

R(CS) 9/08

Mr J Mesher
Commissioner
20 March 2008

CCS/2342/2007

Child support – calculation of income – treatment of “salary sacrifice” arrangements

The absent parent father applied for a supersession of the maintenance assessment then in place on the ground of change of circumstances (his change of employer and new housing costs). The new assessment, based on gross annual earnings of £11,625, resulted in a nil liability (down from £121.41 per week previously). The parent with care mother appealed against that assessment and also against the decision-maker’s refusal to make departure directions. The main issue before the tribunal was the proper treatment of the father’s “salary sacrifice” arrangements under the Maintenance Assessment and Special Cases Regulations 1992 (the MASC regulations). The father’s total remuneration package (TRP) was £60,000 per annum and he had joined his company’s senior staff pension fund. The fund permitted members with a TRP to select a level of contributions to be made to the scheme by the employer. The father had opted to have £4,000 per month (£48,000 per annum) put into the scheme – leaving £11,625 per annum to be drawn by him as salary. He had also sacrificed a further sum of £375 per annum in respect of his employer’s payment of a health insurance policy under which he was covered. The father indicated that his mortgage lender had only been prepared to grant an interest-only mortgage over 18 years providing that there was an appropriate vehicle (ie the pension fund) in place to secure repayment of the mortgage at the end of the term. The mother queried the true level of the father’s remuneration and argued that he had apparently deliberately reduced his salary knowing that it would have a significant effect on the calculation of maintenance. The tribunal allowed the mother’s appeal against the assessment and decided that the father’s annual net income included the sums of £11,625 and £375 (both subject to the deduction of income tax and national insurance contributions), plus, applying paragraph 1(3)(b) of Schedule 1 to the MASC regulations, £24,000 (not subject to deductions) – ie one half the total sum which he had elected to sacrifice for his pension contributions. The CSA’s presenting officer estimated that the tribunal’s decision would result in a weekly liability in the region of £150 and, in the light of that, the tribunal dismissed the mother’s appeals on the departure directions. In granting the father leave to appeal, the Commissioner noted that for a salary sacrifice arrangement to be accepted by Her Majesty’s Revenue and Customs (HMRC) there needed to be a variation of the employment contract so that the employee was no longer legally entitled to the amount of the remuneration sacrificed. In those circumstances it was arguable that the sum sacrificed could not properly be regarded as earnings and that the only way in which the parent could be treated as having earnings of that amount would be via the operation of paragraphs 26 and 27 of Schedule 1 to the MASC regulations.

Held, allowing the appeal and remitting the case for re-hearing by a new tribunal, that:

1. the essence of a salary sacrifice pension arrangement is that the contributions are made as the employer’s contributions and that the employee has agreed in a contractually valid way to give up the right to cash payment of the amount of salary sacrificed (paragraph 18);
2. in this case, the salary sacrifice pension arrangement had clearly been accepted by HMRC and the payments were clearly made by the employer – the tribunal was therefore in error of law both in proceeding on the basis that the father was contractually entitled to cash remuneration of £60,000 per annum and in its application of paragraph 1(3)(b) of Schedule 1 to the MASC regs to the £48,000 sum sacrificed for the pension contributions (paragraphs 18 and 21);
3. the employer’s contributions to the fund, if regarded as part of the father’s remuneration or profit derived from his employment, fell within the one of the categories specifically stated **not** to be earnings in paragraph 1 of Schedule 1 – ie a “tax-exempt allowance” under paragraph 1(2)(h) (paragraphs 19 and 20);
4. the father could not be **treated as** having earnings of £48,000 per year by virtue of the application of paragraph 26 of Schedule 1 to the MASC regulations because, although he performed services for the benefit of his employers for less remuneration than would normally be paid and the remuneration foregone would otherwise have fallen to be taken into account as earnings (so satisfying sub-paragraphs (a), (b), (c) and (e) of paragraph 26), the tribunal had made no findings of fact relevant to the crucial condition contained in sub-paragraph (d) as to whether the father’s principal purpose in performing the services for less remuneration was to reduce his assessable income for child support purposes (paragraph 24);

5. the test as to whether the condition in sub-paragraph (d) is satisfied is a subjective one – the test is not merely whether the parent’s intention was to reduce income in general (with a side effect of there being a reduction in the amount of assessable income for child support purposes) – rather the test is focused on the parent’s intention in reducing the income (the decision in CCS/3675/2004 followed) (paragraph 24);

6. paragraph 27 of Schedule 1 to the MASC regulations can also be potentially relevant in salary sacrifice cases; however it can only apply where one or more of the conditions in heads (a) to (e) of paragraph 26 are not met (paragraph 26).

DECISION OF THE CHILD SUPPORT COMMISSIONER

1. The absent parent’s appeal to the Commissioner is allowed. I set aside the decision of the Ashford appeal tribunal dated 10 January 2007, as it is wrong in law for the reasons identified below. The case is referred to a differently constituted appeal tribunal for determination in accordance with the directions given in paragraphs 28 to 35 below and with further procedural directions to be given by a district chairman of appeal tribunals (Child Support Act 1991, section 24(3)(d)).

2. The appellant is, in the terms of the child support legislation, the absent parent. From now on I shall call him the father and the parent with care the mother. The father had requested an oral hearing of the appeal to the Commissioner. There has been no need for an oral hearing in order to decide that the appeal tribunal of 10 January 2007 went wrong in law. Some factual issues still need to be resolved. That will be more economically and effectively done through a rehearing by a new appeal tribunal, where all parties will have the opportunity to attend, rather than in an oral hearing before the Commissioner. I refuse the father’s request as I am satisfied that the appeal to the Commissioner can properly be determined without a hearing.

The issues

3. This case involves one very straightforward point, of interest only to the immediate parties, and one quite difficult point that has a rather wider significance. The straightforward point stems from a muddle between monthly and weekly figures in relation to one element of housing costs. The other point concerns the proper approach under the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 (SI 1992/1815) (the MASC Regulations) to salary sacrifice arrangements whereby an employee agrees to accept a lower level of cash remuneration in return for the employer contributing an amount equal to the remuneration foregone into a pension scheme or providing some other benefit. The appeal tribunal treated the amount of salary sacrificed by the father as still part of his gross earnings under paragraph 1(3) of Schedule 1 to the MASC Regulations and then allowed half of the amount contributed to the pension scheme to be deducted as a payment made by the father under paragraph 1(3)(b). The central issues are whether that approach is right in law and, if not, what is the right approach.

4. Paragraph 1(1) of Schedule 1 to the MASC Regulations provides that, subject to sub-paragraphs (2) and (3), “earnings” in the case of an employed earner means “any remuneration or profit derived from that employment” and goes on to list a number of specific categories of payments that are to be included within the meaning of earnings. Sub-paragraph (2) lists categories that are not to count as earnings. The categories include any occupational pension (head (b)), any payment in kind (head (f)) and “any tax-exempt allowance made by an employer to an employee”, subject to an exception about allowances for housing costs (head (h)). Sub-paragraph (3) provides:

“(3) The earnings to be taken into account for the purposes of calculating [the net income of the absent parent or the parent with care] shall be gross earnings less –

- (a) any amount deducted from those earnings by way of –
 - (i) income tax;
 - (ii) primary Class 1 contributions under the [Social Security Contributions and Benefits Act 1992 or its Northern Ireland equivalent]; and
- (b) one half of any sums paid by the parent towards an occupational pension scheme;
- (c) one half of any sums paid by the parent towards a personal pension scheme, or, where the scheme is intended partly to provide a capital sum to discharge a mortgage secured upon the parent's home, 37.5 per centum of any such sums."

"Occupational pension scheme" and "personal pension scheme" have the same meanings as in section 1 of the Pension Schemes Act 1993.

5. Paragraphs 26 and 27 of Schedule 1 are also relevant. Paragraph 26 provides:

"26. Where the Secretary of State is satisfied –

- (a) that a person who has performed a service either –
 - (i) without receiving any remuneration in respect of it; or
 - (ii) for remuneration which is less than that normally paid for that service;
- (b) that the service in question was for the benefit of –
 - (i) another person who is not a member of the same family as the person in question; or
 - (ii) a body which is neither a charity nor a voluntary organisation;
- (c) that the service in question was performed for a person who, or as the case may be, a body which was able to pay remuneration at the normal rate for the service in question;
- (d) that the principal purpose of the person undertaking the service without receiving any or adequate remuneration is to reduce his assessable income for the purposes of the [Child Support Act 1991]; and
- (e) that any remuneration foregone would have fallen to be taken into account as earnings,

the value of the remuneration foregone shall be estimated by the Secretary of State and an amount equal to the value so estimated shall be treated as income of the person who performed those services."

Paragraph 27 applies, "otherwise than in the circumstances set out in paragraph 26", when a person has intentionally deprived himself of income with a view to reducing the amount of his assessable income. The amount of that income counts as part of net income. If paragraph 1(3) does not allow the deduction of the amounts of income tax or national insurance contributions that would have been deducted from that deemed income if it had actually been paid, paragraph 2 of Schedule 2 allows the appropriate amount to be disregarded.

The background in brief

6. The appeal tribunal was concerned with the mother's appeal against a maintenance assessment made on 12 June 2006 on the father's application for supersession on the ground of change of circumstances (change of employer and new housing costs). The assessment, with a nil liability, took effect from 2 May 2006 (the date of the father's telephone call notifying the changes). The father had previously been liable to pay £121.41 per week, apparently on annual earnings of £48,000. The mother had also appealed against decisions not to make departure directions on various grounds, but the appeal tribunal's dismissal of those appeals has not been appealed to the Commissioner.

7. What eventually emerged as the result of further explanation at the appeal tribunal's hearing on 10 January 2007 of the documentary evidence about the father's new job was this. His employment with Brewin Dolphin Securities Ltd began on 3 October 2005. His total annual remuneration package was £60,000. He became a member of the Brewin Dolphin Senior Staff Pension Fund, then an exempt approved occupational pension scheme (presumably a registered pension scheme from 6 April 2006), on 1 April 2006. According to the 2004 members' booklet, an employee with a total remuneration package (TRP) who agreed to join the scheme had to select a level of contributions to be made to the scheme, which were then to be made by the employer "by way of an allocation of your TRP". Such an employee could also opt in advance to have a bonus paid into the scheme. The scheme allowed the member to exercise various choices about the investment of the contributions and provided a pension at normal retirement date (stated as 65), or earlier with the consent of the employer, of an amount equivalent to the value of the member's fund. A member could withdraw from the scheme at any time. The father opted to have £4,000 per month contributed, ie £48,000 out of his TRP of £60,000, plus £375 per year for permanent health insurance. Thus the letter dated 11 April 2006 from Brewin Dolphin to the father confirming his annual salary from April 2006 as £11,625 was correct, as were the payment slips for April and May 2006 showing net pay after deduction of income tax and national insurance contributions of £804.56 and £805.75 respectively. There was only an apparent discrepancy with Brewin Dolphin's letter dated 17 August 2006 because that letter referred to the amount sacrificed and the amount paid as remuneration in the calendar year 2006.

8. The father's letter received on 25 May 2006 gave details of the 18-year mortgages (although apparently the building society's statement for one went missing somewhere) that he was taking out on a new house, jointly with another person, and referred to his annual salary of £11,625. The maintenance assessment with effect from 2 May 2006 was calculated on a salary of that amount (without at that stage having asked him about the reduction from the previous level) and his share of new housing costs of £94.15 per week for mortgage interest and £8.86 per week for premiums on a mortgage protection policy taken out on the father's life alone.

9. After the mother had appealed and the Secretary of State's submission to the appeal tribunal had been prepared, the father gave some further information in response, in a letter dated 27 September 2006. He said that one mortgage account, with a monthly interest payment of £112.25, had been omitted. And he said this:

"As documented the mortgage lender accepted an interest only mortgage on the proviso that an appropriate repayment vehicle was in place to repay the interest only element at the end of the mortgage term.

For them to accept a pension linked mortgage I had to provide the following: –

- documentary evidence of value and nature of investment
- start date, maturity date, monthly cost and provider

- target maturity value to cover £110,000 (my 50% share of the mortgage).

They also stipulated that if the mortgage term selected went beyond my retirement date ie 60 and I did not have sufficient provision then the mortgage term had to be reduced so that the mortgage is repaid to them on or before my retirement date.

Therefore, in view of the above I have salary sacrificed to meet the above commitment. This is the only way that these contributions can be made into my employers scheme. I have enclosed projections to meet this target amount.

...

I now have only 10 years next birthday to accrue a pension for old age and clear my mortgage debt."

10. Among the many other points put forward by both parents in further correspondence, the mother queried what the true level of the father's remuneration was and argued that he had apparently deliberately reduced his salary knowing that it would have a significant effect on the calculation of the maintenance he had to pay his children.

The appeal tribunal's decision

11. Both the father and the mother attended the hearing on 10 January 2007. There was a long and complicated hearing. In the course of it, the father produced a copy of the member's booklet for the pension scheme and of one page from guidance in Her Majesty's Revenue and Customs' (HMRC's) Employment Income Manual (as available on the internet), giving a general description of salary sacrifice and the effect on income tax liability. The chairman's record of proceedings is occasionally unhelpful in not being clear as to who was making particular points, but it appears that the presenting officer on behalf of the Child Support Agency (CSA) urged the appeal tribunal to allow the appeal on the basis that the result of the father's evidence was that he was to be treated as having earnings of £60,000 less only the amounts of income tax and national insurance contributions actually deducted and half of the £48,000 pension contributions. There was then a good deal of discussion about whether the scheme was an occupational pension scheme or a personal pension scheme (in case the lower percentage deduction in paragraph 1(3)(c) of Schedule 1 to the MASC Regulations were applicable) and about the mortgage amounts.

12. The appeal tribunal allowed the mother's appeal against the assessment and decided that the father's annual income was to include £11,625 and £375 (permanent health insurance), both subject to deduction of income tax and national insurance contributions, plus £24,000 not subject to such deductions. It also decided that the father's housing costs were to be interest-only on the three mortgages, excluding property insurance (£464.11 per month) plus £8.86 mortgage protection payments. On the estimate made by the CSA's presenting officer, that would lead to a weekly liability of £150 – £155 with effect from 2 May 2006. In the light of that likely effect, the appeal tribunal dismissed the mother's two appeals on departure directions.

13. The statement of reasons referred to the provisions of paragraph 1 of Schedule 1 to the MASC Regulations and then spent most time in debating whether the Brewin Dolphin scheme was an occupational pension scheme or a personal pension scheme before concluding (correctly) that it was the former. It was then stated that the payments made by the father by way of salary foregone would be subject to paragraph 1(3), meaning that one half of any sums paid by him towards such a scheme were to be deducted from his gross earnings. In relation to housing costs, the appeal tribunal explained why 50 per cent of the interest on all three mortgages should be allowed to the father. This was stated to total £464.11 plus £8.86 mortgage protection payments per month.

The appeal to the Commissioner

14. The father now appeals against the appeal tribunal's decision with my leave. The father's grounds challenged the calculation of housing costs in the maintenance assessment breakdown following the appeal tribunal's decision and asserted that he had not been treated fairly by the CSA and its presenting officer. When granting leave to appeal I said this:

"It is arguable that the appeal tribunal failed to give an adequate explanation of what it decided in relation to the applicant's housing costs, in that it concluded that the amount for mortgage interest should be £464.11, which was a monthly figure, to which should be added £8.86 per month mortgage protection payments. However, it appears from page 10 of the papers that £8.86 was a weekly figure. Therefore there was an ambiguity in the appeal tribunal's decision, although I am not clear how far some of the points made by the applicant in the application for leave to appeal about housing costs are properly to be pursued in an appeal to the Commissioner instead of by way of appeal against the assessment made following the appeal tribunal's decision.

In addition, an issue arises that deserves consideration on appeal. This is the legal nature of salary sacrifice arrangements and how they fit into the provisions of [the MASC Regulations] on the calculation of earnings. As I understand it, for a salary sacrifice arrangement to be accepted by [HMRC], the person in question must have varied the contract of employment so that he is no longer legally entitled to receive the amount of remuneration sacrificed. Then if the benefit provided by the employer in return relates to an occupational pension scheme, contributions made to the scheme will be employer's contributions. It is therefore arguable that it was not legally open to the appeal tribunal for it simply to regard the applicant as receiving the amount of salary sacrificed as earnings from employment, subject to a deduction of 50 per cent of that amount as contributions paid by the applicant towards the scheme. It is arguable that the only way in which a parent could be treated as having earnings in such circumstances is through the operation of either paragraph 26 or 27 of Schedule 1 to the MASC Regulations. The appeal tribunal stated that it had considered paragraph 26, but did not make findings of fact on all the factors that would have been necessary to a conclusion that that paragraph applied."

15. The submission dated 13 September 2007 on behalf of the Secretary of State supported the appeal to the Commissioner. In effect the submission adopted the two points that I had suggested and submitted that the case should be referred to a new appeal tribunal for consideration of whether the conditions existed for the application of paragraph 26 or 27 of Schedule 1 to the MASC Regulations. In their replies, the mother submitted that the father had considered only his own interests in sacrificing such a large proportion of his salary and had not considered the interests of his children and the father repeated his points about the need to build up a lump sum quickly to pay off the interest-only mortgages and provide for retirement, as recommended to him at the time by a financial adviser.

Housing costs

16. It is plain, and no-one has disputed, that the appeal tribunal went wrong in calculating the father's housing costs by muddling up monthly and weekly figures.

Earnings

17. The appeal tribunal seems, so far as one can tell, to have assumed that the proper analysis of the legal situation was that the father had been paid £60,000 per year, out of which he chose to make contributions of £48,000 to the occupational pension scheme. It seems to have regarded the situation as equivalent to his having agreed to the deduction of the contributions at source

through his pay-packet. That analysis was not legally available on the evidence before the appeal tribunal.

18. It is of the essence of salary sacrifice pension arrangements that the contributions to the occupational pension scheme are made as employer's contributions and that the employee has agreed in advance in a contractually valid way to give up the right to receive cash payment of the amount of salary sacrificed. Usually that sacrifice is effected by a variation of the contract of employment. In the present case, although I have not seen any particulars of the father's contract of employment, the sacrifice may have been by the exercise of an option created by the existing contract leading to the allocation of part of his TRP to employer's contributions to the occupational pension scheme and away from payment to the father. It appears that the father could, by withdrawing from the occupational pension scheme, as he was free to do at any time, have taken away the basis for the employer's allocation of TRP away from cash remuneration through the pay-packet. However, as the arrangement has clearly been accepted by HMRC, I see no reason to cast doubt on the reality of its contractual effect. Thus, the appeal tribunal had no basis for finding that the father remained contractually entitled to cash remuneration of £60,000 and, even if it had had, was in difficulty in then applying paragraph 1(3)(b) of Schedule 1 to the MASC Regulations when the contributions were not paid by the father but by Brewin Dolphin.

19. I have considered carefully whether the appeal tribunal's conclusions might be supported on a more sophisticated analysis. The analysis would be along these lines. The words used in paragraph 1(1) of Schedule 1 to the MASC Regulations – "any remuneration or profit derived from that employment" – are very wide ones. In the ordinary use of language the provision of pension rights to the father by Brewin Dolphin's making of contributions to the scheme could be said to amount to profit or remuneration derived from employment (in the general context of the recognition, legal and otherwise, of pensions as deferred pay for many purposes). Under the current income tax legislation it appears that if an employer makes a contribution in respect of an employee to an unregistered pension scheme, the employee is charged to income tax on its amount. There is some fairly old case law suggesting that that would result from a general principle about what amounts to an emolument of employment, rather than merely from the existence of a specific legislative provision making that charge to tax. Section 308 of the Income Tax (Earnings and Pensions) Act 2003, headed "Exemption of contributions to registered pension scheme", provides that no liability to income tax arises in respect of earnings where an employee's employer makes contributions under a registered pension scheme. That plainly assumes that such contributions are earnings of the employee and that there would be a liability to income tax in respect of them if the pension scheme were not registered. Thus, the analysis would go, the contributions in the present case were remuneration or profit derived from the father's employment and there is nothing in the MASC Regulations to take them out of that category or to allow any deductions beyond paragraph 1(3)(b) of Schedule 1 if that could be stretched to cover this situation.

20. If I had thought that that analysis was arguably sound, I would have granted the father's request for an oral hearing, as the difficult legal questions raised would have required much more detailed consideration than in the brief outline above. There would also have been the rather startling consequence that in any case where a parent was in employment and the employer made contributions to a pension scheme, the amount of the contributions would have to be taken into account as earnings. The effect would not be limited to salary sacrifice cases. However, I have concluded that, even if the contributions are properly to be regarded as earnings in a general sense, paragraph 1(2)(h) (tax-exempt allowances) as applied to the present case deems them not to be earnings. It is not clear to me exactly what the amending regulations intended to get at when inserting that head into paragraph 1(2) with effect from 13 January 1997 and perhaps one would not most naturally talk about making contributions to a pension scheme as making an

allowance to the employee. However, in my judgment the words are wide enough to cover that situation in a context in which the employer's contributions are treated as earnings of the employee. Providing that the contributions are to a registered pension scheme, their amount is then certainly exempt from income tax so far as the employee is concerned.

21. Thus, even on that more sophisticated analysis, that I do not now need to develop any further, it was not open to the appeal tribunal to operate on the basis that the father's earnings under paragraph 1 of Schedule 1 to the MASC Regulations included the amount of £48,000 per year allocated to Brewin Dolphin's contributions to the occupational pension scheme. The appeal tribunal went wrong in law by doing so, as well as in failing to give adequate reasons.

22. I should say a few words about the £375 per year sacrificed by the father "to cover the cost of permanent health insurance" (see Brewin Dolphin's letter of 17 August 2006). On the assumption that the premiums on the policy were paid directly by Brewin Dolphin, the appeal tribunal must have erred in law at the least by a failure to explain how it reached the conclusion that the £375 remained part of the claimant's earnings subject to deductions for income tax and national insurance. I do not attempt here to set out the full legal position. I have had no submissions directly on that and it appears to be rather complicated. If there was a group policy, the benefit provided by the employer for each individual employee appears not to be subject to income tax in the employee's hands. Thus, one could probably say for child support purposes that if the benefit is remuneration or profit derived from employment, the amount is not earnings, either as a tax-exempt allowance (paragraph 1(2)(h) of Schedule 1 to the MASC Regulations) or possibly as a payment in kind (paragraph 1(2)(f)). If the policy was for the father as a named individual, the value of the benefit appears to be taxable in his hands. Therefore it could not be taken out of the category of earnings as a tax-exempt allowance and the question would be whether it counted as a payment in kind. I suspect not, in which case the £375 would form part of the father's earnings. However, I make no conclusive findings on any of those points. The CSA will have to investigate and make a specific submission in writing to the new appeal tribunal in advance of the rehearing on those points in the light of the general principles that I have already identified. The father and the mother will then have the opportunity to make any submissions in reply and to put forward any supporting evidence.

Deemed earnings

23. The appeal tribunal's decision cannot be supported on the basis that the father was to be treated as having gross earnings of £48,000 per year in addition to his cash remuneration under paragraph 26 of Schedule 1 to the MASC Regulations (see paragraph 32 for the treatment of the deemed income as earnings). In circumstances like those of the present case, "remuneration" in paragraph 26(a) must refer to payments that count as earnings under paragraph 1. Thus, in the light of the conclusions of law reached above, the father performed services for Brewin Dolphin from 1 April 2006 for remuneration of £11,625 (or possibly £12,000, if he is to be treated as receiving earnings of the amount of the permanent health insurance premium). It seems unarguable that that remuneration was not less than that normally paid for the services provided, in the light of the employer's willingness to pay out £60,000 in one form or another, and that the conditions in all of sub-paragraphs (a), (b) and (c) were satisfied. So too was sub-paragraph (e), in that, if the father had not opted for the salary sacrifice arrangement, all of the £60,000 would have been taken into account as earnings.

24. However, the crucial condition is in sub-paragraph (d), that the father's principal purpose in undertaking the services at below-normal remuneration was to reduce his assessable income for child support purposes. The appeal tribunal stated that it had considered paragraph 26, but made no findings of fact as to the father's purposes and expressed no conclusion about paragraph 26. Although in the decision notice the appeal tribunal expressed the view that, if 50 per cent of

the pension contributions could not have been treated as income, it would have found the conditions for a departure direction on the ground of diversion of income met (and in particular the condition that the reduction of income was unreasonable), that falls well short of a finding about the father's purposes. The father's position was that his principal purpose was as set out in paragraph 9 above and that he had followed financial advice and government policy to provide for his own income in retirement. Although the father plainly intended in general to reduce his income (that was what the salary sacrifice arrangement, as opposed to putting the same amount of money into a personal pension scheme, was all about), with the necessary effect of reducing his assessable income for child support purposes, Mr Commissioner Howell QC has decided in CCS/3675/2004 that such an effect does not in itself satisfy sub-paragraph (d). I think that that ruling has to be right. It represents the most recent thinking of the Commissioners and I follow it. The test cannot be merely whether the purpose is to reduce income (because that would impose no practical additional condition), but must be focused on the purpose of reducing the income. That leaves the test, as Mr Commissioner Howell put it, as a subjective one, depending on the intention of the parent concerned, recognising that there will be difficult borderline cases when an appeal tribunal has to determine which out of a number of purposes is the principal one.

25. In those circumstances it is impossible to conclude that the errors of law already identified were immaterial because the appeal tribunal's findings of fact supported treating the father as receiving earnings under paragraph 26 of Schedule 1.

26. Paragraph 27 of Schedule 1 can also potentially be relevant in salary sacrifice cases, as by definition a parent will have deprived himself of income. However, it can only apply where one or more of the conditions in heads (a) to (e) of paragraph 26 is not met. I do not read "otherwise than in the circumstances set out in paragraph 26" as meaning that paragraph 27 cannot apply in any case of working for no or below-normal remuneration for a person who can afford to pay, regardless of the outcome under paragraph 26. Paragraph 27 is therefore secondary to paragraph 26 and I deal with it in my directions to the new appeal tribunal below.

The Commissioner's decision on the appeal and directions

27. For the reasons given above, the decision of the appeal tribunal must be set aside as wrong in law. Particularly because of the outstanding issues identified in paragraphs 22 and 24 above, and other consequential issues of fact that may arise, I am not in a position to substitute a decision on the mother's appeal against the amount of the maintenance assessment made on 12 June 2006. A decision on those issues should be made by a body that has considered submissions and evidence particularly directed to those issues and before which both parents have had the opportunity of appearing to give evidence and to answer questions in person. Such a hearing is best conducted by a new appeal tribunal.

28. Accordingly, the mother's appeal is referred to a differently constituted appeal tribunal for determination in accordance with the following directions and any further procedural directions that may be given by a district chairman of appeal tribunals. There is to be a complete rehearing of the appeal on the evidence presented and submissions made to the new appeal tribunal, which will not be bound by any findings made or conclusions expressed by the appeal tribunal of 10 January 2007. The Secretary of State is to produce a fresh written submission, within a time to be fixed by a district chairman, dealing with the matters mentioned in paragraph 22 above (probably after making further enquiries) and with the application of paragraphs 26 and 27 of Schedule 1 to the MASC Regulations in the light of the directions given below.

29. The new appeal tribunal must adopt the approach to the meaning of earnings under paragraph 1 of Schedule 1 to the MASC Regulations set out in paragraphs 18 to 22 above, subject to further consideration of the issues mentioned in paragraph 22. The result of doing so,

unless radically different evidence is produced, will be a conclusion that the £48,000 of employer contributions to the occupational pension scheme do not form part of the father's earnings and that the £375 sacrificed for the permanent health insurance may or may not form part of his earnings.

30. The new appeal tribunal must then go on to consider the possible application of, first, paragraph 26 of Schedule 1 to the MASC Regulations and, if and only if it finds paragraph 26 not applicable, paragraph 27. In relation to paragraph 26, the approach of law set out in paragraphs 23 and 24 above must be followed. In relation to paragraph 27, the only direction of law that I give is about what appears to be the crucial condition of whether any deprivation of income was "with a view to reducing the amount of his assessable income". If the new appeal tribunal is considering that condition it should take into account the authorities mentioned in paragraph 19 of Commissioner's decision R(CS) 3/00 suggesting that that phrase might require the identification of a person's dominant intention, as well as what is said in paragraph 24 above about purpose/intention. It will be relevant, in relation to both paragraphs, to ask why the father chose to make his pension provision in the form that he did, rather than in another form (such as through a personal pension scheme or a stakeholder scheme) that did not involve a reduction of cash remuneration, but the making of tax-deductible payments out of that cash remuneration.

31. If the new appeal tribunal concludes that the conditions of paragraph 26 are met, it must consider the effect on the father's net income in the light of the provision in paragraph 32 of Schedule 1 that the deemed income is to be treated as if it were earnings from employment. It seems to me, without giving a definite direction, that the assumption has to be made, at least in respect of the pension contributions, that, if the cash remuneration had not been foregone in the way that actually happened, the father would have made the same pension contributions himself to a personal pension scheme out of the earnings he would be treated as receiving (as the Brewin Dolphin Senior Staff scheme appears to have contained no provision for members' contributions by TRP members). Thus, a deduction of one half or 37.5 per cent (because of the purpose of paying off the capital outstanding on the mortgages) of those notional contributions could be made as in paragraph 1(3)(b). In relation to paragraph 27, things are slightly more difficult, because paragraph 32 says that the deemed income is to be treated as other income under Part III of Schedule 1, where there is no provision for the deduction of half of pension contributions. However, as there must be some doubt whether paragraph 27 could be found to apply here if paragraph 26 had not been found to apply, I give no directions of law on this point. If the new appeal tribunal reaches this stage in its considerations it must work the result out for itself.

32. If, in the light of what the new appeal tribunal decides as to earnings, it becomes relevant to consider the father's housing costs and the other matters mentioned by the father in, for instance, his letter dated 3 February 2007 (such as shared care and travel to work costs), the new appeal tribunal must consider all those issues afresh, avoiding the error as to housing costs identified in paragraphs 14 and 16 above.

33. I further direct the new appeal tribunal that once it has decided what is the proper formula maintenance assessment with effect from 2 May 2006 (not taking into account any circumstances not obtaining on 12 June 2006: Child Support Act 1991, section 20(7)(b)), it has no power to go on and consider the giving of any departure directions. The mother's appeals against the negative decisions on her applications were disallowed by the appeal tribunal of 10 January 2007 and there has been no appeal against those decisions of the appeal tribunal. Accordingly, only the formula maintenance assessment will be before the new appeal tribunal. I was concerned that this might be unfair to the mother (if it turns out that the new appeal tribunal decides substantially in the father's favour on the formula maintenance assessment) and considered

inviting the mother to make a late application to appeal against the appeal tribunal's departure direction decisions. However, I have concluded that that is not necessary.

34. Under regulation 32(1) of the Child Support Departure Direction and Consequential Amendments Regulations 1996 (SI 1996/2907) a parent has one month from the date of notification of a current maintenance assessment to apply for a departure direction, which can then, if made, take effect from the effective date of that current assessment. Thus, if, in the present case, the new appeal tribunal were to make a maintenance assessment (or set out the basis for the calculation of an assessment) of some positive amount with effect from 2 May 2006, the mother would then have a month from being notified of the amount of the assessment to make an application for departure directions on whatever grounds she wished. If the new appeal tribunal were to disallow the mother's appeal against the nil amount of the maintenance assessment, it does not matter whether that is treated as a notification of a new assessment or as a mere confirmation of the assessment notified on 12 June 2006. That is because under regulation 32(2) of the Departure Direction Regulations if an application for a departure direction is made more than one month after the date of notification of the current assessment, but the Secretary of State is satisfied that there has been unavoidable delay, he may treat the application as made within the month. In the circumstances of the present case, I do not see how anyone could conclude that there was not unavoidable delay if the mother did not apply until after the decision of the new appeal tribunal. She has had the decision of the appeal tribunal of 10 January 2007 in her favour, giving her all that she could realistically have obtained from a departure direction, until I have set that decision aside in this decision. Once that decision has been set aside, the operative decision becomes that of 12 June 2006. The mother could, I suppose, make a pre-emptive departure direction application straight away, but it seems to me that it would be wrong to disadvantage her in any way for waiting to see what decision as to the amount of the maintenance assessment with effect from 2 May 2006 emerges from the new appeal tribunal.

35. The evaluation of all the evidence and submissions, subject to the directions given above, will be entirely a matter for the judgment of the new appeal tribunal.