregarded from the calculation of a claimant's capital under paragraph (1), any capital, where applicable, specified in Schedule 6.

47. – Calculation of capital in the United Kingdom

Capital which a claimant possesses in the United Kingdom shall be calculated at its current market or surrender value less-

(a) Where there would be any expenses attributable to the sale, 10 per cent; and

(b) The amount of any encumbrance secured on it.

49. – Notional capital

(1) A claimant shall be treated as possessing capital of which he has deprived himself for the purpose of securing entitlement to housing benefit or increasing the amount of that benefit except to the extent that that capital is reduced in accordance with regulation 50 (diminishing notional capital rule).

….

(5) Where a claimant stands in relation to a company in a position analogous to that of a sole owner or partner in the business of that company, he may be treated as if he were such sole owner or partner and in such a case—

(a) the value of his holding in that company shall, notwithstanding regulation 44 (calculation of capital) be disregarded; and

(b) he shall, subject to paragraph (6), be treated as possessing an amount of capital equal to the value or, as the case may be, his share of the value of the capital of that company and the foregoing provisions of this Section shall apply for the purposes of calculating that amount as if it were actual capital which he does possess.

(6) For so long as the claimant undertakes activities in the course of the business of the company, the amount which he is treated as possessing under paragraph (5) shall be disregarded."

30. In paragraph 29 of its written submissions to the First-tier Tribunal, Barnet also referred to notional income under regulation 42(9), but as a ground where it reserved the right to make a decision about ZA's entitlement if the tribunal decided that regulation 49(5) applied to her. Regulation 42(9) provides:

"**42. – Notional income**

(9) Subject to paragraph (10), where—

(a) a claimant performs a service for another person; and

(b) that person makes no payment of earnings or pays less than that paid for a comparable employment in the area,

the relevant authority shall treat the claimant as possessing such earnings (if any) as is reasonable for that employment unless the claimant satisfies the authority that the means of that person are insufficient for him to pay or to pay more for the service."

Case law

31. In its Response to the Appeal, Barnet referred the tribunal to the Supreme Court decision in ***Prest v Petrodel Group Resources Limited and others [2013] UKSC 34*** (copy at pages 47 to 79 of bundle). Barnet had also provided the tribunal with a copy of ***CA v Hastings Borough Council [2022] UKUT 57 (AAC)*** (pages 36 to 45 bundle). Barnet relied on ***CA*** to support its position that applying regulation 49(5) and (6) of the 2006 Regulations is discretionary.

32. Shortly before the hearing on 17 June 2024, having received Barnet's response to my directions on 14 June 2024, I arranged for my clerk to provide Ms Parry with a copy of ***R(SB) 57/83***, a decision referred to in paragraphs 35 to 36 of ***CA***. It is a short decision, and I took Ms Parry through it during the hearing

My decision

33. At the permission stage, Upper Tribunal Judge Ovey only needed to be persuaded that it was arguable with a realistic (as opposed to fanciful) prospect of success that the tribunal had made a legal error in a way that was material.

34. At this substantive stage, I need to be satisfied on the balance of probabilities that the tribunal did make a legal error or errors. Applying that test, I find the tribunal deciding ZA's appeal on 16 January 2023 made a material error, or errors, of law in the ways set out below.

Discussion

(a) Which decision was being appealed?

35. Barnet's 23 March 2021 entitlement decision involved the following:

(a) a revision of ZA's past entitlement to housing benefit between 03 April 2017 and 21 March 2021, reducing it to nil; and

(b) a supersession of ZA's ongoing entitlement to housing benefit from 22 March 2021, reducing it to nil.

36. Barnet phrased its decision letter dated 17 February 2022 as only dealing with the 23 March 2021 overpayment decision. However, it appears the 17 February 2022 decision revised both of the decisions it made on 23 March 2021.

37. The 17 February 2022 decision partially revised the 23 March 2021 entitlement decision in terms of ZA's past housing benefit entitlement from 03 April 2017 to 21 March 2021, indicated by the wording: "*There were no grounds to revise the decision from 03/04/17*". The effect was that ZA remained entitled to housing benefit between 03 April 2017 and 21 March 2021. An alternative analysis is that Barnet maintained its position ZA had no entitlement to housing benefit between 03 April 2017 and 21 March 2021 due to her capital (and therefore did not revise the entitlement decision), but decided the overpayment was not recoverable for failing to ask ZA the right questions.

38. Whichever analysis applied, it is clear that on 17 February 2022, Barnet revised the 23 March 2021 overpayment decision by deciding no overpayment was recoverable from ZA.

39. However, there were two parts to the 23 March 2021 entitlement decision; one part dealing with past entitlement and the other dealing with ongoing entitlement. Irrespective of whether it actually changed the past entitlement element of that decision, the 17 February 2022 decision did not change the ongoing entitlement element of the 23 March 2021 entitlement decision.

40. ZA challenged Barnet's continuing position that she was not entitled to housing benefit from 22 March 2021 onwards. Her appeal was therefore against the 23 March 2021 entitlement decision. This is the situation even if that decision had been revised. See paragraph 3(3) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. It confirms that regarding time limits for appealing against a revised decision, the underlying decision is treated as made on the date it was revised.

41. In its Response to the appeal, Barnet described the decision dated 17 February 2022 as superseding the 23 March 2021 entitlement decision under regulations 7 and 8 of the 2001 regulations. This referred to changing ZA's ongoing entitlement to housing benefit. However, for the reasons set out above, in terms of ongoing entitlement, the decision dated 17 February 2022 maintained, rather than changed, the 23 March 2021 entitlement decision. Barnet confirmed this was the position in page 2 of its response received on 14 June 2024 ("latest response").

42. The tribunal's decision notice stated incorrectly that it was confirming Barnet's decision dated 17 February 2022. At paragraph 3, the tribunal adopted Barnet's reasoning that the 17 February 2022 decision superseded ZA's entitlement under regulations 7 and 8 of the 2001 regulations. At paragraph 4 of the Statement of Reasons, the tribunal referred to the 17 February 2022 decision deciding ZA was not entitled to housing benefit from 21 March 2021 onwards. While the date used (21 March 2021) is likely a typographical error, the tribunal decided incorrectly that the 17 February 2022 decision changed ZA's ongoing benefit entitlement.

43. The tribunal therefore materially misdirected itself in law, by incorrectly identifying the decision-making process Barnet applied and which decision was under appeal.

(b) Addressing whether ZA had capital or was to be treated as having capital

44. In the 23 March 2021 entitlement decision, Barnet stated that ZA had capital in excess of £16,000. However, Barnet's later letters dated 17 December 2021 and 17 February 2022 contradicted this, stating ZA was to be treated as having capital in excess of £16,000. In paragraph 10 of the submissions in its Response to the appeal (page 32 of bundle), Barnet stated that ZA and JA were therefore treated as possessing their share of the capital value of the company (meaning CG). Barnet stated: "*That capital is treated as actual capital under regulation 43*".

45. The tribunal stated at paragraph 6 of its decision notice and paragraph 30 of its Statement of Reasons that the issue was whether ZA could be treated as possessing capital in excess of £16,000. At paragraphs 3 and 10 of its decision notice, the tribunal decided ZA was to be treated as having capital in excess of the £16,000 limit. The tribunal agreed with Barnet's reasoning that there was substantially in excess of £16,000 funds in each of the companies to which ZA and JA had access to pay their rent.

46. At paragraph 43 of the Statement of Reasons, the tribunal stated it had refused the appeal in accordance with regulation 43 and 49(5) and therefore did not need to consider the alternative grounds put forward by Barnet.

47. I directed Barnet to explain whether it had decided ZA had capital exceeding £16,000 or had instead decided to treat her as having that capital. Barnet's response stated its 23 March 2021 entitlement decision was that ZA held capital above the capital limit on the basis it decided the capital held in the company (CG) belonged to her. Barnet stated the use of "*treated*" in its decision letter dated 17 February 2022 was misleading (page 3 of latest response).

48. Section 6 of Part 6 of the 2006 regulations deals with calculating capital. It uses the following structure:

(a) **Some regulations in section 6 apply *both to capital actually held and also to sums treated as* a claimant's capital**. See, for example, regulation 43, which confirms the capital limit for housing benefit entitlement is set at £16,000. See also regulation 44, which states the capital of a claimant to be taken into account shall be the whole of his capital calculated in accordance with Part 6, and any income treated as capital under regulation 46 (subject to the exceptions set out in Schedule 6 to the regulations);

(b) **Some regulations in section 6 apply *only to capital actually held.*** See for example, regulations 47 and 48. Regulation 47 deals with actual capital held by a claimant. It explains that the capital a claimant possesses in the UK shall be calculated at its current market or surrender value, less 10% where there would be expenses attributable to sale and the amount of any encumbrance

(e.g., loan or mortgage) secured on it. Regulation 48 deals with actual capital held by a claimant in a country outside the United Kingdom; and

(c) **Some regulations in section 6 apply *only to capital a claimant is treated as having***. Regulation 46 deals with income treated as capital. Regulation 49 deals with notional capital. It contains freestanding provisions, which operate as alternative ways to treat a claimant as having capital. Regulation 50 applies to notional capital calculated under regulation 49(1).

49. Regulation 49(1) applies where a claimant deprives himself of capital for the purpose of securing entitlement to housing benefit or increasing that entitlement. Barnet had raised this as an alternative argument in its initial Response to the appeal but did not use that provision to make the entitlement decision.

50. Regulation 49(5) provides a discretionary power where a claimant stands in relation to a company in a position analogous to that of a sole owner or partner in the business of the company. Regulation 49(5)(a) disregards the value of the person's holding in the company. Regulation 49(5)(b) treats the person as possessing an amount of capital equal to the value of the capital of that company (or of his share of that value). Regulation 49(5)(b) applies the earlier provisions of Section 6 to calculate the amount as if it were actual capital the person possesses.

51. Regulation 49(5)(b) states expressly that it is subject to regulation 49(6). This provision disregards the amount of capital calculated under regulation 49(5)(b) for as long as the person undertakes activities in the course of the business of the company.

52. The tribunal stated at paragraph 43 of its Statement of Reasons that it had refused ZA's appeal in accordance with regulation 43 and 49(5) and therefore did not proceed to consider any of Barnet's alternative arguments (i.e., deprivation of capital under regulation 49(1), how the decision in ***Prest*** might apply and notional income under regulation 42(9)).

53. However, the tribunal decided that regulation 49(5) is discretionary and that Barnet had validly decided not to exercise it in ZA's case (paragraphs 36-37 of Statement of Reasons). The tribunal therefore appeared to decide it would not apply regulation 49(5) to treat ZA as having capital.

54. The provisions in Section 6 of the 2006 regulations that allow a claimant to be treated as having capital, are regulation 46 (income treated as capital) and regulation 49 (notional capital). In my assessment, these provide an exhaustive list of the ways in which a person can be treated as having capital under Section 6. Regulation 46 has no clear application to ZA's circumstances. Furthermore, Barnet did not raise it and it the tribunal did not mention it in either its decision or Statement of Reasons. As stated above, the tribunal did not consider deprivation of capital under regulation 49(1) and decided it was appropriate not to apply regulation 49(5).

55. This means the tribunal treated ZA as having capital, but without applying any of the provisions in Section 6 allowing it to do so. I am satisfied this was a material

misdirection in law. Further or alternatively, I am satisfied the tribunal's reasons were inadequate, because they do not make clear which provisions in the 2006 regulations it applied to ZA and how it calculated her capital.

(c) Which options were available when calculating ZA's capital through her shareholding in CG?

56. At the relevant time, ZA and JA were shareholders of CG. It is a limited company, meaning it is a legal person separate and distinct from its members. In ***CA v Hastings BC [2022] UKUT 57 (AAC)***, Upper Tribunal Judge Gullick KC explained that ordinarily, it is the value of a person's shareholding in the company, not the value of the company's assets, which is the issue when determining what capital they possess. He relied on the earlier decision of ***R(SB)57/83***, an appeal about a different benefit, but involving a claimant who was a shareholder in a limited company.

57. As Judge Gullick explained, ***R(SB) 57/83*** confirmed the shareholding would have to be valued, and this would be determined by the price a willing buyer would pay for them to a willing seller (see paragraphs 35-36 of ***CA***).

58. Judge Gullick explained that regulation 49(5)(a) and (b) of the 2006 regulations contain a different provision where someone is treated as if they are the sole owner or partner in the business of a company. He confirmed regulation 49(5) is a discretionary power. This is indicated by using: "*<u>may</u> be treated as if he were such sole owner or partner"* (my underlining added) in the opening words.

59. After this wording, regulation 49(5) proceeds to state: "*and in such a case*", followed by sub-paragraphs (a) and (b), each of which use the word "*shall*". This means that where a claimant is in a position analogous to a sole owner or partner in the business of a company, and a local authority (or tribunal) decides to exercise its discretion to treat them in that way, the local authority must apply the provisions in both regulation 49(5)(a) and (b). The effect is that:

(a) The value of the person's shareholding in the company is disregarded. See regulation 49(5)(a). Note also that this sub-paragraph confirms it is disregarded despite the general requirement under regulation 44 to take into account all of a claimant's capital;

(b) The person is treated as possessing capital equal to the value of the capital in the company (or, if he only has a share of the company, his share of it), but this treatment is expressly subject to regulation 49(6). See regulation 49(5)(b); and

(c) The value of the company's capital (or the claimant's share in it) is disregarded for as long as the claimant undertakes activities in the course of the business of the company. See regulation 49(6). Again, it uses the word "*shall*," meaning the disregard must be applied.

60. Turning specifically to regulation 49(5)(b), in ***CA***, Judge Gullick explained that a person's share of the value of the company's capital is calculated by identifying his or

her share of the net assets of the company, after taking into account its liabilities. See paragraph 36 of ***CA***. I agree with his analysis.

61. The first option available to Barnet and to the tribunal was to calculate the capital ZA actually held by identifying the value of her shareholding in the companies. This involved identifying the price a willing buyer would pay for her shares to a willing seller. This would apply to JA's shareholding as well, because his income and capital was also relevant to the housing benefit calculation.

62. Barnet has stated that the value of the shareholding in the three companies would probably be impossible to value because they are unquoted shares that have never been traded on the stock market (page 8 of its latest response). Ms Parry also confirmed this position at the hearing.

63. I appreciate this may be the factual position for ZA and JA's specific shareholdings in the companies. However, this does not mean it is incorrect to calculate their actual capital in that way

64. In reaching this analysis, I note that regulation 49(5)(a) also illustrates how a person's capital in a company should ordinarily be calculated – by identifying the value of his holding in the company. Regulation 49(5)(a) confirms this is the usual calculation method, and then explains it is to be disregarded where the discretionary power in regulation 49(5) is used to treat the person as having capital in the company instead.

65. A second option available to Barnet and to the tribunal was to treat ZA and JA as having capital under regulation 49(5) on the basis that they stood in relation to CG in a position analogous to that of a sole owner or partner in the business of the company. This power is not available generally for all shareholders in a company. It requires the shareholder to hold a position in relation to the company similar to being a sole owner or partner in it – meaning they have a level of control over how it operates.

66. While the power in regulation 49(5) is discretionary, where exercised, it requires both regulation 49(5)(a) and (b) to be addressed. Applying regulation 49(5)(a), one would disregard the value of ZA and JA's shareholding in the companies, which Barnet has, in any event, described as likely worthless. Applying regulation 49(5)(b) as explained in ***CA***, one would then identify ZA and JA's share of the assets in the companies, having taken into account the companies' liabilities.

67. Barnet confirmed it attributed capital to ZA and JA representing the retained profits in CG, calculated as the value of that company's assets and having taken into account its liabilities (page 8 of latest response). I explored this with Ms Parry at the hearing. Looking at the unaudited financial statements for CG ending 30 April 2020, these confirm CG had current assets of £304,739 and liabilities of £20,638. This produced a net current assets figure of £284,001 (page 812 of bundle). The statements also record this as the profit and loss account figure and the shareholders' funds figure for that year. Page 811 of the bundle records it as the retained earnings at the end of that (accounting) year. Barnet used £284,001 as capital for CG in its letter

dated 17 December 2021, stating this was its net assets with retained profits carried forward each year (page 1089 of bundle).

68. I have considered whether, once a company's net assets are categorised as retained profits or shareholders' funds, they cease to be the company's assets and become something else that could, under the 2006 regulations, be viewed as capital actually held by a shareholder. However, I am not satisfied this is the position. Firstly, there is already a method for calculating a shareholder's capital in a company (i.e., how much a willing buyer would pay for their shares). Secondly, a shareholder in a company is generally entitled to a share of the profits paid out of the company through the payment of dividends, but only if the company decides to issue dividends.

69. A dividend will generally be paid based on the money remaining in a company after its business expenses and liabilities have been paid. Where ordinary shares are held, the amount of dividends a shareholder can receive reflects the number of shares they own in the company. However, the company officers decide whether to issue dividends, based on any written requirements about how this is done. This usually requires agreement at a company meeting to issue dividends and a decision about how much money to issue per share.

70. In general terms, a company may decide to retain its profits and a shareholder has no guarantee that it will issue dividends. This explains why a shareholder's actual capital is calculated based on what a willing buyer would pay a willing seller for their shares; a holder's shares contain the potential for dividends rather than a guarantee they will be issued.

71. It seems to me that one reason why regulation 49(5) provides for a person to be treated as having a different amount of capital to the value of their shareholding, may be because it can only be triggered where the person is in a position analogous to a sole owner or partner in the business of the company. They will likely have enough control over the company to resolve to pay out shareholders' funds through dividends.

72. However, once a local authority (or tribunal) exercises the discretion in regulation 49(5) of the 2006 regulations, they must apply both paragraph (5)(a) and (b), triggering consideration of regulation 49(6). Even where a person's share of the value of the net assets in the company can, in principle, be treated as their capital, it is disregarded while the person undertakes activities in the course of the company's business.

73. The tribunal could therefore identify ZA and JA's capital in relation to the companies by calculating the capital they actually held. Another option open to the tribunal was to treat ZA and JA as having capital under regulation 49(5). If the tribunal decided to take the latter approach, it was required to go on to consider regulation 49(6).

74. At page 8 of its latest response, Barnet maps what it did against the approach identified by Judge Gullick in paragraph 36 of ***CA***. Barnet disregarded the value of ZA and JA's holdings in CG (regulation 49(5)(a)) and calculated their share of the net assets in that company, by deducting its liabilities and reached a figure equal to the

retained profits held in the shareholder funds (regulation 49(5)(b)) Ms Parry conceded Barnet did not then proceed to apply regulation 49(6), the final step Judge Gullick explained was required (paragraph 37 of ***CA***). Barnet therefore did not calculate ZA's actual capital under regulations 44 and 47. Nor did it apply regulation 49(5) and (6) to her correctly.

75. Paragraph 7 of the tribunal's decision notice and paragraph 38 of its Statement of Reasons confirm it adopted the same approach as Barnet when calculating ZA and JA's capital. I am satisfied this demonstrates the tribunal materially misdirected itself about the relevant law and therefore made an error of law.

76. While Section 6 provides an exhaustive list of the ways in which to calculate the capital they held (regulations 47 to 48) or were treated as holding (regulations 46 and 49), regulation 49 sets out different ways in which a person can be treated as possessing capital. My analysis of the wording of regulation 49 is that it indicates the grounds in regulation 49(1), (2), (3) and (5) can be satisfied independently of each other. When deciding whether a person has notional capital, it is therefore open to a local authority or tribunal to consider whether any of the notional capital grounds in regulation 49 apply to them.

(d) How the tribunal dealt with Barnet's other arguments

77. The tribunal did not address any of Barnet's alternative arguments in its decision notice dated 16 January 2023. At paragraphs 39 to 42 of its Statement of Reasons, the tribunal referred to the alternative grounds about ***Prest*** and notional capital under regulation 49(1) that Barnet had set out in its Response to the Appeal. The tribunal explained at paragraph 43 of its Statement of Reasons that it had not considered those alternative grounds in detail; it had refused the appeal under regulation 43 and 49(5) and it did not need to consider the alternative grounds.

78. At paragraphs 44 to 45 of its Statement of Reasons, the tribunal stated it agreed with Barnet's position that the public purse cannot be used as a vehicle for a claimant to subside their living costs in order to build a portfolio of profitable companies with profit in those companies substantially in excess of £16,000. The tribunal also stated (ZA and JA's) earned income is kept artificially low in order to ensure eligibility to housing benefit. Finally, the tribunal stated that the profit from ZA's companies is available to her to pay the rent liability and other living costs and therefore should be treated as capital.

79. Immediately after making these statements, the tribunal wrote: *"For these reasons, the appeal is refused, the decision made by the local authority on 17/02/2022 is confirmed"* (paragraph 46).

80. Barnet's argument about using the public purse to subsidise living costs and build profitable companies arguably address the notional capital ground in regulation 49(1). Barnet's argument about earned income being kept artificially low was likely either relevant to the notional capital ground provided in regulation 49(1) or to the notional income ground in regulation 42(9). However, the tribunal expressly stated it did not

consider those grounds. Therefore, neither of these matters were relevant to the decision the tribunal made.

81. I am therefore satisfied the tribunal made a material error of law by placing weight on immaterial matters in the decision it made.

(e) Is *Prest v Petrodel* relevant when calculating ZA's capital?

82. In its latest response, Barnet states it did not rely on the Supreme Court decision in ***Prest v Petrodel Resources Limited and others [2013] UKSC 34 ("Prest")*** when making ZA's benefit entitlement decisions. Barnet also states it now considers ***Prest*** is not relevant to this appeal unless the Upper Tribunal believes otherwise. The tribunal did not apply ***Prest*** as part of making its decision. I therefore deal with this issue simply for completeness.

83. Barnet first raised ***Prest*** in its letter dated 17 December 2021, in response to ZA's representations. Barnet referred to regulation 49(5) and (6) of the 2006 regulations. It stated that it accepted ZA and JA undertook activities in the course of CG's business. Barnet stated it had decided, by reference to ***Prest***, that ZA was the beneficial owner and controller of the three companies. Barnet referred to ZA's argument that she and JA were in a benefit trap and quoted from her letter (pages 1090-1 of bundle). Barnet stated that ZA's letter indicated JA was the beneficial owner of the capital held in the companies, and they had chosen to leave the capital in the company for now and remain in the benefit trap.

84. In its Response to the appeal, Barnet argued that if the tribunal decided ZA was analogous to a sole owner, by reference to ***Prest***, JA should be seen as the beneficial owner and controller of the companies, with ZA and JA taking advantage of the housing benefit scheme. Barnet stated the public purse cannot be used to subside a claimant's living costs to build up a portfolio of profitable companies.

85. Barnet's argument was that if the tribunal considered ZA and JA had control over the companies, JA could be seen as the beneficial owner and controller of those companies and ***Prest*** would allow the companies' assets to be viewed as his directly and taken into account.

86. However, this does not reflect what ***Prest*** decided. It concerned ancillary relief in divorce proceedings under the Matrimonial Causes Act 1973 ("the 1973 Act"). The wife argued that properties owned by companied controlled by her husband should be transferred to her.

87. The Supreme Court acknowledged there is no general legal principle allowing a company's assets to be reached by piercing the corporate veil. It confirmed that to do so is a remedy of last resort, largely reserved for where a company's separate legal purpose is abused for a purpose that is in some way improper.

88. The Supreme Court did not accept the circumstances before it justified piercing the corporate veil, or that the 1973 Act gave it a distinct power to do so. It decided the companies could be seen as holding the properties on trust for the husband, but not

because he was the sole shareholder and controller per se. Lord Sumption KC emphasised that where a matrimonial home is owned by a company, it is more likely to justify the inference it is held on trust for a spouse who owned and controlled the company. Lord Sumption explained that whether assets legally vested in a company are beneficially owned by its controller, is a highly fact-specific issue.

89. I do not consider the decision in ***Prest*** was relevant to what Barnet (and the tribunal) needed to decide. Nor does it provide a clear basis for creating a different, additional category for treating a claimant as having capital. As explained above, the 2006 regulations already provide a complete legislative system for dealing with capital. That system includes dealing with intentional deprivation of capital to obtain housing benefit (regulation 49(1)). It also provides for looking beyond the corporate veil into the net assets of a company, but in a limited way and with specific parameters (regulation 49(5) and (6)). In my view, there is neither scope, nor need, to use ***Prest*** to create a new approach for treating a claimant as having capital.

Disposal

90. It is appropriate to exercise my discretion to set aside the tribunal's decision dated 16 January 2023 under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Having done this, section 12(2)(b) of that Act provides that I must either remit the case to the First-tier Tribunal with directions for its reconsideration or remake the decision.

91. I am satisfied a fresh hearing is required so that a First-tier Tribunal can explore all the arguments and make appropriate findings of fact.

92. I therefore remit the appeal for rehearing before a new tribunal. It will make a fresh decision about ZA's entitlement to housing benefit from 22 March 2021.

93. While I have set aside the tribunal's decision dated 16 January 2023, I am not making any findings or expressing any view about whether ZA was entitled to housing benefit. The next tribunal will need to hear and assess any oral evidence and representations and consider the paper evidence and make its own findings of fact.

Judith Butler
Judge of the Upper Tribunal

Authorised for issue: 25 July 2024