

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Oral Hearing: 10 July 2019 at George House, Edinburgh

Representation:

For the Appellant: Ms Deborah Sinclair, Senior Welfare Rights Officer, Perth & Kinross Council

For the Respondent: Mr Julius Komorowski, Advocate

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The appeal is allowed. The decision of the tribunal given at Stirling on 15 October 2018 is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the Directions at the end of this Decision.

REASONS FOR DECISION

Background

1. This is an appeal about income related (“**IR**”) employment and support allowance (“**ESA**”). It concerns the question of whether payments from a trust should have been taken into account when determining whether the appellant (the “**claimant**”) met the financial conditions for ESA(IR), and if so the level of ESA(IR) to which she was entitled. For reasons set out below, I have decided that some of the payments from the trust fell to be taken into account, and some did not, as more fully set out in paragraph 32 below.
2. The background facts are that the claimant has learning disabilities. She was in receipt of ESA from 11 February 2015. Although she was later found fit for work and so moved on to Jobseekers’ Allowance (“**JSA**”), this appeal concerns the claimant’s ESA entitlement for a period after 13 May 2015 before she moved to JSA. The claimant’s mother died on 13 May 2015. She had made provision for the claimant in her will, subscribed on 16 November 2004 and registered in the Books of Council and Session on 27 May 2015 (the “**Will**”). Under Clause 5 of the Will, a legacy of £2000 was to be paid to the claimant. Under Clause 8, the residue of the estate was to be divided into two equal parts. One part was given to another beneficiary absolutely. The other half was:

“to be held in liferent for my daughter [the claimant], declaring that my Trustees may make distributions out of the trust funds in their hands to any beneficiary or prospective beneficiary, including the liferentrix, provided that:

8.2.1 Any distributions made to any prospective beneficiary shall not be made without the consent of the liferentrix

8.2.2 Any distributions made to or for behoof of any prospective beneficiary shall be taken into account in calculating the amount of residue and be deducted without interest from the share of residue to which such prospective beneficiary is or would have been [entitled]

8.2.3 Any distribution shall vest on payment.”

Under Clause 8.3, on the termination of the liferent, the funds were to be made over to grandchildren of the testator. The trustees were given a number of general powers under Clause 12 of the Will (in respect of this trust and their other functions under the Will), including in Clause 12.10 to decide what money represents capital and what represents income. It is perhaps worth observing that a liferent trust in Scotland is similar to an interest in possession trust in England and Wales.

3. The trust created as a result of these provisions was called the Sheila Morris Liferent Trust (the “**trust**”). The trust funds comprised approximately a quarter of million pounds, now held in financial investments. From the papers it appears that:
 - 3.1 During the period which ran from 13 May 2015 until 27 October 2016 after the claimant’s mother’s death during which her estate was administered (the “**executry period**”), interim payments were made from the trust to the claimant totalling £1,653.47. There is no evidence before the Upper Tribunal as to the pattern, timing or purpose of these payments. The claimant’s representative submitted that they were paid on an ad hoc basis.
 - 3.2 After 28 October 2016, the trustees decided to make payments to the claimant up to £12,000 a year from the fund. The pattern of these payments was that regular transfers were made to the claimant’s bank account (initially £200 fortnightly, then £125 weekly rising to £135 weekly) by Miller Hendry, solicitors who were acting in relation to the executry and the trust. In addition, other payments were made as and when required for the claimant’s car running costs, rent and other matters, on an ad hoc basis.
 - 3.3 The payments made by the trustees exceeded the income from the trust fund. Dividend income had been: 2016/17 £902; 2017/18 £6509; and 2018/19 £6934. However, between 13 May 2015 and 15 October 2018 payments were made from the trust to the claimant in excess of £40,000. In legal terms, the trustees were paying the liferent income from the trust fund to the claimant, but also exercising their powers to advance her additional capital.
4. On 14 July 2017 the Secretary of State for Work and Pensions (“**SSWP**”) decided that the entitlement of the claimant to ESA(IR) should be reduced

from 13 March 2015 to take account of payments from the trust. This decision was revised on 8 December 2017 to a decision that for a period commencing from 13 March 2015 to 27 October 2016 there had been income equating to £21.75 a week, and ESA(IR) should be reduced to take account of this weekly income. There was a resulting overpayment, and the claimant was required to repay it and pay a civil penalty. Initially it was considered that the entitlement appeal lapsed because of the revision decision, under Section 9(6) of the Social Security Act 1998, but the appeal was reinstated after it was accepted there were outstanding issues which needed to be determined.

5. On 15 October 2018 the First-tier Tribunal (the “**tribunal**”) partially allowed the appeal relating to entitlement, by changing the dates for the period of income to be taken into account to 13 May 2015 to 6 October 2015. This was because the income stream did not commence until the date of the claimant’s mother’s death, which was 13 May 2015 not 13 March 2015. The tribunal found that all the payments from the trust fell to be taken into account when considering ESA(IR). I return to the terms of the Decision Notice and Statement of Reasons below. There were also decisions in related overpayment and civil penalty appeals, but those were sisted by the First-tier Tribunal to await the outcome of this appeal, and are not before the Upper Tribunal.

Governing law

6. In order to qualify for ESA(IR), under Section 1(2)(b) of the Welfare Reform Act 2007 (the “**2007 Act**”) a claimant must satisfy financial conditions set out in Part 2 of Schedule 1 of the 2007 Act (as well as basic conditions). The financial conditions include that the claimant has an income which does not exceed the applicable amount, or has no income (paragraph 6(1)(a) of Part 2 of Schedule 1). There are also capital conditions. The amount of ESA(IR), under Section 4 of the 2007 Act, is the applicable amount if there is no income, or if there is an income, the amount by which the applicable amount exceeds income. The references to “applicable amount” are to an amount prescribed from time to time, which is then used to help calculate the amount of ESA(IR) to which there is entitlement.
7. It is therefore necessary to work out the income and capital a claimant has that must be taken into account. Section 17 of the 2007 Act states that:

“(1)...the income and capital of a person shall be calculated or estimated in such manner as may be prescribed.
(2) A person’s income in respect of a week shall be calculated in accordance with prescribed rules, which may provide for the calculation to be made by reference to an average over a period....
(3) Circumstances may be prescribed in which...
(b) capital or income which a person does possess is to be disregarded.”
8. The regulations which prescribe the matters mentioned in Section 17 are the Employment and Support Allowance Regulations 2008 (the “**2008**

Regulations”). Part 10 of the 2008 Regulations is headed “Income and Capital”. There are a number of provisions in Part 10 which govern how income is calculated in different situations. Regulation 90 confirms that income from various sources should be taken into account and calculated on a weekly basis. Regulation 91(1) further provides that income which does not consist of earnings is to be taken into account as set out in the rest of that regulation, and there are provisions for working out the period of that income and a weekly amount. Regulation 104 is headed “Calculation of income other than earnings” and provides:

“(1) For the purposes of regulation 91, the income of a claimant which does not consist of earnings to be taken into account will, subject to paragraphs (2) to (7), be the claimant’s gross income and any capital treated as income under regulation 105 (capital treated as income).

(2) There is to be disregarded from the calculation of a claimant’s gross income under paragraph (1) any sum, where applicable, specified in Schedule 8”.

Notional income is also taken into account. Under Regulation 106 this includes income of which the claimant has deprived themselves for the purposes of obtaining benefit. Under Regulation 106(2), income which would become available if application was made for it but has not been acquired is treated as possessed, but discretionary trusts are exempted from this provision under Section 106(2)(a). Regulation 107(1) also mentions discretionary trusts; income from discretionary trusts is excluded from provisions which require income due to be paid but not yet paid to be counted as notional income.

9. The effect of the provisions in Part 10 of the 2008 Regulations is that all sources of income (including capital treated as income, and notional income) should be taken into account unless the governing legislation provides elsewhere that they are disregarded. Schedule 8 of the 2008 Regulations, referred to in Regulation 104(2), provides a list of sources of income which are disregarded: it is entitled “Sums to be disregarded in the calculation of income other than earnings”. Paragraph 16 is relevant in this case and provides:

“(1) Subject to sub-paragraph (2), any relevant payment made or due to be made at regular intervals.

(2) Sub-paragraph (1) is not to apply to a payment which is made by a person for the maintenance of any member of that person’s family or of that person’s former partner or of that person’s children.

(3) In this paragraph, “relevant payment” means-

(a) a charitable payment;

(b) a voluntary payment;

(c) a payment (not falling within sub-paragraph (a) or (b) above) from a trust whose funds are derived from a payment made in consequence of any personal injury to the claimant.....”

10. Regulation 112 is headed “income treated as capital”, and Regulation 112(7) provides so far as is relevant:

“Any charitable or voluntary payment which is not made or not due to be made at regular intervals...is to be treated as capital”.

Schedule 9 concerns disregards from capital. Paragraph 18 exempts the value of a right to receive any income under a life interest or from a liferent. There are various other disregards for trusts (e.g. personal injury trusts (paragraph 16), and certain named trusts (paragraphs 27, 53 and 61).

11. Finally, it is relevant to notice that there is a Guide for Decision Makers issued by the Department of Work and Pensions (the “**Guide**”). In Chapter 28 of the Guide, at paragraph 28495, it states that “A voluntary payment is a payment that 1. has a benevolent purpose and 2. is given without anything being given in return”. At paragraph 28497 the Guide says that the decision maker should consider the background to and the reasons for the payment when deciding if it is voluntary. At paragraph 28502, the Guide states that “Claimants may receive payments from trust funds. If income from a trust fund is paid at the discretion of the trustees it should be treated as a voluntary payment”.

The Tribunal’s Decision Notice and Statement of Reasons

12. Before deciding the issues arising in this case about payments from the trust, I address the tribunal’s Decision Notice, which of itself discloses an error of law. Although the decision under appeal in this case concerns ESA, the Decision Notice issued on the day of the hearing does not mention ESA, but instead at three points talks about entitlement to JSA. The Decision Notice also stated in terms “Entitlement to JSA has therefore ceased from 13 May 2015”. The claimant’s representative queried the terms of the Decision Notice and requested it be amended or set aside. The Decision Notice was not corrected or set aside, but the Statement of Reasons for the decision provided by the tribunal acknowledged at paragraph 8 that the Decision Notice erroneously referred to JSA. The Statement of Reasons then explained that the words “entitlement to JSA had therefore ceased from 13 May 2015” should not be taken as a direction to the respondent to cease the benefit altogether, and it was a matter for the SSWP to calculate whether or not the benefit ceased altogether.
13. Care has to be taken by tribunals when drafting summary reasons in a Decision Notice. The wording used must reflect the process of reasoning actually deployed by the tribunal (*LA v SSWP (ESA)* [2014] UKUT 482 (AAC), at paragraphs 8 and 12, and *SSWP v C O’N (ESA)* [2018] UKUT 80 (AAC) at paragraph 1). Claimants are entitled to be reassured that the tribunal knows which benefit the appeal is about, and are applying the rules which relate to that particular benefit. The mention of JSA rather than ESA might be capable of correction as an accidental slip under Rule 36 of the Tribunal Procedure (First-tier Tribunal) Rules, provided the procedure set out in that rule has been followed. That has not, however, happened in this case. I also doubt

that Rule 36 could be used to change a finding that entitlement ceased on a particular date to a finding that in fact entitlement might continue beyond then, since they are different decisions (see *AI v Secretary of State for Work and Pensions* (PIP) [2019] UKUT 103 (AAC) at paragraph 50). I find these deficiencies in the Decision Notice, and the conflict between the decision reflected in the Decision Notice and that suggested in paragraph 8 of the Statement of Reasons, amount to an error in law by the tribunal.

Payments from the trust

The parties' submissions

14. The central issue in this appeal was whether payments from the trust should have counted as income or capital when determining whether the appellant (the “**claimant**”) met the financial conditions for ESA(IR), and if so the level of ESA(IR) to which she was entitled. Initially the claimant’s representative argued that none of the payments should be taken into account, and the SSWP argued that all of the payments should be taken into account. The position of both parties has become more nuanced during the course of the appeal, and below I summarise my understanding of their final positions only.
15. On behalf of the claimant, it is argued that the trust was a discretionary trust, based on the way it was applied to the claimant. The claimant does not have control over the actual sums she receives and the timing of payments, and the trustees use their discretion in making the payments. A minute of a meeting of 1 August 2017 says that the trust funds will eventually run out due to expenditure on the claimant, so it is not a liferent trust but a discretionary trust. The payments made to the claimant were made with trustees getting nothing in return, and were classed as voluntary, in accordance with paragraph 28502 of the Guide. Payments made during the executry period were voluntary payments made on an irregular ad hoc basis, and so under Regulation 112(7) of the 2008 Regulations they fell to be treated as capital. Payments made after that period fell into two categories. Fortnightly, then weekly, payments of funds to the claimant were payments made at regular intervals. They fell to be disregarded under paragraph 16 of Schedule 8 of the 2008 Regulations. Other ad hoc payments for the claimant’s car, housing costs and other matters were irregular payments and fell within Regulation 112(7), so should be treated as capital.
16. The SSWP argues that it is incorrect to categorise the trust as a discretionary trust. It is a liferent trust. Payments of the liferent income were not voluntary payments and so could not fall within paragraph 16 of Schedule 8, and so should be taken into account when calculating entitlement to ESA(IR). They were not voluntary because, by paying out liferent income, trustees obtained discharge of their legal obligation to the claimant. No concession was made about the intervals of the payments made during the executry period and whether they were regular or irregular. In respect of payments in the period after that, the amount of the regular payments equating to the liferent income should be taken into account, but the amount equating to additional capital

advances should not. The SSWP submitted that the appeal should be allowed and remitted to the First-tier Tribunal to decide the extent to which payments of the trust were voluntary.

The trust

17. On the basis of the evidence before me, I find that the trust was a liferent trust with a power to advance capital. It was not a purely discretionary trust.
18. In order to ascertain the properties of a particular trust, the terms of the trust deed or document setting up the trust must be consulted. Those set out the parameters of the trust. The way in which trustees administer trust funds does not change the character of the trust. In general, if the administration of the trust is not in accordance with the trust powers and purposes, then the consequence is that trustees may be in breach of trust, and not that the type of trust has changed. In this case, on the evidence before me, the terms of the trust are as set out in paragraph 2 above. I note that Clause 3 of the Will directs trustees to give effect to informal writings, but there are no such writings before me. There has been no formal variation of the trust under the Trusts (Scotland) Act 1961. I therefore proceed on the basis that the terms of the trust are as set out in paragraph 2 above. I accept the submission of the SSWP that in law the trust came into existence on the death of the claimant's mother, although various practicalities of setting up the trust were addressed during the executry period.
19. From the trust terms in paragraph 2 above, it can be seen that the type of trust set up is expressly a liferent trust. A liferent is the right to receive for life the benefits of property or assets, without the right to dispose of the property or assets. The liferent is an interest in possession, because the beneficiary or liferenter is entitled to the use of and/or income from assets held by the trust during the liferenter's lifetime. In this case, I understand that the trust fund now comprises various financial investments, so in practice it is the income on those investments to which the claimant will be entitled. In addition, the trust expressly gave the trustees a power of advancement of capital, by providing that they "may make distributions out of the trust funds in their hands to any beneficiary or prospective beneficiary, including the liferentrix". Accordingly, the claimant has a right under the trust to receive any income from the trust funds. She has no enforceable right to any other payments, but if the trustees choose to advance her additional capital, they may do so. The trust is therefore not purely discretionary. The trustees have no discretion over payment of the income from the funds, which must be paid to the claimant, but they do have discretion as to whether they will advance her additional capital. The trustees can be compelled by the claimant to pay over income, but whether the claimant receives additional payments is a matter for the trustees to decide.
20. I do not accept the claimant's argument that, because the trustees can decide the timing and frequency of payments of liferent income, the liferent is therefore discretionary. Discretion in this context refers to the decision

whether to make distributions at all, not to decisions about timing of distributions the trustees are under a legal obligation to make. It is true that in this case the trustees have a discretion whether or not to make payments from trust funds above and beyond the income on the fund, and the claimant has no right to such payments, and to that extent there are discretionary aspects. But there is an absolute obligation on the trustees to pay over income from the trust funds, and the claimant could take proceedings to enforce that obligation if necessary; this aspect of the trust is not discretionary.

Did the payments from the trust fall to be taken into account when calculating entitlement to ESA (IR)?

21. ESA(IR) is an income related benefit. “The intention, broadly at any rate, is that [income related benefits] should be paid to persons demonstrably in need who are to be identified as such by the level of any income they have” (borrowing from Laws J in *R v Doncaster Borough Council ex p Boulton* 25 HLR 195 at page 204). In effect, the state steps in where income is low. Where a person stands to benefit from a substantial trust fund, legitimate questions arise whether this source of funds adversely affects their entitlement to income related benefits.
22. As a matter of public policy, there are various sources of finance which it has been decided will not affect entitlement to benefits. There is a long list of disregards in Schedule 8 of the 2008 Regulations, and others elsewhere in the 2008 Regulations. For example, payments from infected blood schemes, personal injuries trusts and other specific trusts will be left out of account (Schedule 8 of the 2008 Regulations at paragraphs 16(3)(c), 22 and 41). But there is no general exemption which states that payments from liferent or discretionary trusts are left out of account. It must be presumed that the absence of such a general exemption is deliberate, given that the legislature has expressly considered trusts elsewhere in the 2008 Regulations. It follows that payments from a liferent or discretionary trust would only be disregarded if falling within a specific disregard in Schedule 8 or elsewhere in the legislation.
23. The key provisions for the purposes of the present case are paragraph 16 of Schedule 8 and Regulation 112(7) of the 2008 Regulations, set out in the governing law section above. Paragraph 16 exempts, among other things, payments made or due to be made at regular intervals which are charitable, voluntary or from personal injury trusts. This case is concerned with “voluntary” payments, a category which reflects public policy that certain benevolent payments should not be taken into account and that not all payments made for benevolent purposes are necessarily charitable (*R v Doncaster Borough Council ex p Boulton* 25 HLR 195 at page 204). If payments are voluntary, but are not made or due to be made at regular intervals, then under Regulation 112(7), they will fall to be treated as capital. If the payments are made at regular intervals and are voluntary, then they will fall to be disregarded. If the payments are not voluntary, then unless another

exemption applies, they will fall to be taken into account. The drafting of paragraph 16 calls a decision maker to look at the timing of the payments, whether they are maintenance payments by certain people, and whether they are voluntary, and I consider each in turn below.

24. It is convenient to start with paragraph 16(2). Paragraph 16(2) has the effect that some payments made at regular intervals will not fall to be disregarded if they are “a payment which is made by a person for the maintenance of any member of that person’s family or of that person’s former partner or of that person’s children”. I have decided the payments made from the trust do not fall within this provision. If payments had been directly from the claimant’s mother for maintenance of her daughter, then paragraph 16(2) would have prevented any disregard applying. However, a trust has been set up with a number of trustees (page 51) responsible for making payments (one of whom is the claimant’s sister). I consider that the payments fall to be considered as being made by the trust or the trustees as a whole. The trust and trustees as a whole are not a member of the claimant’s family. The result is that it is necessary to go on to consider the intervals at which payments were made and whether or not they were voluntary.
25. The intervals at which payments from the trust are made or due to be made is important for both paragraph 16 of Schedule 8 and Regulation 112(7) of the 2008 Regulations. In relation to the interim payments made in the executry period, I am not in a position to decide whether they were made at regular intervals or not, because there are no details about them in the papers other than a global sum of £1653.47, and the tribunal did not address these specifically. In relation to payments from the trust after 28 October 2016, I find that some of the payments were made at regular intervals. These were payments made into the claimant’s bank account initially at the rate of £200 fortnightly, then weekly at the rate of £125 rising to £135. I also find there were other payments not made at regular intervals, being the additional distributions from the trust fund made on an ad hoc basis to cover expenditure associated with the claimant’s car, rent and other matters. As a result, some of the payments after 28 October 2016, and possibly some of the payments during the executry period, were not made at regular intervals and could not fall within paragraph 16 of Schedule 8. To the extent they were voluntary they did not fall to be disregarded, but instead treated as capital under Regulation 112(7) of the 2008 Regulations (*R(H)* 5/05 at paragraph 43). In respect of the regular payments, whether or not they fell to be disregarded, depended on whether they were “voluntary”.
26. The final matter to be considered is whether payments from the trust were voluntary or not, again a matter relevant to both paragraph 16 of Schedule 8 and Regulation 112(7) of the 2008 Regulations. There is existing caselaw on what “voluntary” means. In *Overseers of the Savoy v Art Union of London* [1896] AC 296, Lord Halsbury said:

“...there is no doubt that the word “voluntary” is constantly used in two different senses: it is constantly used as the antithesis of something

done under compulsion; but it is also used....as denoting the obtaining or giving of something without anything being obtained in return....There is no doubt of the frequent use of the word "voluntary" in both these senses; and the problem to be solved is in what sense, or in which of these two senses, the legislature has used the word in the section under construction".

27. In *R v Doncaster Borough Council ex p Boulton* 25 HLR 195, Laws J had to decide whether a cash payment in lieu of coal should be disregarded when calculating entitlement to housing benefit. He was interpreting a similar, but not identical, disregards provision to that in paragraph 16 of Schedule 8 to the 2008 Regulations under consideration in this case: "any voluntary payment made or due to be made at regular intervals". He cited the dicta set out above, and decided that "voluntary" did not mean "without compulsion", but rather a payment without anything being received in return. It was a question of looking at the intention of the volunteer rather than whether the payee had legal rights. The underlying policy was the same as charitable gifts: the person wants their largesse to be enjoyed in full rather than relieving the state of its obligations (page 204). In this case the Coal Board was promoting good relations with employees which contributed towards the efficient running of the coal industry. They were getting something in return and so the payments were not voluntary. It is also necessary for me to quote two further passages. The first at page 205 states "In my judgement the provision is not at all concerned with the question whether or not the payer has entered upon legal obligations; it is concerned with cases where a person or body, outside the state, has shouldered some part of the burden of providing relief to people living in the kind of economic circumstances which will attract housing benefit. I have no doubt but that the adjective "voluntary", as it appears in these regulations, is used in the second sense described by Lord Halsbury". The second passage is at page 206 where Laws J states that "I have held that the possibility of legal proceedings does not of itself necessarily determine the question which I have to decide...". The word "necessarily" is important. Legal obligations are not the focus of the enquiry, but in my opinion it does not follow that they are wholly irrelevant when considering whether anything has been received in return for a payment.

28. *Boulton* was followed by the Commissioner in *R(IS) 4/94*, again about coal, where it was held that the purpose of payment in lieu of concessionary coal was not the benevolent one which lies behind "voluntary". It was held by the Commissioner that the approach in *Boulton* applied equally to the Schedule to the Income Support (General) Regulations 1987. Similarly in *R(H) 5/05*, a Commissioner applied the interpretation in *Boulton* to whether there were voluntary payments for the purposes of housing benefit. In that case a person had been injured and his girlfriend and parents sent him money. They were found to be voluntary payments; maintenance of affection or familial duty did not count as obtaining something in return.

29. In my opinion, and having regard to these authorities, the payments made regularly by the trust which equate to liferent income were not voluntary, and

do not fall within the disregard in paragraph 16 of Schedule 8 (or, for that matter, Regulation 112(7)). The trustees received something in return for the payments, which was a discharge of their legal obligation arising under the trust to pay liferent income to the claimant. I accept the line of authority, reflected in paragraph 28495 of the SSWP's Guide, that the focus of 'voluntariness' in the context of income related benefits is on whether anything was obtained in return for a payment. However, it seems to me that in considering whether something is obtained in return for a payment, it is not necessary to leave out all considerations of obligation and compulsion. I observe that neither Lord Halsbury nor Laws J in the *Overseers* or *Boulton* cases above say that factors bearing on one of the two accepted meanings of the word "voluntary" are wholly irrelevant to the other. I consider that legal obligation may be one relevant factor when considering if a payer receives something in return for a payment. To this extent, I do not agree with the suggestion in *R(IS) 4/94* at paragraph 6 that "as Laws J has stated, enforceability was wholly irrelevant". This passage does not appear in the decision of Laws J in *Boulton*, and the quotations I have set out in paragraph 27 above suggest that Laws J left the door open for legal enforceability to be a relevant consideration when deciding if anything had been received in return for a payment. When deciding something is voluntary in the sense of a payment having been made without anything being obtained in return, in my opinion the Guide is correct to say that the background to and the reasons for the payment should be considered. It seems to me that legal obligation may be one aspect of that background. In the present case, the trustees are obliged to pay the claimant the income from the trust funds. When they do this, they obtain a discharge of their legal obligation under the trust, so they receive something in return for making the payments. As it happens, the payment of liferent income is not voluntary in both senses identified by Lord Halsbury: the trustees receive something in return but are also compelled to pay. It does not matter that there was a degree of choice for the trustees as to the timing of payments of liferent income; they were still obliged to make those payments. The payments made to the claimant which represent income on the trust funds are not voluntary.

30. However, payments made to the claimant which represent discretionary advances of capital over and above the liferent income on the trust funds are, in my opinion, voluntary within the meaning of paragraph 16 of Schedule 8 and Regulation 112(7) of the 2008 Regulations. The SSWP's Guide at paragraph 28502 is consistent with this position; capital advances in excess of the liferent income are money paid at the discretion of the trustees, and fall to be treated as voluntary. There is no legal obligation to pay any sums over and above the income on the trust funds, so the trustees are not discharged from any such obligation when additional capital advances are made. They do not obtain anything in return for the payments. The payments are of a benevolent nature as they are to support the claimant. Where those payments are made at regular intervals, they will fall within the exemption in paragraph 16 of Schedule 8. If not made at regular intervals, they will fall within Regulation 112(7).

31. Before moving on to the tribunal's decision under appeal, I accept that Regulations 106(2)(a) and 107(1) of the 2008 Regulations mentioned in the governing law section above refer to discretionary trusts. However, neither of these Regulations are relevant in the present appeal. They concern notional income, which is income a claimant does not have but is treated as having. The present case is concerned with payments received by the claimant, or actual income and capital. Regulations 106(2)(a) and 107(1) make it clear that if a person has failed to make an application for income under a discretionary trust, or if income is due to be paid from a discretionary trust but has not been paid, it cannot be taken into account. But neither situation is in point for the present case.
32. The result of this discussion is that, when deciding in respect of periods since 13 May 2015 whether the claimant met the financial conditions for ESA(IR) and, if so, the level of ESA(IR) to which she was entitled:
- 32.1 Payments made from the trust to the claimant up to the value of the income arising on trust funds fall to be taken into account as income. The payments were not voluntary and are neither disregarded under paragraph 16 of Schedule 8 nor treated as capital under Regulation 112(7) of the 2008 Regulations.
- 32.2 Payments made from the trust to the claimant in excess of the value of the income arising on the trust fund:
- 32.2.1 should be disregarded as income if they were made at regular intervals, under paragraph 16 of Schedule 8, as they were voluntary;
- 32.2.2 should be treated as capital under Regulation 112(7) of the 2008 Regulations if they were not made at regular intervals. Because they are not payments representing the liferent interest, but capital advances, the exemption in paragraph 18 of Schedule 9 will not apply.

The tribunal's errors in law and disposal

33. The tribunal found that all of the payments from the trust fell to be taken into account by the SSWP for the purposes of the claimant's entitlement to state benefits. That was an error in law, in addition to the error in law discussed in paragraphs 12 and 13. The tribunal failed properly to apply the provisions of the 2008 Regulations when considering which payments from the trust fell to be taken into account and which did not. The tribunal's decision must be set aside.
34. There is insufficient information before me to substitute a decision. Although the papers disclose a global total of £1653.47 for interim payments to the claimant during the executry period, I do not have information about the intervals of the interim payments during that period, or of the total liferent income arising on the trust funds during that period. Further, although I have some information about dividend income (page 162), and of total amounts paid out to the claimant (page 223) after the executry period, these are not

broken down in a way so that they map on to particular ESA claim periods. Further fact finding is necessary to be able to apply the principles I have identified in paragraph 32 above.

35. I therefore remit the case to a differently constituted First-tier Tribunal, to be determined in accordance with the Directions given below.

DIRECTIONS

- 1. The case is to be reconsidered at a hearing. The member of the First-tier Tribunal who is chosen to reconsider the case is not to be the same as the member who made the decision which has been set aside. When re-determining the case, the new First-tier Tribunal should have regard to this decision, and in particular should apply the principles set out in paragraph 32 above.**
- 2. Within one month of the date of issue of this Decision, I direct under Rule 6 of the Tribunal Procedure (Upper Tribunal Rules) 2008 that Miller Hendry, 10 Blackfriars Street, Perth PH1 5NS (reference AS/JGT/IAS MOR.474.3), solicitors acting in relation to the executry of the late Sheila Morris and the Sheila Morris Liferent Trust, should provide to HMCTS, 20 York Street, Glasgow, G2 8GT, a list of the interim payments made to the appellant during the executry period between 13 May 2015 until 27 October 2016, broken down by date, amount and what they were for, and indicate that the list is provided in connection with case SC113/17/01124 and CSE/49/2019.**
- 3. Within four weeks of receipt of the information covered by the previous Direction, the Secretary of State for Work and Pensions is to provide to HMCTS (details as in Direction 2), a calculation of the claimant's entitlement to ESA(IR) for the periods relevant to the present appeal, applying the principles in paragraph 32 above in relation to payments from the Sheila Morris Liferent Trust to the claimant. The Secretary of State for Work and Pensions should also provide the text of any decision in the appeal which the First-tier Tribunal is invited to make, and any further evidence on which she wishes to rely. Should the Secretary of State for Work and Pensions need any further information to be able to provide the relevant calculation, a list of the information should be provided to HMCTS and the claimant's representative within four weeks of receipt of the information covered by Direction 2.**
- 4. With four weeks from the date on which HMCTS issues to parties information covered by Direction 3, the claimant's representative may provide a reply to the Secretary of State's submissions.**
- 5. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal and will not be limited to the evidence and submissions before the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

(Signed)
A I Poole QC
Judge of the Upper Tribunal
Date: 11 July 2019