



**Trinity Term
[2026] UKSC 18**

On appeal from: [2025] EWCA Civ 23

JUDGMENT

Commissioners for His Majesty's Revenue and Customs (Respondent) v BlueCrest Capital Management (UK) LLP (Appellant)

before

**Lord Briggs
Lord Hamblen
Lord Burrows
Lord Richards
Lady Simler**

**JUDGMENT GIVEN ON
1 July 2026**

Heard on 28 and 29 January 2026

Appellant

Hui Ling McCarthy KC
John Machell KC
Jennifer Haywood
Barbara Belgrano
(Instructed by Slaughter and May)

Respondent

Richard Vallat KC
Laura Poots KC
James Kirby
(Instructed by HMRC Legal Group)

*Interveners – Alternative Investment Management Association Limited and Managed Funds
Association (written submissions only)*

Jonathan Peacock KC
(Instructed by Alternative Investment Management Association Limited and Managed Funds
Association)

LORD RICHARDS AND LADY SIMLER (with whom Lord Briggs, Lord Hamblen and Lord Burrows agree):

Introduction

1. This appeal concerns the correct interpretation of the “salaried members legislation” and its application to certain members of the appellant, BlueCrest Capital Management (UK) LLP (“BlueCrest”). The legislation determines whether a member of a limited liability partnership (or “LLP”) is to be treated as a partner or as an employee of the partnership for the purposes of income tax and national insurance contributions (“NICs”).

2. The salaried members legislation was first enacted in the Finance Act 2014 (“the FA 2014”) to counter the perceived unfairness in the taxation of certain members of LLPs. It set three separate conditions (A, B and C) each directed at capturing a different feature of “disguised employment” in an LLP. A member is to be treated as an employee for tax purposes if each of the three conditions is met; if any one of the conditions is not met, the member is not to be treated as an employee. In other words, to fall outside the scope of the salaried members legislation a member need only fail any one condition.

3. The three conditions were introduced by section 74 of and Schedule 17 to the FA 2014 which inserted new provisions, sections 863A to 863G, into the Income Tax (Trading and Other Income) Act 2005 (“ITTOIA 2005”). It is common ground that Condition C is met by all individual members of BlueCrest and, accordingly, only Conditions A and B are in issue (and have been in issue throughout these proceedings). In broad terms:

(i) Condition A (section 863B) concerns the nature of the member’s receipts and is met if a member’s remuneration from the LLP is (a) fixed or (b) is variable but is varied without reference to the profits or losses of the partnership or (c) is not in practice affected by the overall amount of those profits or losses.

(ii) Condition B (section 863C) concerns a member’s influence and is met if a member does not have significant influence over the affairs of the LLP.

(iii) Condition C (section 863D) concerns capital contribution to the LLP.

4. BlueCrest is a UK registered LLP which, as part of the BlueCrest Group, carries on the business of providing investment management services to the Group’s funds. For the five tax years 2014 to 2019 inclusive, His Majesty’s Revenue and Customs

(“HMRC”) formed the view that all but four members of BlueCrest met the conditions for the salaried members legislation to apply. The four exceptions were the members of BlueCrest’s original executive committee, no doubt on the basis that HMRC accepted that they had significant influence over the affairs of BlueCrest and therefore did not meet Condition B. Accordingly, HMRC made PAYE determinations against BlueCrest under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) for those five tax years in respect of all the other members, in a total sum of approximately £142m. A decision was also issued under section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 that BlueCrest was liable to pay Class 1 NICs of approximately £55.3m for the same tax years.

5. BlueCrest appealed that decision and those determinations. BlueCrest also issued proceedings for judicial review. These have been stayed pending the outcome of the tax appeals and we say no more about them. We discuss the outcome of the appeals in the tax tribunals and the Court of Appeal below (see paras 47–54). It is helpful first to set out the background to the salaried members legislation, the materially relevant provisions and the factual context.

The background to the salaried members legislation

6. A limited liability partnership was a newly created legal entity first introduced by the Limited Liability Partnerships Act 2000 (“the 2000 Act”). Section 1 of the 2000 Act provides 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; ...”

Notwithstanding the separate corporate identity of an LLP (section 1(2) above) the 2000 Act put members of LLPs in the same position for tax purposes as partners in a traditional partnership formed under the Partnership Act 1890, even though traditional partnerships have no form of corporate identity (that is in England and Wales although not in Scotland). The relevant tax legislation went further by deeming an LLP member to be a partner for all the activities of the LLP. Thus, for income tax purposes, section 863 of ITTOIA 2005 provides:

“(1) For income tax purposes, if a limited liability partnership carries on a trade, profession or business with a view to profit

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(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.”

Accordingly, for so long as the business of the LLP was being carried on with a view to profit, its existence as an entity separate from its members was (for tax purposes) ignored: put another way, it was “looked through” for tax purposes. (The legislation made corresponding provisions for NICs purposes, but it is unnecessary to set these out.)

7. This meant that the LLP structure provided limited liability for its members together with the same tax treatment as members of a traditional partnership even if the members were engaged on membership terms that meant they were closer to those of an employer-employee relationship. Thus, for example, whereas partnership is a relationship of joint venture, in which each partner is an agent for the other partners and jointly entitled to the profits or liable for the losses of the partnership, members of LLPs were taxed as partners even if they had fixed salaries, were not exposed to the risk of partnership losses, and had no role in the management of the partnership’s business. That gave rise to perceived unfairness and inconsistency of treatment in the tax system.

8. Against this background, the Government published a consultation document on 20 May 2013, entitled “Partnerships: A review of two aspects of the tax rules”. The aspect of relevance to this appeal was identified in para 1.2 as “removing the presumption of self-employment for some LLP members, to tackle the disguising of employment relationships through LLPs.” Paras 1.7 and 1.8 explained that current tax legislation meant “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” and that:

“1.8 This produces unfairness in the tax system as an individual member of an LLP who is treated as a partner 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.”

The solution identified was:

“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.”

9. Para 2.12 proposed to achieve this 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 were different to those subsequently enacted: 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.

10. In response to the consultation responses (many of which objected to the use of traditional employment law tests as the relevant criterion), HMRC published proposals (in a document headed “Summary of Responses” together with a Technical Note and proposed legislation dated 10 December 2013) abandoning the employment status test in favour of a test based on three separate conditions. The revised test was explained in para 3.15 as follows:

“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. On 20 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 with corresponding “Explanatory Notes”, and in due course the FA 2014 received Royal Assent on 17 July 2014. Also on 27 March 2014, HMRC published a further Revised Technical Note and Guidance on the Salaried Members Rules (“the Revised Technical Note”).

12. Section 1.7 of Chapter 1 of the Revised Technical Note, 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).

The legislation enacted by the FA 2014

13. Section 863A of ITTOIA 2005 is a deeming provision: it deems 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 Conditions A to C are all met in M’s case. In other words, 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 failed in relation to M. It 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 structure of the legislation, as Sir Launcelot Henderson explained in para 13 of his judgment in the Court of Appeal (with which Lewison and Arnold LJJ agreed: [2025] EWCA Civ 23; [2025] 1 WLR 1925), has the 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. Condition A is contained in section 863B and has two main limbs. The first limb (step 1) 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 those arrangements to continue. The second limb contains the substance of the test for “disguised salary” (step 2). Section 863B provides as follows:

“(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 redetermined 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)."

15. 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.

16. Condition B is contained in section 863C as follows:

“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.”

In other words, Condition B 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 over the affairs of the partnership.” The words “significant”, “influence” and “affairs” are not defined. 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.

17. For completeness, Condition C (which is not in issue in these proceedings) is contained in section 863D and provides:

“(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) The question of whether condition C is met is to be determined -

(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.”

There are other supplementary provisions concerning Condition C in the rest of section 863D (in subsections (4) to (12), and in section 863E and section 863F) but it is unnecessary to set these out since BlueCrest accepts 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.

18. The targeted anti-avoidance provision in section 863G operates to disregard arrangements the main purpose (or one of the main purposes) of which is to avoid the application of the regime. But since neither side placed any reliance on it, it is unnecessary to set it out.

19. The parties agree that for the purposes of this appeal, the corresponding NIC provisions apply in the same way as the income tax provisions, and they are not therefore considered separately in this judgment.

The LLP Agreement

20. BlueCrest was 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 management 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."

21. 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.

22. 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 [the 2000 Act 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 to vote on matters relating to the Partnership other than as provided in [the 2000 Act, any applicable Regulations made pursuant to the 2000 Act] 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.”

23. Clause 14.2 provided that the members of the Board should be jointly nominated from time to time by two specified group companies. 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 (“the UK ExCo”).

24. The remit of the UK ExCo was 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.

25. 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.”

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

27. Clause 25 contained miscellaneous provisions, including an entire agreement clause in 25.1, and a provision in clause 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.”

28. Clause 26 provided that the LLP Agreement is governed by English law.

The factual background

29. The Court of Appeal summarised the necessary factual context at paras 21 to 45, and we gratefully adopt that summary. For a fuller account of the facts, the findings of fact are set out in the decision of the First-tier Tribunal (Tax Chamber) (“the FTT”) ([2022] UKFTT 204 (TC)) at paras 14–128 (see summary of the conclusions reached in paras 47–48 below). Unless otherwise stated, paragraph references are to the FTT decision.

30. BlueCrest was incorporated in England and Wales on 29 October 2009 under the 2000 Act. It forms part of the wider BlueCrest Group (“the Group”) which was co-

founded by Mike Platt and William Reeves as a hedge fund management group. Mr Platt led the Group during the relevant tax years.

31. 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 \$3.9bn.

32. 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 ("the CEO") and the chief investment officer ("the CIO") of the General Partner.

33. Following the return of external funds, the principal investors in the Fund were Mr Platt and Andrew 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 (para 128).

34. 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.

35. 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 (para 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" (para 75).

36. The evidence showed that Group ExCo was involved in various matters concerning the activities of BlueCrest, 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 (paras 83, 84, 86 and 100).

37. 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 determine investment strategy. Since taking the Fund private, Mr Platt said there had 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 (para 126).

38. During the relevant period, the members of the Board of BlueCrest were Peter Cox and Paul Dehadray, respectively the CEO and the general counsel at that time of BlueCrest.

39. The original membership of the UK ExCo comprised Mr Cox and Mr Dehadray together with two others (“the Original ExCo”). 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 membership of the UK ExCo in the context of the present dispute (para 78).

40. The FTT divided the individual members of BlueCrest (with whom the appeal is concerned) into three broad categories, identified in para 33 as (a) infrastructure members, (b) discretionary traders or portfolio managers, and (c) other front office members.

41. The infrastructure members are those responsible for providing the administrative support or back-office services to the Group, such as technology, facilities, legal and compliance (para 34).

42. The infrastructure members include the Original ExCo, a number of departmental heads (the head of technology, the head of human resources etc), and other senior members of those departments. As of 3 April 2014, there were 82 individual members, 16 of whom were infrastructure members, including the Original ExCo (para 36).

43. The portfolio managers are responsible for managing an investment portfolio as part of the investment management services provided by BlueCrest to the Group entities. They are allocated an amount of capital, not in the sense of a fixed amount of cash but

rather a level of investment risk they are permitted to take on. They have discretion over how to invest that capital allocation, subject to regulatory, compliance and risk parameters. Their capital allocation was referred to as their “portfolio” or “book”. This category also includes “desk heads”, who manage a team of portfolio managers. Some of the desk heads have their own capital allocations, while others oversee a team of portfolio managers and/or a distinct fund (paras 37–39). As of 3 April 2014, there were 48 individual members in this category, including seven desk heads (para 40).

44. 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.”

As of 3 April 2014, there were 18 members in this category (para 42).

45. The FTT described the remuneration of the individual members in paras 45–74. We shall return to these findings in the context of our consideration of the application of Condition A.

The proceedings below

46. As we have said, to succeed on its appeal, the BlueCrest members had to fail either Condition A or Condition B (it having been conceded that all members met Condition C).

47. By a decision dated 29 June 2022, the FTT (Judge Nigel Popplewell) dismissed the appeal in relation to Condition A but allowed it in relation to Condition B in respect of the portfolio managers with capital allocations of \$100m or more and the desk heads: [2022] UKFTT 204 (TC). In other words, the judge found that all the relevant individual members met Condition A, but while the portfolio managers with capital allocations of at least \$100m and the desk heads exercised significant influence over the affairs of BlueCrest and therefore failed to meet Condition B (paras 194–195), the opposite was true of all other portfolio managers and the non-portfolio managers (the infrastructure members and other front office members) who, on his findings, exercised no such influence and therefore met Condition B (para 208).

48. In reaching those conclusions the FTT accepted the agreed position of both sides that “significant influence does not need to be exercised through a formal constitutional

procedure, but requires a realistic examination of the facts” (para 188). Accordingly, the FTT held that desk heads and certain portfolio managers could exert significant influence (and thereby fail Condition B) notwithstanding that they were not members of any of BlueCrest’s committees (including the ExCos) or the Board. The FTT held that relevant influence need not be limited to managerial influence but could include operational and strategic influence, and that desk heads and portfolio managers had influence in all three respects (paras 172–177). The FTT also held that influence need not be over every aspect of BlueCrest’s affairs (paras 181–187). The FTT held that desk heads’ and portfolio managers’ influence was over matters that were “absolutely fundamental to the core activity” of BlueCrest as the sub-investment manager and this was sufficient to mean that Condition B was failed in their cases (para 194).

49. Both sides appealed to the Upper Tribunal (Tax and Chancery Chamber) (Edwin Johnson J and Judge Jennifer Dean). HMRC appealed on the basis that none of the relevant individual members had significant influence over the affairs of BlueCrest so that all met Condition B. BlueCrest cross-appealed against the FTT’s decision on the grounds that Condition A was not met by any of the relevant members and Condition B was not met by non-portfolio managers. By a decision dated 18 September 2023 the Upper Tribunal dismissed both the appeal and cross-appeal, holding that the FTT made no error of law in its interpretation of either Condition and that its findings of fact were ones that it was entitled to make (para 167): [2023] UKUT 232 (TCC); [2023] STC 1642.

50. In para 115, the Upper Tribunal quoted from para 188 of the FTT decision referring to the source of the requisite influence for the purpose of Condition B, and emphasising the sentence, “Both parties accept that significant influence does not need to be exercised through a formal constitutional procedure but requires a realistic examination of the facts”. In para 116, the Upper Tribunal noted that this remained the position in the hearing: “Mr Vallat accepted that de facto influence was capable of qualifying as significant influence, within the meaning of Condition B”. The Upper Tribunal also said (para 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 the Respondent in this case 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.”

51. The parties appealed and cross-appealed. Neither side sought to depart from the agreed position as to the source of the requisite influence in Condition B as summarised above. However, the Court of Appeal took a different view, which was first articulated by Sir Launcelot Henderson in the course of the hearing, and then set out in the judgment at para 68 (see para 52 below). By its judgment dated 17 January 2025, the Court of Appeal dismissed BlueCrest’s cross-appeal on Condition A but allowed HMRC’s appeal on Condition B.

52. The Court of Appeal held (para 68), for the purposes of Condition B, that the requisite influence:

“...must derive from, and have its source in, the mutual rights and duties of the members of the LLP... as conferred by the statutory and contractual framework ... 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”.

Neither side takes issue with that conclusion as far as it goes. But both sides make detailed points about the proper interpretation of Condition B that were not canvassed before the FTT or the Upper Tribunal because of the way in which the approach to Condition B developed. BlueCrest also challenges the Court of Appeal’s interpretation in other respects.

53. The Court of Appeal held that it followed from its conclusion about the source of the requisite influence, that the FTT had erred in law since it had:

“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” (para 112).

54. The Court of Appeal said that this was not a case where it could safely conclude that the error of law was immaterial and, accordingly, the court ordered the matter to be remitted to the FTT for it to reconsider the evidence in the light of the correct test (para 113). BlueCrest takes issue with these conclusions, submitting in short that the FTT made no material error of law in its examination and evaluation of the evidence and seeking the

reinstatement of the FTT decision so far as portfolio managers (with capital allocations of at least \$100m) and desk heads are concerned.

55. On the appeal to this court, the court has also been assisted by written submissions made on behalf of the Alternative Investment Management Association Ltd and the Managed Funds Association (together referred to as “the Interveners”) who were permitted to intervene in this court. The Interveners have no direct interest in the outcome of the appeal, but as industry representative bodies acting in the public interest, they are concerned that the correct application of the salaried members legislation remains in doubt and emphasise the particular need for clarity and certainty as to the tests that taxpayers, advisers and HMRC should apply so as to reach a common position. In common with BlueCrest, they submit that the Court of Appeal erred in its interpretation of Conditions A and B.

The proper approach to interpretation of the salaried members legislation

56. The approach to statutory interpretation is well established. The court must seek to ascertain the objective meaning of the words used in the statutory provision in question in the light of their context and the purpose of the statute and the provision itself: see, for example, *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, para 8 (per Lord Bingham of Cornhill); *R(O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 29–31 (per Lord Hodge). The words of the statute are the primary focus.

57. As Lord Hodge explained in *R(O)* (para 29):

“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*, p 397: ‘Citizens, with the assistance of their advisers, 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.’”

(The reference to *Spath Holme* is to the passage in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 at p 397.)

58. The words of the provision in issue should be read in the context of the section as a whole and in the wider context of the group of sections of which it forms part and of the statute read as a whole. This is the primary means by which Parliament’s meaning is to be ascertained: see *R(O)* para 30; *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594 (“*PACCAR*”) at para 42 (per Lord Sales).

59. It follows that external aids to interpretation (Explanatory Notes, White papers etc) may play a secondary role in casting light on the meaning, or disclosing the context, mischief or purpose of the legislation in question. But, as Lord Hodge made clear (*R(O)* para 30):

“...none of these external aids displace the meaning conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.”

Preliminary points about the approach to interpreting the salaried members legislation

60. In our view, the pre-legislative material does show that the broad purpose of the salaried members legislation in sections 863A to 863G of ITTOIA 2005 was to address the particular disparity (created by the deeming provision in section 863 of ITTOIA 2005) in the tax treatment of an LLP as compared with that of a traditional partnership, namely treating a member of an LLP for tax purposes as a partner in a traditional partnership even if their relationship with the LLP and/or with other members was in substance more like that of an employee working under a contract of service than a partner carrying on the trade of the LLP. This inconsistent treatment had created unfairness in the tax system as well as leading to tax avoidance. The material makes clear that the initial proposal, to apply the common law employment status test (found, for example, in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 and most recently *Professional Game Match Officials Ltd v Revenue and Customs Comrs* [2024] UKSC 29; [2024] ICR 1480; [2025] 1 All ER 2892) as a means of determining the correct status of LLP members, was rejected. Instead, the legislation set out to “provide a more certain method of determining the status of members, based on, but not identical to” factors established as relevant at common law (para 3.14 of the Summary of Responses). It did so by providing for a newly created tripartite test without precise statutory or common law antecedents that sought collectively to encapsulate three typical factors for distinguishing a traditional relationship of partnership on the one hand from a relationship more like employment on the other hand: rights to profit-sharing, requirement to make a capital contribution, and mutual rights and duties giving significant influence over the affairs of the partnership.

61. These three factors were reflected in the analysis of the status question as it arose in *Stekel v Ellice* [1973] 1 WLR 191 (“*Stekel*”). The parties in that case entered into an agreement in October 1968 (“the 1968 agreement”) which recited their agreement “to enter into partnership” and by which the plaintiff became a salaried partner (in the two-person firm) with the promise of full partnership in April 1969. The partnership’s capital was to be provided by and belong solely to the defendant, who was also to take all profits and bear all losses. No deed or agreement of full partnership was concluded in 1969 and the parties continued as before, with the plaintiff held out as a partner in the firm. The relationship had broken down by mid-1970 and the plaintiff sought a declaration that the partnership (at will) was dissolved, and he sought accounts and inquiries. Megarry J rejected the defendant’s argument that a “salaried partner” could not, as a matter of law, be a partner in the true sense (p 199G). The question depended instead on the substance of the relationship on the facts of the particular case; and depending on the facts, the name “salaried partner” could be consistent in substance with either an employment relationship or a relationship of true partnership (p 199H–200B). That meant that it was necessary to look at the terms of the relationship to ascertain whether a true partnership was created by them (p 200D).

62. Applying that approach to the facts, Megarry J held that the terms of the 1968 agreement contained several features that strongly pointed to partnership (including “restraining either partner without the consent of the other from being engaged in any other business, taking apprentices or hiring or dismissing any agent or servant of the firm, lending the firm’s money, giving securities on account of the firm, endangering the partnership property, or drawing, accepting or indorsing bills of exchange or promissory notes on account of the firm”). In other words, the plaintiff had the right to participate in important decisions about the firm’s affairs. Megarry J regarded this as an agreement for partnership notwithstanding the provisions for salary and the ownership of capital which, albeit they were unusual in a partnership agreement, “did not denature the agreement” (p 201A-B). As Megarry J put it, “the absence of one possible head of prima facie evidence does not negative the other evidence of partnership”. Furthermore, the conduct of the parties was consistent with partnership as recorded in the 1968 agreement. On the facts accordingly, the relationship was one between persons carrying on a business in common with a view of profit (p 201C).

63. Similarly, in *Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35; [2012] 1 WLR 1887; [2012] 2 All ER 1113 (“*Tiffin*”) (where the appellant was a former member of the LLP but sought to present claims in the employment tribunal for unfair dismissal and other matters, based on his asserted employment status) the same three factors were regarded as indicators of a partnership relationship. Thus in *Tiffin*, all members had to contribute capital; all had a prospect of a share of profits depending upon the performance of the LLP in any particular accounting year; all had a prospect of a share in the surplus assets on a winding up; and, significantly, all had “a voice in the management of the affairs of the LLP” (Rimer LJ, para 59) even if, in relation to this last factor, fixed share partners were limited to voting on a subset of 22 partnership matters and “on most votes the fixed share partners would or might find themselves outgunned by the full equity

partners” (para 65). None of these factors was an essential prerequisite of partnership status, but all were regarded as indicators of it. Moreover, while it was not essential for a member to assume a role in the management of the partnership, the assumption of such a role was a strong indication of status as a partner because, as Rimer LJ explained (para 65), “Employees are not ordinarily involved in a partnership’s management. Management is a matter for the partners.”

64. It is readily apparent that the test set by the legislation (in Conditions A, B and C) broadly encapsulates three elements of the common law test for traditional partnership status. This is not about equivalence with or replication of the common law test. The three discrete conditions are new, but they plainly draw on factors regarded as strong indicators of partnership at common law, and each is broadly reflective of an element of that common law test. Inevitably some conditions are likely to be more appropriate in one factual case than in another, given the infinitely variable fact patterns that might arise. This was the position in *Stekel*. But to an extent at least, this feature of the overall test is catered for by the fact that no single condition is an essential prerequisite, and a member will only be treated as a salaried member if all three statutory conditions are met. It is therefore possible that a person might not be a partner at common law, although that person failed one of the statutory tests and was accordingly treated as a partner, and not as a salaried member, for the purposes of income tax. It is also possible that a person might be assessed as a partner at common law but nevertheless be regarded as a salaried member of an LLP because they meet all three conditions of the statutory test.

65. Condition B derives from the element of the common law test that is concerned with the right to participate in important decisions about the affairs of the partnership – eg rights to vote in the management or governance of the partnership – and should therefore be construed in light of the common law context we have summarised above.

66. There are two further preliminary points to make. First, each of the three conditions sets an objective test that is intended to be applied prospectively so that the taxpayer member and/or LLP can assess status at the start of the relevant period. This is important for practical reasons (for example, if the individual is an employee a PAYE coding will be needed) and for reasons of certainty. By contrast, the common law test is generally applied after the fact and with the benefit of hindsight.

67. Secondly, the three conditions must be workable in the sense of establishing tests that are capable of being applied in practice by taxpayers. That was an expressed aim of the legislation. Each member of an LLP—and the LLP itself—must be able to determine, in advance of a tax year, whether they are or are not to be treated as an employee for tax purposes. In the words of Lord Nicholls in *Spath Holme*, “Citizens, with the assistance of their advisers, 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” (cited by Lord Hodge in *R(O)*, para 29).

The proper interpretation of Condition B

68. Against that background and context, the starting point in interpreting the test set by Condition B must be the words of the statutory condition. For ease of reference, we repeat that the condition is satisfied where:

“the mutual rights and duties of the members of the limited liability partnership, and of the partnership and its members, do not give [a member] significant influence over the affairs of the partnership.”

69. These are all ordinary English words (viz significant, influence, affairs) that are not defined and are not terms of legal art. They are capable of bearing different meanings depending on the context in which the words are used. Where in a provision of a statute an ordinary English word is used, it is generally neither necessary nor wise for a court to attempt to define it by substituting or paraphrasing the word (see for example *Seramco Ltd Superannuation Fund Trustees v Income Tax Comr* [1977] AC 287, 298 per Lord Diplock). Moreover, although there is a single test set by Condition B, the parties’ approach was to break it down into its constituent parts and address each part separately. We are content in broad terms to adopt that approach but bearing in mind that the words must ultimately be interpreted together, in the context of the salaried members legislation, read as a whole.

(i) Mutual rights and duties

70. Condition B is concerned with the mutual legally enforceable rights and duties of the members and of the partnership and its members (in other words, both vertical and horizontal rights). These are the legally enforceable rights and duties conferred by the contractual and statutory framework which governs the operation of the partnership, including, where relevant, by reference to any implied contractual terms and any common law or equitable rights and duties. Influence derived from these rights is qualifying influence for the purposes of Condition B. It is consistent with the legislative purpose that the type of influence over the partnership’s affairs that should qualify in this context is influence founded in the legally binding constitutional framework of the partnership, and that influence from other sources, including de facto influence exercised by members and others, should not qualify (although we recognise that its nature and extent may well be relevant to the separate question whether the qualifying influence of an individual member is “significant”).

71. That the mutual rights and duties in question are those arising from the LLP agreement or other sources of legally enforceable rights and duties is supported by the

substantially identical language of mutual rights and duties used in section 5(1) of the 2000 Act. Under the heading “Relationship of members etc.” it provides:

“(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).”

72. Section 15(c) of the 2000 Act, read with section 17, permits 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 Partnerships Regulations 2001 (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 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.”

73. In the case of traditional partnerships formed under the Partnership Act 1890, the language of mutual rights and obligations is also 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 (which is a precursor to section 5 of the 2000 Act) states, “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.

74. Accordingly, where there is a written agreement governing the operation of the LLP, that agreement will be the starting point for identifying the rights and duties of the LLP and the members: it is the ultimate source. However, the source of qualifying influence is not limited to the four corners of the agreement (or agreements) governing the rights and duties of the members inter se and between them and the LLP. This point was understandably not explored in the tribunals below and was not addressed by the Court of Appeal. We consider that qualifying influence might also derive from the mutually enforceable rights and duties of a member of the LLP pursuant to some delegated authority or by virtue of their appointment to a specific role in the LLP, where, in each case, the relevant right or duty may not be found expressly on the face of the LLP agreement itself but can ultimately be traced back to that agreement. Thus, where rights are delegated under the LLP agreement by all of the members to an executive committee and some of those rights are sub-delegated by the executive committee to a sub-committee or to one or more members, the rights held and exercised by those sub-delegates are capable of constituting the source of qualifying influence of the members inter se and vis-a-vis the LLP that might result in a failure to satisfy Condition B.

75. This could include the appointment of a member to a particular position within the LLP, including in principle appointment to a position such as a portfolio manager which, like all appointments, is ultimately derived from the agreement between the members inter se and with the LLP itself. This is conceded on behalf of HMRC. The issue is whether the legally enforceable rights and duties derived from governance instruments, delegated authority or from holding a specific role in the LLP, give the member the necessary “significant influence over the affairs of the partnership”.

76. It also follows that, in the absence of any statutory requirement to limit the relevant enquiry to agreement (or agreements) governing the operation of the LLP, the fact that one such document (namely the written LLP agreement if there is one) might have an “entire agreement” clause cannot exclude all other sources or be conclusive as to the source of the relevant rights and duties in this context.

77. Conversely, influence over the affairs of the LLP which cannot be traced back to an identifiable contractual, statutory or other legal source is excluded from consideration of the kind of influence which counts for the purposes of Condition B, whether that influence derives from informal, de facto or external arrangements or arises in any other way.

78. Thus any additional influence beyond that derived from a member’s formal role (say as a junior partner or member of a management committee) is excluded, whether that be influence as a consequence of the member’s strong performance in the role, high financial contribution to the profits of the LLP, personal qualities or relationships with clients or other senior members. This distinction between what is in effect the scope of a role and the performance in that role is consistent with the purpose of the legislation; in a traditional partnership, the scope of an individual’s role in the management of the partnership’s affairs is one of the factors that distinguishes a partner from an employee. On the other hand, a member’s performance in conducting the LLP’s business (or indeed in conducting the part of the business for which the member has been given responsibility) can be done by partners and employees alike and does not assist in drawing the necessary distinction. The focus is on the scope of the individual’s formal role in the management of the business or affairs of the LLP (including how that fits with the roles of others in that management).

79. The Court of Appeal illustrated this distinction by reference to the roles performed by Mr Platt in this case and, in particular, the influence he was able to exert over the affairs of BlueCrest, 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. As the Court of Appeal observed, while in practical terms, the combination of those roles meant that Mr Platt could usually (perhaps always) ensure that his wishes were followed throughout the Group, 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, even if he had been a member, any influence which Mr Platt may have exerted over BlueCrest's affairs was non-qualifying for the purposes of Condition B, although the nature and extent of Mr Platt's influence nonetheless remained relevant to the evaluation of whether the qualifying influence of the individual members of BlueCrest over its affairs was "significant".

(ii) Meaning of "influence" and "significant" influence

80. As we have said, these are ordinary words and it is wrong and unnecessary to seek to define them by using other, non-statutory words which have a slightly different shade of meaning or emphasis and that are then treated as a substitute for the statutory words. The meaning of an ordinary word is better identified by considering how it is ordinarily used in its everyday sense. Here, one would ordinarily say that a person has influence where they have the power or ability to affect something else.

81. The legislation uses influence as the relevant threshold and not, for example, control or the ability to direct or dictate. This means that a member need not have the ability or power to control the LLP's affairs or determine a particular course of action. It is sufficient if the member has the ability to influence the affairs of the LLP in the sense of having the right to participate in important decisions capable of affecting the affairs of the partnership or the way the affairs of the partnership are conducted, whether through meaningful voting or other rights.

82. That the influence must be significant must add some intensity to the strength of the influence. The Court of Appeal described the shade of meaning contemplated as (para 92) "a degree of influence ... which has practical and commercial substance in the conduct of those affairs in the real world." We agree.

83. What is critical is that the influence must be a qualifying influence (as we have explained above). The influence of a shadow member does not qualify, nor does soft power giving rise to an ability to exercise influence. Neither derives from the legally enforceable mutual rights and duties of the members and the LLP. It also follows that influence derived from performance, good or bad, in the role is irrelevant. Likewise, if a member exercises influence by virtue of a relationship with a key customer, that too is irrelevant. Nor is it sufficient that the member has a significant impact on the profits of the business because he or she is an excellent rainmaker or investor.

(iii) Meaning of “affairs of the LLP”

84. As well as having its source in the mutual rights and duties of the members and the LLP, the necessary qualifying influence must also be exerted “over the affairs of the partnership”. Again, these are ordinary words, and any gloss is to be avoided. Two questions arise. What is covered by the phrase “affairs of the partnership”; and must the significant influence be exerted over the whole field of those affairs?

85. We start with the first question. The expression “affairs of the partnership” connotes the affairs of the partnership generally, viewed as a whole. The affairs of a partnership are broader than, but include, its business. The “affairs of the partnership” or of a company or of “a body” is an expression frequently used across a wide range of legislation. For example, several provisions of the Corporation Tax Act 2010 use the expression in definitions of “control”, all in a similar way. One is section 942(4) which provides that: “For the purposes of subsection (1) a person has management control over a company if the person has the power to secure that the affairs of the company are conducted in accordance with the wishes of that person.” The context will generally suggest a broad meaning and that is how the courts have interpreted such expressions. In *R v Board of Trade, Ex p St Martins Preserving Co Ltd* [1965] 1 QB 603, an issue arose as to the meaning of “the affairs of a company” in section 165 of the Companies Act 1948 which empowered the Board of Trade to appoint inspectors “to investigate the affairs of a company”. Phillimore J and Winn J both gave judgments and Lord Parker CJ agreed with both. Winn J said at p 618: “For myself, I would think that apart from some controlling consideration, contextual or other, the phrase ‘affairs of the company’ comprises all its business affairs, interests or transactions, all its investment or other property interests, all its profits and losses or balance of profits or losses, and its goodwill.”

86. There is nothing in the context of the provisions constituting the salaried members legislation to suggest that “the affairs of the partnership” do not carry the widest meaning. This was common ground.

87. BlueCrest’s submission was that a member might have immediate responsibility over only part of the LLP’s affairs, but the nature of the business and the importance of that part is such that the member has significant influence over the affairs of the LLP overall. This, BlueCrest submitted, was consistent with a purposive and contextual interpretation of Condition B which, like the other conditions, is intended to identify individuals with attributes equivalent to partners in a traditional partnership.

88. BlueCrest was critical of what it saw as a requirement laid down by the Court of Appeal that significant influence over the affairs of the LLP must involve decision-making at a strategic level. Sir Launcelot Henderson said at para 70 of his judgment:

“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.”

89. Given that the purpose of the test set by Condition B is to distinguish between members whose position is like that of a partner in a traditional partnership and those whose relationship with the LLP is more like an employment relationship, we tend to agree with the Court of Appeal that the focus is likely to be on “managerial” or “strategic” decision-making. However, we do not read para 70 as excluding the possibility that a member may have significant influence over the affairs of the LLP without necessarily being involved in decision-making at a strategic level. It would depend on the precise circumstances and the nature and extent of the rights and powers given to the member concerned by the LLP agreement and other relevant sources.

90. Nonetheless, having regard to the purpose of Condition B and the common law test from which it derives, we consider that the requirement that the member has influence over the affairs of the LLP does suggest having “a voice in the management of the affairs of the LLP” (*Tiffin* at para 59). It follows that the influence is likely to lie in rights to participate in high level or strategic decision making about the partnership’s affairs or at any rate, an ability to influence such decisions. In many cases that will be the focus. This means that participation in decision-making at board or strategic and/or management level is likely to qualify, whereas day to day decision making on a purely operational level may well not qualify.

91. That is unsurprising given that a member’s performance in conducting the LLP’s day to day business can be done by partners and employees alike and a focus on the influence derived from such activities is unlikely to assist in drawing the status distinction necessary for Condition B to achieve its purpose.

92. Accordingly, we reject BlueCrest’s argument that significant influence, derived from, or by virtue of, a delegated role on operational or day to day decisions in a particular part of the business, counts for this purpose. The argument collapses into saying that performing a role which is important to the business carries with it significant influence over “the affairs of the partnership”, but in our view a member’s influence (even if significant) on the profitability of the business in carrying out his or her particular role in one part of the business cannot translate into significant influence over the affairs of the LLP taken generally. It follows that while investment decisions taken by portfolio managers in relation to their own capital allocation may have an impact on the financial position of the LLP, they will not amount to significant influence over the affairs of the

LLP. As we have said, the influence must be over “the affairs” of the LLP; day to day management or operational management of only a part of the business, even in relation to a core part, is not sufficient.

93. The Interveners challenged this approach to the meaning of influence over the affairs of the LLP because an LLP agreement might reserve certain decisions to, say, one member, in which case no other member could have the necessary influence. We do not accept this argument. It is by no means unknown for the articles of association of a company to provide that the holders of a particular class of shares are to have a veto over certain specified matters, but no one would suggest that the board of directors or the general body of shareholders do not control, still less do not have significant influence over, the affairs of the company. Significant influence over the affairs of an LLP can accommodate the existence of reserved powers.

94. Condition B looks to whether a member has influence by virtue of rights to participate in important decisions concerning the partnership and its business viewed as a whole. We say this for three principal reasons. First, it is the natural reading of the language of the provision. Secondly, it is consistent with the purpose of the provision which is to draw a parallel with the position of a partner in a traditional partnership, where the partners are together responsible for the running of the firm generally. Thirdly, it meets the need for reasonable certainty and objectivity, given that it is a test which is to be applied prospectively. BlueCrest’s approach would involve difficult evaluative judgments which would vary according to the facts of the particular case and would often be difficult or impossible to make in advance at the start of “the relevant period”.

95. Standing back and considering the test set by the various parts of Condition B together, the correct approach to Condition B is to start by considering what the LLP does in carrying on its business. The next consideration is whether, by virtue of contractual, statutory and/or other legal or equitable rights and duties qua member in relation to other members and the LLP (including from the formal role and responsibilities given to a member that can be traced back to the LLP agreement) the member is given a voice in decisions affecting the affairs of the LLP as a whole. The requisite qualifying influence is likely to be managerial or strategic influence.

96. Although it is true that some of the detailed points canvassed on this appeal and discussed above in relation to Condition B were not addressed by the Court of Appeal, that is entirely understandable given the course the argument took. We have detected no error in the Court of Appeal’s approach to interpretation. We turn now to consider whether the Court of Appeal was wrong to conclude that the FTT erred in law in its application of the Condition B test to the facts of this case.

Application in this case

97. The FTT’s discussion of Condition B starts at para 168 and runs to para 207. At para 170 it said:

“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.”

The FTT agreed with counsel for BlueCrest (Amanda Hardy KC) on both points.

98. The FTT approached the question of what influence members had by reference to what the position would be if BlueCrest were a traditional general partnership, saying that “Condition B looks at the ongoing contribution, from an operational perspective, which a partner would make to that traditional partnership’s business” (para 173). It said that the role of such a partner is to “find, mind and grind”, ie “to go out and find work, supervise others to undertake it, and to do the work themselves” (para 174). Judge Popplewell drew on his own experience as a partner in a firm of solicitors at paras 174–177.

99. So far as the extent of the influence is concerned, the FTT started by considering the two main activities of BlueCrest (investment and back-office activities) and said that if it could be shown that an individual member significantly influenced either of those activities, that would be influence over the “affairs of the partnership” and sufficient to engage Condition B (para 181). The FTT rejected HMRC’s submission that the focus should be on high level strategic or managerial decisions and held that operational decisions which significantly influence the affairs of BlueCrest were squarely within Condition B (para 183).

100. Having directed itself in this way, the FTT considered in detail the activities of portfolio managers with capital allocations of at least \$100m, desk heads and others. At paras 185–187 the FTT summarised the evidence about the activities of the portfolio managers. As the FTT held, “they were allocated capital, and the way in which they invested that capital was a matter for individual discretion. They took key investment decisions on a daily basis, and their main if not sole purpose was to make money for the appellant” so that it in turn could make money as a sub-investment manager. The FTT described this as:

“... the core activity of the appellant. They could therefore, as a class, and individually, potentially exercise influence over the affairs of the appellant by dint of this investment activity.”
(para 185)

101. These portfolio managers were also involved in hiring and firing; exploiting new business opportunities; and bringing on junior staff (para 186). As regards management, the FTT said that:

“...the evidence shows that the appellant had an informal approach to management, with many decisions being made outside the context of formal meetings. And that in the discussions between portfolio managers which generated those decisions, those managers who had large capital allocations were more experienced and more trusted, and thus were more influential.” (para 187)

102. At para 188 the FTT said:

“Both parties accept that significant influence does not need to be exercised through a formal constitutional procedure, but requires a realistic examination of the facts. In the context of this appellant, the investment and operational decisions made by the portfolio managers demonstrate that they have influence over the affairs of the partnership notwithstanding that the portfolio managers themselves may not sit on any of the UK committees, the members of the Board, or are members of UK ExCo.”

103. The FTT was satisfied that, once a portfolio manager with a capital allocation of at least \$100m had been promoted to that category, his or her status would be analogous to that of a partner in a traditional partnership (para 191). This group of portfolio managers “as a whole” had a significant influence over the affairs of the LLP (para 192). As to

whether each individual portfolio manager had such influence, the FTT held that “from both a quantitative and a qualitative perspective” they did. This was because (para 194):

“They will have made a significant impact on the financial performance of the appellant. From a qualitative point of view, as I have already said, those portfolio managers who were made up to be members of the LLP, and thus in the same position as a partner in a traditional partnership, would have already demonstrated the personal managerial and operational qualities to justify that elevation, and that they were capable of performing the tripartite role of a partner, namely generating work, doing the work, and, if necessary, supervising work. These roles are absolutely fundamental to the core activity of the sub-investment manager, namely to maximise its sub-investment fees, and the evidence shows that these individual portfolio managers demonstrated ‘managerial clout’ in the discussions with other portfolio managers concerning 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.”

104. It is clear beyond doubt from this reasoning that the FTT (like the Upper Tribunal) approached the application of Condition B in this case on the mistaken basis that the necessary qualifying influence on the affairs of an LLP can be found outside the contractual or statutory governance framework of the LLP, in de facto arrangements however informal and whether or not legally enforceable. It is unsurprising that this was the approach adopted given the common ground between the parties that a member’s de facto influence could be taken into account for the purposes of Condition B. Nevertheless, it was fundamental to the approach it adopted and was a material error of law.

105. It meant that the FTT hardly addressed the terms of the LLP Agreement and its implications for BlueCrest’s case on Condition B and, in particular, how it affected the influence the members were able to exercise in relation to the partnership’s affairs. Instead, the FTT approached the evidence as if the Condition B requirement was simply whether the member in question had significant influence over the affairs of the LLP (as defined by the FTT) as a matter of fact. The Upper Tribunal detected no error of law in this mistaken approach.

106. We have set out above (see paras 20–28 above) several important clauses in the LLP Agreement that are critical to this issue but were not examined by the FTT in this context. Clause 14 is central. As we have indicated above, clause 14.1 deals with management of the partnership. It provides for the Board to have management and control of the affairs of the partnership, including its “Business” (defined in clause 4 broadly as

carrying on the business of providing the administrative, support, advisory and investment etc services and holding, purchasing, selling investments, shares etc, and associated services): “Subject to the provisions of this Agreement and any applicable legislation, including [the 2000 Act 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...”.

107. As clause 14.1 makes clear, individual members’ governance rights are minimal. The Board is required to consult them “as appropriate on strategic matters affecting the development of the Business and on such other matters as the Board shall consider appropriate”, but it is only required to convene one meeting per year “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”. Members may well have been entitled to information for this purpose. But beyond this, “the Members [...] shall have no right or authority to act for the Partnership or to vote on matters relating to the Partnership” (except as otherwise provided for by statute or the LLP Agreement): clause 14.1. We were not shown any other provision in the LLP Agreement affording members these rights.

108. The Board itself (by contrast) has extensive powers, including power to take such actions as it deems necessary or desirable to manage the business (clause 14.7), and to admit or remove members and determine their capital contributions and profit allocations (clause 14.9), and even to amend the LLP Agreement itself without the consent of other members (clause 23). Clause 14.7 is subject to the rights of the members conferred by clause 14.8 and is without prejudice to the generality of clause 14.1.

109. The matters reserved to members’ votes relate to changing the nature of the Business and undertaking exceptional borrowing, lending, guarantee or security transactions: clause 14.8. But the reservation of these matters to the members does not mean that the individual members together have any significant influence over them. At a poll taken on any resolution at a meeting of members, one of the corporate members, BlueCrest Capital UK Ltd (“BCUKL”), has 100 votes (as it is entitled to 100% of the capital profits and losses under clause 10.6), while each individual member has one vote (as they are not entitled to any of the capital profits and losses): schedule 3, para 9. As BlueCrest always had fewer than 100 individual members during the relevant period under appeal, the individual members could always be outvoted by BCUKL if any matter was put to a vote. Even if the individual members could have outvoted BCUKL, the matters reserved for members’ votes would have been insufficient to give those members significant influence over the affairs of BlueCrest: see para 114 below.

110. The Board is obliged to establish an executive committee (and established UK ExCo, with original members including Mr Cox and Mr Dehadray). The remit of UK ExCo is also widely stated in clause 14.11, extending to 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.

111. Clause 14.16 afforded limited information rights to members but only for the purposes of preparing and submitting their tax returns and dealing with tax authorities as follows:

“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.”

112. Clause 19 set out the covenants given by each individual member of BlueCrest, including to devote the whole of the member’s time and attention during normal business hours to the Business to promote and develop the Business to the best advantage.

113. It is undoubtedly the case that members of the Board and UK ExCo are given significant influence over the affairs of BlueCrest by clause 14 and these individuals fail Condition B. The whole conduct of BlueCrest’s business and its affairs is vested in the Board and where relevant, UK ExCo, and this is doubtless why HMRC has accepted that the salaried members legislation does not apply in their cases. Had the corporate partners been individuals no doubt they would have been treated in the same way.

114. But the position is different for other members. As Ms McCarthy KC accepts, the provisions of clauses 14.1 and 14.8 are not enough on their own to give the members significant influence. The limited rights given by these clauses to members, together with the limited information rights they are given, do not give the members significant influence over BlueCrest’s affairs generally. Though members may have rights to information by virtue of consultation rights and involvement in committees with delegated authority, these are restricted and likely to be inconsistent with an intention to give them significant influence over the partnership’s affairs. However, we recognise that this aspect of the evidence was not fully explored below and that further investigation may be required.

115. Nonetheless, Ms McCarthy submits that properly understood, and although it did not expressly consider the question whether the role of the members (that gave them influence) was tethered to their enforceable mutual rights and duties, the FTT did not in fact fall into any error in this regard. Rather, she submits that the FTT rooted its analysis in the desk heads' and portfolio managers' formal roles and responsibilities; and since appointment of desk heads and portfolio managers was the product of the exercise of contractual powers pursuant to the LLP Agreement, a member's role is rooted (or put another way, the rights and duties governing a member's role have their source) in the LLP Agreement. The result is that the FTT made no material error in relation to that aspect of the test, nor did the FTT err in its interpretation of "significant influence" or "affairs of the partnership", and its decision should be restored.

116. In developing her case on this point, Ms McCarthy submits that there are two dimensions to consider: an external and an internal dimension. As to the external dimension, BlueCrest is a sub-investment manager of the funds (FTT para 17, 28–29 and 179). Its relationship with the funds is governed by an agreement which contains detailed provisions as to its ability to act as agent for the investment manager and the Fund, and the duties that BlueCrest owed to the investment manager/Fund. Ms McCarthy submits that these duties include trading on behalf of the Fund and managing counterparty relationships. The portfolio managers were the individuals who made the decisions as to the trades to be entered into (FTT para 185) and accordingly, by appointing a member as a portfolio manager and conferring a capital allocation, UK ExCo vested legal authority in them to act on behalf of BlueCrest in performance of its sub-investment manager role (within the relevant parameters) including authority to bind the Fund to trades.

117. As to the internal dimension, as well as the information, consultation and voting rights given by the LLP Agreement (as described above), the obligations imposed by the LLP Agreement include the covenant in clause 19 (requiring members to work full time for the LLP, devoting time, attention, skill and endeavour to BlueCrest and its business as defined, acting in the utmost good faith and complying with all relevant legal and other standards). These obligations are directed at the role that a particular member is to perform (eg as desk head and/or portfolio manager), and they impose duties on all members in respect of the role that they are appointed to carry out and from which relevant influence is sourced. Accordingly, Ms McCarthy submits that these matters are all rooted, or have their source, in the LLP Agreement and so in the "mutual rights and duties" in the sense intended by Condition B. It follows that the FTT made no error in applying the law to the facts in this respect.

118. We do not accept these submissions. In our view, although the FTT and Upper Tribunal expressed this point differently (and we acknowledge, as Ms McCarthy pointed out, that only the Upper Tribunal used the expression "de facto" influence: see para 83 of its decision), the reasoning of both tribunals was in substance the same and both fell into the same error. Thus, for example, the FTT said in terms (para 188) that influence "does not need to be exercised through a formal constitutional procedure but requires a realistic

examination of the facts”. Para 194 (cited above) clearly confirms that this was the approach adopted by the FTT.

119. Moreover, it seems to us that the focus of the FTT analysis was on members’ influence deriving from their personal qualities or their activities to the exclusion of their influence deriving from their mutual legal rights and obligations. That is why the FTT said that “The role of a partner in a traditional partnership is to ‘find, mind and grind’” (FTT para 174). These were understood by Judge Popplewell to be the “activities” of a partner in a traditional partnership: paras 177, 190–191. Those who could perform them had “the qualities of a partner in a traditional partnership” (FTT para 191). It was these activities or qualities that the FTT found to be the source of the influence of portfolio managers with capital allocations of at least \$100m, as demonstrated by para 187 as follows:

“As regards management, the evidence shows that the appellant had an informal approach to management, with many decisions being made outside the context of formal meetings. And that in the discussions between portfolio managers which generated those decisions, those managers who had large capital allocations were more experienced and more trusted, and thus were more influential. As regards the latter point, I accept that evidence. It chimes with my experience, and is largely unsurprising given that more senior partners are likely to be more experienced, not just about the marketplace but the firm itself, and thus carry more weight and respect in managerial and operational discussions. Furthermore, given that those partners with greater capital allocations are likely to have an X factor when it comes to making investment decisions, it is my experience that such partners, in many (but admittedly not all) cases, are also exceptional when dealing with managerial and operational decisions. So, I accept the witness evidence that those portfolio managers with greater capital allocations carry greater weight in the internal managerial discussions.”

120. The comparison drawn by Judge Popplewell with his own experience as a partner in a firm of solicitors was irrelevant and did not illuminate the question he had to decide. To the contrary, and with respect, it underlines his erroneous approach. Further, in a sense, the FTT reversed the statutory test in Condition B: it found that qualifying portfolio managers’ membership status derived from the influence they had (as they were only promoted once they acquired significant influence) which in turn derived from their personal qualities; whereas Condition B requires that their influence is derived from their rights and duties as members (or in the words of the FTT, membership status).

121. In fact, as the LLP Agreement makes clear, responsibility for BlueCrest’s affairs was vested in the Board (which did not include any portfolio manager members). The Board could (and did) delegate some of that responsibility. But on the face of it, this top-down structure appears to have left little room for other individual members to be given significant influence over the LLP’s affairs; and the FTT made no findings to suggest otherwise. For example, Group ExCo has responsibility for the strategic direction and governance of the Group’s activities (FTT para 75) and decides on all changes to the Group’s overarching investment strategy (FTT para 125). High-level strategic decisions are made, in the main, by Mr Platt and Group ExCo (FTT para 183). Mr Platt is essentially the portfolio managers’ only client; if his objectives change, he can “move the goalposts” (FTT para 128). Moreover, the portfolio managers are expected to operate only within their sphere of expertise (FTT para 99). They are tasked with carrying out a circumscribed investment management role within the hierarchy of the Group and BlueCrest itself. They are subordinate to those responsible for the affairs of BlueCrest and the Group; their performance is monitored and can lead to decisions to reduce their capital allocation or for them to be “let go” (FTT paras 84 and 101–102).

122. There are other material errors in the FTT decision. The FTT was wrong to hold that members’ influence deriving from their own financial contribution or ability to contribute to profits could count for the purpose of Condition B. This was a view clearly expressed by the FTT at para 172. It applied that view in determining that relevant portfolio managers wielded significant influence (para 194) and in deciding that infrastructure and back-office staff did not (paras 206–207). The FTT was also wrong to rely on influence deriving from their operational or day-to-day decisions in conducting their part of the business. As the FTT made clear when rejecting HMRC’s contrary submission, the FTT saw no principled justification why significant influence could not be shown from “doing no more than what was required of them in their role as portfolio managers” (para 190).

123. This also reflects a fundamentally flawed approach to the question whether members’ qualifying influence was over the “affairs of the partnership”. The FTT regarded the activities undertaken by the portfolio managers as directly analogous to activities carried out by partners in a traditional partnership. Judge Popplewell said (para 190):

“They cultivate existing client relationships with their counterparties; they generate new work either by new product lines or tinkering with existing product lines; they undertake investment activities themselves; and, for those where there is a joint book, they actually conduct joint investment activities with junior members of staff. The evidence also shows that they disseminate their experience to junior members of staff, something which is fundamental to the role of a partner in a

traditional partnership. So by undertaking their core role, they are acting as a partner would in a traditional partnership.”

In other words, the operational responsibility they had as portfolio managers was sufficient to give them the necessary qualifying influence. This led ultimately to the conclusion that these managers had significant influence over the “affairs” of BlueCrest. It was wrong for the reasons we have given above.

124. These errors (alone or in combination) undermine the FTT’s evaluation that the influence of the relevant portfolio managers and desk heads was significant. This is plainly not a case where we could safely conclude that the errors are immaterial. They went to the heart of the case on Condition B, and we cannot say that the outcome would have been no different had the FTT directed itself correctly and conducted its evaluation of the evidence on a correct understanding of Condition B, including conducting the necessary close examination of the terms of the LLP Agreement as the main source of qualifying influence in this case. In these circumstances, we consider that the Court of Appeal was right to hold that the case should be remitted to the FTT. There is no basis for challenging the terms on which it did so.

Condition A

125. We have set out section 863B of ITTOIA 2005 which contains Condition A in para 14 above. The issue on this appeal arises in relation to “Step 2” in section 863B(3) which for convenience we repeat:

“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.”

126. Leaving aside the tests provided by Conditions B and C, the effect of Step 2 is that a member of an LLP will for income tax purposes be treated as an employee, not a partner, of the LLP if at “the relevant time” (as defined in section 863B) it is reasonable to expect that at least 80% of the total amount payable by the LLP to the member in respect of his services as a member will be “disguised salary” as defined in paras (a) to (c) of Step 2. The requirement that at least 80% should be disguised salary, rather than 100%, is to allow for not more than 20% to be paid by way of bonus calculated on the basis of the profits of the LLP. Such bonuses are a common feature of the remuneration packages of many employees of companies, partnerships and other employers.

127. The issue is whether it was reasonable to expect that the payments to be made to the portfolio managers and desk heads in each of the years in question (or, strictly speaking, at least 80% of the payments to be made in each year) would constitute “disguised salary”. The payments made to portfolio managers and desk heads comprised three elements, but it is common ground that in order to succeed BlueCrest must establish that one of those elements, discretionary allocations, was not disguised salary. The principal issue is whether the discretionary allocations fall outside para (b), ie “is variable, but is varied without reference to the overall amount of the profits or losses of the limited liability partnership”. If they do fall outside para (b), the question then arises as to whether they nonetheless fall within para (c).

128. The discretionary allocations were calculated by reference to the profits made by the individual portfolio manager or, in the cases of desk heads, their desks. 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. The discretionary allocation was equal to the net award. The FTT found as a fact that BlueCrest’s policy was that if it transpired that its total profits for a year were less than the total discretionary allocations for that year, the latter would be reduced accordingly. If that situation arose, the total profits would therefore act as a cap on the discretionary allocations. In fact, it did not occur.

129. BlueCrest submitted to this court, as it did to the tribunals below and to the Court of Appeal, that the existence of this policy means that it could not be said that the discretionary allocations were “varied without reference to the overall amount of the profits or losses of the limited liability partnership” and that therefore the portfolio managers and desk heads failed Condition A and were not to be treated as employees of BlueCrest for income tax purposes. The existence of the total profits of BlueCrest as a cap on the discretionary allocations meant that the allocations were, or were at least capable of being, varied with reference to the total profits or losses.

130. The FTT, the Upper Tribunal and the Court of Appeal all rejected this submission, and, in our judgment, they were right to do so.

131. It is clear that Condition A is, in general terms, designed to reflect one of the principal characteristics of a traditional partnership, that the profits and losses of the partnership are shared between the partners.

132. Section 2(3) of the Partnership Act 1890 provides that the “receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business”, although it does not of itself make the person a partner in the business. The receipt by a person of a share of the profits made by that person in the performance of his or her duties on behalf of a partnership, subject to a cap based on the total profits of the firm, would not satisfy that test and would not itself provide any evidence of a partnership. As section 2(3) shows, the receipt of a share of a firm’s profits is not determinative that the recipient is a partner, nor is the receipt of a share of profits an essential element of being a partner. As *Stekel* shows, a person can be a partner even though he or she is paid only a salary. But it is undoubtedly a usual feature of the status of partner. Describing the position at common law, Sir Nathaniel Lindley said that it was “the grand characteristic of every partnership” (*Lindley’s A Treatise on the Law of Partnership*, 5th ed (1888), pp 1–2) but he acknowledged that with the decision of the Court of Appeal in *Badeley v Consolidated Bank* (1888) 38 Ch D 238 (on which he sat) and the passing of the 1890 Act it was not an essential element of a partnership (Supplement to *Lindley on the Partnership Act 1890* (1891) at pp 14, 16, and 18–19). *M Young Legal Associates Ltd v Zahid* [2006] EWCA Civ 613; [2006] 1 WLR 2562 was another case in which a person in receipt of fixed remuneration was nonetheless held to be partner, but as Wilson LJ (with whose judgment Hughes and Tuckey LJ agreed) said at para 33: “Nevertheless the absence of a direct link between the level of payments and the profits of the firm is in most cases a strongly negative pointer towards the crucial conclusion as to whether the recipient is among those who are carrying on its business.”

133. The purpose of the conditions, as described in the Revised Technical Note (para 1.6), is “collectively to encapsulate what it means to be operating in a typical partnership”. The purpose of Condition A is to distinguish between what is *typical* remuneration for a partner and typical remuneration for an employee.

134. Portfolio managers and desk heads employed by fund management funds or similar financial institutions are commonly remunerated by reference not to the profits of the firm as a whole but to the profits generated by themselves or by their team. This is precisely the way in which the remuneration paid to those members of BlueCrest occupying those positions is determined. It is not determined by reference to, or in any substantial way linked to, the overall profits of BlueCrest. While BlueCrest’s argument can just about pray in aid a literal reading of paragraph (b), it is a reading so divorced from the purpose of paragraph (b) or from any ordinary reading of its language that it

must be rejected. We are therefore satisfied that the payments to the portfolio managers and desk heads satisfy paragraph (b) and it is unnecessary to consider paragraph (c).

Conclusion

135. For the reasons given above, we would dismiss this appeal, as regards both Condition A and Condition B.

136. By its order made on 17 January 2025, the Court of Appeal remitted the “issue whether Condition B is satisfied in relation to any or all of the Members” to the FTT “for reconsideration in light of the correct construction of condition B as set out in the Court’s judgement”. Having received submissions, the court made a further order on 11 February 2025 setting out the terms of the remitter, which included that the parties might rely on the evidence already filed before the FTT but were not to file any further evidence.

137. It is agreed by the parties that in these circumstances, as the Court of Appeal ordered, the issue as to the application of Condition B to all or any of the members of BlueCrest should be remitted to the FTT. It is not for us to question that agreement, but the order for remitter in paragraph 3 of the Court of Appeal’s order dated 17 January 2025 should be amended to include a reference to this judgment as well as that of the Court of Appeal. BlueCrest challenged the direction as to evidence given in the Court of Appeal’s order dated 11 February 2025. It would be rare for this court to interfere with such a direction, and we see no reason to do so in this case.