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Case No: CA-2023-002512
CA-2023-002529

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mr Justice Edwin Johnson and Upper Tribunal Judge Jennifer Dean
[2023] UKUT 00232 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2025

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
SIR LAUNCELOT HENDERSON

- -

Between :

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellant**
- and –	
BLUECREST CAPITAL MANAGEMENT (UK) LLP	**Respondent**
And between:	
BLUECREST CAPITAL MANAGEMENT (UK) LLP	**Cross - Appellant**
- and –	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Cross-Respondents**

- -
- -

Richard Vallet KC, Laura Poots and James Kirby (instructed by **The General Counsel and Solicitor for HMRC**) for the **Appellant**

Amanda Hardy KC and Oliver Marre (instructed by **Slaughter and May**) for the **Respondent**

Hearing dates : 26 and 27 November 2024

(Further written submissions on 4 and 11 December 2024)

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 17 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Launcelot Henderson :

Introduction

1. This second appeal and cross-appeal from the decision of the Tax and Chancery Chamber of the Upper Tribunal (Edwin Johnson J and Judge Jennifer Dean) dated 18 September 2023 ("the UT Decision") raise issues about the correct interpretation and application to the facts of the "salaried members" legislation first enacted in the Finance Act 2014 ("FA 2014") to counter the perceived avoidance of the usual charges to income tax and national insurance contributions ("NICs") on "disguised salary" paid to certain members of limited liability partnerships ("LLPs"). The relevant legislation is contained in sections 863A to 863G of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), as inserted by section 74 of, and Schedule 17 to, FA 2014.

2. LLPs were a form of legal entity unknown to English law until the enactment of the Limited Liability Partnerships Act 2000 ("LLPA 2000"). Section 1 of LLPA 2000 provided that:

> "(1) There shall be a new form of legal entity to be known as a limited liability partnership.
>
> (2) A limited liability partnership is a body corporate (with legal personality separate from that of its members) which is formed by being incorporated under this Act; …"

3. Despite the separate corporate identity of LLPs, however, their treatment for the purposes of income tax and NICs was assimilated with that of traditional partnerships formed under the Partnership Act 1890, which in England and Wales (although not in Scotland) have always lacked any form of corporate identity. For income tax, this assimilation was effected in comprehensive terms by ITTOIA section 863 which provides that:

> "(1) For income tax purposes, if a limited liability partnership carries on a trade, profession or business with a view to profit –
>
> (a) all the activities of the [*LLP*] are treated as carried on in partnership by its members (and not by the [*LLP*] as such),
>
> (b) anything done by, to or in relation to the [*LLP*] for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and
>
> (c) the property of the [*LLP*] is treated as held by the members as partnership property.
>
> References in this subsection to the activities of the [*LLP*] are to anything that it does, whether or not in the course of carrying on a trade, profession or business with a view to profit."

There are corresponding provisions for NIC purposes, which I need not recite.

4. One consequence of this deeming is that members of an LLP are generally treated for income tax and NIC purposes as self-employed, in the same way as members of a traditional, non-corporate partnership. In broad terms, the reasons for this treatment are that a partnership is a relationship of joint venture, where each partner is an agent for the others and jointly liable for the liabilities of the partnership, whereas those features are absent from an employment relationship, where an element of service and control is typically present: see the observations of Elias LJ, giving the leading judgment in the Court of Appeal with which Stephen Richards and Lloyd LJJ agreed, in *Bates van Winkelhof v Clyde & Co LLP* [2012] EWCA Civ 1207, [2013] 1 All ER 844, at [64] and [65]. The issue in that case was whether a partner in a firm of solicitors was a "worker" for the purposes of the Employment Rights Act 1996, on which the Supreme Court took a different view from the Court of Appeal: see [2014] UKSC 32, [2014] 1 WLR 2047. But I do not understand there to be any dispute about the basic validity of the points made by Elias LJ when he said (*ibid*):

> "The very concept of employment presupposes as a matter of sociological fact a hierarchical relationship whereby the worker is to some extent at least subordinate to the employer. This is the characteristic which underpins the general understanding of what constitutes the essence of an employment relationship. Where the relationship is one of partners in a joint venture, that characteristic is absent.
>
> …
>
> It is true that the contractual arrangements between the parties may, and typically do, confer different powers on different groups of partners. But the essential nature of the relationship with each partner acting as an agent for, and being responsible for the acts of other partners places them outside the sphere of employment relations entirely."

5. Against this background, on 20 May 2013 the Government published a consultation document entitled "Partnerships: A review of two aspects of the tax rules". One of those aspects was identified in para 1.2, by reference to an announcement made in the 2013 Budget, as "removing the presumption of self-employment for some LLP members, to tackle the disguising of employment relationships through LLPs." The other "aspect" of the tax rules is, for present purposes, irrelevant. In his Foreword, Mr David Gauke MP, the Exchequer Secretary to the Treasury, said:

> "The Government recognises that LLPs are an important and legitimate commercial structure and that the majority of LLPs operate in a way that does not disguise employment relationships. However, there is currently an unintended inconsistency in the way that LLPs and general partnerships are treated that means that some LLPs are able to avoid their employment tax obligations. This strand of the review will level the playing field in the tax treatment of all partnerships, ensuring that employment taxes are paid for LLP members who should properly be counted as employees."

6. Under the heading "Salaried members of LLPs", the consultation document then explained:

> "1.7 Current tax rules mean that individuals who are members of an LLP are taxed as if they are partners in a partnership established under the Partnership Act 1890 (traditional partnership) even if they are engaged on terms closer to those of employees.
>
> 1.8 This produces unfairness in the tax system as an individual member of an LLP receives more favourable treatment of income tax and National Insurance Contributions ("employment taxes") than an individual who is an employee engaged on similar terms. As a result, LLPs can be used to disguise employment and to avoid employment taxes. There is evidence that LLPs are increasingly being used and marketed on that basis.
>
> …
>
> 1.10 To preserve fairness and prevent avoidance through LLPs, the Government will make changes to employment taxes rules to:
>
> (a) remove the presumption that all individual LLP members are treated as partners and hence self-employed for tax purposes; and
>
> (b) set out the factors which will be taken into account in deciding whether an individual member of an LLP should be treated as an employee for the purposes of employment taxes."

7. In the ensuring discussion of "Disguised Employment", the document then said:

> "2.7 The LLP is a unique entity as it combines limited liability for its members with the tax treatment of a traditional partnership. However, individual members of an LLP are taxed as if they are partners even if their membership terms are such that an individual would normally be regarded as being in an employer-employee relationship. For example, members will be taxed as partners even if they have fixed salaries, are not exposed to risk, take no substantive role in the management of the business and have no right to profits or assets if the partnership ends."

8. Paragraph 2.8 proposed to achieve this objective by providing that an individual member who met either of two conditions would be classed as a "salaried member" and, in that capacity, would be liable to income tax and primary class 1 NICs as an employee; the LLP would become the secondary contributor and be liable to pay secondary NICs. The two conditions, which differ significantly from those

subsequently enacted, were then set out. In short, the first condition was that the individual member would be a "salaried member" if he or she would be regarded as employed by the partnership under the general law of employment. The second condition, if the first was not met, was that the individual would also be treated as a "salaried member" if (a) he or she had no economic risk in the form of loss of capital or repayment of drawings if the LLP made a loss or was wound up, (b) was not entitled to a share of profits, and (c) was not entitled to a share of any surplus assets on a winding-up.

9. On 10 December 2013, HMRC published a Summary of Responses to the consultation. The executive summary at the beginning of this document acknowledged that, while there was general support for the proposal to prevent the avoidance of employment taxes through disguised employment relationships, a "large number" of the respondents objected to the use of traditional employment law tests as the relevant criterion. Accordingly, the detailed design of the original proposals was modified by dropping the first condition (employment status) and strengthening the second condition (economic risks) in line with the responses. In particular, the revised condition would now focus on "whether the member's remuneration is a fixed amount, the amount of any capital contribution and the degree of control the member has over the partnership business": see paragraph 1.8.

10. The proposed content of the revised condition was then fleshed out in paragraph 3.15:

> "Where all of new conditions A to C (as set out below) are met, then with effect from 6 April 2014, an individual member of an LLP will be treated as an employee of the LLP for tax and NICs purposes:
>
> ***Condition A:*** the member is to perform services for the LLP in his or her capacity as a member, and is expected to be wholly or substantially rewarded through a "disguised salary" that is fixed or, if varied, varied without reference to the profits or losses of the LLP;
>
> ***Condition B:*** the member does not have significant influence over the affairs of the partnership; and
>
> ***Condition C:*** the member's contribution to the LLP is less than 25% of the disguised salary."

11. As recorded in paragraph 2.10 of the Summary of Responses, the full set of the proposed primary tax legislation was also published by HMRC on 10 December 2013, together with the Summary of Responses and a Technical Note. On 21 February 2014, HMRC published a Revised Technical Note and Guidance on the Salaried Members Rules ("the Revised Technical Note").

12. On 19 March 2014, a Resolution was passed by the House of Commons under the Provisional Collection of Taxes Act 1968 for the relevant amendments to take effect on 6 April 2014. On 27 March 2014, the Finance Bill 2014 was published, and in due course FA 2014 received Royal Assent on 17 July 2014.

The "salaried members" legislation as enacted in FA 2014

13. The key provision Is section 863A, which provides as follows:

> "**863A Limited liability partnerships: salaried members**
>
> (1) Subsection (2) applies at any time when conditions A to C in sections 863B to 863D are met in the case of an individual ("M") who is a member of a limited liability partnership in relation to which section 863(1) applies.
>
> (2) for the purposes of the Income Tax Acts-
>
> (a) M is to be treated as being employed by the limited liability partnership under a contract of service instead of being a member of the partnership, and
>
> (b) accordingly, M's rights and duties as a member of the limited liability partnership are to be treated as rights and duties under that contract of service.
>
> (3) This section needs to be read with Section 863G (anti-avoidance)."

The section therefore operates by deeming the individual member, M, to be employed by the LLP under a contract of service, instead of being a self-employed member of the LLP, but only if all three of Conditions A to C are met in M's case. It follows that the normal treatment of M as a self-employed member of the LLP will not be displaced if any one or more of the Conditions are not met, or in other words are failed, in relation to M. This legislative structure thus has the rather counter-intuitive result that it will usually be in the fiscal best interests of M and the LLP for M *not* to satisfy, or to *fail* to meet, at least one of the Conditions.

14. The two conditions with which we are directly concerned in the present case are Conditions A and B. It has throughout the proceedings been common ground that Condition C is met in the case of all relevant members.

15. Condition A is contained in section 863B:

> "(1) The question of whether condition A is met is to be determined at the following times –
>
> (a) if relevant arrangements are in place –
>
> (i) at the beginning of the tax year 2014-15, or
>
> (ii) if later, when M becomes a member of the limited liability partnership,
>
> at the time mentioned in sub-paragraph (i) or (ii) (as the case may be);

(b) at any subsequent time when relevant arrangements are put in place or modified;

(c) where –

(i) the question has previously been determined, and

(ii) the relevant arrangements which were in place at the time of the previous determination do not end and are not modified, by the end of the period which was the relevant period for the purposes of the previous determination (see step 1 in subsection (3)),

immediately after the end of that period.

(2) "Relevant arrangements" means arrangements under which amounts are to be, or may be, payable by the limited liability partnership in respect of M's performance of services for the partnership in M's capacity as a member of the partnership.

(3) Take the following steps to determine whether condition A is met at a time ("the relevant time").

Step 1

Identify the relevant period by reference to the relevant arrangements which are in place at the relevant time. "The relevant period" means the period –

(a) beginning with the relevant time, and

(b) ending at the time when, as at the relevant time, it is reasonable to expect that the relevant arrangements will end or be modified.

Step 2

Condition A is met if at the relevant time, it is reasonable to expect that at least 80% of the total amount payable by the limited liability partnership in respect of M's performance during the relevant period of services for the partnership in M's capacity as a member of the partnership will be disguised salary. An amount within the total amount is "disguised salary" if it –

(a) is fixed,

(b) is variable, but is varied without reference to the overall amount of the profits or losses of the limited liability partnership, or

> (c) is not, in practice, affected by the overall amount of those profits or losses.
>
> (4) If condition A is determined to be met, or not to be met, at a time, the condition is to be treated as met, or as not met, at all subsequent times until the question is required to be re-determined under subsections (1)(b) or (c).
>
> (5) In this section "arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)."

16. It will be seen that Condition A has two main limbs. The first limb is concerned with identifying the relevant time at which relevant arrangements are in place, and the relevant period for which it is reasonable to expect such a state of affairs to continue. That is step 1 in subsection (3). The second limb contains the substance of the test for "disguised salary", as set out in Step 2. In summary, the test is whether it is reasonable to expect that at least 80% of M's remuneration for the performance of his or her services for the LLP during the relevant period will be (a) fixed, or (b) variable, but varied without reference to the overall amount of the profits or losses of the LLP, or (c) will not, in practice, be affected by the overall amount of those profits or losses. The limited area of contention in this court concerns Step 2, and the question whether the tests in paragraphs (b) and/or (c) of the definition of "disguised salary" are met. There are no issues about the first limb of Condition A or Step 1.

17. By comparison, Condition B is relatively simple. It is contained in section 863C, and says:

> "Condition B is that the mutual rights and duties of the members of the limited liability partnership, and of the partnership and its members, do not give M significant influence over the affairs of the partnership."

It follows from the negative terms of this Condition that it will not be met, and M and the LLP will therefore fall outside the ambit of the legislation, if the specified mutual rights and duties are such as to give M significant influence of the type described, namely "significant influence over the affairs of the partnership." There are no definitions of the key words "significant", "influence" or "affairs", but it is inherent in the statutory wording that the relevant influence must be given to M by the mutual rights and duties of the members of the LLP, either as between themselves or as between them and the LLP. The correct interpretation of the deceptively simple wording of Condition B is the most important of the questions which we have to decide.

18. Condition C is contained in section 863D. The basic nature of the Condition is apparent from subsections (1) to (3), which provide that:

> **"863D Condition C**
>
> (1) Condition C is that, at the time at which it is being determined whether the condition is met ("the relevant

> time"), M's contribution to the limited liability partnership (see sections 863E and 863F) is less than 25% of the amount given by subsection (2) (subject to subsection (7)).
>
> (2) That amount is the total amount of the disguised salary, which, at the relevant time, it is reasonable to expect will be payable by the limited liability partnership in respect of M's performance during the relevant tax year of services for the partnership in M's capacity as a member of the partnership. In this section "*the relevant tax year*" means the tax year in which the relevant time falls and an amount is "*disguised salary*" if it falls within any of paragraphs (a) to (c) at step 2 in section 863B(3).
>
> (3) That amount is the total amount of the disguised salary, which, at the relevant time, it is reasonable to expect will be payable by the limited liability partnership in respect of M's performance during
>
> (a) at the beginning of the tax year 2014-15, or, if later, the time at which M becomes a member of the limited liability partnership;
>
> (b) after that, at the beginning of each tax year."

19. This basic structure of Condition C is then supplemented by detailed provisions contained in the remainder of section 863D, section 863E and section 863F. Since there is no dispute that Condition C is met in the case of all relevant members, it is unnecessary to set out any of those provisions. It is enough to note that, in broad terms, it is accepted by the respondent ("BlueCrest" or "the LLP") that, at the relevant times, the amount of M's contribution to the LLP was less than 25% of the total amount of the disguised salary which it was reasonable to expect would be payable by the LLP to M for his or her services during the relevant tax years (which run from 2014/15 to 2018/19).

20. It is also unnecessary to say anything about the anti-avoidance provisions contained in section 863G, upon which neither side placed any reliance before us.

The factual background

21. For a full account of the facts, reference should be made to the decision of the First-tier Tribunal ("the FTT") (Tribunal Judge Nigel Popplewell, "the FTT Decision") released on 29 June 2022: see [2022] UKFTT 204 TC), [2022] SFTD 1201. The hearing before the FTT occupied seven days in March 2022, including two and a half days of oral evidence. Judge Popplewell's findings of fact are set out in the FTT Decision at [14] to [128]. The main facts are also summarised in the UT Decision at [12] to [63]. The following summary, which draws on HMRC's main skeleton argument in this court, is intended to provide no more than a sketch of the necessary factual context for the questions we must decide. Unless otherwise stated, paragraph references are to the FTT Decision.

22. BlueCrest is a UK-resident LLP which was incorporated in England and Wales on 29 October 2009 under LLPA 2000. It forms part of the wider BlueCrest Group ("the Group") which was co-founded by Mike Platt ("Mr Platt") and William Reeves as a hedge fund management group. Mr Platt was at the helm of the Group during the relevant years.

23. BlueCrest started business in London on 1 April 2010, providing management services to the Group's funds as a sub-investment manager working under the lead investment manager from time to time, and also providing back-office services to other Group entities. Before December 2015, the Group managed the funds of external investors as well as "internal funds", but in December 2015 all the Group funds were closed to external investors and their capital was returned to them. After that date, the Group's funds under investment ("the Fund") were held in other entities within the Group. By the time of the FTT hearing in 2022, the assets under management across the Group totalled some $3.9 billion.

24. At the relevant times, the lead investment manager was a Guernsey limited partnership called BlueCrest Capital Management LP. The general partner of that entity, which carried on its business, was a Jersey-resident company, BlueCrest Capital Management Ltd ("the General Partner"). Mr Platt was both the chief executive officer ("CEO") and the chief investment officer ("CIO") of the General Partner.

25. Following the return of external funds, the principal investors in the Fund were Mr Platt and Andrew Dodd ("Mr Dodd"). Mr Dodd was also the chief financial officer of the General Partner. Although the FTT did not record the split of the Fund between Mr Platt and Mr Dodd, Mr Platt clearly had the lion's share. In evidence accepted by the FTT, one of the portfolio managers explained that "essentially we have one client", namely Mr Platt: see [128].

26. BlueCrest received fees for the services which it supplied, broadly comprising (a) support service fees for the back-office services, and (b) investment fees for the investment management services, calculated by reference to a percentage of the funds under management (typically 2%), payable irrespective of the performance of those funds, and a percentage of the profits on those funds (typically 18 to 20%) as a performance fee.

27. The overall governance of the Group's business was the responsibility of the Jersey-based General Partner, the board of which was charged with the strategic direction, governance and oversight of the Group's activities, including the management of the Fund's assets and central risk management function: [75]. These responsibilities were in turn delegated to the Group Executive Committee ("Group ExCo") which had five members (including Mr Platt and Mr Dodd) and met approximately ten times a year "to discuss and make decisions regarding group strategy, operations and performance" (*ibid*).

28. The evidence showed that Group ExCo was involved in various matters concerning the activities of the LLP, such as reviewing the proposed capital allocations of portfolio managers, monitoring their performance, scrutinising their investment positions and establishing a sophisticated framework to manage portfolio risk: [83], [84], [86] and [100].

29. In his capacity as the CEO and CIO of the General Partner, as well as the co-founder of the Group and principal investor in the Fund, Mr Platt used Group ExCo as a vehicle through which to change investment strategy. Since taking the Fund private, there has been a greater appetite for risk reflected in the increased use of leverage to above-average levels. Because of this, risk management and the quality of risk management are very important: [126].

30. The LLP was itself governed by a limited liability partnership agreement dated 22 March 2011, as amended with effect from 1 July 2013 by an instrument of amendment dated 10 July 2013 ("the LLP Agreement"). The parties to the LLP Agreement were the individual and corporate members of the LLP. Clause 4 of the LLP Agreement defined the Business of the Partnership as being:

> "to carry on the business of (1) providing administrative and support services to other entities, (2) providing advisory, sub-advisory, investment and sub-investment management services to other entities, (3) providing marketing and distribution services to the other entities, (4) the holding of investments and the purchase, acquisition, sale and disposal of shares and interests in bodies corporate, partnerships, limited partnerships and limited liability partnerships and (5) activities associated therewith."

31. Clause 10 of the LLP Agreement dealt with the allocation of profits and losses among the members, by reference to the partnership accounts drawn up for each financial year. Clause 13.1 provided that each financial year should coincide with the calendar year, unless the Board decided otherwise.

32. Under the heading "Management of the Partnership", clause 14.1 provided for the day-to-day management and control of the Business and the affairs of the partnership to be vested in the Board:

> "Subject to the provisions of this Agreement and any applicable legislation, including [*LLPA 2000 as amended from time to time*], the Board shall have responsibility for the day to day management and control of the Business and the affairs of the Partnership and shall have the power and authority to do all things necessary to carry out the purpose of the Partnership (including, when it deems appropriate, the delegation of any such powers or authorities) and shall carry on and manage the same with the assistance from time to time of the Members and of agents, servants or other employees of the Partnership or any other member of the BlueCrest Group as they shall deem necessary. The Board will consult with the Members as appropriate on strategic matters affecting the development of the Business and on such other matters as the Board shall consider appropriate and the Board shall convene not less than one meeting of the Members in each financial year of the Partnership to provide a forum for such consultation and to allow the Members to vote on such matters as are put to a vote of the Members by the Board but otherwise the Members

> (otherwise than in their capacity as Board members) shall have no right or authority to act for the Partnership or vote on matters relating to the Partnership other than as provided in [*LLPA 2000, any applicable Regulations made pursuant to LLPA 2000*] or any other statutory provision applicable to the Partnership or as set forth in this Agreement. In the event that this Agreement or the Act or the Regulations … shall require a meeting of the Members, such meeting shall be convened by the Board and the provisions of Schedule 3 shall apply to any such meeting."

33. Clause 14.2 provided that the members of the Board should be jointly nominated from time to time by two specified group companies, the current members so nominated being Paul Dehadray and Peter Cox who were respectively the general counsel and the CEO of BlueCrest. They were also both members of Group ExCo, together with Mr Platt, Mr Dodd and one other: see [27] above. Further provisions in clause 14 regulated Board meetings (to be held at least four times a year), the quorum (two members present in person or remotely), the Board's powers (widely stated), reserved matters (which needed the approval of a simple majority of members present at a duly convened meeting) and delegation by the Board to committees, including the establishment of an Executive Committee ("UK ExCo"), the original membership of which again included Mr Cox and Mr Dehadray together with two others ("the Original ExCo").

34. The remit of UK ExCo was very widely stated in clause 14.11. In short, it had responsibility for monitoring, reviewing and resolving all matters and issues relating to the operational management of the Business, together with such other matters as the Board might decide.

35. On 22 November 2016, a further 15 individual members joined UK ExCo. Before this date, these additional members had regularly attended and spoken at UK ExCo meetings, but they had not formally been appointed. This step was only taken when it became apparent that HMRC seemed to attach significance to the membership of UK ExCo in the context of the present dispute: [78].

36. Finally, clause 14.16 provided that:

> "The Board shall supply to each Member, as soon as reasonably practicable following such Member's request, such information concerning the affairs of the Partnership, and such access to the books, accounts and records of the Partnership, as such Member may reasonably request in order to prepare and submit any tax returns and related documentation required to be submitted by such Member to any tax authority in relation to the Partnership."

37. Clause 19 set out the covenants given by each individual member of the LLP, including to devote the whole of the member's time and attention during normal business hours to the Business.

38. Clause 25 contained miscellaneous provisions, including an entire agreement clause in 25.1, and a provision in 25.8 that:

> "None of the default provisions set out in Regulations 7 and 8 of the Limited Liability Partnerships Regulations 2001 … shall apply to the Partnership or the mutual rights and duties of the Members."

39. Clause 28 provided that the LLP Agreement was governed by English law.

40. The FTT divided the individual members of BlueCrest into "three broad categories", identified in [33] as (a) infrastructure members, (b) discretionary traders or portfolio managers, and (c) other front office members.

41. The infrastructure members were those responsible for providing the support or back-office services to the Group, such as technology, facilities, legal and compliance: [34]. They included the four Original ExCo members, a number of departmental heads, and other senior members of those departments. On 3 April 2014 there were 82 individual members, 16 of whom were infrastructure members (including the Original ExCo): [36].

42. The portfolio managers were responsible for managing an investment portfolio as part of the investment management services provided to the Group entities. They were allocated an amount of capital, not in the sense of a fixed amount of cash but rather a level of investment risk they were permitted to take on. They had discretion over how to invest that capital allocation, subject to regulatory, compliance and risk parameters. This category also includes "desk heads", who managed a team of portfolio managers. Some of the desk heads had their own capital allocations, while others oversaw a team of portfolio managers and/or a distinct fund: [37] to [39]. On 3 April 2014, there were 48 individual members in this category, including 7 desk heads: [40].

43. The third category was described by Catherine Kerridge, the Group Head of Tax from September 2007, as composed of:

> "Other front office members … who do not have their own discretionary portfolios [and] are very experienced researchers or technologists responsible for managing teams such as quant research teams and computer modellers."

On 3 April 2014 there were 18 members of this category: [42].

44. The members of BlueCrest all worked together in one building in open plan offices in London spread over two floors. Only Mr Cox (the CEO) and Mr Dehadray (the general counsel) have their own offices: [27].

Procedural history

45. HMRC formed the view that all but four members of the LLP met the conditions for the "disguised salary" legislation to apply. The four exceptions were the members of the Original ExCo, who included Mr Cox and Mr Dehadray, no doubt on the basis that they were accepted to have significant influence over the affairs of the LLP and therefore did not meet Condition B. Determinations were issued against the LLP

under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) for the five tax years from 2014/15 to 2018/19 inclusive, in a total sum of approximately £142 million. A decision was also issued under section 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 that the LLP was liable to pay Class 1 NICs of approximately £55.3 million for the same tax years.

46. BlueCrest appealed against those determinations and that decision to the FTT. BlueCrest also challenged the legality in public law of HMRC's application of the relevant legislation in judicial review proceedings in the High Court, which have been stayed pending the outcome of the Tribunal litigation and this appeal.

47. The FTT allowed BlueCrest's appeal in respect of the portfolio managers with allocations of $100 million or more and the desk heads, but it dismissed the appeal in respect of the other portfolio managers and all the non-portfolio managers: [209]. By "the non-portfolio managers", the FTT meant those members in categories (a) and (c) in [40] above, i.e. the infrastructure members and the other front office members. In reaching this ultimate conclusion, the FTT held that both the portfolio managers (including the desk heads) and the non-portfolio managers, or in other words all the relevant individual members, met Condition A, but that while the portfolio managers and the desk heads did exercise significant influence over the affairs of the LLP, and therefore did not meet Condition B, the opposite was true of the non-portfolio managers, who on the evidence exercised no such influence and therefore met Condition B: [208].

48. Both sides then appealed to the Upper Tribunal, with the permission of the FTT. HMRC appealed on the basis that no members had significant influence over the affairs of BlueCrest, with the result that all of them met Condition B (other than the four Original ExCo members). BlueCrest cross-appealed on the ground that Condition A was not met by any of the members, because the FTT had misconstrued it.

49. The hearing in the Upper Tribunal occupied three days in June 2023. The outcome was that both the appeal and the cross-appeal were dismissed. The Upper Tribunal held that the FTT had made no error of law in its construction of either Condition and that its findings of fact were ones that "it was perfectly entitled to make": see the UT Decision at [167].

50. HMRC now appeal to this court on Condition B, with permission granted by Falk LJ on 9 April 2024. In her order granting permission, Falk LJ observed that the interpretation of Condition B "clearly raises an important point of principle", and it was arguable that the Tribunals below had erred in law:

> "In particular: 1) Condition B needs to be interpreted in its context, which includes the other conditions; 2) the test is not simply "significant influence over the affairs" without more; rather, such influence must be determined with reference to the "mutual rights and duties" of members, which raises the question as to how that reference affects the correct interpretation of "significant influence"; and 3) it is arguable that the affairs referred to are the affairs of the partnership as a whole".

51. Falk LJ also granted permission to BlueCrest to pursue its essentially protective cross-appeal, which would arise only if HMRC were allowed to appeal on Condition B. BlueCrest's position was that Condition B had been correctly construed by the Upper Tribunal, but if there was to be an appeal it would be unjust to not also reconsider the position of the members of the LLP other than the portfolio managers and desk heads. As stated in para 16 of BlueCrest's grounds of appeal:

> "The statute cannot be construed and applied differently to different categories of member. A consistent treatment must be applied on the evidence which was before the FTT."

52. In granting permission for the cross-appeal, Falk LJ observed that, if HMRC's narrower test for Condition B were to be adopted, it was unlikely that BlueCrest could succeed on its cross-appeal, but permission should nevertheless be granted so that:

> "if HMRC's appeal succeeds then the position of all members within the scope of the original appeal to the FTT will be determined by reference to what is found to be the correct test, whether that is in terms of HMRC's formulation or a different one."

53. In addition, by a respondent's notice in HMRC's appeal, BlueCrest contend that the decision of the Upper Tribunal in relation to the portfolio managers and desk heads should be upheld on the further ground that, on the basis of the facts found by the FTT, those members also failed to meet Condition A because their remuneration "was variable and varied in practice by reference to the profits and losses of the LLP."

The true construction of Condition B: preliminary points

54. Condition B is one of the three conditions which must be met if an individual member of an LLP, "M", is to be treated as being employed by the LLP under a contract of service instead of being a member of the partnership: ITTOIA section 863A(1) and (2)(a). The genesis and broad purpose of the legislation about "salaried members" of LLPs contained in sections 863A to 863G of ITTOIA are, in my judgment, reasonably clear from the consultation exercise carried out by HMRC, following the announcement in the 2013 Budget of the proposal to enact targeted anti-avoidance provisions to remove the presumption of self-employment for some LLP members so as "to tackle the disguising of employment relationships through LLPs". I have already cited some of the main provisions in this consultation exercise which show the general nature of the mischief which the proposed legislation was intended to counter, and the evolution in the form of the envisaged remedial provisions in the light of the responses to the initial consultation: see [5] to [11] above.

55. In particular, this material shows that, by the time the Finance Bill 2014 was published on 27 March 2014, the focus had shifted from an initial proposal to replicate the tests used in employment law generally when seeking to identify LLP members who were disguised employees, in favour of a new tripartite test which had no precise statutory or common law antecedents but instead sought to encapsulate three typical criteria for distinguishing a traditional relation of partnership on the one hand from a relationship more akin to employment on the other hand. These criteria became Conditions A, B and C, all of which would have to be met if M was to be

treated as an employee of the LLP for tax and NIC purposes. It was never any part of the proposal that M should be deemed to be an employee for other, non-fiscal purposes. Consistently with this important limitation, section 863A(2) states explicitly that the deemed employment of M is only "for the purposes of the Income Tax Acts".

56. It is worth noting in this context that the proposed Condition B in paragraph 3.15 of the Summary of Responses published on 10 December 2013 said merely that "the member does not have significant influence over the affairs of the partnership", but the proposed legislation published on the same day (which we have not seen) presumably already included the further wording contained in Condition B as later enacted, which on the face of it incorporates the further requirement that the "significant influence" must be given by "the mutual rights and duties of the members" both between themselves and between them and the LLP: see [17] above. Certainly, the proposed Condition B must have taken its final form by the date of publication of the Revised Technical Note on 21 February 2014: see para 2.5 on page 28, where the text of the legislation is quoted.

57. In the Overview in Chapter 1 of the Revised Technical Note, section 1.5.2 (paragraphs 21 and 22) says this about Condition B:

> "This condition is met if the mutual rights and duties of the members and the LLP do not give M significant influence over the affairs of the partnership.
>
> Here, the legislation is referring to those individuals who do not have significant influence, i.e. those that merely work in the business rather than carry it on. Examples of those who do have significant influence include those who are involved in the management of the business as a whole, or senior members of a firm who may have little interest in day-to-day management which they leave to others but their roles and rights mean that they can exert significant influence over the business as a whole."

58. Section 1.7 of Chapter 1, which is headed "A common sense approach to applying the conditions", says that the three conditions "are intended collectively to encapsulate what it means to be operating in a typical partnership". Some will be more, or less, appropriate for particular LLPs, "but it is only if all 3 conditions are satisfied that the individual will be treated as a Salaried Member" (para 29).

59. Section 2.5 of Chapter 2 deals with Condition B in more detail, with examples. Under the heading "What type of influence is relevant to the test?", section 2.5.2 of the guidance includes the following:

> "The purpose of Condition B is to exclude from being Salaried Members, those individuals who have a real say in the business. The test is applied on the basis of a realistic view of the facts.
>
> All relevant information must be considered in applying this condition, including agreements between the partner and the

> firm, the LLP Agreement and any contracts between the firm and its investors. As explained in the Business Income Manual … the LLP Agreement includes not only the written agreement but also verbal or implied agreements.
>
> [*Examples are then given of the kind of decisions which might be involved in appropriate cases, such as "appointment of new partners", "strategic decisions" and "formulating the firm's business plan"*]
>
> As noted above, members of the board or management committee of a large professional firm are likely to have the requisite level of influence over the affairs of the business.
>
> By contrast, merely being able to vote, or to express a view, on such matters would be unlikely, in itself, to constitute significant influence.
>
> Sometimes, an individual who has no apparent role in the management of the business may wield considerable influence. If, on a realistic view of the facts, the members defer to the views of that individual, then the individual can fail Condition B."

60. Section 2.5.6 then articulates a recurrent theme in the guidance, stating that:

> "The test applies to the business as a whole. If an individual runs part of the LLP, such as a specific branch or shop, but has no say in the business as a whole then Condition B will be satisfied and the individual can be a Salaried Member."

61. As far as I can see, no assistance can be gained from any of the pre-enactment history to which we were referred about the intended purpose of the limiting words in Condition B which, read literally, require the "significant influence" in question to be given by "the mutual rights and duties of the members … and of the partnership and its members". The words are clearly not mere surplusage, so what did Parliament intend by their inclusion? Most unfortunately, for reasons which I will need to explore in more detail later in this judgment, this is a question which went virtually by default in both Tribunals and in the written submissions of both parties in this court. So, we are left to puzzle it out for ourselves, in the light of the relevant principles of statutory construction and the guidance in the authorities on what is meant by the intention of Parliament. What we certainly cannot do is to ignore the question, or to answer it by reference to what may have been common ground between the parties. As a pure question of statutory interpretation, it is a question of law on which we must make up our own minds.

62. The relevant principles of statutory interpretation have been recently and authoritatively restated by the Supreme Court in *R (O) v Secretary of State for the Home Department* 2022 [UKSC] 3, [2023] AC 255. Lord Hodge DPSC (with whom Lord Briggs, Lord Stephens, Lady Rose JJSC and Lady Arden agreed) set out the guiding principles at [29] to]31]:

"29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: "statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC, 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p397, "Citizens, with the assistance of their advisors, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.

30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which is addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

> 31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:
>
> "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House…Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended' they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.""

63. While all of this guidance is important, I emphasise in particular that (a) the words which Parliament has chosen to enact are "the primary source by which meaning is ascertained", for "the important constitutional reason" explained by Lord Nicholls in the *Spath Holme* case that citizens "should be able to rely upon what they read in an Act of Parliament"; (b) "[e]xternal aids to interpretation must therefore play a secondary role"; (c) no external aids can "displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity"; and (d) "the intention of Parliament" is an objective concept in the sense lucidly explained by Lord Nicholls in *Spath Holme* [2001] 2 AC 349, 396.

64. There is also a contextual point to be made. The language of mutual rights and duties in Condition B is in substance identical to the language used in section 5(1) of LLPA 2000, which under the heading "Relationship of members etc." provides that:

> "(1) Except as far as otherwise provided by this Act or any other enactment, the mutual rights and duties of the members of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its members, shall be governed –
>
> (a) by agreement between the members, or between the limited liability partnership and its members, or
>
> (b) in the absence of agreement as to any matter, by any provision made in relation to that matter by regulations under section 15(c)."

65. Section 15(c) of LLPA 2000, read with section 17, enables regulations to be made about LLPs by the Secretary of State which apply or incorporate "with such

modifications as appear appropriate, any law relating to partnerships". For present purposes, the relevant regulations are the Limited Liability Partnership Regulations (SI 2001/1090) ("the LLP Regulations 2001"), regulation 7 of which makes default provision for the mutual rights and duties identified in section 5(1):

> "7. Default provision for limited liability partnerships
>
> The mutual rights and duties of the members and the mutual rights and duties of the limited liability partnership and the members shall be determined, subject to the provisions of the general law and to the terms of any limited liability partnership agreement, by the following rules:
>
> …
>
> (3) Every member may take part in the management of the limited liability partnership.
>
> …
>
> (6) Any difference arising as to ordinary matters connected with the business of the limited liability partnership may be decided by a majority of the members, but no change may be made in the nature of the business of the limited liability partnership without the consent of all the members.
>
> (7) The books and records of the limited liability partnership are to be made available for inspection at the registered office of the limited liability partnership or at such other place as the members may think fit and every member of the limited liability partnership may when he thinks fit have access to and inspect and copy any of them.
>
> (8) Each member shall render true accounts and full information of all things affecting the limited liability partnership to any member or his legal representatives."

66. It will be recalled that, by virtue of clause 25.8 of the LLP Agreement in the present case, none of the default provisions set out in regulation 7 shall apply to the LLP or to the mutual rights and duties of the members: see [38] above. The effect of the opening words of regulation 7 is to subordinate the default rules to the terms of the LLP Agreement.

67. In the case of traditional partnerships formed under the Partnership Act 1890, the language of mutual rights and obligations may also be found in sections 19 and 24. Section 19 enables such rights and duties to be "varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing". Section 24 is a precursor of section 5 of LLPA 2000, and states that "The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules", which are then set out. Rules (5), (8)

and (9) are in similar terms to rules (3), (6) and (7) in regulation 7 of the LLP Regulations 2001, quoted above.

68. Viewed in this wider statutory context, it seems clear to me that the "significant influence over the affairs of the partnership" contemplated by Condition B must derive from, and have its source in, the mutual rights and duties of the members of the LLP (both horizontally, as between the members themselves, and vertically, as between the members and the LLP) as conferred by the statutory and contractual framework which governs the operation of the LLP, including in particular section 5 of LLPA 2000, regulation 7 of the LLP Regulations 2001, and the relevant provisions of the LLP agreement. Where, as in the present case, the LLP agreement contains both an "entire agreement" clause and a clause excluding the default provisions in regulation 7 of the LLP Regulations 2001, the main focus will be on the terms of the LLP agreement itself. Further, the concepts of "rights" and "duties" connote legal enforceability, whether that is to be found in a relevant statute, in the contractual agreement governing the LLP, or in a combination of the two. Conversely, influence over the affairs of the LLP which lacks any identifiable contractual and/or statutory source in the specified rights and duties is excluded from consideration of the kind of influence which counts for the purposes of Condition B, although it may remain highly material in deciding whether the influence that does qualify ("qualifying influence") is "significant" when assessed in the light of any "non-qualifying influence" which may be found to exist on the facts of the given case.

69. The distinction which I am drawing may be illustrated in the present case by considering the influence exerted by Mr Platt over the affairs of the LLP, both in his personal capacity as the co-founder of the Group and the largest investor in the Fund, and in the performance of his executive and governance roles as the CEO and CIO of the Jersey-based General Partner and as one of the five members of Group ExCo. In practical terms, the combination of those roles doubtless meant that Mr Platt could usually, and perhaps always, ensure that his wishes were followed throughout the Group; but none of those roles had its origin in any of the mutual rights and duties of the members (of whom Mr Platt was not one) under the LLP Agreement. Accordingly, any influence which Mr Platt may have exerted over the affairs of the LLP was non-qualifying for the purposes of Condition B, although the nature and extent of Mr Platt's influence nonetheless remained relevant to the question of evaluation of whether the qualifying influence of the individual members of the LLP over the affairs of the LLP was indeed "significant".

70. As I have already pointed out, Parliament has chosen not to define or elaborate upon the meaning of the word "significant" in the context of Condition B. But it may at least be said that the requisite influence, as well as having its source in the mutual rights and duties, must also be exerted "over the affairs of the partnership". In this context, the affairs of the partnership seem to me to connote the affairs of the partnership generally, viewed as a whole and in the wider context of the Group. The affairs of the LLP are broader than, although they include, the business of the LLP. This distinction is to my mind reflected in the LLP Agreement, which defines "the Business" in clause 4 in terms of the services and other activities provided and carried on by the members, but in clause 14 provides for the day-to-day management and control of "the Business *and the affairs of the partnership*" (my emphasis) to be vested in the Board. More generally, a focus on decision-making at a strategic level,

rather than on how individual members perform their duties in conducting the Business, seems to me to accord better with the basic purpose of Condition B, which is to provide one of the three tests which, if any one or more of them are satisfied, prevent a member from being treated as a disguised employee instead of as a self-employed partner.

The decision of the FTT on Condition B

71. The FTT made detailed findings about the management and governance of the Group, the role of portfolio managers within the LLP, the management of risk throughout the Group, the role of ExCo and other committees of the LLP, the heads of department and back-office services, and the involvement of Mr Platt in his various capacities: see the FTT Decision at [75] to [128]. The FTT then recorded at considerable length the submissions of Amanda Hardy KC for BlueCrest in the 35 numbered sub-paragraphs of [129]. Those sub-paragraphs need to be read as a whole, but for brevity I will confine myself to a short extract from Ms Hardy's submissions in relation to Condition B:

> "(16) Testing significant influence is not just a question of voting rights. It requires a realistic view of the facts … Nor is significant influence limited solely to managerial influence. It can include financial influence. Furthermore, affairs of the partnership does not mean affairs of the partnership generally. Significant influence can be over one or more aspects of the affairs of the partnership.
>
> …
>
> (18) Key investment decisions are taken by the portfolio managers on a daily basis. They also discuss the organisational and operational aspects of the business which is fed in, via desk heads, to UK ExCo, and to the Board, and influences the … affairs of [*the LLP*] even though no formal vote might be taken in relation to the views of those members. This ongoing dialogue fulfilled the Board's obligations under clause 14.1 of the LLP Agreement …
>
> …
>
> (22) In summary, the [*LLP's*] primary case is that, on a proper understanding of the [*LLP's*] affairs, and the rights and duties of the members, all portfolio managers with a capital allocation of $100 million or more exercise significant influence over its affairs because they have autonomous influence over the key purpose of the appellant [*identified at (20) as "to make money"*]; and all infrastructure members exercise significant influence over its affairs because they run departments which are essential to supporting the key purpose … and to delivering support services to the rest of the Group."

72. The submissions of Richard Vallat KC for HMRC were then summarised at comparable length in the 28 sub-paragraphs of [130], from which I again cite a few extracts on Condition B:

> "(18) As regards Condition B … this condition looks to whether a member has significant influence over the affairs of the partnership generally, looking at the business of [*the LLP*] as a whole. This is similar to the position of a partner in a normal partnership, where the partners are together responsible for the running of the business generally. In particular … it is not sufficient to have a significant influence over one aspect of the business or one department. This does not involve reading in additional words or limitations … This condition looks at significant managerial influence. If a member generates large earnings, that is not enough. Those earnings need to be translated into 'managerial clout'.
>
> …
>
> (20) … it is also necessary to consider the influence and control which is 'external' to the appellant given that it is part of a wider group. Given the overarching responsibility and power of Group ExCo and Mike Platt, there is no room for others (beyond a few individuals such as Mr Dodd) to have significant influence.
>
> (21) The evidence shows that the Board … was not really involved in the day-to-day running of [*the LLP*]. UK ExCo feeds up to, and is subordinate to, Group ExCo … the scope of Group ExCo's power does not appear to leave room for significant influence to be exercised at UK ExCo level. [*The LLP*] is an entity which is designed to sit within the wider Group structure, and to provide services which feed into the overall aims of the Fund … It is, in effect, a captive LLP."

73. The FTT's discussion of Condition B starts at [168] and runs to [207]. After some preliminaries, the FTT began its consideration of the extent of Condition B at [170]:

> "170. I start by considering the extent of Condition B. It is Mrs Hardy's submission that this Condition can include direct financial influence (in the context of the portfolio managers) and is not limited to managerial influence. And significant influence can be over one or more aspects of the affairs of the partnership and need not be over the affairs of the partnership as a whole. Mr Vallat's position is diametrically the opposite. Significant influence is significant managerial influence, and a high earner (or significant biller in the context of a law firm) only wields significant influence if that financial contribution is reflected in "managerial clout". Furthermore, the [*influence*] must be over the overall affairs of the partnership and not just … one or more aspects of them. If this means that significant

> influence is limited to, say, a managing partner, or managing board, and is not wielded by individual partners, then that is the case.
>
> 171. I am with Mrs Hardy on both points."

74. Thus, the FTT agreed with BlueCrest's submissions that (a) the influence referred to in Condition B is not limited to managerial influence, and (b) such influence could be over one or more aspects of the LLP's affairs, and it need not be over the affairs of the partnership as a whole. The FTT then gave its reasons for so concluding, at [172] to [177] on point (a) and at [178] to [184] on point (b).

75. On point (a), the FTT approached the question by reference to what the position would be if the LLP were a traditional general partnership, and it said that "Condition B looks at the ongoing contribution, from an operational perspective, which a partner would make to that traditional partnership's business": [173]. The role of such a partner is to "find, mind and grind", i.e. "to go out and find work, supervise others to undertake it, and to do the work themselves": [174]. In amplifying this aspect of his reasoning, Judge Popplewell drew on his own experience as a partner in a leading firm of solicitors: [174] and [177].

76. On point (b), the FTT said that the starting point must be to analyse what the LLP does. In essence, it was agreed that the LLP had two activities: the provision of investment advice to the General Partner, and the provision of back-office services to other members of the Group. (I note, in passing, that it seems to me rather odd to describe the delegated investment management services provided by the portfolio managers and desk heads as "the provision of investment advice", but I do not think anything turns on this). If it could be shown that an individual member significantly influenced either of those activities, that would suffice to engage Condition B: [181]. With reference to HMRC's argument, the FTT then said:

> "183. Mr Vallat's focus is on the high level strategic decisions, and I accept that these are made, in the main, by Mike Platt and Group ExCo, but I do not accept that the significant influence over the affairs of the partnership means that operational decisions which significantly influence the affairs of the appellant have to be discounted. To my mind those operational decisions, and operational influence, at the level of the [*LLP*] fall squarely within the ambit of Condition B.
>
> 184. HMRC accept that significant influence by Mike Platt and Group ExCo still admits of the possibility that significant influence might be exercised elsewhere, but the evidence shows that is not the case in this appeal. I do not agree. Nor do I agree that the appellant should be treated as some form of "captive" which operates at the behest of the broader Group. I shall elaborate on this a little more later, but to my mind provided that the individual members of the Board and of UK ExCo had the essential competencies to make operational decisions about the twin activities of the appellant, then they were capable of having significant influence over its affairs."

77. Having directed itself in this way on the legal principles in play, the FTT then gave detailed consideration in turn to the activities of the portfolio managers with capital allocations in excess of $100 million, the desk heads, the non-portfolio managers, and the providers of back-office services, before coming to the ultimate conclusions in [208] which I have already described at [47] above.

78. In relation to the $100 million-plus portfolio managers, Judge Popplewell was satisfied on the evidence that, once a manager had been promoted to that category, his status would be analogous to that of a partner in a traditional partnership: [191]. The Judge had "absolutely no doubt" that the portfolio managers "as a whole" had a significant influence over the affairs of the LLP: [192]. On what he described as the "more difficult question", which it was common ground had to be answered in the LLP's favour, whether each individual portfolio manager had such influence, his answer was again affirmative, "from both a quantitative and a qualitative perspective: [194]. The Judge considered the roles of managers in this category to be "absolutely fundamental to the core activity of the sub-investment manager, namely to maximise its sub-investment fees", and they also demonstrated "managerial clout" in their discussions with other portfolio managers on managerial and operational issues "which, if necessary, were then ratified by the Board or UK ExCo. Each such individual's view was of significance, as was their influence": [*ibid*].

The decision of the Upper Tribunal on Condition B

79. HMRC appealed to the Upper Tribunal on Condition B, on the basis that no members of the LLP had significant influence over its affairs apart from the four original members of UK ExCo. HMRC argued that the FTT had erred both in its construction of Condition B in section 863C of ITTOIA, and in its application of Condition B to the facts. HMRC's grounds of appeal are recorded in the UT Decision at [68]. Grounds 1 to 4 concerned the construction of the section, including contentions that the FTT had erred in its construction of "affairs of the partnership", "influence" and "significant".

80. At [83] of the UT Decision, the Upper Tribunal directed itself in these terms:

> "83. In our view, the question to be asked, by reference to the wording of Condition B, is whether the mutual rights and duties of the members of the limited liability partnership, and of the partnership and its members, do not give the members significant influence over the affairs of the partnership. At first sight this requires focus upon the relevant agreement or agreements which set out the rights and duties of the members of the partnership. It has, however, been accepted by [*HMRC*] that it is permissible also to consider this question in terms of actual (de facto) influence, which may not necessarily derive from the LLP Agreement or any formal agreement governing the rights and duties of the members of BlueCrest."

It will be noted that, although the first two sentences of [83] correctly reflect the fundamental importance of the rights and duties of the members to the true construction of Condition B, this is then qualified by the words "At first sight" and the reference to HMRC's acceptance that the question may also be considered in terms of

"actual (de facto) influence", whether or not such influence is derived from the LLP Agreement or any other formal agreement. The Upper Tribunal did not, however, explain how this qualification could be reconciled with the clear wording of Condition B, or how they could be bound by a concession on a question of statutory interpretation.

81. HMRC's first ground of appeal was that the FTT had not adequately considered the legal distinction between traditional partners and employees, and had failed to apply that distinction to the construction of Condition B. Instead, it was argued, the FTT had concentrated on the function of a traditional partner to "find, mind and grind", thereby focusing on what a partner does rather than the legal nature of the relationship between traditional partners. In particular, the FTT had failed to consider the statutory question of influence, and the degree of subordination typically found in an employment relationship which is absent from a partnership: [84].

82. The Upper Tribunal found ground 1 to be "misconceived", for the reasons given at [85] to [89]. In short, the FTT was not obliged to approach the question of significant influence by reference to the observations of Elias LJ in the *Bates* case (see [4] above) or to any other rigid test. The question was "acutely fact sensitive" and "all depends upon the facts of the particular case". The "find, mind and grind" role of a traditional partner had been correctly identified by the Judge, who was entitled to find it a helpful analytical tool.

83. Ground 2 concerned the construction of "affairs", and HMRC's case that the test of significant influence applies to the affairs of the LLP generally, looking at the business as a whole. The Upper Tribunal rejected this submission, for the reasons given at [91] to [94]. The statutory reference to the affairs of the partnership was not to the entirety of those affairs, which would be "a highly unrealistic approach". With the possible exception of "small partnerships, with a couple of members, one would expect the members … to have individual areas of responsibility within the business of the partnership". If the relevant influence had to be over the entirety of a partnership's affairs, "this would be capable of producing strange results, particularly in a large partnership". In any medium-sized or large LLP, there might on HMRC's case be only one or two members with the necessary significant influence, and perhaps only the managing or senior partner. The Upper Tribunal did not accept HMRC's answer to this point, that Condition B was only one of three conditions which all had to be met before a partner could be taxed as an employee. While agreeing that Condition B was only one of the conditions which had to be met, the Upper Tribunal thought that an argument of this kind "has its limits" and could not "justify reading into the Condition a restriction which is not present in the Condition".

84. Ground 3 concerned the construction of "influence", and HMRC's argument that the relevant influence had to be over the management of the partnership's business and not merely financial influence or impact. At [98], the Upper Tribunal recorded HMRC's submission that "[e]quating financial impact or operational contribution with influence … results in an unworkable test which does not differentiate between the roles of employees and partners". The Upper Tribunal rejected this submission, for the same reasons as it had rejected ground 2: [99]. The Upper Tribunal said:

> "In our view, HMRC seek to import words into the statute and there is no warrant for demarcating particular types of activity

> as giving or not giving significant influence. The inquiry is a fact sensitive one … Again, this all depends upon the facts of the particular case."

85. Ground 4 concerned the construction of "significant", and the Upper Tribunal again reached a similar conclusion:

> "104. We consider that it would be a mistake to try to put a gloss on the expression "*significant influence*", either by imposing a tripartite distinction between insignificant influence, influence and significant influence or by trying to use the employee/partner distinction as a key to unlock the meaning of significant influence, or by any other means of construction.
>
> 105. There is no one size fits all approach to answering the Condition B question. Whether there is significant influence in the case of any individual member of a partnership depends upon the facts of the particular case. The present case is not a case where guidance is required for future cases, because there was no key issue of principle or construction at stake. What was at stake before the Judge, in this context, was whether the members of the Respondent met or failed Condition B, on the evidence before him."

The Upper Tribunal then added some general observations on the meaning of Condition B, at [107] to [111]. They considered that the Judge's findings of fact in [194] of the FTT Decision, which they set out in full, demonstrate "[t]he futility of trying to argue that the Judge applied the wrong test".

86. Ground 5 is of some interest, because it concerned the LLP Agreement and it alleged that "The FTT erred in failing to appreciate that any significant influence must ultimately derive from their 'mutual rights and duties' under the LLP Agreement": see [68(v)]. The Upper Tribunal considered this ground at [112] to [117]. They said at [114], with my emphasis:

> "It is correct to say that the focus of Condition B is on whether the mutual rights and duties of the members of the relevant partnership give an individual member significant influence over the affairs of the partnership. *It was common ground in the present case that the Judge was entitled to consider the actual position and the inquiry was not restricted to the terms of the LLP Agreement."*

This "common ground" reflected what the FTT had said at [188] of the FTT Decision, and remained the position in the Upper Tribunal, where "Mr Vallat accepted that de facto influence was capable of qualifying as significant influence, within the meaning of Condition B": [116]. The Upper Tribunal continued:

> "117. Although this is, in our view, sufficient to dispose of Ground 5, the Judge in fact considered the evidence in

> significant detail, by reference to the LLP Agreement and the position on the ground, and came to the conclusion that the portfolio managers each exercised significant influence over the affairs of BlueCrest. It is clear that the LLP Agreement was not ignored, but the evidence of what had happened on the ground, in terms of who exercised significant influence, proved decisive in the decision of the Judge in relation to the portfolio managers. We note that the Judge undertook the same exercise in respect of the non-portfolio managers, and decided that they did meet Condition B. Accordingly, this Ground must fail."

87. I comment that the Upper Tribunal, like the FTT, was again content to proceed on the footing that the correct "focus" of Condition B could be affected by the common ground agreed between the parties. Furthermore, the Upper Tribunal considered that the evidence of what had happened on the ground "proved decisive" in relation to the FTT's decision about the portfolio managers, and it also played a part in the FTT's decision about the non-portfolio members.

88. The Upper Tribunal went on to consider HMRC's remaining grounds of appeal on Condition B, which concerned aspects of the FTT's assessment of the evidence and included some challenges to findings of fact on *Edwards v Bairstow* grounds (*Edwards v Bairstow* [1956] AC 14 (HL)) which are no longer pursued. The Upper Tribunal rejected these grounds too, relying on the multi-factorial nature of the evaluative exercise the FTT had to perform and the high threshold in the case law for a successful *Edwards v Bairstow* challenge in an appeal confined to points of law.

HMRC's appeal to this court on Condition B: discussion

89. HMRC's second appeal to this court covers essentially the same ground as their first appeal. Their single overall ground of appeal is that the Upper Tribunal erred in its construction of Condition B, which is an error of law and not, as the Upper Tribunal had said when refusing permission to appeal, a disguised attack on the facts found by the FTT. As it was put in paragraph 9 of HMRC's grounds of appeal:

> "… the correct approach to Condition B is to consider whether the member is given influence over the affairs of the LLP generally, looking at the business of the LLP as a whole. In line with the joint venture nature of a partnership, and the mutual rights and duties of partners, influence can be described as managerial or strategic influence over the business. Finally, that influence must be significant in the context of that business."

90. On the footing that there have been material errors of law, in the sense of errors which might (not would) have made a difference to the outcome below, we are asked to set aside the UT Decision and either re-make it or remit the appeal to the FTT: compare the approach taken by this court in *Degorce v Revenue and Customs Commissioners* [2017] EWCA Civ 1427, [2018] 4 WLR 79, at [95] to [102].

91. In their written submissions, HMRC agree with the Upper Tribunal that the aim of the legislation was to distinguish between persons in the position of an employee and

persons in the position of a partner in a traditional partnership: see the UT Decision at [79]. However, the legislation does not incorporate the multi-faceted general law test for identifying a traditional partner, but instead focuses on three aspects of the relationship that must all be present before the legislative deeming applies. In general terms, I agree.

92. HMRC further submit that, in considering the purpose of Condition B, it is helpful to take the case of an LLP member who is remunerated to a very large extent by "disguised salary" and who has not contributed a significant amount of capital to the business, so that he or she meets Conditions A and C. Such a member is not tied to the financial success of the LLP in the way that a typical traditional partner would be, so it is reasonable to expect that a high level of influence should be needed for that individual to be taxed as a partner. Condition B accordingly sets the bar at a high level, and it requires a "significant" level of influence to be demonstrated before such a member is excluded from the legislative scope. I have some reservations about accepting this submission, because Parliament has chosen not to gloss the word "significant" and I do not think that its meaning can vary depending on which, if any, of the other two Conditions are satisfied. But in general terms, and without hazarding a definition of an ordinary English word, I would accept that the shade of meaning contemplated is a degree of influence over the partnership's affairs which is more than insignificant, and which has practical and commercial substance in the conduct of those affairs in the real world.

93. This leads on to the central point at the heart of this appeal, which is the force and effect of the wording in Condition B which, read literally, requires the relevant influence to be given to the member by the mutual rights and duties of the members of the LLP, and of the LLP and its members. As I have explained in my preliminary analysis of the true construction of Condition B, I consider that those words mean what they say, and that in a case such as the present, where the default provisions in regulation 7 of the LLP Regulations 2001 are excluded by agreement between the members and the LLP, the requisite source for the rights and duties must in practice be found in the LLP Agreement itself. This conclusion is reinforced by the entire agreement clause 25.1, which states that:

> "This Agreement (together with the letters of allocation and any Deeds of Adherence) constitutes the entire agreement between the Members and there are no other written or verbal agreements or representations with respect to the subject matter hereof."

94. In my judgment, the wording of Condition B is clear and unambiguous, nor does the limitation of its scope to what I have called "qualifying influence" derived from the relevant mutual rights and duties conflict with the overall purpose of the legislation. It seems to me a rational legislative purpose that the type of influence over the partnership's affairs which should qualify in this context is influence grounded in the legally binding constitutional framework of the partnership, and that influence from other sources, including the de facto influence exercised by somebody like Mr Platt, should not qualify, although its nature and extent may well be relevant to the separate question whether the qualifying influence of an individual member is "significant". I would therefore construe Condition B, and section 863C of ITTOIA, accordingly, in

line with the guiding principles explained by the Supreme Court in the case of *R(O)* cited at [62] above.

95. I am not deterred from taking this course by the fact that the construction which I consider to be correct was not advanced by either side in either Tribunal, and it only emerged as a fallback secondary position relied upon by HMRC in this court after we had drawn attention in the course of argument to what seemed to us to be the clear import of the relevant statutory wording. On a question of statutory interpretation, it is our duty to decide for ourselves what the legislation means, and we cannot be bound by any agreement between the parties. There may, however, be procedural issues about the fairness of permitting a party to rely on a new point of law in an appellate court after the facts have been found at first instance, and it is to that aspect of the matter that I now turn.

Condition B: the procedural issue

96. In a complex tax appeal to the FTT, the issues between the parties are defined by their respective statements of case. It must also be remembered that the burden of proof normally lies upon the taxpayer to displace the assessment or determination under appeal. I emphasise this point, because the first statement of case before the FTT in the present case was in fact a consolidated statement of case filed by HMRC on 20 August 2020, after three initial letters of appeal had been submitted on behalf of the LLP in 2018 and earlier in 2020. These initial letters included a contention that the relevant individual members of the LLP failed Condition B, framed in language which did little more than track the wording of the Condition. For example, the first letter said:

> "As a result of the mutual rights and obligations owed to and by the LLP and their respective roles in the LLP's business, the members of the LLP each had significant influence over the LLP's affairs."

In addition, the first appeal letter also asked HMRC to note the content of BlueCrest's letters of 20 August and 19 November 2015. Those letters, each written by the Group's Head of Tax, Ms Kerridge, who was also a member of the LLP, provided HMRC with detailed factual information, but said nothing about the construction of Condition B.

97. Against this background, it was agreed that the first statement of case should be filed by HMRC, although HMRC were the respondents in the FTT. This document was the consolidated statement of case referred to above, which was signed by Mr Vallat KC. It recorded HMRC's position that Condition B was met in relation to all the members of the LLP, apart from the four original members of UK ExCo. It set out the wording of Condition B, emphasising the words "significant influence", but said no more about the construction of the Condition apart from recording HMRC's position that the requisite influence must be over the whole of the affairs of the LLP.

98. On 16 October, the LLP filed its Reply, signed by the counsel who have represented it throughout, Ms Hardy KC and Mr Marre. Para 2 recorded the parties' agreement to treat HMRC's statement of case as setting out HMRC's position in the three appeals, pursuant to draft case management directions which were yet to be (but were later)

approved. Para 3 said that the Reply dealt only with matters raised by HMRC in their statement of case, or in other words that the Reply would be purely responsive. Para 6 of the Reply, headed "The LLP Agreement", is important. It said:

> "HMRC's characterisation of the … LLP Agreement does not provide the answer to the statutory question in … condition B, of who has 'significant influence over the affairs of the [*LLP*]'. As HMRC recognise in the current guidance in their Partnership Manual at PM256200:
>
> *'In looking at whether or not an individual member has significant influence it is important not only to look at the written agreement, but also to look at how the LLP operates in practice.'*"

Apart from taking issue with HMRC's case that the influence must be over the "whole" of the affairs of the LLP, or the affairs "generally", which was said to involve reading words into the statute, the remaining parts of the Reply which addressed Condition B concentrated on the facts.

99. On 3 March 2021, agreed case management directions were issued by the FTT. They included directions for the service of witness statements, the preparation of a statement of agreed facts, and the service of sequential skeleton arguments, beginning with the LLP's "outline of the case that it will put to the Tribunal", followed by a similar outline from HMRC and an optional reply.

100. In due course, the LLP filed six witness statements: two from Ms Kerridge, two from Peter Cox (who was the CEO of the LLP and the Chief Operating Officer of the Group), and one each from Nicholas Moore and John Wilson (who were members of the LLP and portfolio managers during some or all of the years under appeal). The LLP then filed its skeleton argument on 7 March 2022.

101. The LLP's skeleton summarised BlueCrest's case on Condition B at paras 41 to 44. The summary began by saying, correctly in my view, that "Condition B is met only if 'the mutual rights and duties of the members' do not give a member 'significant influence over the affairs of the partnership'". It is clear from this, in my opinion, that the LLP was under no misapprehension about the natural meaning of the wording of Condition B, and the LLP should therefore have had this well in mind when gathering its evidence to present to the FTT. This impression is reinforced by the inclusion in paras 43 and 44 of alternative submissions that (a) the portfolio managers, and (b) the other members with specific management roles, "have *rights and duties* amounting to the management of the [*LLP's*] affairs." This language again appears to recognise that the necessary influence needs to be found in the mutual rights and duties of the members.

102. The LLP's skeleton proceeded to deal in more detail with Condition B at paras 103 to 161. Para 104 repeated that the legislation requires significant influence to be tested "with regard to 'the mutual rights and duties' of the members", and the starting point for ascertaining those rights and duties was the LLP Agreement. But this was then qualified in para 105, which submitted that "there is no statutory requirement to look only at the [*LLP's*] governing documentation", and "to do so would be to ignore the

factual reality" of how influence is exercised. Reliance was placed on HMRC's published guidance to that effect, which was said to accord with "the purposive construction of tax legislation" as set out in leading authorities including *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13. This wider approach then informed the detailed submissions made by the LLP on the facts.

103. HMRC's skeleton argument dealt with Condition B at paras 83 to 106. It repeated the approach to the construction of the Condition in their statement of case, and expressly accepted at para 97 that significant influence "can arise in other ways" than under the LLP Agreement and the position of members "within the governance structure". The point was not elaborated, no doubt because it was thought to be common ground.

104. HMRC's position on the construction of Condition B then remained essentially unchanged on their appeal to the Upper Tribunal, and on their further appeal to this court. In those circumstances, BlueCrest now submits that HMRC should not be permitted to advance or rely upon the fallback position which emerged in the course of argument before us, and which was most clearly articulated by Mr Vallat KC in exchanges between him and the court after the short adjournment on the first day of the hearing. In the light of those exchanges, and some further discussion with Ms Hardy KC in the early stages of her response to HMRC's appeal, it was agreed that BlueCrest would reflect overnight on the question whether it wished to press a procedural objection, and (if so) that BlueCrest would provide a written summary of its case on it.

105. In the event, BlueCrest decided to maintain the objection, and provided a helpful position statement which we were able to consider just before the start of the second day of the hearing. This material was then supplemented by sequential written submissions which we directed to be lodged within 7 and 14 days respectively after the hearing. In summary, BlueCrest submitted that HMRC should be refused permission to advance their alternative case and/or to resile from their concession below on the true construction of Condition B, because if HMRC had made their alternative case clear in good time before the FTT hearing, the evidence adduced by BlueCrest to the FTT might well have been different. For this reason, it was argued, the position could not be characterised as one where a party merely wished to advance a new point of law on appeal, and in any event HMRC had not applied for permission to do so. Further, the fact that the grant of such permission would necessitate remittal of the case to the FTT for further evidence to be adduced would be a powerful reason for refusing permission.

106. We were referred to recent authority in this court on the principles which should be followed in relation to the pursuit of new arguments on appeal: see *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146, at [23] to [28] (Snowden J sitting in this court, with whom Peter Jackson and Longmore LJJ agreed), *Hudson v Hathaway* [2022] EWCA Civ 1648, [2023] KB 345, at [34] to [38] (Lewison LJ, with whom Andrews and Nugee LJJ agreed) and *Commercial Bank of Dubai PSC v Al Sari* [2024] EWCA Civ 643 at [59] and [60] (Males LJ, with whom Elisabeth Laing and Nicola Davies LJJ agreed). In the last of those cases, the court endorsed the following summary given by Popplewell LJ in *ADM International Sarl v Grain House International SA* [2024] EWCA Civ 33 at [95]:

> "The court has a general discretion as to whether to allow new points of law to be taken on appeal, the ultimate test being whether it is in the interests of justice … That will depend upon an analysis of all the relevant factors, which include the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken, especially where it would have required additional evidence."

107. Salutary though these principles are, they are not in my judgment engaged to any significant extent in the present case. On a tax appeal to the FTT brought within normal time limits, the burden lies on the taxpayer to displace the assessment or determination under appeal. Furthermore, it should always be remembered on both sides that there is a public interest in taxpayers paying the correct amount of tax, such that fresh arguments may be advanced by either side, or by the tribunal of its own motion, subject always to the requirements of fairness and proper case management: see the observations of Lord Walker of Gestingthorpe in *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2011] UKSC 19, [2011] STC 1143, at [15]. The problem in the present case is that, until the hearing in this court, both sides and both Tribunals were content to proceed on the basis that HMRC's published guidance on Condition B was correct in accepting the possibility that qualifying influence could be derived from a source outside the mutual rights and duties of the members and the LLP, as set out in the LLP Agreement or any contractually binding variation or supplement thereto.

108. It is clear from the procedural history which I have summarised above that, perhaps for tactical reasons, BlueCrest was content for the case to proceed on that mistaken basis, even though BlueCrest was well aware of what the unambiguous language of Condition B apparently requires. Furthermore, even though HMRC filed the first statement of case, this was not a case of BlueCrest responding to a pleaded case which HMRC had to establish, but rather a case where BlueCrest was the appellant and therefore had to make the running and formulate its positive case on both the law and the facts. It evidently suited BlueCrest to adopt HMRC's published view of what the legislation relevantly meant in support of its own appeal, even though neither side has ever attempted to explain how that wider supposed meaning of the clear statutory language can be reconciled with the established principles of statutory interpretation. The incantation of a purposive interpretation is of no avail, if the relevant words construed in their context, and with due regard to the statutory purpose, admit of only one meaning and do not produce absurdity. If BlueCrest then chose to limit its evidence accordingly, without regard to the very real possibility that the FTT (or in due course an appellate tribunal or court) might disagree with the common ground on the meaning of Condition B, I see considerable force in the argument that BlueCrest, as a very experienced and well-resourced litigant, proceeded at its own risk.

109. It is now rightly accepted by the parties that, on a question of statutory construction, there can be no estoppel or other principle of law which prevents this court, or would have prevented either Tribunal, from taking the point and deciding it as a matter of law, even if the parties displayed no enthusiasm for such a course. The interests of the general body of taxpayers sometimes require nothing less, quite apart from the

judicial oaths of the judges hearing the case. In this context, HMRC have aptly reminded us of what Lord Diplock said in *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514 at 1525 about the construction of a written document:

> "It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it was erroneous."

110. There is also a further point about the alleged unfairness to BlueCrest in relation to possible further evidence, which was put to Ms Hardy KC by Arnold LJ but to which in my view she had no satisfactory answer. The point was that the construction of Condition B which I consider to be correct, and which constitutes HMRC's alternative case, is on the face of it *narrower* in its scope than the primary argument, because it does not look beyond the enforceable rights and duties of the members in identifying the qualifying influence which they may have over the LLP's affairs. It is therefore hard to understand how BlueCrest could have been prejudiced when collecting its evidence in support of its positive case that the *wider* construction embodied in HMRC's primary argument was correct. The point perhaps gains added force when it is remembered that, even on the alternative case, it may still be relevant to examine other sources of influence for the purpose of deciding whether the qualifying influence of a member is "significant". So, in other words, however the condition is to be construed, it would have been prudent for BlueCrest to prepare its evidence to deal with other possible sources of actual influence on the conduct of the LLP's affairs, and it cannot plausibly be maintained that the LLP was misled by HMRC's published guidance and/or statement of case into failing to do so.

111. To conclude, I would reject BlueCrest's procedural objection to the new point advanced by HMRC for the reasons given above. Indeed, I would prefer to characterise it as a forensic change of position by the adoption of an alternative fallback argument of construction on a pure question of law, rather than as the taking of a new point which engages in full the jurisprudence to which I have referred. But if that is too relaxed an approach, and HMRC need the permission of the court to rely on their alternative case, I would have no hesitation in granting it. Any potential detriment to BlueCrest in having to meet the new argument can in my judgment be reflected in our eventual costs order, although my provisional view is that any costs order adverse to HMRC, at least in this court, would need to take account of the fact that the question of construction was very clearly raised by Falk LJ in her reasons for granting permission to appeal: see [50] above.

Condition B: conclusion and disposal

112. If my view of the true construction of Condition B is correct, I can see no escape from the conclusion that both Tribunals erred in law in accepting the wider construction which is reflected in HMRC's published guidance and in the common ground between the parties. In particular, the FTT approached its all-important examination and evaluation of the evidence on the mistaken basis that the necessary qualifying influence on the affairs of the LLP could be found not only in the LLP Agreement and

any other sources of enforceable mutual rights and duties, but also in any de facto arrangements which were in place from time to time, however informal they may have been, and whether or not they were legally enforceable. Indeed, it was an unfortunate result of the common ground that the FTT said very little about the detailed provisions of the LLP Agreement in the context of Condition B, and the Judge approached the evidence in much the same way as he would have done if the relevant test were simply whether the member in question, as a matter of fact, had significant influence over the affairs of the LLP. Furthermore, the Upper Tribunal detected no error of law in this mistaken approach, although it was clearly (and rightly) concerned about the apparent disjunction between the wording of Condition B and the agreed approach of the parties, as illustrated by an exchange between Edwin Johnson J and Mr Vallat KC on the first day of the Upper Tribunal hearing, reproduced in footnote 4 of BlueCrest's position statement, which ended with Mr Vallat saying "We do accept that it's possible for someone to have significant influence de facto, outside the terms of the partnership agreement".

113. In these circumstances, I think that the only fair course is to set aside the decision of the Upper Tribunal and remit the case to the FTT so that it can reconsider the evidence in the light of the correct test. This is plainly not a case where we could safely conclude that the error of law was immaterial. On the contrary, it went to the heart of the case, and we are in no position to say with confidence what the outcome would have been if the FTT had directed itself correctly and had conducted the necessary close examination of the terms of the LLP Agreement as the main source of qualifying influence. It is also clear that the remitter should be to the FTT, which was the tribunal of fact which heard all the oral evidence and made the extensive findings contained in the FTT Decision.

114. Further than that, I would not at present go. We indicated during the hearing that there would be an opportunity for the parties to make written submissions on the disposal of the appeal after they had received our judgments in draft, and I will not attempt to pre-empt that process apart from making a few preliminary observations which I hope may be helpful.

115. First, as I have already said, I think the remitter must be to the FTT. Indeed, my impression was that this was all but agreed if we accepted HMRC's alternative argument on the construction of Condition B. Secondly, I would leave it to the FTT to give appropriate directions for the preparation and conduct of any further hearing. Thirdly, I am not at present persuaded that those directions should include an opportunity for BlueCrest to adduce further evidence. For the reasons which I have given in dismissing BlueCrest's procedural objection, I consider that BlueCrest could and should have adduced all the evidence on which it might wish to rely at the original hearing, and the question of the true construction of Condition B was always one that BlueCrest should have known would have to be resolved sooner or later. Fourthly, I am generally sympathetic to the main thrust of BlueCrest's protective cross-appeal, which I take to be that the FTT should have the opportunity to reconsider the application of the correct legal test to all the individual members of the LLP whose tax status is in issue; but this should not be interpreted as giving BlueCrest the chance to advance a new positive case for those members for whom the FTT was satisfied that sufficient evidence was lacking to enable any firm conclusion to be drawn.

BlueCrest's respondent's notice: do the portfolio managers and desk heads fail to meet Condition A?

116. It remains to consider the application of Condition A to the portfolio managers and desk heads. As I have explained, the Tribunals both held that Condition A was met in relation to all the relevant individual members. There is no direct appeal by BlueCrest against the decision of the Upper Tribunal to that effect, and the question arises in this court only in relation to the portfolio managers and desk heads by virtue of BlueCrest's respondent's notice in HMRC's appeal on Condition B, as an alleged additional reason for upholding the Upper Tribunal's decision that those members were not taxable as "disguised employees" because they failed to meet Condition B. It will be recalled that failure to meet any one of the three Conditions is enough to ensure that the member in question falls outside the ambit of the legislation.

117. I will deal with the point relatively briefly, because I feel no doubt that the Tribunals came to the right conclusion on it, substantially for the reasons which they gave.

118. I have already set out the wording of the relevant parts of Condition A, contained in section 863B of ITTOIA, at [16] above. The focus of the argument is on what section 863B calls Step 2, and the question whether the tests in limbs (b) and/or (c) of the definition of "disguised salary" are met. In short, an amount payable by the LLP to M is disguised salary within those limbs of the definition if it is either "variable, but is varied without reference to the overall amount of the profits or losses of [*the LLP*]", or if it is "not, in practice, affected by the overall amount of those profits or losses". The third limb of the definition, in paragraph (a), is satisfied if the amount of the payment "is fixed". Condition A is met if, at the relevant time, it is reasonable to expect that at least 80% of the total amount payable by the LLP in respect of M's performance of services for the partnership during the relevant period, in his capacity as a member, will be disguised salary.

119. In order to place the question in its factual context, I need to say a little more about how the portfolio managers and desk heads were remunerated during the relevant years. The allocation of BlueCrest's profits was governed by clause 10 of the LLP Agreement. The amounts received by individual members had three main components: (a) priority distributions; (b) discretionary allocations; and (c) income point allocations. The priority distributions were equal to the amount of interim profit allocations made to members during the course of the year, based on prudent assumptions about the availability of distributable profits when the accounts for the financial year came to be finalised. It was common ground that this element of remuneration counted as "disguised salary", on the basis that it was "fixed". The discretionary allocations, by contrast, were akin to bonuses in that both the recipients and the amounts were in the absolute discretion of the Board, subject to a complex formula for determining their maximum aggregate amount: see clause 10.3(A)(3) of the LLP Agreement. After payment of the priority and discretionary allocations, any remaining profits were allocated among all the members, both corporate and individual, in the Agreed Income Proportions which were based on their respective income point allocations. The FTT found at [47] that "income points do not represent a significant amount of any individual member's remuneration" since the "vast majority" of the points were allocated to a corporate member as a mechanism for paying surplus profits up the Group to the Fund's participators, including Mr Platt and Mr Dodd.

120. The process for determining the discretionary allocations for all individual members was described by the FTT at [50] to [57]. In the case of the portfolio managers, the calculation was based on the net profit or loss on their portfolios, to which (if there was a profit) a headline percentage (typically 18%) was applied to produce a gross award from which costs were then deducted to produce a net award: see [58] to [66]. The discretionary allocation would be equal to the net award.

121. The FTT also found that, if it turned out when the accounts were finalised that there were insufficient profits to fund either or both of the priority and the discretionary allocations, they would abate to the necessary extent: see [151] to [153]. As the FTT said at [152], "You cannot dish out more than the accounting profits dictate". However, this position did not in practice arise during the years under appeal, although the FTT found the economic risks faced by the business to be real, and gave some examples at [110] to [112], the most striking of which was that in a period of five days in March 2020 the Fund (not the LLP) lost over $850 million out of a cash reserve of about $1 billion. The LLP also faces investment and commercial risks, although there were procedures in place which were intended to manage them.

122. Against this background, BlueCrest advances a short point of construction in relation to Condition A. If the discretionary allocation made to a portfolio manager or desk head is to count as disguised salary within limb (b) of Step 2 in section 863B(3), it must be "varied without reference to the overall amount of the profits or losses of the LLP". This test is not satisfied, submits Ms Hardy KC, because "reference to" does not mean "computed by" but merely imports the existence of a real link between the profits of the LLP and this element of the member's remuneration. It was reasonable to expect that profit allocations paid to them would be variable, and varied in practice, by reference to the profits or losses of the LLP. The Upper Tribunal accepted at [147] of the UT Decision that there was both a practical and a contractual link between losses made by the LLP as a whole and the relevant profit allocations. Ms Hardy emphasised that the reference to "profits or losses" is disjunctive, and she submitted that a link with either profits or losses will suffice. The members in question were exposed to the economic risks of the LLP, and the risk of insufficient profits to fund the discretionary element of their expected remuneration was ever-present.

123. Similarly in the case of limb (c) of the definition of disguised salary, submits Ms Hardy, the test must have been intended by Parliament to add something to limb (b), and the word "affected" denotes that the profits or losses of the LLP can impact on the amounts paid to members. The words "in practice" are intended to exclude situations where, in reality, there is no chance of the governing documentation allowing for such an impact to be felt by the members. Here, however, the LLP might in a given year make a loss large enough to reduce or even eliminate discretionary allocations. A real possibility of that nature is enough to show that limb (c) is not satisfied.

124. HMRC's written arguments in response contend that limb (b) requires something more than the overall amount of profits functioning as a cap on an amount that was determined without reference to the overall profits. Alternatively, if that is wrong, it was still reasonable to expect (on the facts found by the FTT) that the discretionary allocations would be varied without reference to the overall profits of the LLP. HMRC submit that section 863B must be construed purposively, and the appropriate contrast to draw is between (a) a traditional partnership, where all the partners have an

interest in the profits being as large as possible, and the profits are then divided between the partners in agreed shares, and (b) an employment relationship, where the employee is typically rewarded by a fixed salary, which is not normally linked with the employer's overall profits, and the salary may be topped up by a discretionary bonus which rewards the employee for his efforts and performance, but again need not be linked with the employer's overall profits. The discretionary profit allocation mechanism in the LLP Agreement follows the second of these approaches, starting with the financial performance of the member and not with an agreed division of the overall profits of the LLP. The fortunes of the portfolio managers were expected to fluctuate in line with their own performance, not with that of the firm.

125. HMRC go on to submit that the mere fact that the overall profits may cap the remuneration does not convert a mechanism which is broadly typical of an employee's salary plus bonus into one that is typical of a sharing of profits between partners. Even an employee's salary is ultimately dependent on the ability of the employer to pay it. In using the term "disguised salary" Parliament was intending to capture methods of remunerating LLP members which are akin to salary in an employment context, and the use of the word "salary" may legitimately colour the meaning of the term defined: see *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594, at [48] and (in a tax context) *MacDonald v Dextra Accessories Ltd* [2005] UKHL 47, [2005] 4 All ER 107, at [18] per Lord Hoffmann.

126. Accordingly, say HMRC, the FTT and the Upper Tribunal were right to hold that where the overall amount of profits merely functions as a cap on remuneration which is variable without reference to overall profits, such remuneration is a form of disguised profit within the meaning of limb (b).

127. I agree with HMRC, whose oral submissions on this part of the case were ably presented by Ms Poots. This conclusion is enough to establish that the discretionary awards made to portfolio managers (including the desk heads) fell within limb (b), and therefore constituted disguised salary. It is unnecessary to consider whether limb (c) was also satisfied, although both Tribunals considered that it was, and I see no reason to disagree with their reasoning on this point too.

128. Having dismissed the respondent's notice argument, the upshot is that Condition A remains satisfied in relation to all the relevant individual members of the LLP, including the portfolio managers and the desk heads.

Disposal

129. I would allow HMRC's appeal on Condition B, and I would accept their alternative argument (formulated during the hearing) on its true construction. If the other members of the court agree, the UT Decision will be set aside and the case remitted to the FTT for reconsideration in the light of the correct construction of the Condition. As indicated at the hearing, the parties must agree a short timetable for lodging sequential written submissions on the terms of the remitter and other consequential matters. Since HMRC are the successful party, they should lodge the first submissions.

130. I would also make a declaration, for the avoidance of doubt, that Condition A is met in relation to all relevant individual members of the LLP, including the portfolio managers and the desk heads.

Arnold LJ :

131. I agree.

Lewison LJ :

132. I also agree.