FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/09328

PAYE and NICs – salaried members legislation in sections 863A-G ITTOIA 2005 and section 4A SSCBA 1992- application to members of a hedge fund manager trading as an LLP – Condition A - were the bonuses variable without reference to the profits of the LLP?- yes – Condition A met for all members - Condition B – did the members have significant influence over the affairs of the LLP? - yes for the traders with capital allocations of $100 million or more – no for the other members – appeal allowed in part

Heard on: 22nd-31st March 2022
Judgment date: 29th June 2022

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

BLUECREST CAPITAL MANAGEMENT (UK) LLP

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Amanda Hardy QC and Oliver Marre instructed by Slaughter and May Solicitors

For the Respondents: Richard Vallat QC, Laura Poots and Calypso Blaj instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns the application of the salaried members legislation, otherwise known as the salaried members rules, to certain individual members of the appellant (or "**BlueCrest**"). Broadly, where that legislation applies, a member of a limited liability partnership is to be treated as an employee of that partnership for the purposes of income tax and national insurance contributions (**"NICs**").

2. This is an appeal against:

(1) Determinations (the **"Determinations**") that BlueCrest is liable to pay income tax under the pay-as-you-earn ("**PAYE**") regime for the following tax years (the "**relevant years**"):

Date of Determination	Tax Year	Additional Tax
16 March 2018	2014/15	£28,817,446
19 March 2020	2015/16	£27,065,762
19 March 2020	2016/17	£39,154,212
19 March 2020	2017/18	£27,515,292
19 March 2020	2018/19	£21,355,607

(2) A decision that BlueCrest is liable to pay Class 1 NICs in the sum of £55,325,329 for the same tax years ("**the relevant years**"), issued on 17 June 2020 (the "**NIC Decision**").

3. The Determinations and the NIC Decision (together, the **"Decisions**") relate to the individual members of BlueCrest, of whom there were around 80 to 100 during the relevant years.

4. In addition to this appeal, BlueCrest has also issued judicial review proceedings regarding the legality of the respondents' (or "**HMRC**") application of the salaried members rules in the High Court. Those proceedings are stayed pending this appeal.

SALARIED MEMBERS RULES - OUTLINE

5. The salaried members rules which are found in sections 863A to 863G ITTOIA 2005 (for income tax) and section 4 SSCBA 1992 and regulation 4 SSC(LLP)R 2014 (for NICs) were introduced by the Finance Act 2014 and came into effect on 6 April 2014. They were designed to remove the presumption of self-employment for some members of LLPs and so tackle the disguising of employment relationships through LLPs. They are intended to apply to those members of LLPs who are more like employees than partners in a traditional partnership. They are designed to ensure that LLP members who are, in effect, providing services on terms similar to employment are treated as employees for tax purposes. In order for the rules to apply, an individual must satisfy three conditions. These are Conditions A, B and C. Failure to satisfy any of these conditions means that the rules do not apply. It is common ground in this appeal that Condition C applies to the individual members of BlueCrest. It is also common ground that BlueCrest is an LLP to which the relevant legislation is applicable.

CONDITIONS A AND B IN THIS APPEAL – OUTLINE AND ISSUES IN BRIEF

6. Condition A is met if at the relevant time it is reasonable to expect that at least 80% of the amount paid by an LLP to an individual member is disguised salary. That includes amounts which are variable but vary without reference to the overall amount of the profits or losses of the LLP, or are not, in practice, affected by the overall amount of those profits and losses. Condition B is met if the mutual rights and duties of the members of the LLP do not give a member significant influence over the affairs of the LLP.

7. The members of the LLP whose remuneration is under consideration in this appeal (the "**relevant members**") fall into three broad categories. Infrastructure members; discretionary traders or portfolio managers; and other front office members. The important distinction for the purposes of this appeal is between the portfolio managers, or traders, on the one hand, and all other relevant members on the other. In this Decision I refer to the latter group as the "**non-portfolio managers**".

8. The relevant members received three categories of remuneration from the LLP. Priority distributions; discretionary allocations; income points allocations. It is agreed that the priority distributions are disguised salary and the income points allocations are not disguised salary. The focus on Condition A, therefore, is on its application to the discretionary allocations.

9. The appellant's position is that at least 20% of the amounts received by the relevant members are expected to be variable and are affected in practice by its profitability. In each tax year there was a real possibility that given the trading and non-trading risks it faced, BlueCrest would make a loss and such a loss could have an effect on the amounts paid by it to the relevant members. HMRC say that the discretionary allocations are disguised salary since whilst in the case of the portfolio managers, they varied by reference to individual performance, there is no evidence that they varied by reference to the overall profits or losses of BlueCrest; and that in respect to relevant members other than the portfolio managers, the appellant has not demonstrated that those allocations are not disguised salary. Furthermore, if I were to find that the discretionary allocations were not disguised salary, then statutory targeted anti-avoidance provisions should apply such that, in effect, Condition A is met.

10. As regards Condition B, BlueCrest's position is that when considering significant influence, one can consider not just managerial influence but also financial influence, and that influence need not be over all of the affairs of the LLP but it can apply where a member has significant influence over one aspect of those affairs; and on the facts of this appeal, all portfolio managers with capital allocations of $100 million or more, and all non-portfolio managers have significant influence. HMRC's position is that Condition B relates only to managerial influence and not to financial influence; and that influence must be over the affairs of the partnership generally and not in relation to individual aspects or departments. On the facts, none of the relevant members other than Peter Cox, Paul Dehadray, Matthew Weir and Andrew Moss (together the "**Original ExCo**") had such influence.

11. The issue, therefore, which I have to determine, is whether Conditions A and B apply to the relevant members. The parties agree that the position for income tax and for NICs is the same. If these Conditions are satisfied, then the Decisions should be upheld and the appeal dismissed. If, however, either of the Conditions is satisfied, then the appeal succeeds for both income tax and NIC purposes. If I decide that Conditions A and B are satisfied, then I am asked to make that decision in principle, and to leave it to the parties to seek to agree the figures.

12. Mrs Hardy and Mr Vallat made clear, helpful and eloquent submissions, both orally and in writing. I am grateful for those submissions which have helped me considerably, and I have taken those submissions into account (along with all of the evidence) even though, in reaching my conclusions I have not necessarily referred to each and every argument and item of evidence in detail.

THE LEGISLATION

13. The relevant legislation is set out in Appendix 1 of this Decision. Definitions and abbreviations in that Appendix bear the same meanings in the body of this Decision.

THE EVIDENCE AND FINDINGS OF FACT

14. The evidence in this appeal comprised the following:

(1) A statement of agreed facts.

(2) Two significant bundles of documents.

(3) Witness statements and oral evidence from the following witnesses:

(a) Nicholas Moore, a former portfolio manager and member of BlueCrest;

(b) John Wilson, a current portfolio manager and member of BlueCrest;

(c) Peter Cox, Chief Executive Officer and member of BlueCrest and Chief Operating Officer of the wider BlueCrest Group;

(d) Catherine Kerridge, former Head of Tax and current member of BlueCrest.

15. I summarise this evidence below and, save as otherwise indicated, I find the matters set out in those paragraphs as facts. My discussion of it in relation to each category of relevant members and my further findings of more specific facts are set out later in this Decision.

BlueCrest and the BlueCrest group

16. The BlueCrest Group (or the "**Group**") is involved in financial asset management around the world. BlueCrest is a UK registered and UK resident Limited Liability Partnership which forms part of the BlueCrest Group and was incorporated in England and Wales on 29 October 2009 under the Limited Liability Partnerships Act 2000.

17. BlueCrest commenced business in London on 1 April 2010 providing investment management services to the Group's funds, as a sub-investment manager working under the lead investment manager from time to time; and providing back-office services to other Group entities.

18. Prior to December 2015, the Group managed the funds of external investors, and also 'internal funds'. External funds made up over 90% of the assets under management.

19. Since December 2015 all the Group funds have been closed to outside investors. The main investment fund is BSMA Ltd ("**BSMA**"). A further fund known as Millais Limited was set up in 2017. There are now $3.9 billion under management across the Group (held in BSMA and Millais (together the "**Fund**")).

20. BlueCrest Capital Management LP (a Guernsey Limited Partnership) is the lead investment manager of the Fund (the "**lead investment manager**").

21. BlueCrest Capital Management Limited (a Jersey-resident company) is the general partner of the lead investment manager. In that capacity, it represents and carries on the business of the lead investment manager ("the **General Partner**").

22. The BlueCrest Group was co-founded by Mike Platt and William Reeves, as an alternative asset management business, or hedge fund management group. Mr Platt has been at the helm of the Group throughout the relevant years.

23. Mike Platt is the Chief Executive Officer and Chief Investment Officer of the General Partner.

24. Following the return of external funds, the other principal investor in the Fund is Andrew Dodd who is also the Chief Financial Officer of the General Partner.

25. BlueCrest has never had any direct employees but employed its more junior investment managers and many of the back-office staff via a service company.

26. At the end of each accounting period relevant to the tax years under appeal, the number of members in BlueCrest and employees of the service company were as follows:

Date	Number of Partners	Number of employees
1/1/2015	86	280
1/1/2016	86	223
1/1/2017	81	199
1/4/2018	77	195
1/4/2019	63	208

27. The members of BlueCrest all work together in one building in open plan offices in London spread over two floors. Only Peter Cox, the CEO, and Paul Dehadray, the General Counsel, have their own offices.

BlueCrest's activities

28. BlueCrest has two broad strands of activities:

(a) Investment management: as mentioned above, the Fund is managed by the lead investment manager, and the appellant acts as a 'sub-investment manager'. This activity is governed by a sub-investment management agreement made between BlueCrest and the lead investment manager. In turn, this investment management was undertaken firstly by discretionary investment managers, engaged in traditional decision based investment management, usually undertaken by individual portfolio managers who, within their set investment remit, decide what

assets to hold and what transactions to enter into based on their views of a particular market and their particular expertise and experience; and secondly by systematic trading, often referred to as algorithmic trading, a computer-based investment management strategy in which algorithms determine when or where to enter and exit a series of trades. This systematic trading was significantly developed by Ms Leda Braga from 2004 onwards and her team created a new investment management business, Systematica Investments, which span out from BlueCrest in January 2015. BlueCrest nevertheless continues to operate some systematic trading strategies managed outside the UK.

(b) Support services: BlueCrest provides support services to entities within the Group, such as legal, finance and IT services (also described as back-office services). BlueCrest provides these support services under service agreements and receives fees for doing so.

29. Before the return of capital to external investors in 2016, the Group's lead investment management entity received management and performance fees from the Group's funds. Typically, the management fee received was 2% of funds under management, which was payable irrespective of the performance of the fund, and the performance fee was 20% of profits of the period. The lead investment management entity paid a proportion of these fees to each of its sub-investment managers, including the appellant. During this period there was a "netting risk", i.e. the performance fee was only paid on profits above a certain level, and if there had been losses since the last performance fee payment date, those were recovered before any performance fees were paid. Furthermore, other investment managers' losses were netted against profits generally, so one investment manager could suffer from the poor performance of another.

30. During the period 2016 to 2018 there was a change to the method of calculating the performance fee payable to the appellant. During that time the appellant was paid 18% of the performance of each UK investment manager. The reason for this was that the Fund was closed to outside investors. Once things had settled down, however, from 2018, netting was reintroduced and the performance fee increased to 20%.

31. The appellant's fee receipts are summarised below.

All figures in £m rounded up to the nearest million

	Total	Breakdown of Total		Breakdown of Investment Fees	
		Support Service Fees	Investment Fees	Management Fees	Performance Fees
31 Dec 2014	148	55	93	39	54
31 Dec 2015	99	23	76	26	50
31 Dec 2016	131	27	104	25	84
31 March 2018	133	23	110	31	79

32. Throughout the relevant period, the appellant was profitable, as shown in the table below.

All figures rounded up to the nearest million

	Profit before tax (£m)
31 Dec 2014	85
31 Dec 2015	66
31 Dec 2016	107
31 March 2018	100

Relevant members

33. The individual members with whom this appeal is concerned can be viewed by reference to three broad categories:

(a) Infrastructure members;

(b) Discretionary traders or portfolio managers;

(c) Other front office members.

34. The infrastructure members are, broadly, the members who are responsible for providing the support or back-office services to the Group, such as technology, facilities, legal and compliance.

35. The infrastructure members include:

(a) The Original ExCo;

(b) A number of "heads of department", such as the head of technology or head of human resources;

(c) Other senior members of these departments.

36. As at 3 April 2014 there were 82 individual members. 16 of these were infrastructure members, including the Original ExCo.

37. Portfolio managers are responsible for managing an investment portfolio as part of the investment management services provided by the appellant to the BlueCrest Group entities. Portfolio managers are allocated an amount of capital and have discretion as to how to invest that capital allocation (subject to regulatory, compliance and risk parameters). The scope of that role is described in more detail below. HMRC accepts that "capital allocation" does not refer to a fixed amount of "cash" but represents the level of investment risk that a portfolio manager is allowed to take on which means that the assets in a given portfolio can exceed the capital allocation.

38. The capital allocation of each portfolio manager can be described as their "portfolio" or "book".

39. This category also includes "desk heads" who manage a team of portfolio managers. Some of those desk heads have their own capital allocation. Others do not have their own allocations, but instead oversee a team of portfolio managers and/or a distinct fund. Mr Cox described desk heads in that position as a "sort of chief investment officer for a group of senior portfolio managers".

40. As at 3 April 2014, there were 48 individuals in this category overall, and in 2014 seven of those were desk heads.

41. In her first witness statement Miss Kerridge mentions other front office members:

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

42. As at 3 April 2014, there were 18 individuals in this category.

43. While Miss Kerridge identified this category of members in her statement, it was clear during her oral evidence that she did not regard this as a particularly identifiable category, with the dividing line between this category and infrastructure members being somewhat unclear. These categories are set out in Appendix 3.

The LLP Agreements

44. At the beginning of the relevant years, the appellant was governed by a Limited Liability Partnership Agreement, dated 22 March 2011 and substantively amended 10 July 2013 (the "**LLP Agreement**"). During the relevant years, the LLP Agreement was further amended or substituted on a number of occasions.

Remuneration generally

45. The allocation of the appellant's profits is governed by the LLP Agreement, in particular clause 10. While the LLP Agreement has been amended or replaced on a number of occasions, clause 10 did not materially change during the relevant years.

46. There are three main components of the amounts received by individual members from the appellant:

(a) Priority distributions: individual members receive a fixed amount each month. The maximum priority distribution for each individual member is set out in a letter of

allocation. For portfolio managers, this was generally £150,000 per year and was paid by way of monthly drawings against the expectation of profit.

(b) Discretionary allocations: to be determined at the discretion of the Board. The discretionary allocations could not exceed the total profits available for that purpose in a given year. The traders called this their bonus.

(c) Income point allocations: any remaining profits after discretionary allocations are allocated between members by reference to the "income points" held by each member.

47. Priority distributions can be described as the individual member's fixed salary; discretionary allocations can be described as the individual member's bonus; and income points do not represent a significant amount of any individual member's remuneration. The vast majority of the income points were allocated to BC Capital UK Ltd which were, in essence, the conduit for sweeping up the residual profit and paying it, up the Group, to the Fund's participators, including Mike Platt and Andrew Dodd.

48. In dealing with discretionary allocations, the appellant undertook arrangements known as a partner incentivisation plan or "PIP", under which, very broadly, amounts were allocated to a corporate member as a discretionary allocation and then ended up in the hands of individual members at a later date. There were two main companies used to facilitate the PIP: ABN Avon Ltd and, later, Special Capital Limited (the "**PIP Facilitators**"). For the purposes of this appeal, it is agreed that the amounts paid to the individual members, either directly or via the PIP Facilitators, together comprise discretionary allocations. The amounts paid to the PIP Facilitators are described in schedules showing the members' remuneration for the relevant years as a "Reallocation of allocation to Special Capital Limited in accordance with FA2014 mixed membership rules based on provisional indicative awards". These amounts could not be drawn down immediately but were, in effect, deferred, and could only be drawn down over a three-year period subject to ongoing membership of the appellant.

49. In addition to the allocations made to individual members and the PIP Facilitators, profits were also allocated to other corporate members of the appellant in the form of discretionary allocations and income points.

50. The process for determining the discretionary allocations involved the Global Remuneration Committee (the "**GRC**"). This is a committee of Group ExCo ("**Group ExCo**"), an executive committee to whom the board of the General Partner has delegated its responsibilities, and which coordinates the approach to compensation across the Group. However, the power to determine profit allocations rests with the Board of BlueCrest (the "**Board**").

51. For all individual members, the process for determining discretionary allocations is as follows:

(a) The GRC considers the position of the entire Group and then, in respect of the appellant and its members, makes recommendations to Group ExCo;

(b) Group ExCo then makes recommendations to the Board;

(c) The Board makes the final decision on discretionary allocations.

52. The remuneration process involved a provisional stage and a final stage. In outline, bonuses for the bonus year ending 31 December were announced in the following January or February. The Board is given a discretion under clause 11.4 of the LLP Agreement to resolve to allow members to make drawings ("**Discretionary Drawings**") in advance of the end of the financial year in anticipation of their profit entitlement for such year "Subject in all respects to the Board being satisfied as to the level of profits anticipated in respect of any financial year".

53. Group ExCo has appointed the GRC to determine partner drawings across the Group, including the amounts to be drawn on account in January and February. This committee decides on the amounts each partner should be awarded having reviewed the performance of members and the overall performance of the business. This part of the process drives drawings on account of profits but is not in itself an allocation of profits. The checks which are carried out through this process are intended to ensure that drawings will not exceed the amounts that will eventually be available as profits, which amount cannot be certain until the relevant accounts have been finalised. The starting point of this exercise is the anticipated accounting profit.

54. Each member had a "Distribution Account" with the appellant. Once the discretionary allocations had been determined, they were credited to that account. They could then be withdrawn by the individual member.

55. The Board is not typically in a position to finalise profit allocations until at least six months after the accounting year end. For instance, in respect of the year ended 31 December 2014, the Board made its profit allocations in October 2015.

56. Under clause 10.8 of the LLP Agreement, "…. Discretionary Drawings made by any member shall be debited on each occasion they are made to the Distribution Account of such member. In the case of any individual member, the Board shall have the discretion to require the relevant member to immediately repay any Discretionary Drawings that have been so debited to the Distribution Account of such individual member to the extent they have not been reduced by any subsequent profit allocation. In the event that the amount of any Discretionary Drawings made by any member in any financial year of the Partnership shall exceed the amount of profits allocated to the relevant member pursuant to this clause 10, or if the Partnership has incurred losses (other than capital losses) in respect of such financial year, so that there is a negative balance on his Distribution Account following such allocation of profits or any allocation of losses then the Board shall have discretion to require the relevant member to immediately repay the excess amount of such Discretionary Drawings over the profits so allocated or, in the case of a loss, the whole amount of such Discretionary Drawings or to allow such negative balance to be carried forward to be set off against profits allocated to the relevant member in respect of future financial years of the Partnership……."

57. The allocations for the relevant years are set out below (all figures rounded up to the nearest million):

	Profit before tax (£m)	Total allocations (£m)	Total allocations to individual members and PIP Facilitators (£m)	Total allocations to other corporate members (£m)
31 Dec 2014	85	82	63	19
31 Dec 2015	66	58	54	4
31 Dec 2016	107	100	98	3
31 March 2018	100	98	85	14

Portfolio managers' remuneration

58. Throughout the relevant years, the portfolio managers were entitled to priority distributions. For Mr Moore and Mr Wilson, the relevant figure was £150,000.

59. In addition, the portfolio managers were paid discretionary allocations calculated by reference to the profit (if any) on their individual portfolio. In broad terms, this worked as follows:

(a) The "net profit or loss" on the individual portfolio was calculated;

(b) A "headline percentage" was applied to that, producing a "gross award". The headline percentage varied across the relevant years, and across desks;

(c) Costs were then deducted from the gross award to produce a net award.

60. The calculations above were carried out in US dollars, because the capital allocations were in US dollars.

61. The portfolio manager would then receive a discretionary allocation equal to that net award, converted into sterling, by way of a credit to his/her Distribution Account.

62. This process is set out in a document entitled BCM (UK) LLP- Variable Remuneration Approval Process. This sets out the background to the variable remuneration policy. It states that the appellant's remuneration policy is designed to attract, retain and motivate partners and employees and to sustain the high standards required to ensure that the appellant is managed successfully to the benefit of fund investors, partners and employees. Remuneration comprises basic salary and benefits in kind set at competitive levels, short-term variable remuneration dependent upon the achievement of performance targets and longer-term rewards, including

retirement benefits, various ownership interest in the business and three year vesting restricted fund units.

63. It goes on to discuss the performance of the firm in determining variable remuneration pools, and that the appellant takes into consideration its strategy for future years and assesses its financial performance and future financial stability including lead indicators such as assets under management and investment performance. In determining an individual's variable remuneration, the individual's performance is assessed, including: "the performance of any funds managed by the individual, achievement of annual objectives, discipline record including compliance with the firm's policies and risk limits".

64. As regards portfolio managers, the document goes on to state:

> "Portfolio Managers – Portfolio Managers (PM) and [the appellant] typically agree when the PM joins the firm, a variable remuneration award methodology, for example a typical arrangement might be: 20% of trading profits less directly attributable costs. While not contractual and subject to adjustment this calculation forms the basis of the remuneration to be awarded to the PM. BCM(UK) executive management (CEO [Mr Cox] and CFO [Mr Dodd]) determine whether the variable remuneration award calculation is appropriate in the context of: 1) [The appellant's] business strategy, financial performance and future stability and 2) the individuals non-financial performance. [The appellant] executive management (CEO and CFO) consult with the Head of HR, Chief Risk Officer and Head of Compliance on whether any PM's nonfinancial performance requires adjustment due to the PM's discipline record including compliance with the firm's policies and risk limits."

65. Mr Moore and Mr Wilson were taken to the detailed documents showing the calculations of their bonuses and the allocations received in each year. Both confirmed, by reference to the documents and their own knowledge, that the bonus calculation worked as set out above at [59], and that in each year they had received bonuses calculated in that way. So, for Mr Moore, in 2017 for example, his net and gross profit on his capital allocation was $10,260,177. His "cut" was 18% so a gross bonus of $1,845,032. From this were deducted direct costs of $228,418, "Support" of $48,568 and a variety of smaller costs resulting in a net award or bonus of $1,547,060.

66. In 2014, Mr Moore made a loss and received only £150,001 (his priority distribution and an income point), though in that year BlueCrest made a profit as did other portfolio managers such as Mr Wilson, and as did the cohort of portfolio managers as a whole. Furthermore, in the following year, 2015, when the profits of the appellant had fallen from £85 million in 2014 to £66 million in 2015, Mr Moore made a personal profit, and thus received a discretionary allowance so that his overall pay was greater than in 2014 notwithstanding the profits of the appellant had fallen.

Non-portfolio managers' remuneration

67. Non-portfolio managers (i.e. infrastructure members and other front office members) had no portfolios to manage, and so their discretionary allocations were not calculated using any individual profit and loss account. The process of calculating their variable remuneration can be found in the Variable Remuneration Approval Process document, and the evidence of Mr Cox.

68. In the former:

"Non-PMs – [The appellant] executive management (CEO and CFO) perform a top down calculation of the variable remuneration pool by assessing [the appellant's business strategy, financial performance and future financial stability including lead indicators such as recent investment performance. The variable remuneration pool is allocated by [the appellant] executive management to department heads. The allocation takes into consideration the department's prior year variable remuneration pool and the change in the current year's pool relative to the prior year.

The department heads perform a bottom-up assessment taking into account the individual's performance and current market rates utilising market bench-mark surveys and recent hire information. [The appellant's] executive management reconvene to consider the bottom-up recommendations and finalise the variable remuneration awards and pay rises. This is typically a process of iteration between the Executive and department management before the process is concluded."

69. Mr Cox was involved in the process of assessing bonuses for non-portfolio managers and accepted that the Variable Remuneration Approval Process documents accurately described the process. It was a "judgmental process", it was not "formula-driven", there was no "comp machine". Overall, he explained the relevant factors as follows (in the context of answering questions about his own remuneration):

"Q. So those profits are going up and down. Your remuneration is only going up. Do you remember why that was?

A. Well, there were a number of factors that would feed into infrastructure partner compensation, one of which would be the scope of their role and what they were doing within the business and how that had changed year on year, period on period, one of which would be the performance within that role, and again, an assessment as to how effectively they had performed their job. A third contributor would be market, what the market compensation is for like roles in the industry. And then I think fourthly would be the performance of the business and how the business had performed during the period. I think all of those factors would weigh in to the decision on any infrastructure partners' compensation, including my own. How my boss decided the mix of those factors for the years that you've highlighted, I couldn't tell you. Clearly I'd like to think it was because I did such a great job."

70. He emphasised that he had a number of roles and a number of targets, perhaps between 8 and 15 at the beginning of the year which he agreed with Mike Platt and Andrew Dodd. The list of objectives differs for different non-portfolio managers, but the process is broadly the same in that they will have a list of objectives of their own, relevant to their role, which form an important component of the assessment of their bonus. Another important component of that assessment is the market. If compensation levels for certain functions have decreased in the market, then that will have a negative impact on a bonus. Furthermore, the performance of the business is a key contributor to the mix, as too, may be a change in the role of the individual within that period.

71. He illustrated this by describing the process for a former colleague (redacted):

"So, look, X is an interesting consideration. In terms of his performance he's a high-performing infrastructure partner. He joined us from…..where he was already in a senior role and he's helped build a first-class…..team of professionals that support some high volumes of business, approximately 10,000 trades a day are processed through our

> business. So I think overall we are happy with X's performance. During this period we were in the process of migrating more functions in to X, primarily from our external administrator …. So X's role got bigger, because we asked him to do more things, and he successfully took those things on board, by growing his team and growing the scope of what his team did. At the same time I think the London market for …..professionals was in decline, not least because there was a decent amount of offshoring in process, whereby ….. were moving some of this functionality to offshore locations and, as a result, the supply of ……, was increased and, hence, dampening compensation. So there's a sort of flavour of the dynamic within X as an individual performing well, taking on more, but in a role whereby the market is paying less. Clearly we would have that conversation around his compensation and weigh into that as well the overall performance of his team, the overall performance of the business as a whole, and on balance we came out with: it doesn't feel fair that X should get paid less, because he's done a good job, he's taken on more, but the market for his role has come down. So, hence, we paid him a modest increase in his compensation from 406 to 429. So to the best of my recollection that's the sort of flavour of dialogue we would have had around X."

72. There will also be a discussion with portfolio managers where the roles of those individuals affect those portfolio managers.

73. For the year to 31 December 2015, Mr Cox's taxable income was considerably greater than his income in the year to 31 December 2014, notwithstanding that the appellant's profits had fallen from £85 million to £66 million.

74. For "X" mentioned above, he received a greater taxable trading profit in the year ended 31 March 2018 than in the year ended 31 December 2016, notwithstanding that the appellant's total pre-tax profit was lower in the former year than in the latter.

Management and governance

75. The board of the General Partner, which is based in Jersey, is charged with the strategic direction, governance and oversight of the Group's activities, including the management of the Fund's assets and the central risk management function. It has delegated its responsibilities to Group ExCo. Meetings of Group ExCo take place approximately 10 times per year to discuss and make decisions regarding group strategy, operations, and performance. During the relevant years, Group ExCo comprised Mike Platt, Andrew Dodd, Robert Heaselgrave, Peter Cox and Paul Dehadray. Broadly speaking, Group ExCo is responsible for setting the strategic direction and governance procedures of the Fund's management activities.

76. Under clause 14.1 of the LLP Agreement, the Board has the responsibility for the day-to-day management and control of BlueCrest. It is obliged to consult the members as appropriate on strategic matters affecting the development of its business and on such other matters as the Board considers appropriate. The Board is obliged to convene at least one members' meeting in each financial year to provide a forum for consultation and allow the members to vote on matters which are put to a vote by the Board.

77. Under clause 14.11 of the LLP Agreement, the Board is obliged to, and has, established an executive committee ("**UK ExCo**") which has responsibility for: reviewing operational performance including business units and financial performance; reviewing the appellant's ongoing risk profile; any legal, compliance, operational, regulatory or human resource related matters; the development and implementation of all matters relating to the day-to-day

operations infrastructure; and monitoring reviewing and resolving all issues relating to the operational management of BlueCrest's business.

78. Until 22 November 2016, UK ExCo was made up of the Original ExCo. On that date, a further 15 individual members joined UK ExCo. Those individuals had, prior thereto, regularly attended and spoken at UK ExCo meetings but had not been formally appointed. It was only when HMRC appeared to attach significance to the membership of the UK ExCo in relation to the matters in dispute under this appeal, that the position was formalised. Members of UK ExCo for the relevant years are set out in Appendix 2.

79. UK ExCo created a number of committees to which it delegated specific responsibilities, namely: the London trading management committee; operational risk committee; new products committee; counterparty risk committee; market and liquidity risk committee; regulatory affairs committee; and new platform committee.

80. The London trading management committee is an investment management committee which meets regularly to discuss matters affecting the investment management community, including hiring, technology and counterparties. It is made up of desk heads and some other investment managers, the head of risk, the head of compliance and other senior infrastructure partners. It has a key role in the management and affairs of the appellant in that it has responsibility for operational risk and is a forum for interaction between front and back-office which is essential to ensure the efficient running of the investment management function.

Portfolio managers

81. The hedge fund industry grew very rapidly from the late 1990s until the financial crisis of 2008/9. There was considerable appetite for investment in hedge fund products, management of which became a very profitable business in a short period of time. It was therefore very important to recruit and retain the best possible portfolio managers in order to maximise profitability. The rewards paid to the managers was key to recruitment and retention.

82. BlueCrest had a policy of recruiting talented portfolio managers from other firms as well as growing their own. Junior portfolio managers would not be partners until they showed themselves capable of fulfilling a partner's role. They would then be allocated a capital allocation, generally starting at $100 million which might then be increased depending on their ongoing experience and track record. Lateral hires were allocated capital, which depended on a number of factors but would not be less than $100 million. Capital allocations could fluctuate. For example, Mr Moore who joined BlueCrest in June 2011 started with a capital allocation of $300 million and that had increased to $500 million when he left in October 2019. He also had a joint book with a capital allocation of $200 million which he managed with a more junior portfolio manager. Mr Wilson's capital allocation was $300 million in 2014/15 which was reduced to $250 million in 2016.

83. An individual portfolio managers' capital allocation is proposed by their desk head and the head of risk and is then considered by Group ExCo. A recommendation is made and the proposed allocation is then discussed and ratified by UK ExCo. The final allocation is ultimately reviewed and agreed by Mike Platt and Andrew Dodd at Group ExCo.

84. There is ongoing monitoring of portfolio managers by desk heads and by Group ExCo. If there are concerns about the performance of a portfolio manager, there may be more detailed monitoring at the request of Mike Platt. The risk team may also review the position, and all of the information would then be reported to Group ExCo, who would then review the position

with the Board and a decision would be taken as to whether that manager's allocation should be reduced or, in certain circumstances, that manager should be let go.

85. Portfolio managers are experts in their respective fields and are often hired because of that specialised expertise. BlueCrest often hired senior investment managers with proven track records who were appointed partner once it was satisfied that they have the necessary experience to run their own portfolios on a discretionary basis. Each manager is responsible for their own investment decisions and has full discretion to incur risk within their own strategy.

86. Portfolio managers are given full discretion regarding the investment positions they take, although their activity is scrutinised by Group ExCo and the risk team to ensure they are not investing in markets/positions which are not within their area of expertise and/or if portfolio managers are making material losses. There are day-to-day interactions with members of UK ExCo and desk heads. Generally, they do not interact with Group ExCo or with Mike Platt except in exceptional circumstances (for example failing to meet performance targets or stop-loss issues).

87. Some senior portfolio managers are appointed to operate as desk heads who are responsible for, amongst other things, monitoring the day-to-day performance of other portfolio managers on their desk, management of their desk generally, and the recruitment of portfolio managers onto their desk. Desk heads and the risk department monitor the overall risk taken by a desk but do not generally interfere with individual portfolio managers' strategies.

88. The ratio of partner portfolio managers to employee portfolio managers is high. In the relevant years it was between 47.5% and 57.5% members.

89. The portfolio managers seek to minimise the amount of cash that backs up the market exposure they assume, which means that such exposure will only be partly backed by cash, the balance being leverage provided in some form by a counterparty (a bank or broker).

90. They undertake large quantities of market research to form a long-term view of the market of their investments and use that research to reach conclusions before the rest of the market does. They investigate opportunities and construct a portfolio which is within their desk and enter into investments (or divestments) in order to adapt their individual portfolio in response to research. These investments are generally longer term. Given that they are engaged to preserve and grow the Fund's capital, determining the amount of capital to allocate to a particular position is critical. Furthermore, a portfolio manager has to take into account other positions which they already hold to ensure that their investment portfolio is risk balanced at all times.

91. During the relevant years, the total capital allocations amounted to approximately $15 billion.

92. Broadly speaking, the profits generated by a portfolio manager for the benefit of the Fund (and thus his or her discretionary allocation) are unaffected by the profits generated by fellow portfolio managers. This is the case even if they might be working on the same sub fund, and that sub fund makes a loss.

93. Although there were no weighted voting rights, a portfolio manager's standing within the firm was a reflection of their capital allocation. A capital allocation was likely to be greater, the greater the experience and expertise of the portfolio manager. And so the more senior the

portfolio manager, and the greater his or her capital allocation, the greater their standing in the firm and the greater the level of trust and confidence that the firm had in that individual. And the greater the weight attached to that individual's opinion about matters affecting the business.

94. The figure of $100 million which had been identified as the threshold above which a portfolio manager exercised significant influence was an arbitrary figure. However, portfolio managers who have capital allocations above that amount were recognised as individuals of high standing and whose opinions carried weight and who other people would listen to.

95. Mr Moore thought that in the 10 years with which he was with BlueCrest, it was likely that he had earned $300 million for the firm.

96. His view, too, was that he had no contractual entitlement to his discretionary allocation. If it was not paid, in his view he had no recourse. He had no legal right to the payment.

97. Portfolio managers are involved in hiring new portfolio managers and also bringing on junior portfolio managers. The success of the business depends on the quality of the portfolio managers. The existing portfolio managers are best placed to decide what new skills and business needs for a new portfolio manager might be. They also know people in the industry who might have those skills. If a particular candidate is identified, the portfolio manager would discuss it with the desk head and then, if appropriate, the candidate will be interviewed. Around that time the size of the individual's capital allocation would be discussed to which the portfolio manager bringing the candidate forward would be party. It was unlikely that that allocation would change much if the candidate was offered a position. Following interview, if the candidate is successful, this will be escalated to Group ExCo for approval. Ultimate sign off remains with the Board.

98. The involvement of senior management such as Mike Platt in the recruitment process depended on the nature of the candidate. If there was a superstar candidate, or a candidate of sufficient seniority who would attract a large capital allocation, then Mike Platt would be involved in the recruitment process. But for more regular recruitment, neither he nor Group ExCo would be involved even though at the end of the day Mike Platt had a theoretical veto on any candidate.

99. Portfolio managers are expected to operate only within their sphere of expertise, and to do otherwise might be a disciplinary matter which might lead to dismissal. If portfolio managers are guilty of style drift, i.e. moving away from their core portfolio, questions are asked and discussions held with other portfolio managers or the relevant desk head. These are intended to nip any problem in the bud and so no need to escalate to Group ExCo.

100. BlueCrest has a sophisticated risk framework to manage portfolio risk which was established by Group ExCo, and updated in 2020. Day to day responsibility for portfolio risk management is delegated to the desk heads, the risk team, and the individual portfolio managers. A good part of BlueCrest's consistent track record of performance can be attributed to its careful risk monitoring and swift and decisive steps when risk thresholds are exceeded.

101. It operates a tight "stop-loss" policy which is monitored by the risk team on a daily basis. Portfolio managers are aware of the stop-loss guidelines which kick in if annual performance reaches -5% of portfolio manager's capital allocation. That percentage has varied during the relevant years.

102. If the stop-loss limit is hit, a number of decisions need to be made including: whether the portfolio manager should continue to manage the risk; whether the manager should be dismissed; who should take responsibility for that manager's position; and what should be done with that risk.

103. Whilst risk policy guidelines are set by Group ExCo, discussions regarding risk took place on a regular basis between portfolio managers (amongst themselves) and with members of the risk team who might sit, physically, close to those portfolio managers. Generally speaking, there was, and is, considerable discussion and sharing of information between portfolio managers and it was in everyone's interests to do this not just to bring on the junior members of staff but also to disseminate information to help to protect them from making mistakes. By doing this, issues which could blow up into significant ones were forestalled. The risks were heightened by the fact that a portfolio manager's position was not limited to actual cash, but was geared, meaning that whilst returns were greater, the risks were too, since a trader could lose money which was not backed by assets of the firm.

104. A portfolio manager's relationship with a counterparty, such as a bank, is essential to the manager's ability to trade profitably and effectively. BlueCrest has multiple points of contact with counterparties ranging from high level strategic contacts between Mike Platt at the top, down to the more operational relationships of the portfolio managers with their operational counterparties. If such relationships were going sour, then it was up to the portfolio manager to sort out, but there were relationship managers, and more senior management, who might step in to assist. It was also important for a portfolio manager not to sour the relationship with a counterparty which might impact on other portfolio managers' ability to trade with that counterparty. Mr Moore cited an example of when he had overheard conversations with a counterparty with which he did not approve of, and made his displeasure known to those colleagues.

105. These counterparty relationships were built up, originally, by Mike Platt, but Mr Cox's evidence was that they currently have a relationship with over 300 different trading counterparties and Mike Platt does not have a relationship with all of those. He has a relationship with only the top six or eight with whom regular meetings are set up with senior representatives of those banks but the remaining 290 counterparties are managed at a lower level by himself, by relationship managers, by desk heads, and by the portfolio managers. Mr Cox probably meets counterparties three or four times a year, the relationship manager about eight or nine times a year, and portfolio managers on a daily basis.

106. BlueCrest takes leverage in a number of different forms. Mr Cox gave an example of where, in October 2021, the Fund lost nearly $500 million in a very short period of time and made the point that BlueCrest does not get infinite leverage. And so the impact of losing this money was significant and had it lost the same again, the Fund would have been insolvent.

107. If a portfolio manager wants to invest in a new product or market or to engage with a new counterparty, the proposal will typically be reviewed by the new product committee in the first instance. If the request clearly fits within the Fund's overall approach/strategy this might be approved by the new product committee. Other requests will be passed to Group ExCo to review, decide on permitted investments, the level of exposure to any new areas, and the identity of the portfolio managers who can invest in the new product or operate in the new market. A decision on what to escalate to Group ExCo is a judgment call for the desk heads and Mr Cox.

108. In his first witness statement, Mr Cox stated that the appellant manages its affairs in an informal way and the partners are not asked to provide their views by vote or even a formal meeting. However, people will always make their views known on anything they feel strongly about. In cross examination he went on to indicate that this did not mean that the formal decision-making process was bypassed or ignored, but it might be truncated a little in order to take advantage of the perceived opportunity or in order to avoid a perceived danger. He said that the governance of the appellant is managed more through informal groups feeding into UK ExCo and then into Group ExCo. He gave the example of buying and selling assets relating to the Ukraine and Russia. The appellant did not wait for a formal governance committee in order to discuss that because market opportunities and market risks happen in real time. The new product committee would not be bypassed if this required a new product, and it may well be escalated, very quickly, to Mike Platt and it would then come to a view as to the scale of permitted activity. But even though the governance process is reasonably informal, ultimately, the formal governance structure is respected.

109. He also explained that when it came to recruitment, the pace was a great deal slower in 2014 than as at present. In the former period Group ExCo could be much more involved in pre-approval than during the latter. In 2021 the appellant hired over 35 new portfolio managers, the recruitment of many of whom were ratified post event by Group ExCo. But during the relevant years Group ExCo was involved in its pre-approval role.

110. In a five day period in March 2020, the Fund lost over $850 million out of a cash reserve of about $1 billion. If the US Federal Reserve had not intervened over the course of the weekend, the Fund would have been in real financial difficulty on the following Monday.

111. The Fund also faces commercial risk. For example, in December 2020 the General Partner entered into a $170 million "no admit no deny" settlement with the US Securities and Exchange Commission.

112. As well as the risk which impacts on the Fund, the appellant also faces investment and commercial risks (which are intended to be managed by the stop-loss provisions and value at risk limits). These include counterparty credit risks (refusing to trade or seeking to change the terms of trade) and counterparty margin credit risks. Commercial risks include an ultimately adverse decision in this appeal as well as a £40 million fine (subject to appeal) visited on the appellant by the FCA.

The April 2014 resolutions

113. When the salaried members rules were proposed by HMRC, the draft legislation and guidance were reviewed by Miss Kerridge and her tax team and she also consulted Ernst & Young on its interpretation. This resulted in a tax department paper prepared for UK ExCo. When discussing the application of Condition A to the discretionary allocations, that paper states:

> "We have been advised that this requirement should be met if after calculating all of the partners' discretionary profit allocation, using the methods that have historically been used, the total of all of these allocations is compared against the profits of [the appellant] to determine whether there is sufficient profit to fund the aggregate of all of the discretionary allocations.
>
> It is therefore recommended that the ExCo confirm that its policy is that future profit allocations will be referenced to the total profits of [the appellant] and if there is a year

> when the total profits of [the appellant] were not sufficient to fund the discretionary profit allocations these allocations would be reduced accordingly. It would be preferable for this reduction to be effected pro rata across all discretionary allocations, rather than by reduction of some partners' discretionary allocations in priority to others. In such a case the profits should not be increased through an amendment to the transfer pricing policy or through some other means to ensure that there are sufficient profits to fund the profit allocations."

114. That tax paper was considered by UK ExCo at a meeting held on 3 April 2014. It resolved to recommend to the Board of the Partnership that "a) it reaffirm the fact that it would not make discretionary allocations in excess of profits available the purpose; b) in the event that discretionary allocations did exceed available profits then such allocations would be reduced; and c) the Partnership would not seek to artificially increase the amount of profits available for allocation to ensure compliance with b)".

115. The Board accepted this recommendation and by way of a written resolution dated 3 April 2014:

(1) Noted, inter alia, that pursuant to the LLP agreement the Board is entitled to allocate income profits in any year as it may in its absolute discretion determine; that in certain circumstances it is possible for the Board to make allocations which might in aggregate exceed the total amount of profit available in a given year; and that the availability of unallocated profits is taken into account by the Board when determining potential allocations.

(2) Resolved that future discretionary allocation of income profits in accordance with the LLP Agreement dated 22 March 2011 should not exceed in aggregate total profits available for that purpose for a given year; in the event that the proposed allocations exceed those total profits, the Board shall reduce the amount of such allocations accordingly; and the appellant should not seek to enter into any arrangement with the express purpose of increasing the profits available for the preceding purpose.

116. In her evidence, Miss Kerridge's position was that she did not consider this "cap" to be new but it simply confirmed existing policy and accepted that the recommendation in the tax paper and by the UK ExCo had been made to "bolster" the argument that the salaried members legislation would not apply to the appellant.

UK ExCo and other committees

117. The various committees were established mainly in April and May 2012, although the valuation committee was established in May 2014 and the regulatory affairs committee in July 2014. I was provided with a document which purports to be terms of reference for UK ExCo but turned out on examination to be the terms of reference for the operational risk committee. These terms of reference are, broadly speaking, in a common form and many include, under the heading "purpose" the following:

> "[UK Exco] and [Group Exco] (together "the Exco's") are responsible for the systems of internal controls and for managing the risks associated with the business and markets within which each entity operates. [The lead investment manager] has outsourced to [the appellant] the following support services: operations, product control, risk management, position valuing, legal, compliance, investor relations and human resources services."

118. The terms of reference then go on to identify the core responsibilities delegated by the ExCo's to that particular committee together with the committee's duties, authority and reporting obligations. So, for example, the terms of reference for the regulatory affairs committee identifies its purpose as being to consider a number of matters including FSA and other regulatory visits, global regulatory developments, resourcing for compliance, resourcing for growing regulatory reporting requirements, issues relating to bribery corruption and money-laundering. Its duties include reviewing and improving compliance monitoring plans and policies, approve resourcing for compliance, consider responses to regulatory requirements and regulatory risks as they arise.

119. The minutes of the meetings of these committees demonstrate, generally, that they received reports from individuals, reviewed those reports and then undertook some action on the back of that review. Generally that action was undertaken by the individual presenting the report. Interestingly, in the minutes of the operational risk committee of 26 June 2014, concerning the backup data centre move, the individual providing the report was to produce a six week plan detailing critical timings of potential risks which will be presented to the operational risk attendees and "tabled at the next Group ExCo for approval of proposed action plan".

120. The minutes of UK ExCo meetings illustrate how these committees reported to UK ExCo. These minutes, which were not the minutes for the meetings which dealt with profit allocation where the meetings were simply called, as I see it, to consider and approve the provisional allocations, follow a reasonably standard format. They record under that under the LLP agreement, its members have appointed UK ExCo to assist the Board in various strategic matters relating to the appellant which are set out in more detail at clause 14.11 of the LLP Agreement. There were then a number of reasonably standard headings namely Product Control, Operations, Market Risk, Financing, Management Accounts, Liquidity and Collateral, Technology, Compliance, Mandates & Projects and Human Resources. The meetings were largely chaired by Mr Cox and attended by the heads of the various departments such as product control, new business, financing & counterparty credit, operations, HR, compliance, risk technology, risk, legal and IT.

121. The minutes of the UK ExCo which dealt, specifically, with profit allocation, are also in reasonably standard form. In each case it appears that a schedule of proposed allocations to each member was tabled. In each case it was noted that the calculations had been carried out in accordance with clause 10.3 of the LLP Agreement and following discussion it was resolved that the final allocations should be in accordance with the provisional allocations set out in the schedule.

Heads of Department and back-office services

122. Miss Kerridge's evidence was that the back-office is made up of the departments needed to run the Group's business including the day-to-day running of the processes necessary to support the investment managers, product control, technology, facilities, legal, compliance, finance and tax. Only the most senior personnel, being the department heads and others of similar seniority are members of the appellant. The department heads are responsible for providing the relevant services, hiring, performance review and terminations of the employed staff, setting policy and procedures, and all matters required for the efficient provision of the relevant services. Others, such as senior members of the legal team are responsible for business critical matters such as advising on the law relating to derivative transactions and advising senior management on strategy and both new and existing business initiatives.

Mike Platt

123. Mike Platt is the Chief Executive Officer and Chief Investment Officer of the General Partner. He established the appellant in January 2000 and is both the founder and principal investor in the Fund.

124. His role, in these capacities, is to, set the overall investment strategy for the Group; ensure that the Fund maintains appropriate cash and liquidity levels; recommend cash should be invested or divested from the Fund; take decisive actions and provide clear direction to help mitigate macro economic events which will affect the return of the Fund; identify risk areas and decide on the Fund's investment strategies.

125. Mike Platt and Andrew Dodd are ultimately the primary investors in the Fund, which forms part of their overall investment strategy, such strategy including investments in other funds outside the Group. However, it is Group ExCo which decides on all changes to the Group's overarching investment strategy including moving into and out of a particular strategy and setting of risk preferences. And that is the vehicle through which Mike Platt would change investment strategy.

126. Since taking the Fund private, it has a greater appetite for risk than was the case when there were a number of external investors. This greater appetite for risk is reflected by the increased use of leverage, and because of this above average leverage, risk management and the quality of risk management is very important.

127. BlueCrest has a portfolio of 60,000 positions. Mike Platt cannot oversee or make decisions on all of these. A lot of management decisions therefore are managed at a local level by portfolio managers, desk heads, and UK ExCo. But when things are escalated to him, he would take guidance and counsel from his trusted teams. In some cases he may disagree with that guidance but it is does not mean he does not ask people's opinion. He talks to traders and desk heads directly on trading strategies.

128. Mike Platt's involvement in various organisational, operational and managerial aspects of the Group is set out above. His role, however, was eloquently explained by Mr Moore in cross examination when he said this:

> "Q…So the PMs have freedom within the parameters set by and monitored by, ultimately, Group ExCo, Mike Platt, Andrew Dodd, yes?
>
> A. Well, Mike represents -- particularly Mike, partly Andrew -- represents an unusual situation in the relationship with the firm. So historically we took external money and ultimately we were providing a service to the external customers, trying to generate a return on their money subject to criteria that we'd agreed at the outset, the level of risk, the type of products, and the general profile of the operation. The thing that is slightly different now, and perhaps the only thing that really has changed in some ways since we took the firm private, is that essentially we have one investor now, and instead of having to have a static mandate, because it would be very difficult to constantly renegotiate your mandate of what you're trying to achieve as an investment vehicle, to be constantly negotiating that as a firm with a series of -- hundreds of clients simultaneously would be next to impossible. But now we have one client. Essentially we have one client, which is Mike. So he is the CEO, he's the CIO, but he is also the client. And ultimately if his objectives change, and the things that he thinks we should be focusing on and trying to -- and the way in which we should be trying to ultimately service his money -- which is

what we're doing, we're providing, you know, trying to provide a service for his investments -- he's able to move the goalposts. I mean that's possible because of the particular structure where we essentially have one client. So he's many things. He is the investor. And I guess you couldn't -- when you have 200 investors they're never going to be of one voice and they're not going to be able to express their opinion or move the targets in that way. But when you have one investor essentially, they can -- he can. So he does. If he changes his mind or has a strong opinion then obviously, needless to say he's something of an expert, he expresses that.

Q. Okay. But it's not just the way things are structured, as we've seen in the Fact Paper. Decisions regularly go up the chain from you, desk head, Group ExCo, ultimately Mike. That's how it's structured. It's not just a matter of a client expressing a strong view; it's structured so that, colloquially, the buck stops with -- well, in several senses the buck stops with him.

A. Well, he's the top of the organisation. But that doesn't mean -- you know, the head of the Civil Service doesn't sort out my local parking permit. He doesn't make every decision but ultimately of course he can veto a decision if he chooses to get involved.

Q. Well, he does make decisions, doesn't he. He decides whether to move into –

A. No, I said he doesn't make every decision, but ultimately he can choose to get involved in any particular topic."

SUBMISSIONS

129. Mrs Hardy submitted, in summary, as follows:

(1) The salaried member rules are, as identified in HMRC's publications, intended to remove the presumption of self-employment for some LLP members in order to tackle the disguising of employment relationships through LLPs. They apply to those members who are more like employees than partners in a traditional partnership. This is not the case with the individual members of the appellant. It is not a situation where there was an attempt to disguise salary. The individual members of BlueCrest carry out the role of a partner in a general partnership.

(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 a member's (M) 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.

(3) The discretionary allocation of profits to the individual members, whether they are calculated by reference to the headline percentage as in the case of portfolio managers or arrived at on the recommendation of the remuneration committee in respect of the infrastructure

partners, are not fixed but are variable by reference to the profits or, more relevantly, losses of the appellant and are in practice affected by the profitability of the appellant.

(4) In nearly every year, the arrangements in place for members' remuneration made it reasonable to expect that at least 20% of what was received by each of the individual members would be made up of discretionary allocations, together with the agreed income points allocations.

(5) Given the purpose for which Parliament enacted the salaried member rules, it cannot be right to strain the construction to catch members of the appellant who are its senior figures, in a position akin to partners in a conventional partnership, and indeed who were, or whose predecessors were, partners when the appellant's business was carried out by a conventional partnership.

(6) The oral and documentary evidence shows that the portfolio managers were remunerated by reference to a proportion of their allocation of capital less costs, but subject always to the discretion of the Board, the availability of profits for the year in question, and the impact of losses on the financial position of the appellant. The oral and documentary evidence regarding non-portfolio managers shows the same. The overall financial position of the business was a factor which was considered when remunerated such members.

(7) The Fund faced considerable risks identified in the evidence, for example, during the early days of the Covid pandemic, the losses identified at [110] above. There were also considerable risks to the operation of the appellant, some of which were internal and could be managed by way of stop-loss arrangements. Some of which were external and difficult to manage such as a cyber-attack, an unexpected regulatory fine, or the impact of losing these appeals. HMRC's position, which appears to be that because these risks had no material impact on the profitability of the business, they should be disregarded, is misconceived. It ignores the evidence of the presence of those risks. Given the prospective application of Condition A, the prospect of genuine risks to the profitability of the appellant is the only way the test can sensibly be applied.

(8) The evidence shows that if the profits at the end of the year were insufficient to cover the discretionary allocations, those would be abated or would not be paid in full.

(9) Each portfolio manager's financial position was affected by the performance of other portfolio managers in that, although ostensibly siloed, underperformance by one or a group of portfolio managers would affect the overall profitability of the appellant which in turn would affect the profits available for distribution against which the individual member's discretionary allocation was initially and then finally tested.

(10) The evidence shows that the portfolio managers did not consider that their discretionary allocations were something to which they were contractually entitled but depended on the overall profitability of the business. The LLP Agreement confirms this. The discretionary allocation is just that, and if, in respect of portfolio managers there are insufficient profits to pay the amounts calculated in accordance with the percentage of capital allocation, then they would not get paid in accordance with that formula.

(11) The expression "is varied" in limb (b) does not require the appellant to show that, in any year, the profit allocated to an individual member was actually varied. All the appellant needs to show is that the amount is capable of variation with reference to the overall amount of the profits or losses. There is no requirement to "track" the overall profits and losses such that if

the overall profits are greater in one year than the previous year, there has to be a greater share of the profit earned by an individual member in the later year. Mr Vallat used a number of expressions such as "link" or "sufficient link" or "link of the right sort" to explain the relationship between the variable amounts, and the relationship to the overall profits and losses. These are no substitute for the statutory definition.

(12) The legislation must be construed purposively, and it cannot be right that any profitable partnership satisfies Condition A. The appellant has been well managed and has made a profit in each of the relevant years. It should not be prejudiced by this.

(13) Taxing statutes draw their lifeblood from real-world transactions with real-world economic effects. The real-world transactions here involve payments, to the individual members, of variable remuneration determined by reference to and affected by the losses of the appellant. As regards limb (c), and in the context of the foregoing purposive construction, the words "affected" and "in practice" denote something different from the test in limb (b). The words "in practice" are intended to exclude situations where there is, in reality, no chance of the members of an LLP being remunerated other than in a fixed manner, despite the provisions of the governing documentation which ostensibly provides for variability. In the case of this appeal, the individual members' remuneration is, in reality, affected by its profitability. The evidence shows that the appellant might in any given year make a significant loss in which case there would be a direct impact on the members' remuneration. This is in contrast to an arrangement for remuneration which was unrelated, on a realistic view of the facts, to the profitability of an LLP.

(14) As to the application of the anti-avoidance legislation, the evidence shows that the April 2014 resolutions simply regularised the pre-existing position, namely that the appellant could not distribute profits of an amount greater than it made in a financial year.

(15) 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.

(16) Testing significant influence is not just a question of voting rights. It requires a realistic view of the facts. This must be right in the context of purposive interpretation, and is accepted by HMRC in their explanatory notes of March 2014. Nor is significant influence limited solely to managerial influence. It can include financial influence. Furthermore, affairs of the partnership does not mean affairs of the partnership generally. Significant influence can be over one or more aspects of the affairs of the partnership.

(17) Influence is not defined in the statute and so bears its ordinary meaning. Case law does not assist. It has been defined as "the power to have an effect on people or things", or "had an impact on". It should be construed in the context of the purpose of the legislation namely to prevent the avoidance of employment taxes by people who did not have the power to have a significant effect impact on an LLP's affairs. It does not ask who is in control of every aspect of an LLP. "Significant" is not defined either. A helpful starting point might be "of considerable amount or effect or importance". Whatever the threshold, however, it is surpassed by the individual members of the appellant.

(18) Key investment decisions are taken by the portfolio managers on a daily basis. They also discuss the organisational and operational aspects of the business which is fed in, via desk heads, to UK ExCo, and to the Board, and influences the organisational and operational affairs of the appellant even though no formal vote might be taken in relation to the views of those

members. This ongoing dialogue fulfilled the Board's obligations under clause 14.1 of the LLP Agreement. Given these informal discussions, it is unsurprising that there are no documents, such as minutes reflecting them. Furthermore, this form of management was essential in a fast moving business such as that undertaken by the appellant. The evidence shows that many of these decisions were, in fact, signed off by UK ExCo, which was important for regulatory and legal reasons.

(19) Portfolio managers are involved in managing counterparty relationships, hiring other portfolio managers, and were consulted in respect of a potential office move. It is notable that one portfolio manager might affect a counterparty relationship to the detriment of another portfolio manager or to the detriment of the appellant's business as a whole.

(20) Given that the main reason for its existence is for the appellant to make money, then portfolio managers, both individually and as a class, have a significant influence over that aspect of the appellant's business. In simple terms, those with larger capital allocations are likely to make more money for the appellant. Those portfolio managers with greater capital allocations, and thus greater experience in the fund management business also carry greater weight in discussions regarding operational and organisational issues.

(21) HMRC appear to accept, in the context of financial services, that an individual who was authorised by the FCA and holds Controlled Function CF4 (which is the case for portfolio managers for the relevant years) wields significant influence; see section 2.5.3 of HMRC's explanatory notes of March 2014. Furthermore, section 2.5.2 of those notes sets out a number of examples of the kind of decisions which might be involved in evidencing significant influence in appropriate cases. This includes: appointment of new members; deciding where the firm conducts its business; deciding the firm's areas of business; strategic decisions; appointment of key personnel; management of key contracts; decisions on important financial commitments; approving major new investments; and formulating the firm's business plan. The appellant submits that the evidence shows that the portfolio managers and the non-portfolio managers exhibit, to some degree, elements of these characteristics.

(22) In summary, the appellant's primary case is that, on a proper understanding of the appellant's affairs, and the rights and duties of the members, all portfolio manager members of the appellant with a capital allocation of $100 million or more exercise significant influence over its affairs because they have autonomous influence over the key purpose of the appellant; and all infrastructure members exercise significant influence over its affairs because they run departments which are essential to supporting the key purpose of the appellant and to delivering support services to the rest of the Group.

(23) The affairs of the appellant must be considered in the context of it being a sub-investment manager and must be distinguished from the affairs of the wider Group. The appellant exists to generate returns for the Fund and to generate both investment fees for itself and to offer support to other parts of the Group in their endeavours to generate returns for the Fund. The appellant therefore undertakes its affairs successfully when, through its investment management activities undertaken by the portfolio managers, it generates profits for the Fund. It undertakes its affairs unsuccessfully when it generates losses for the Fund.

(24) Given that the appellant is part of the Group, it is unsurprising that both Group ExCo and Mike Platt make decisions which affect the appellant. But these strategic decisions made by Group ExCo and Mike Platt do not detract from the influence of the portfolio managers and the non-portfolio managers on the affairs of the appellant. The appellant is a "team effort" and

no one has dominant influence over it. HMRC appear to accept that it is possible for more than one person to exercise significant influence yet failed to apply that in practice in the context of this appeal. One needs to consider the affairs of the appellant itself and how it conducts those affairs within the Group. Simply because Group ExCo signs off a trading strategy which involves trading a new commodity, does not mean that those who have been instrumental in bringing the proposal to Group ExCo have not had a significant influence. If HMRC are correct, then it suggests that only a managing partner in a conventional professional services firm exerts significant influence and Parliament cannot have intended this to be the case given the stated intention behind the legislation. Partners in an LLP law firm who determine the strategy and operational regime of a department rather than of the overall firm, and who in a conventional partnership would clearly be treated as partners rather than employees, should be treated as exercising significant influence.

(25) And Parliament cannot have intended to penalise members of an LLP such that they satisfy Condition B if an LLP with 20 members, all of whom exercise significant influence, delegate executive operation of the LLP to a management board. HMRC's position seems to be that in those circumstances, by dint of such delegation, the members relinquished their significant influence and it would only be those members of the management board (or perhaps the managing partner) who exercises such influence. That cannot be right.

(26) Nor is it satisfactory that members of an LLP, which operates an eat what you kill strategy and which has delegated executive powers to a management board, can only escape the salaried member rules by failing Condition C. Each of these Conditions must be interpreted in the context of the mischief which they are designed to defeat. In the case of this appellant, there is no attempt to disguise remuneration which "should" have been paid as salary, as profit.

(27) The evidence shows that employees were promoted to membership when they acquire significant influence. The appellant's policy was to appoint to its membership only portfolio managers with sufficiently high capital allocations to wield significant influence. The evidence of Mr Cox is that individuals with capital allocations of less than $100 million are likely to be employees, and that they were made up to be members once they have demonstrated the qualities necessary to warrant a capital allocation of $100 million or more. Mr Cox could think of no examples where an employee was responsible for deployment of capital of more than $100 million.

(28) Portfolio managers had significant influence, as evidenced by the importance given to their views in identifying and implementing new trading strategies and products.

(29) It is not enough, she accepts, for the portfolio managers as a class to exercise significant influence. She has to show that each particular portfolio manager exercises significant influence. However, even if HMRC are correct and it must be significant influence over the affairs of the partnership generally, it is her submission that each individual portfolio manager does exercise such significant influence. The decisions made by one portfolio manager will have a knock-on effect on others, both managerially (see above re counterparties) and financially (losses made by one portfolio manager will have an effect on the overall profits of the business). Bad investment decisions can lead to a flight of capital. The book of a dismissed portfolio manager must be dealt with by remaining portfolio managers.

(30) Desk heads had a significant influence in the same way as other portfolio managers but additionally through their role in liaising both with group management in respect of the

performance of the portfolio managers on their desks, and in determining capital allocations for those portfolio managers. Furthermore, they played a fundamental role in recruitment.

(31) Infrastructure partners had significant influence in departments in managerial oversight, whose performance impacted on the affairs of the appellant (for example the crucial roles of members responsible for risk compliance and legal matters). They had significant influence in hiring members and employees in their specific areas and had significant influence over the general managerial input into the affairs of the appellant. The senior members of the departments offered support services both to the appellant and to the wider Group. Their role was to facilitate the portfolio managers' conduct of the business and was critical to that. Certain members who were not members of UK ExCo, nor heads of departments, also had equivalent levels of influence to the infrastructure partners. The lines are not bright ones, as evidenced by Miss Kerridge's testimony.

(32) The members of UK ExCo had influence in all the same ways as other infrastructure partners and additionally they had significant influence through their role in taking delegated Board decisions. Although the influence test is not a management or control test, members with a management role in the appellant exerted significant influence over its affairs. There is no justification for differentiating members who joined the UK ExCo in 2016, and the Original ExCo.

(33) Whilst influence over the appellant's affairs is not principally exerted through committee membership, the terms of reference for the committees and their minutes, neither of which were challenged, demonstrate the matters discussed and scope of the committees. It is submitted that the members of each committee therefore exert significant influence over the whole affairs of the appellant.

(34) The facts paper prepared by PwC (the "**facts paper**") should be seen in context and oral evidence adduced in this appeal should carry more weight if it conflicts with that paper. Furthermore, Mr Vallat's criticisms of evidence given by Mr Cox and its reliability should be disregarded. His assertion that other witnesses of fact made submissions rather than facts was not correct.

(35) HMRC are seeking to cast the net of this legislation far more widely than Parliament had intended and their interpretation will catch many individuals who are carrying out a traditional partnership role. The purpose of this legislation was not to extend the scope of PAYE and NICs to traditional partners. Furthermore, there is no justification for suggesting that simply because an individual is performing his/her job, his/her influence should not be taken into account. It begs the question of whether, in doing that job, he/she has significant influence. Moreover, HMRC accept that an individual who has no apparent role in the management of the business may wield considerable influence if on a realistic view of the facts, members defer to the view of that individual. Significant influence is a soft test and does not mean management and control. It is not limited solely to management but includes financial influence.

130. In summary, Mr Vallat submitted as follows:

(1) In broad terms the salaried members legislation is aimed at circumstances where the relationship between an LLP and its member is more like an employment relationship. Its purpose is to distinguish between members whose position is like that of a partner in a traditional partnership and those who are playing the role of employees.

(2) The facts paper sets out facts which should be true in any circumstances and, in any event, many of the facts contained in it were confirmed by witness evidence.

(3) The three Conditions must be applied to each individual member but I might be able to determine the application of those Conditions by reference to categories or subcategories of the individual members. I am asked to make a decision in principle, leaving the parties to seek to agree the figures.

(4) Arguments based on the application of HMRC's guidance should be dealt with in the judicial review proceedings which are on hold pending the outcome of this appeal.

(5) HMRC's position is that in respect of the portfolio managers the discretionary allocations are disguised salary, and that in relation to the other relevant members, the appellant has not demonstrated that the discretionary allocations are not disguised salary. The burden of proof is on the appellant and evidential gaps cannot be filled by assertions.

(6) As regards Condition A, the portfolio managers each have a hypothetical individual profit and loss account which shows the performance of their own capital allocation to which a headline percentage is then applied to calculate the discretionary allocation. So those discretionary allocations vary by reference to an individual's profit and loss account and not by reference to the overall amount of the profits and losses of the appellant. They vary by reference to individual performance and the performance of particular parts of the business. Discretionary allocations are not a share of the overall profits. The application of a cap by reference to the total profits does not mean that the discretionary allocations are varied by reference to the overall amount of profits and losses.

(7) There has to be a link, a sufficient link, a material link, between the firm's profits and losses and the rewards of the members. The expression "varied without reference to the overall profits or losses" means to him that it is variable by some other factor or by reference to some other factor or factors. The weight of that clause is on the type of variation whether or not there is actually a variation.

(8) The Variable Remuneration Approval Process document links remuneration of both portfolio managers and non-portfolio managers to the financial performance of the appellant but there is no clear link between remuneration and the profits and losses of the appellant. Furthermore, the most that can be said about BlueCrest's level of profit is that it is one of the factors in determining financial performance and it is taken into account in setting the pool from which individual bonuses are paid. But the evidence does not establish any link between individual bonuses and that firm level profit. There is no evidence that the profitability of the appellant actually made any difference to anyone whose pay has been put forward in evidence in this appeal. It is for the appellant to prove what effect the profits had on pay to a member, and it has not done that. We are concerned about the real world and in that real world the appellant has always been profitable; no one's bonus was reduced by reference to any loss; and in that real world it is unrealistic to suggest that there were going to be insufficient profits to pay the bonuses. There is no part or no meaningful part of any individual member's pay which has been shown to be linked to the profits and losses of the firm, and even if one could show some sort of theoretical variation with reference to the profits and losses, one does not see any effect in practice on those payments. We do not really know what would happen if there were insufficient profits to pay the discretionary allocations even though there has been some suggestion of scaling back. The scaling back is simply a business risk and not a variation.

(9) When construing limb (c) it cannot be right, as the appellant argues, that the disguised salary must be wholly divorced from and unaffected by the profitability of the LLP as a whole. The clear purpose of this limb is to distinguish between payments that are in practice set by reference to overall profits and therefore change annually as profits vary, and those where, even if there is a theoretical link to profits, the link has no effect in practice.

(10) The number of income points allocated to individual members was small, the vast majority being allocated to corporate partners. Any abatement, therefore, of the profits arising from an unforeseen loss would impact first on those partners rather than on the individuals through their discretionary allocations. It is noteworthy that the LLP Agreement apportions all losses to the corporate members so that the individual members do not share in those losses.

(11) Portfolio managers might make an individual loss notwithstanding that the appellant makes an overall profit, and those portfolio managers would not receive anything more than their priority distribution.

(12) For non-portfolio managers, the discretionary allocations varied significantly during the relevant years and there was no correlation between those allocations and the overall profits of the appellant. For example, for Mr Cox, his bonus in 2015 was substantially higher than his bonus in 2014, despite the decrease in the appellant's profits.

(13) The evidence shows that the judgmental process for awarding discretionary allocations to non-portfolio managers demonstrates that whilst the overall performance of the appellant may have been a factor, it was not a dominant one. More important was the need to motivate and retain members of staff taking into account their performance against objectives and what they might be paid by others in the market. The overall performance of the appellant was relevant only in the same way that it would be relevant for an entity determining its employee bonus pool.

(14) Although the appellant has sought to demonstrate that it faced risks and could make a loss which would prevent it from paying the discretionary allocations, that has never happened in practice. The appellant has been profitable in each of the relevant years. If the Fund suffers a loss, then the appellant will still be paid investment management fees by dint of the management fee which reflects the value of the Fund under management. It will also receive income from the services it supplies to the other Group members. If there is a catastrophic scenario and the Fund fails completely, that might result in the end of the appellant. But such a catastrophic scenario cannot be the basis on which the legislation is to be properly analysed and applied. Any LLP is at risk of making a loss and not having profits available for distribution, and it cannot be right that the salaried members rules are disapplied as a result of that possibility alone. The risks identified by the evidence have not stopped the appellant from being profitable and indeed the appellant invests in people and systems to minimise those risks.

(15) Condition A is also a look forward test and what might happen after the event is less important or relevant as what one would expect to happen looking forward. One needs to ask about what one would expect to happen in relatively normal circumstances and not what would happen in unusual or catastrophic circumstances. No one in any of the years in question reasonably expected those circumstances to have wiped out the appellant. Their possibility has never had any effect in practice on anyone's remuneration. And looking forward, one needs also to consider the background that this has been a successful business with tight risk management in place and notwithstanding some of the financial issues identified by Mr Cox,

the appellant survived those issues and continued to make large profits for itself and its members.

(16) The question of what might happen if profits are insufficient to pay bonuses, or the discretionary allocation, whilst the appellant is still profitable overall, is a matter of speculation.

(17) If the cap imposed by the resolutions made in April 2014, namely that the appellant would not make discretionary allocations in excess of profits available for the purpose, does have an application on the impact of the salaried members rules, then the evidence suggests that the resolutions were arrangements which had the purpose of securing that they do not apply. The evidence from Miss Kerridge is that the only reason they were put in place was because of the imposition of the salaried members legislation.

(18) As regards Condition B, Mr Vallat submits that this condition looks to whether a member has significant influence over the affairs of the appellant generally, looking at the business of the appellant as a whole. This is similar to the position of a partner in a normal partnership, where the partners are together responsible for the running of the business generally. In particular, he submits that it is not sufficient to have a significant influence over one aspect of the business or one department. This does not involve reading in additional words or limitations. Instead, it is a natural interpretation of the words "significant influence over the affairs of the partnership". The affairs of the partnership are its affairs generally, not individual aspects or departments of the business. This condition looks at significant managerial influence. If a member generates large earnings, that is not enough. Those earnings need to be translated into "managerial clout".

(19) One cannot look at a class of membership and see whether that class, together, has significant influence. One has to look at each individual member and ask whether that member has significant influence.

(20) In this case, it is also necessary to consider the influence and control which is "external" to the appellant given that it is part of a wider group. Given the overarching responsibility and power of Group ExCo and Mike Platt, there is no room for others (beyond a few individuals such as Mr Dodd) to have significant influence.

(21) The evidence shows that the Board, which is given ultimate responsibility for the management of the appellant by dint of the LLP Agreement, was not really involved in the day-to-day running of the appellant. UK ExCo feeds up to, and is subordinate to, Group ExCo. The minutes of UK ExCo suggest that it is focused on providing updates and reports rather than making active decisions (beyond ratification of capital allocations which in any event are approved by Group ExCo). UK ExCo is subordinate to Group ExCo, and the scope of Group ExCo's power does not appear to leave room for significant influence to be exercised at UK ExCo level. The appellant is an entity which is designed to sit within the wider Group structure, and to provide services which feed into the overall aims of the Fund. Its business can only be viewed properly within the context of the Group. It is, in effect, a captive LLP.

(22) The appellant's committees are subordinate to both Group ExCo and UK ExCo and significant influence is not exercised at this level. Their roles are largely reporting, reviewing and monitoring. For those committees which do make decisions or improve matters, significant or strategic matters are escalated to Group ExCo and Mike Platt. Furthermore, these committees are concerned with specific aspects of the appellant's business rather than its affairs overall.

(23) As far as the positions identified in Appendix 3 are concerned, the appellant's position seems to be that for those in the front or middle office, significant influence arises from their potential to have financial impact due to their contribution to the investment management services; and for those on committees, and in particular those on UK ExCo from their roles on those committees. HMRC's position is that the ability to have a financial impact (even a significant one) on the appellant is not part of the test. For the UK ExCo attendees (and subsequent members), HMRC's submission is that UK ExCo is subordinate to Group ExCo and the evidence provided does not demonstrate that any individual exercises significant influence. The same applies to membership of committees. These are subordinate to both UK ExCo and Group ExCo. No single committee can be seen as having significant influence and their roles generally involve monitoring, reviewing and reporting. Anything significant was escalated to UK ExCo and/or Group ExCo. The appellant has, furthermore, failed to explain how or why membership of UK ExCo, or of other committees, translates into meaningful influence on the management of the appellant.

(24) Group ExCo determined the Group's overarching investment strategy and high level strategic investment decisions are made by Group ExCo. And Mike Platt was the ultimate decision maker. Where a portfolio manager wished to trade a new product, that needed to be approved by the new products committee or even by Mike Platt and Group ExCo. Group ExCo reviewed and approved final capital allocations for each individual portfolio manager. Group ExCo had visibility over daily profit and loss accounts of each individual portfolio manager and was in regular contact with senior portfolio managers monitoring the positions that were taken. Monitoring the performance of portfolio managers might be taken by a desk head who would report to UK ExCo and onwards to Group ExCo who would then discuss, with the management of the appellant, how to deal with that portfolio manager (to retain, to reduce that individual's capital allocation, or to let go). Whilst portfolio managers might have been involved in recommending lateral hires, that would only take place within the overall strategy set by Mike Platt and Group ExCo, and that individual's capital allocation required approval by Group ExCo. Whilst individual portfolio managers have day-to-day relationships with individuals at counterparties, the important relationships were those which had been built up by Mike Platt, and which he continued to manage.

(25) The portfolio managers did not therefore exercise significant influence over the affairs of the appellant. One needs to identify a managerial influence rather than a financial influence. They do not exercise significant influence by virtue of their capital allocation (whatever the size of that allocation) or otherwise simply by virtue of their investment function or their contribution to the appellant's profits and losses. The dividing line of $100 million suggested by the appellant, above which a portfolio manager exercises significant influence, but below which he or she does not, is simply an arbitrary line. It is not clear who dreamt up this dividing line, but there was no explanation of how that $100 million translated into managerial influence. In any event, an individual portfolio managers' financial influence over the overall profits of the appellant, and his or her contribution thereto, was relatively small. The total capital allocations for the appellant were in the region of $15 billion. For Mr Moore, who was at the upper end of the capital allocations, his capital allocation was in the region of 3% of the total. This is notwithstanding that the portfolio managers clearly made, both collectively and individually, a lot of money for the firm.

(26) Investment decisions taken by portfolio managers in relation to their own capital allocation will have an impact on the financial position of the appellant but not significant influence over its affairs. The portfolio managers are subject to strict risk parameters and may only trade products which are approved and fit in with the strategy set by Mike Platt and Group

ExCo. Involvement from time to time in hiring portfolio managers does not amount to significant influence, particularly where such hires have been made within the overall strategy set by Group ExCo and capital allocations have to be approved by Group ExCo. This sort of involvement in recruitment is entirely consistent with what might be expected of an employee in any organisation. Day-to-day management of relationships with individuals at counterparties in the course of carrying on their roles as investment managers does not amount to significant influence, particularly when viewed within the framework of Mike Platt and the Group having ultimate responsibility for relationships with those counterparties. Being consulted on matters which affect all personnel (such as office moves) does not amount to significant influence. The activities undertaken by the portfolio managers is part of their ordinary investment management role within the parameters set for that. This is not significant influence.

(27) The foregoing activities undertaken by portfolio managers were, in any event, nothing more than portfolio managers carrying out their core roles. They are just part of a portfolio manager's job. A partner in a full services law firm who may be influential over the affairs of his or her particular department, but who is not influential over the affairs of the partnership as a whole, will fail the significant influence test. Importance to the business is not the same as significant influence. The issue is whether someone's position is properly analogous to a partner or to an employee.

(28) Notwithstanding the informal and flexible approach to management of the appellant undertaken by individual members, the appellant did not ignore or bypass the procedures set out in the LLP Agreement. It was not managed by the portfolio managers by dint of the conversations they had with other partners, but was managed by the Board (in consultation with UK ExCo) under the influence of Group ExCo.

DISCUSSION

131. Before considering the facts and the submissions of the parties, there are a number of preliminary issues to deal with. Firstly, I agree that the burden of proof of establishing that either Condition A or Condition B is not met, rests with the appellant. As I have said above, in order for the salaried member rules to apply, HMRC have to make out that all three of Conditions A, B, and C are met, and they have assessed the appellant on the basis that the first two have been met. Those assessments are contained in the Decisions, and in the usual way it is now for the appellant to displace those, the standard of proof being the balance of probabilities.

132. The appellant, however, only needs to show that either Condition A or Condition B is not met.

133. Secondly, I have treated Mr Cox as a reliable witness, and I do not accept Mr Vallat's suggestion that because he should have been able to give evidence in what Mr Vallat thought were his core areas of expertise, yet did not, that tainted the evidence that he gave in respect of other areas. Mr Cox sensibly deferred giving evidence which he thought would be better given by Miss Kerridge, to her. I see nothing wrong in this.

134. Finally, although the Facts Paper was prepared for a different purpose, it carries considerable evidential weight given that the witnesses were taken to it and much of its content was confirmed by them in oral testimony.

135. Turning first, then, to Condition A. This is a look forward test. One must consider at the beginning of the relevant period (in this case each relevant year) whether it is reasonable to

expect that (paraphrased) at least 80% of the individual members' remuneration is either fixed, or is variable but is capable of variation without reference to the overall profits or losses of the appellant, or is not in practice affected by the overall profits or losses.

136. It has been agreed that the priority distributions fall within this definition. The focus is on the discretionary allocations.

137. The expression in limb (b) "is variable, but is varied….." does not require the appellant to show that in every case there had been an initial allocation which had then been considered and actually varied once the overall profits and losses of the appellant had been determined. Whilst clearly that would be helpful evidence in favour of the appellant, all it has to do is establish that the amount of variable remuneration is capable of variation with reference to the appellant's overall profits and losses.

138. I agree with Mrs Hardy when she says that there is no need for the individual members' remuneration to "track" the appellant's overall profits and losses. By this I think she means that there is no need for the profits of the remuneration of the individual members to increase if the overall profits and losses of the partnership increase. One of Mr Vallat's points was that the evidence clearly shows (which it does) that the individual portfolio managers might make losses on their individual profit and loss accounts even if the appellant made an overall profit and even if other portfolio managers made a profit on their individual profit and loss accounts. But having agreed with her on this point, I also agree with Mr Vallat that the appellant must show that there is a link between an individual's remuneration on the one hand and the overall profits and losses on the other. And that link cannot simply be that if there were fewer profits available for distribution, an individual member would receive a lesser amount.

139. On the "tracking" point, I do not believe that Mr Vallat specifically disagreed with her assertion. And indeed, as HMRC's explanatory notes of 27 March 2014 suggests, HMRC accept that limb (b) can be satisfied where the profits of an LLP fall, but a member receives a larger share of the profit. In Example 25 where additional profit share units are awarded to a member part way through a year, based on their performance, HMRC say "to return to the cake analogy, their performance partly determines how large the slice is, but the actual amount of money depends on the size of the cake. An individual who receives a bigger slice of a smaller cake may have less cake than an individual receiving a thinner slice of a bigger cake." I take from this that HMRC agree that an individual whose profit share arrangements change so that they may have a lower share in a year in which the LLP does very well, and in which other LLP members might take a larger share, falls outside limb (b). I accept that the importance of these examples is more relevant to the judicial review proceedings, than to this appeal. But it does illustrate, and is consistent with, HMRC's submissions in this appeal.

140. But the difficulty faced by Mrs Hardy is that, whilst it is clear that the bonus of the portfolio managers varies, it varies by reference to their own personal performance. And although the initial bonus might then abate when the profits of the appellant are finally determined, and the overall total of those initial allocations is found to be equal to or greater than the accounting profit, she has not made out that the allocations are, essentially, variable and are computed by reference to, that overall profit. They are computed by reference to individual performance. There is no evidence that I have seen that the mechanism of computing the portfolio manager's bonus is intended to establish the share of the overall profits of the partnership to which the individual is entitled any more than computing an employee's bonus. Clearly there must be accounting profits to distribute, and equally clearly, if there are insufficient accounting profits to satisfy the bonuses, they will be abated in some way. But the

mechanism does not, in terms, entitle a portfolio manager to share in a proportion of the overall partnership profits. On the one hand, there is the individual's profit and loss account. On the other, there are the accounting profits of the partnership. But it seems to me that the first is calculated without reference to the variability of the second for the reasons I have given above.

141. Much has been made in this case about the risks which the appellant has faced and the possibility of catastrophic losses both at Fund level and at the level of the appellant itself. And that by dint of the possibility of these losses and by running these risks, the profitability of the appellant will vary and thus the individual members' remuneration will be affected by those risks by dint of that variation. I can see the force of this argument, and the relevance of the possibility of losses and the commercial risks run by the appellant in the context that Condition A is a look forward test. And so, if at the start of a relevant accounting period the appellant considered the likelihood of loss, or the significance of a financial risk, then those would have been relevant to the application of the Condition given that it will be a factor in assessing the proportion of the remuneration which might vary. But I am afraid I cannot see how it is relevant to the basis on which the profits of the partnership are distributed between its members.

142. The starting point for identifying the profits of the appellant is to find the accounting profits. This is what the LLP Agreement does. Any financial losses or risks which actually manifest themselves in an accounting period will, therefore, be taken into account when compiling the accounting profit. In colloquial parlance, these go in to making up the size of the cake, rather than deciding how it is then sliced. Condition A then looks at the criteria which must be met when determining how those profits are to be shared. If they are shared in such a way that they vary by reference to those profits, Condition A is not met. But that variability is tested against the evidence once the profits have been determined. Losses and risks which either theoretically or actually have affected the profit are not taken into account again when considering the basis of the distribution of that profit.

143. I accept the appellant's evidence that there have been times during the relevant years where it has faced significant financial risks. But they do not appear to have affected the attitude of the appellant towards the variable remuneration which it proposed to give to its individual members. The Covid pandemic was in no one's mind (nor was the fact that the appellant faced the possibility of a catastrophic loss over one weekend in March 2020) at the start of the 2020/21 accounting period and so it is unsurprising that it was not factored into the basis of the variable remuneration which was to be meted out to individual members for that financial year. But a more concrete example of a possible financial risk is the outcome of this appeal. When setting the parameters for the individual members' variable remuneration for the current financial year, the risks associated with losing this appeal would have been well known. Yet the evidence of Miss Kerridge was that no thought had been given as to how any variable remuneration would be affected by an adverse decision.

144. I do not accept, therefore, that the possibility of these losses or risks are, or as a matter of fact, were actually, relevant to the link between the variable remuneration on one hand and the overall profits and losses of the appellant, on the other. And for this reason too, I do not think that there is anything in Mrs Hardy's criticism of Mr Vallat's position that HMRC's interpretation penalises well-run partnerships which have comprehensive and effective risk management procedures in place. Those procedures manage the risk and therefore are likely to impact on the overall profits and losses. But that is all. They cannot take any further the

relationship between those overall profits and losses on one hand, and the variability of the remuneration, on the other.

145. I do not accept Mr Vallat's point that the appellant has not, in fact, during the relevant years, failed to be extremely profitable. And this is notwithstanding the vagaries of the market and the risks faced by the appellant. And thus, as a matter of fact, there has been no abatement of the initial variable remuneration awards arising from a lower than anticipated level of profits of the partnership. The question is whether the bonuses are capable of variation without reference to the overall profitability of the partnership. It is therefore a theoretical rather than an actual test, even though I accept that had there been such an abatement or evidence of how a lower level of profitability would have impacted on initial awards of variable remuneration, that would have been weighty and helpful evidence when interpreting this legislative provision.

146. In this case, the appellant argues essentially that if there were no profit, the members would receive no remuneration. And if there was less profit than anticipated, the portfolio managers could not be paid the amount computed in accordance with their individual profit and loss accounts. And thus their bonuses are capable of variation by reference to the appellant's profits. I am afraid that I do not accept this. What we are looking at in the context of this test is the link between those profits, on the one hand, and the basis of the calculation of the variable remuneration, on the other. It is self-evident that if there are no, or fewer, profits to be distributed, then individual members will get less remuneration. But that of itself is insufficient to make the remuneration variable. I agree with Mr Vallat that there must be a more concrete link, even though the threshold is a low one ("reference to"). In my view the appellant has not made out that link.

147. Mrs Hardy submits that tax statutes draw their lifeblood from real-world transactions with real-world economic effects. I have no issue with this. In real life there must be a mechanism which enables a member of an LLP to share in the profits of the partnership, and the lifeblood here is the way in which the portfolio managers are remunerated by dint of their individual performance. So the portfolio managers do have an overarching interest in the overall profits of the appellant since if the appellant fails to make sufficient profits to cover the amounts due to the portfolio managers under their individual profit and loss accounts, they will not get their anticipated bonus. But that is the extent of their interest in the overall performance and profitability of the partnership. If the partnership does better than that, they do not share in the uplift. That is extracted by virtue of the income points which are heavily weighted in favour of the corporate members. So coming back to the language of a traditional partnership, the portfolio managers are not really concerned whether the partnership has a "good year", provided there are sufficient profits to cover their individual allocations. This is different from the traditional partnership structure where partners generally benefit when a partnership has a good year. It seems to me that this illustrates Mr Vallat's view that here the basis of variation is the individual's profit and loss account, and not the overall profits of the partnership. I accept that this is a fine line, and a difficult distinction, and, with respect to the parliamentary draughtsman, he/she has done us no favours. But bearing in mind that the salaried members rules are deeming provisions which are intended to distinguish between those members who are more like employees, and those who are more like partners in a traditional partnership, it is my judgment that the discretionary allocations are more akin to an employee's performance related bonus than to a partner in a traditional firm sharing in the overall profits of the partnership.

148. Mrs Hardy also, however, asserts that the discretionary allocations are variable in the sense that they are at the gift of the relevant entity (the remuneration committee, the Board,

UK ExCo), and the evidence shows that the traders do not consider that they had a contractual right to those discretionary allocations. Given, therefore, the discretion vested in those bodies to both review and to vary the initial discretionary allocations, those bodies might have exercised that discretion by reference to the overall profits of the partnership and thus increased or reduced the initial awards. This provides the relevant link between the remuneration on the one hand and the overall profits on the other.

149. I have two observations on this submission. The first is whether, although expressed as a "discretion", the Board genuinely has that discretion. The discretionary allocations are governed by clause 10.3 (3) of the LLP Agreement. "Thirdly, there shall be allocated to such of the Members (if any) as the Board shall in its absolute discretion determine……." In the January or February following a financial year, a preliminary award, called "Discretionary Drawings" is made to the Distribution Account of each individual member, which is then confirmed or otherwise following the finalisation of the accounts. So, at face value it does appear that the traders are correct and they have no contractual right to such amounts.

150. However, this discretion is fettered by the terms of the variable remuneration or award methodology agreed when a portfolio manager joins the appellant, or as part of the terms of his or her ongoing membership of the appellant. For portfolio managers, this makes clear that the methodology is essentially a proportion (say 20%) of trading profits less costs (i.e. the individual's profit and loss account). So although there appears to be full discretion vested in the Board, and the variable remuneration basis is expressed to be "noncontractual and subject to adjustment" in the context of portfolio managers, this seems to me to give the portfolio managers a legitimate expectation that, provided there are sufficient overall profits of the appellant to meet this quasi contractual promise, his or her variable remuneration will be computed in that way and a discretionary allocation made accordingly.

151. There was some discussion about what would happen if there were insufficient overall profits to meet these obligations, and there was suggestion that they would be abated but that little consideration had been given to this. I think that the witnesses may have forgotten (I make no criticism of this) the written resolution of 3 April 2014 which recorded the pre-existing situation regarding the fact that discretionary allocations could not exceed total profits. That resolution states that "in the event that the proposed allocations exceeded those total profits, the Board shall reduce the amount of such allocations accordingly". So, some thought had been given to it in 2014.

152. This, however, does no more than state the obvious. It goes to the point made above, namely that if there are insufficient profits to fulfil the portfolio managers' preliminary allocations, then those allocations must reduce. You cannot dish out more than the accounting profits dictate.

153. And in this context, it is worth considering (although I was not drawn to this specifically) the position of low or nil profits on the priority distributions even though these have been accepted by the appellant as falling within Condition A. The LLP Agreement provides, at 10.3 (2), that in the event that the profits in any financial year shall not be sufficient to meet those priority allocations in full, and such profits shall be "allocated on a pro-rata basis between the Priority Distributions made to the relevant Members". In other words, the same thing will happen to the priority distributions as might happen to the discretionary allocations. If there are insufficient overall profits, they will abate. If the appellant accepts that such abatements do

not take the priority distributions outside Condition A, then I cannot see why they should do so for the discretionary allocations.

154. Secondly there is no evidence that, as a matter of fact, when the Board came to consider the final discretionary allocations, it took into account the accounting profits of the appellant when considering the individual allocations of the portfolio managers (or indeed of the non-portfolio managers). The process appears to have been that a schedule setting out each individual's preliminary discretionary allocation was put before the Board who then noted that the calculations had been carried out in accordance with the LLP Agreement and following discussion it was resolved that the final allocations should be in accordance with the provisional allocations. In the case of the portfolio managers, those provisional allocations have not been allocated by reference to the profits of the partnership. They have been allocated on the basis of the individual profit and loss calculations. It was a formulaic approach. In the case of the non-portfolio managers (more of which later) which was less formulaic, there is still no clear evidence that the initial allocations had been made by reference to the overall profits and losses of the partnership. So, when the Board came to finalise those preliminary awards, it does not seem to have been through each of the preliminary allocations and tested them against the profits of the partnership. It looks to me as though they were, in effect, "rubber stamped" on the basis that the overall profits were sufficient to frank the preliminary allocations. So, although the portfolio managers' calculations were expressed to be non-contractual and subject to adjustment, there is no evidence that genuine consideration was given, when approving the final awards, to the relationship between the preliminary award on the one hand, and the overall profits of the appellant on the other.

155. For these reasons therefore I think that the discretionary allocations made to the portfolio managers fall within limb (b) of Condition A. They comprise disguised salary within the ambit of that limb.

156. Furthermore, for the reasons given above, I also think that they fall within limb (c), as in practice they were not affected by the overall amount of those profits or losses. Clearly this limb cannot mean that a member's remuneration is simply affected by the amount of an LLPs profits. As I have mentioned above, the LLP cannot distribute, to its members, an amount greater than its profits. Both parties are, I think in agreement that the purpose of this limb is to bring within the definition of disguised salary, provisions which theoretically take variable remuneration outside limb (b), but then, in practice, remunerate a member without reference to the overall accounting profits. That is the situation in the case of the portfolio managers. Even if the basis of their discretionary allocations theoretically varied by reference to the appellant's profits (which for reasons given above I do not think is the case) then the reality was that they were not so affected in practice.

157. As far as the non-portfolio managers are concerned, I have reached the same conclusion. The calculation of their preliminary and final allocations is less formulaic and more nebulous than that for the portfolio managers. Mr Vallat has suggested that it is difficult to discern that process in practice, but I think it is reasonably clear from the evidence given by Mr Cox, and the terms of the Variable Remuneration Approval Process. These are then supplemented by the process of confirming the preliminary allocations, by the Board, as set out above.

158. Mr Cox's evidence chimes with my experience of making discretionary allocations of partnership profit where there are no fixed or empirical parameters. His evidence bears out the process recorded in the Variable Remuneration Approval Process that it is a top-down calculation of the variable remuneration pool by assessment of the partnership's strategy,

financial performance and future financial stability including lead indicators such as recent investment performance. The pool is then allocated to department heads which takes into account the department's prior year performance and the change in the current pool relative to the prior year. The department heads then perform a bottom-up assessment taking into account the individual's performance, and current market rates utilising market benchmark surveys and recent hire information. This is typically a process of iteration between the Board and department management. This process can be seen in practice by reference to Mr Cox's remuneration and that of his former colleague (X).

159. This shows that a number of factors were considered, some of which were competing, none of which were conclusive, and that it was, essentially, a value judgment by the executive (through the agency of Mr Cox), which inevitably was subjective but, in fairness to the individuals, was grounded in a number of empirical factors. I am wholly unsurprised that Mr Cox was unable to give extensive evidence of the discussions that he had had over the years in relation to the non-portfolio managers. Each discussion would have been bespoke and the weight given to the various factors would have depended on a number of circumstances, and I am not surprised that Mr Cox has forgotten most of those over the years. Nor am I surprised that Miss Kerridge was not able to testify as to the basis on which her variable remuneration had been determined. I suspect that it was not policy to provide details of the discussions which resulted in the preliminary discretionary allocations and I imagine that the individuals in question did not seek to unpick those allocations as a matter of course.

160. But in the context of this appeal, it is for the appellant to demonstrate that the variable remuneration paid to these individuals was capable of variation by reference to the profits of the partnership. Mr Vallat's position is that the appellant has not demonstrated this, on the evidence, and I agree with him.

161. The evidence does not demonstrate a link between the variable remuneration on the one hand and the profits of the partnership on the other. Whilst I appreciate, as does Mr Vallat, that the variable remuneration calculation for non-portfolio managers takes into account the financial performance and future financial stability of the appellant, that is very different from demonstrating a link to that calculation and the appellant's profits.

162. There is no evidence that either during the iterative process of establishing the preliminary discretionary allocation, nor during the process of the Board approving it and thus making it final, that the profits of the appellant were taken into account, other than to the extent that the Board was fettered by the accounting profits which had been reported for the relevant financial year. There is no evidence that the discretionary allocations for the non-portfolio managers were capable of variation by reference to the profits of the LLP.

163. Such discretionary allocations fall within limb (b) but also fall within limb (c) for the same reasons I have enunciated above in respect of the portfolio managers.

164. In my judgment, for the relevant years, the discretionary allocations for all of the relevant members fall within the definition of disguised salary for the purposes of Condition A which is therefore met for each of those members for each of those years.

165. Having reached this conclusion, there is, strictly speaking, no need for me to consider the application of section 863G. The relevance of this provision is that when considering the application of the three Conditions, satisfaction with all of which results in a member being treated as an employee, any arrangements which have as their main or one of their main purposes to secure that such a member is treated as not being an employee, are to be

disregarded. In the context of this appeal, HMRC have asserted that the arrangements comprising the tax department paper and the April 2014 resolutions referred to at [113]-[115] fall within such arrangements and must therefore be disregarded.

166. It is my view that resolving to distribute no more than the accounting profit in any year, and providing what might happen to initial discretionary allocations if the profits are insufficient to cover them, does not provide the variability required to satisfy Condition A. It is also clear from Miss Kerridge's evidence that the April 2014 resolutions did no more than formalise the previous position. And in any event, the LLP Agreement makes it pretty clear that it is not open to the appellant to distribute more to its members in a financial year than the accounting profit made by it for that financial year.

167. Whilst I accept Miss Kerridge's evidence, I agree with HMRC's submission that the main purpose or one of the main purposes of those resolutions was to secure that members that might otherwise be treated as employees, should not be so treated. They were clearly made in the context of the salaried members rules. Their purpose or main purpose might have been to put beyond doubt something which was, to my mind, already beyond doubt, namely that the appellant could not distribute more to its members that its accounting profit. But that purpose was to secure that the relevant members were not to be treated as employees. As I have said, I think this was ineffective in establishing the required variability. If, however, I am wrong on that point, and variability can be established on the basis that the appellant could not distribute to its members profits greater than it made in a financial period, and that if those profits were less than the initial allocations, they would abate, then I agree with HMRC that these resolutions should be disregarded.

168. I now turn to consider Condition B. The appellant's initial position regarding portfolio managers was that those with a capital allocation of $100 million or more had significant influence over the affairs of the partnership; as, too, did non-portfolio managers. These included those who were on UK ExCo, heads of department, and those who were not heads of department but had equivalent levels of influence to those individuals. In her closing submissions, Mrs Hardy suggested that if I were unattracted to the arguments regarding portfolio managers and their capital allocations of $100 million, then perhaps the bar should be set at $300 million. Mr Vallat was (in my view correctly) critical of this alternative submission largely on the basis that we had heard no evidence to support it and that given the burden of proof is on the appellant, submissions are no substitute for evidence.

169. However, for reasons given below, I am attracted to the argument that portfolio managers with capital allocations of $100 million do exercise significant influence, but had I not been, I would have rejected Mrs Hardy's alternative submission for the reasons given by Mr Vallat.

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

managing partner, or managing board, and is not wielded by individual partners, then that is the case.

171. I am with Mrs Hardy on both points.

172. On the first, I see no justification in limiting significant influence to managerial influence. As HMRC submit, the salaried members legislation is aimed at circumstances where the relationship between an LLP and its members is more like an employment relationship and its purpose is to distinguish between members whose position is like that of a partner in a traditional partnership with those who are playing the role of employees.

173. To my mind, it does this by taking the characteristics of a traditional partnership, and the ways in which a traditional partner contributes to that partnership, and sets them out in three conditions. Condition C looks at the capital structure of the LLP, and reflects what one would expect to be a contribution of capital by a partner in a traditional general partnership. Condition A considers the profit and loss arrangements and looks to align the way in which profits and losses are shared in a traditional partnership with those being shared by members of an LLP. And only where there is a variation to an individual member's remuneration similar to that of a partner in a traditional general partnership does that member fall outside Condition A. Condition B looks at the ongoing contribution, from an operational perspective, which a partner would make to that traditional partnership's business. HMRC's take on the contribution is set out at paragraph 2.5.2 of their explanatory notes. They give examples of the kind of decisions which they would expect a member exercising significant influence to participate in. These include strategic decisions, appointment of key personnel, formulating the firm's business plan, managing key contracts.

174. The role of a partner in a traditional partnership is to "find, mind and grind". In other words, a traditional partner is expected to go out and find work, supervise others to undertake it, and to do the work themselves. The extent of each depends on the role of the partner, his or her particular qualities, and the nature of the partnership. Some partners are better at getting work than doing it, others at doing and supervising it than getting it. But in my experience an individual who is made up to be a partner in a traditional partnership must demonstrate each of these qualities. These are not limited to making management decisions, but to contributing to the success of the partnership. In professional services firms it has always been (and in the current financial climate is certainly the case) crucial to attract top quality individuals and then spend time investing in those individuals, since by doing so, the intellectual capital of the partnership is enhanced. And it is, frankly, that intellectual capital which is sold by partners who are seeking to attract work from clients. Without developing that intellectual capital, the partnership would have a less certain future.

175. Furthermore, a partner's role is to undertake the work which has been commissioned by a client, both individually and by supervising the team of individuals to whom that work has been delegated. That is management on a local basis, and is absolutely crucial to the success of the partnership. And in terms of risk management, supervision by the appropriate partner of work being done by the appropriate lead qualified and experienced individual is essential.

176. And so by doing the work and supervising the appropriate team to do the work, the partner is able to bill the client and thus contribute to the ongoing commercial activities of the partnership.

177. Given, therefore, that HMRC accept that the purpose of salaried members legislation is to distinguish between activities of an individual who is effectively an employee, but operating

under the guise of a member of an LLP, on the one hand, and the activities of a partner in a traditional partnership, on the other, I can see no justification to restricting significant influence to solely managerial influence. Financial and other influence demonstrated by a partner in a traditional firm colours my interpretation of this Condition. I agree with Mrs Hardy that it extends well beyond solely managerial influence, and into the other aspects of a partner's activities in a traditional partnership.

178. I also agree with her that, contrary to HMRC's position, the expression "affairs of the partnership" is not restricted to the affairs of the partnership generally but can be over an aspect of the affairs of the partnership. I also agree with her that the starting point for this analysis must be a consideration of what those affairs are; in other words, what does the partnership do.

179. In the case of the appellant, the parties are agreed that, in essence, it undertakes two activities. It provides investment advice to the General Partner (and thus, in effect, to the Fund) for which it receives remuneration in the form of a percentage of the Fund's capital under management for which it is responsible for sub-managing, together with a performance-related fee.

180. The second activity is the provision of "back-office" services to other members of the Group. These were detailed by Miss Kerridge in her evidence at [122] and include compliance, facilities, product control, legal, finance, and IT services, and that it is paid a fee for their services which is unrelated to funds under management.

181. To my mind, therefore, provided it can be shown that an individual member significantly influences either the investment activities, or the provision of back-office services, (or indeed both) undertaken by the appellant, then the member falls outside Condition B. The "affairs of the partnership" is a wide enough expression to encompass both of these activities and I see no justification for Mr Vallat's submission that a member must demonstrate significant influence over both elements in order to get outside Condition B.

182. Mr Vallat submits that the appellant's situation and activities cannot be seen in isolation, but must be seen in the context of the wider Group. And considered in this context, it can be seen that most of the major, significant, and strategic decisions are not made by the Board or by UK ExCo, or by the portfolio managers, or by the desk heads, or by the departments or by the various committees, but are made by Group ExCo and ultimately by Mike Platt (as the driver of the supertanker, and the chief investment officer and chief executive officer of the [Fund]). Mrs Hardy counters that on a proper understanding of the appellant's affairs, all portfolio managers exercise significant influence as they have that influence over the key purpose of the appellant (namely to maximise income). And all infrastructure members exercise significant influence because they run departments which are essential in supporting that key purpose and to delivering support services to the rest of the Group.

183. Mr Vallat's focus is on the high level strategic decisions, and I accept that these are made, in the main, by Mike Platt and Group ExCo, but I do not accept that the significant influence over the affairs of the partnership means that operational decisions which significantly influence the affairs of the appellant have to be discounted. To my mind those operational decisions, and operational influence, at the level of the appellant fall squarely within the ambit of Condition B.

184. HMRC accept that significant influence by Mike Platt and Group ExCo still admits of the possibility that significant influence might be exercised elsewhere, but the evidence shows that is not the case in this appeal. I do not agree. Nor do I agree that the appellant should be

treated as some form of "captive" which operates at the behest of the broader Group. I shall elaborate on this a little more later, but to my mind provided that the individual members of the Board and of UK ExCo had the essential competencies to make operational decisions about the twin activities of the appellant, then they were capable of having significant influence over its affairs.

185. Turning first to the activities of the portfolio managers. Those activities are described at some length in the evidence and I will not repeat them here, save to say that 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 the appellant, in turn, could make money in its capacity as a sub-investment manager. This was 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.

186. Furthermore, the evidence shows that, on an operational basis, they were involved in the sort of activities which a partner in a traditional partnership would have undertaken; namely: hiring and firing; identifying and then exploiting new business opportunities; bringing on junior members of staff; and managing counterparty relationships.

187. 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.

188. 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.

189. It is important to remember, however, that the evidence showed that where operational decisions were made "on the hoof" for justifiable operational or economic reasons, to seize an opportunity for example, where to comply to the letter of the constitution set out in the LLP Agreement might mean a loss of that opportunity, this did not mean that the formal management process set out in that constitution was bypassed. Such decisions were often regularised by post decision ratification by UK ExCo. And the evidence shows that this is

happening with greater regularity given the number of employees which need to be recruited to maintain the increasingly high level of activity and expertise of the appellant.

190. Mr Vallat suggests that in undertaking the operational activities mentioned above, they were doing no more than what was required of them in their role as portfolio managers, and to demonstrate significant influence, they need to do more. I can see no principled justification for this submission. I bear in mind that it is HMRC's view that the salaried member rules are intended to apply to members who are more like employees than partners in a traditional partnership. And to my mind the activities undertaken by the portfolio managers are directly analogous to those activities carried out by partners in a traditional partnership. 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.

191. It seems to me, therefore, that once a portfolio manager is made up to be a member, either from within the appellant or by way of lateral hire, they will, from thenceforth, be carrying out the activities of the traditional partner. The evidence was that the capital allocation of $100 million was a "rule of thumb" which has been suggested by the appellant as the threshold above which a portfolio manager exercises significant influence. But the evidence also shows that it is at this level that a junior member of staff would generally be made up to be a member since it is a level of capital allocation commensurate with the status of a member (and by analogy a partner in a traditional partnership). A member who is allocated $100 million is someone who has demonstrated the qualities to justify elevation to member. It is true that there are a small number of portfolio managers with capital allocations of less than that figure. My understanding is that the appellant does not suggest that they have significant influence. But, as I say, the evidence is that portfolio managers who have the qualities to manage a capital allocation of $100 million have demonstrated the qualities of a partner in a traditional partnership.

192. I have absolutely no doubt, therefore, that the portfolio managers as a whole have a significant influence over the affairs of the appellant. The affairs include the sub-investment management activities supplied to the investment manager, and these are undertaken by the portfolio managers through the management of their individual capital allocations. They also, as a class, demonstrate significant influence over the managerial and operational affairs of the appellant. The more difficult question, and one which Mrs Hardy accepts must be answered in her favour, is whether each individual portfolio manager has significant influence over those affairs.

193. It is her submission that significant is not defined in the legislation and that a helpful starting point might be of considerable amount or effect or importance. But whatever the threshold, it is surpassed by the portfolio managers. Mr Vallat took no issue with this starting point that I could see, but his point was that whatever the threshold, it is not surpassed by the portfolio managers. Financial influence cannot be taken into account, but even if it could, each individual portfolio managers' financial influence could not be said to be significant in the context of the overall capital allocations and income generated by the appellant. Mr Moore, for example, had a capital allocation roughly in the region of 3% of the total capital allocations of the appellant, which were in the region of $15 billion. And although he had generated

approximately $300 million for the appellant over 10 years, this was not significant in the context of the overall income of the appellant for those years. Mr Wilson's capital allocation was 1– 2% of the total capital allocations. Again, this was not significant.

194. In my judgment, each individual portfolio manager with a capital allocation of $100 million does have significant influence over the affairs of the partnership. I say this from both a quantitative and qualitative perspective. As regards the former, and taking Mr Moore as an example, $300 million over 10 years is, to my mind, significant. It is significant in absolute terms. It certainly cannot be said to be insignificant. I think the same sort of level of overall returns will have been demonstrated by those portfolio managers with capital allocations of $100 million. 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.

195. For the avoidance of doubt, it is my view that desk heads also have significant influence. Not only are they portfolio managers in their own right (and senior ones at that) but they are also responsible for monitoring the day-to-day performance of other portfolio managers on their desk and play an important role in setting individual portfolio managers' capital allocations, in recruitment, and in new product initiatives.

196. I now consider the non-portfolio managers of the appellant and whether they either as a whole or individually have significant influence over the affairs of the partnership. It is my view that they do not. Or at least, the appellant has not established, on the balance of probabilities, that any such individual has significant influence over either the investment or service provision elements of the appellant's activities. In this I make no criticism of the way in which the appellant has presented its case or its evidence. Nor in its preparation. But I am struggling, evidentially, to understand precisely what these individuals actually did in the context of the affairs of the appellant.

197. Mrs Hardy has, perfectly correctly, submitted that in order to exercise significant influence I must understand the affairs of the appellant, and those affairs comprise the provision of investment management services, on the one hand, and back-office services on the other. There has been a considerable volume of evidence relating to the former but far less relating to the latter. It seems to me that these back-office services can be broadly divided into two, those which are provided, internally, to the portfolio managers and other consumers within the appellant, in order to support the investment activities. The second category are the back-office services which are supplied to other members of the Group and for which the appellant is paid a fee. As far as I can see, I have submissions and evidence relating to the former but not to the

latter. I will deal first with the back-office services supplied within the appellant first, and then consider the provision of back-office services to other members of the Group.

198. I have been through the extensive paperwork provided in the supplementary bundle, which includes minutes of the various committees established by the appellant, minutes of the Board, and minutes of Group ExCo, even though I was not taken to them during the hearing to any significant extent. And whilst these show that the foregoing bodies took their role extremely seriously and discussed topics of fundamental importance to the running of the business, I cannot tell therefrom whether any individual played a significant part in any decisions made by those bodies. This is very different from the situation of the portfolio managers where their financial contribution can be clearly divined and I have considerable evidence as to the operational and managerial activities undertaken by them.

199. UK ExCo is established by the Board under clause 14.11 of the LLP Agreement. I have set out its duties and responsibilities earlier in this Decision which include reviewing risk profile, dealing with legal and regulatory issues and with the day-to-day operational issues. The members of the committee are clearly highly competent and experienced individuals. Although the appellant does need to be seen in the context of the Group (and in light of the overarching influence of Mike Platt, and that strategy is a matter for Group ExCo, in the main, rather than UK ExCo) there is still scope for significant influence to be exercised at the level of operational management and implementation of that strategy, by those managing the appellant. To my mind, effective operational implementation of a strategy is just as important as the strategy itself. And it certainly falls within the ambit of the affairs of the partnership.

200. But as Mr Vallat submits, apart from resolving and coming to decisions on capital allocations, the UK ExCo minutes with which I have been provided demonstrate that prior to the meetings, a pack of papers was provided, and the committee then went through that pack discussing it but coming to no decisions on any matters arising out of it save as regards capital allocations (and, once a year, at a special meeting resolving to finalise the provisional discretionary allocations). As I say, the matters discussed were of considerable importance to the day-to-day operational aspects of the appellant's business. I come back, however, to the policy behind this legislation which is to distinguish between those carrying out the role of a partner in a traditional partnership, and those carrying out the role of an employee. Whilst there is a clear distinction in the case of portfolio managers, I can see no such clear distinction in the case of non-portfolio managers, even those on UK ExCo. The activities undertaken by members of that committee are not, in my experience, ones which would have necessarily been undertaken by partners in a traditional partnership. They could equally (and given the specialist nature of the operational activities discussed, for example risk, HR, finance, tax, perhaps more appropriately) be undertaken by employees who specialise in those areas. Indeed, this is my experience of professional services partnerships of any significant size. The executive committee is usually chaired by a partner but is attended by the heads of the internal operational units who are highly competent and experienced employees.

201. I also appreciate that the role of UK ExCo has not changed throughout the relevant period, and wonder, therefore, why HMRC are prepared to accept that the Original ExCo do exercise significant influence whereas those joining in 2016 did not. But it is not for me to question this concession (if such it is). I have to decide on the evidence before me whether the non-portfolio manager individual members exercise considered significant influence over the

affairs of the partnership, and for the foregoing reasons, I cannot say, on the balance of probabilities, they do.

202. I have considered the members of UK ExCo above, and I have come to the same conclusion as regards the other categories of non-portfolio managers set out in Appendix 3. The justification, as I understand it, for submitting that these individuals exercise significant influence was that, firstly, they were of fundamental importance to the portfolio managers to enable them to carry out their activities fully and effectively, and secondly, they were instrumental in providing services to the other members of the Group. Mr Vallat submits that financial influence is not the test, and that in any event the committees dealt with specific aspects of the appellant's business rather than its business generally. As I have said above, it is my view that financial influence is relevant and that influence over one only of the aspects of the appellant's business is sufficient.

203. But apart from the fact that I am light on evidence as to what these individuals actually did, it seems to me that they contributed indirectly to the operational activities undertaken by the portfolio managers, and whilst they therefore assisted the portfolio managers to exercise their significant influence both collectively and individually, they did not so directly. As such, any such "influence" is exercised at second hand, and I do not consider it to be significant in any event. Coming back to the distinction between the role played by a partner in a traditional partnership, and the role played by an employee in that partnership, the role played by these members is more akin to the role of an employee and not to the role of a traditional partner.

204. I now turn to the provision of the back-office services supplied to other members of the Group. If the appellant can show that certain individuals exercised significant influence over the provision of those services, then those individuals will fail Condition B. It is clear from the evidence, and in particular the table at [31] (where the back-office fees are described as "Support Service Fees") that these services generated significant income. £55 million in the year to 31 December 2014, £23 million the following year, £27 million the following year, and £23 million in the year to 31 March 2018. They represented a significant proportion of the overall fees earned by the appellant. So, I have these numbers on the one hand. I then have the evidence, mainly from Miss Kerridge, that these services were provided to other members of the Group under service agreements. And she has given evidence of what the departments did and the responsibility of department heads. But I have heard no evidence of the contribution of those providing the back-office services to those numbers, nor, indeed, was I provided with a copy of those agreements. Miss Kerridge did not provide a breakdown of the time spent by the individuals between the internal and external services, nor did she identify any particular projects on which those providing the external services, worked.

205. Nor, as far as I can see, was any detailed evidence given as to the qualitative nature of those services over and above the general statements made by Miss Kerridge of the broad strands of activities undertaken by the departments and their heads. It is true that I have brief job descriptions of the heads of department. But this evidence goes nowhere near explaining how the services provided by those individuals or by their departments directly contribute to the external services, and that those providing them exercised significant influence over their provision. For example, the head of tax is "Responsible for Tax department including dealing with fiscal authorities around the world and instructing advisers in all jurisdictions. Responsible for agreeing group tax strategy with ExCo". It is not possible for me to translate this into some form of evidence concerning the influence of that individual over the affairs of the partnership in the sense that he or she contributed significantly to the provision of the back-office services to other members of the Group. The same is true regarding the summaries provided for the

other heads of department. From a qualitative point of view, I was not provided with evidence of precisely what those back-office functions contributed to the external services.

206. As I have set out above, it is my view that financial contribution is a factor in wielding significant influence, and that is the submission made by Mrs Hardy. And whilst it is possible in empirical terms to identify the financial contributions made by the portfolio managers, I am not in the position to come to a conclusion regarding the financial contributions of those supplying the back-office services, since I simply have no evidence before me of those financial contributions. I do not know, for example, the amount generated by the head of legal, or the legal team. Nor by the tax department, nor by the IT department. My understanding is that, for transfer pricing purposes, they were cross charged on an arm's length basis using an appropriate transfer pricing methodology. But I have no evidence of the precise amounts of cross charges which are attributable to the individuals or departments.

207. I am therefore unable to determine what financial or other contributions were made by the non-portfolio managers to the provision of the external services provided by the appellant to other members of the Group and which comprise a significant element of its overall activities. I am therefore forced to the conclusion that no non-portfolio manager exercised significant influence over those affairs of the appellant.

CONCLUSION

208. Drawing these strands together:

(1) The portfolio managers (including desk heads) meet Condition A;

(2) The non-portfolio managers meet Condition A;

(3) The portfolio managers with capital allocations of $100 million or more and the desk heads do not meet Condition B;

(4) The other portfolio managers and all of the non-portfolio managers (other than the Original ExCo) meet Condition B.

DECISION

209. Accordingly, I allow this appeal in respect of the portfolio managers with capital allocations of $100 million or more and the desk heads, but not in respect of the other portfolio managers and the non-portfolio managers (other than the Original ExCo).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

210. This document contains full findings of fact and reasons for the Decision. Any party dissatisfied with this Decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this Decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 29TH JUNE 2022

APPENDIX 1

Income tax

1. The relevant legislation is set out in the following sections of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"):

863 Limited liability partnerships

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

(a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),

(b) anything done by, to or in relation to the limited liability partnership 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 limited liability partnership is treated as held by the members as partnership property.

References in this subsection to the activities of the limited liability partnership 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.

(2) For all purposes, except as otherwise provided, in the Income Tax Acts–

(a) references to a firm or partnership include a limited liability partnership in relation to which subsection (1) applies,

(b) references to members or partners of a firm or partnership include members of such a limited liability partnership,

(c) references to a company do not include such a limited liability partnership, and

(d) references to members of a company do not include members of such a limited liability partnership.

(3) Subsection (1) continues to apply in relation to a limited liability partnership which no longer carries on any trade, profession or business with a view to profit–

(a) if the cessation is only temporary, or

(b) during a period of winding up following a permanent cessation, provided–

(i) the winding up is not for reasons connected in whole or in part with the avoidance of tax, and

(ii) the period of winding up is not unreasonably prolonged.

This is subject to subsection (4).

(4) Subsection (1) ceases to apply in relation to a limited liability partnership–

(a) on the appointment of a liquidator or (if earlier) the making of a winding-up order by the court, or

(b) on the occurrence of any event under the law of a territory outside the United Kingdom corresponding to an event specified in paragraph (a).

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).

863B Condition A

(1) The question of whether condition A is met is to be determined at the following times—

(a) if relevant arrangements are in place—

(i) at the beginning of the tax year 2014-15, or

(ii) if later, when M becomes a member of the limited liability partnership,

at the time mentioned in sub-paragraph (i) or (ii) (as the case may be);

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

(c) where—

(i) the question has previously been determined, and

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

immediately after the end of that period.

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

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

Step 1

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

(a) beginning with the relevant time, and

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

Step 2

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

(a) is fixed,

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

(c) is not, in practice, affected by the overall amount of those profits or losses.

(4) If condition A is determined to be met, or not to be met, at a time, the condition is to be treated as met, or as not met, at all subsequent times until the question is required to be re-determined under subsection (1)(b) or (c).

(5) In this section *"arrangements" includes* any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).

863C Condition B

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.

863D Condition C

(1) Condition C is that, at the time at which it is being determined whether the condition is met ("the relevant time"), M's contribution to the limited liability partnership (see sections 863E and 863F) is less than 25% of the amount given by subsection (2) (subject to subsection (7)).

(2) That amount is the total amount of the disguised salary which, at the relevant time, it is reasonable to expect will be payable by the limited liability partnership in respect of M's performance during the relevant tax year of services for the partnership in M's capacity as a member of the partnership. In this section *"the relevant tax year"* means the tax year in which the relevant time falls and an amount is *"disguised salary"* if it falls within any of paragraphs

(a) to (c) at step 2 in section 863B(3).

(3) 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.

(4) If in a tax year—

(a) there is a change in M’s contribution to the limited liability partnership, or

(b) there is otherwise a change of circumstances which might affect the question of whether condition C is met,

the question of whether the condition is met is to be re-determined at the time of the change. This subsection is subject to section 863F(3).

(5) If condition C is determined to be met (including by virtue of subsection (7)), or not to be met, at the relevant time, the condition is to be treated as met, or as not met, at all subsequent times until the question is required to be re-determined under subsection (3)(b) or (4).

(6) Subsection (7) applies if—

(a) the relevant time coincides with an increase in M’s contribution to the limited liability partnership, and

(b) apart from subsection (7), that increase would cause condition C not to be met at the relevant time.

(7) Condition C is to be treated as met at the relevant time unless, at that time, it is reasonable to expect that condition C will not be met for the remainder of the relevant tax year (ignoring this subsection).

(8) If there are any excluded days in the relevant tax year (see subsections (9) to (11)), in subsection (1) the reference to M’s contribution to the limited liability partnership is to be read as a reference to that contribution multiplied by the following fraction—

$(D - E) / (D)$

where—

D is the number of days in the relevant tax year, and

E is the number of excluded days in the relevant tax year.

(9) Any day in the relevant tax year—

(a) which is before the day on which the relevant time falls, and

(b) on which M is not a member of the limited liability partnership,

is an “excluded” day for the purposes of subsection (8).

(10) If, at the relevant time, it is reasonable to expect that M will not be a member of the limited liability partnership for the remainder of the relevant tax year, any day in the relevant tax year—

(a) which is after the day on which the relevant time falls, and

(b) on which it is reasonable to expect that M will not be a member of the limited liability partnership, is an “excluded” day for the purposes of subsection (8).

(11) If the relevant time coincides with an increase in M’s contribution to the limited liability partnership, any day in the relevant tax year—

(a) which is before the day on which the relevant time falls, and

(b) on which condition C is met,

is an “excluded” day for the purposes of subsection (8).

(12) In subsections (6) and (11) references to an increase in M’s contribution to the limited liability partnership include (in particular)—

(a) the making of M’s first contribution to the capital of the limited liability partnership, and

(b) M being treated as having made a contribution by section 863F(2).

863G Anti-avoidance

(1) In determining whether section 863A(2) applies in the case of an individual who is a member of a limited liability partnership, no regard is to be had to any arrangements the main purpose, or one of the main purposes, of which is to secure that section 863A(2) does not apply in the case of—

(a) the individual, or

(b) the individual and one or more other individuals.

(2) Subsection (4) applies if—

(a) an individual (“X”) personally performs services for a limited liability partnership at a time when X is not a member of the partnership,

(b) X performs the services under arrangements involving a member of the limited liability partnership (“Y”) who is not an individual,

(c) the main purpose, or one of the main purposes, of those arrangements is to secure that section 863A(2) does not apply in the case of X or in the case of X and one or more other individuals, and

(d) in relation to X’s performance of the services, an amount falling within subsection (3) arises to Y in respect of Y’s membership of the limited liability partnership.

(3) An amount falls within this subsection if—

(a) were X performing the services under a contract of service by which X were employed by the limited liability partnership, and

(b) were the amount to arise to X directly from the limited liability partnership,

the amount would be employment income of X in respect of the employment.

(4) If this subsection applies, in relation to X's performance of the services, X is to be treated on the following basis—

(a) X is a member of the limited liability partnership in whose case section 863A(2) applies,

(b) the amount arising to Y arises instead to X directly from the limited liability partnership,

(c) that amount is employment income of X in respect of the employment under section 863A (2) accordingly, and

(d) neither that amount, nor any amount representing that amount, is to be income of X for income tax purposes on any other basis.

(4A) Section 863A (2) does not apply in the case of a member of a limited liability partnership if, apart from this subsection, it would apply in consequence of arrangements the main purpose, or one of the main purposes, of which is to secure that section 850C does not apply for one or more periods of account in relation to—

(a) the member, or

(b) the member and one or more other members of the limited liability partnership.

(5) In this section *"arrangements" includes* any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).

National Insurance Contributions ("NIC's"):

2. Under the Social Security Contributions and Benefits Act 1992 ("**SSCBA 1992**"):

4A Limited liability partnerships

(1) The Treasury may, for the purposes of this Act, by regulations—

(a) provide that, in prescribed circumstances—

(i) a person ("E") is to be treated as employed in employed earner's employment by a limited liability partnership (including where E is a member of the partnership), and

(ii) the limited liability partnership is to be treated as the secondary contributor in relation to any payment of earnings to or for the benefit of E as the employed earner;

(b) prescribe how earnings in respect of E's employed earner employment with the limited liability partnership are to be determined (including what constitutes such earnings);

(c) provide that such earnings are to be treated as being paid to or for the benefit of E at prescribed times.

(2) Regulations under subsection (1) may modify the definition of *"employee"* or *"employer"* in section 163, 171, 171ZJ, 171ZS or 171ZZ14 below as the Treasury consider appropriate to take account of any provision falling within subsection (1)(a) to (c).

(3) If—

(a) a provision of the Income Tax Acts relating to limited liability partnerships or members of limited liability partnerships is passed or made, and

(b) in consequence, the Treasury consider it appropriate for provision to be made for the purpose of assimilating to any extent the law relating to income tax and the law relating to contributions under this Part,

the Treasury may by regulations make that provision.

(4) The provision that may be made under subsection (3) includes provision modifying any provision made by or under this Act.

(5) Regulations under this section are to be made with the concurrence of the Secretary of State.

(6) section 4(4) of the Limited Liability Partnerships Act 2000 does not limit the provision that may be made by regulations under this section.

3. Under the Social Security Contributions (LLP) Regulations 2014 ("**SSC(LLP)R 2014**"):

3.— Salaried members of LLPs: Great Britain

(1) This regulation applies where—

(a) for the purposes of the Income Tax Acts an individual is treated by section 863A of ITTOIA 2005 (limited liability partnerships: salaried members) as being employed by an LLP under a contract of service, including where that is the case by virtue of section 863G of ITTOIA 2005 (anti-avoidance), ("the deemed tax employment"); and

(b) if the services performed, or to be performed, by the individual as a member of the LLP in the relevant period (as defined in section 863B(3) of ITTOIA 2005) were actually performed (or to be performed) under a contract of service with the LLP, the employment under that contract of service would be employment in Great Britain.

(2) For the purposes of SSCBA 1992—

(a) the individual ("the salaried member") is to be treated as employed in employed earner's employment by the LLP (being the deemed tax employment);

(b) any amount treated by virtue of section 863A or 863G(4) of ITTOIA 2005 as

employment income from the deemed tax employment, other than employment income under Chapters 2 to 11 of Part 3 of ITEPA 2003 (the benefits code), is to be treated as an amount of earnings paid to or for the benefit of the salaried member in respect of the salaried member's employed earner's employment with the LLP;

(c) the secondary contributor in relation to those earnings is the LLP; and

(d) in the case of an amount of earnings which is an amount of employment income by virtue of section 863G(4) of ITTOIA 2005, the earnings are to be treated as being paid by the LLP to the salaried member when the amount mentioned in section 863G(2)(d) of that Act arises.

(3) The reference in paragraph (1)(b) to services performed (or to be performed) by the individual as a member of the LLP includes services personally performed by the individual for the LLP under arrangements by virtue of which section 863G(4) of ITTOIA 2005 applies.

(4) The definitions of *"employer" and "employee" in*—

(a) section 163 (interpretation of Part 11 and supplementary provisions);

(b) section 171 (interpretation of Part 12 and supplementary provisions);

(c) section 171ZJ (Part 12ZA: supplementary); and

(d) section 171ZA (Part 12ZB: supplementary)

of the SSCBA 1992 have effect as if the salaried member were gainfully employed in Great Britain by the LLP under a contract of service with the earnings mentioned in paragraph (2)(b).

APPENDIX 2

1. In the years under appeal, the members of UK ExCo have been:

Year	Members
2014	Peter Cox Paul Dehadray Matthew Weir Andrew Moss
2015	Peter Cox Paul Dehadray Matthew Weir Andrew Moss
2016	Peter Cox Paul Dehadray Andrew Moss
2017	Peter Cox Paul Dehadray Andrew Moss Mark Bradford John McDonald Christopher Jackson Elizabeth Lander
2018	Peter Cox Paul Dehadray Andrew Moss Mark Bradford John McDonald Christopher Jackson Elizabeth Lander Elisabeth Hinchley Margot Marshall Catherine Kerridge Resha Patel David Emery Ben Souter Dafydd Jones Edward Shuttleworth Paul Lawrence Conleth McKeown Chris Hunter Mark Williams

2019	Peter Cox Paul Dehadray Andrew Moss Mark Bradford John McDonald Christopher Jackson Elizabeth Lander Elisabeth Hinchley Margot Marshall Catherine Kerridge Resha Patel David Emery Ben Souter Dafydd Jones Edward Shuttleworth Paul Lawrence Conleth McKeown Chris Hunter Mark Williams Ronnie Khan Scott Cowling

APPENDIX 3

1. The roles identified by Ms Kerridge as infrastructure members were:

    a. Head of compliance

    b. Head of operations

    c. Head of technology

    d. Head of product control

    e. Senior legal manager (of whom there were 2 in 2014)

    f. Senior technology manager

    g. Head of new business

    h. Head of Management Information

2. The roles identified by Ms Kerridge as 'middle office', 'feeding into front office' difficult to characterise were:

    a. Head of quant research

    b. Head of sales

    c. Head of MLQT

    d. Head of EM research

    e. Senior sales manager (of whom there were 5 in 2014)

3. The roles identified by Ms Kerridge as 'front office' were:

    a. Head of FX Vol

    b. FX business manager

    c. Head of liquidity

    d. Head of product research

    e. Senior quant research manager

    f. Senior risk manager

    g. Systematician

    h. Trading assistant

    i. Analyst (of whom there were 4 in 2014).