***BlueCrest Capital Management (UK) LLP v Revenue and Customs Commissioners* [2022] UKFTT 204 (TC)**

This case involved a dispute as whether particular LLP members were 'salaried members' and thus correctly treated as employees for tax purposes under the salaried member rules. There were two categories of members: those who were fund managers or traders ('portfolio managers') and those who were not ('nonportfolio managers').

The salaried member rules in ss863A-863G of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA) provided for LLP members to be taxed as employees if three conditions were met. The parties agreed that Condition C (capital contribution less than 25% of disguised salary) was satisfied but disputed whether Conditions A and B were. The tribunal noted that the burden of proof rested on the appellant.

Condition A would be met if it was reasonable to expect that at least 80% of the amount paid to an LLP member is disguised salary, defined as:

a) a fixed amount,
b) an amount which was variable but varied without reference to overall profits or losses, or
c) an amount which was not in practice affected by overall amount of profits and losses.

The tribunal described this as 'a look forward test' in that it was necessary to assess, at the start of the relevant tax year, whether it was reasonable to expect that the test would be met. The parties agreed that the fixed amounts payable monthly to each member fell within this definition, but did not agree about the discretionary allocations which were determined at the discretion of the Board subject to not exceeding the total profits for the year. The tribunal noted that the requirement of an amount which was variable but 'varied' without reference to profits and losses did not mean that it must have actually been varied, although this would be evidence in favour of the appellant, but that it was capable of variation. The appellant needed to show a link between individual remuneration and the overall profits and losses, and this link could not simply be that if there were fewer profits availability for distribution, the member would receive less. Here, the discretionary payments were variable by reference to the personal performance of each portfolio manager and so satisfied limb b) of Condition A. The tribunal also considered that they would fall within limb c), because in practice they were not affected by the overall profits and losses.

Although this conclusion meant that the court did not need to consider the application of s863G, it nonetheless did so. Section 863G provided that when considering the application of any of the three conditions, arrangements were to be disregarded if they had as their main or one of their main purposes to secure that a member was treated as not being an employee. Here, the LLP had passed resolutions not to distribute to members more profits than it had made in a financial period, and to abate allocations if they were found to have exceeded the profits. It had done so when the salaried member rules were proposed, and the resolutions simply formalised the existing position. It was therefore clear that their main purpose, or one of them, was to secure that members were not treated as employees. They should therefore be disregarded.

Condition B would be met if the mutual rights and duties of the LLP members and the LLP did not give the member significant influence over the affairs of the LLP.

The tribunal held that 'influence' was not limited to managerial influence but could include direct financial influence. Furthermore, the significant influence could 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. The salaried members legislation was aimed at circumstances where the relationship between the LLP and its members was more like an employment relationship, and its purpose was to distinguish between members whose position was like that of a partner in a traditional partnership and those whose role was that of employees. The tribunal considered that it did this by taking the characteristics of a traditional partnership and the ways in which a traditional partner contributed to the partnership, and setting them out in three conditions. Capital C reflected what would be expected to be expected to be a contribution of capital by a partner in a traditional partnership. Condition A aligned the sharing of profits and losses in a general partnership with the position in an LLP. Condition B looked at the ongoing contribution, from an operational perspective, which a partner would make to a traditional partnership's business. The tribunal also summarised the role of a partner in a traditional partnership as being to find (find work), mind (supervise others to undertake the work) and grind (do the work themselves) and asserted that each of those qualities must be demonstrated [which, it should be noted, does not align with the jurisprudence on whether a person is a partner or not].

The starting point when considering significant influence over the affairs of the LLP was to determine what those affairs were. Here, the LLP's business was to provide i) investment advice to the fund manager, and ii) back office services to other members of the group of which the LLP was part. The portfolio managers took key investment decisions on a daily basis and their main purpose was to make money for the LLP, which was its core activity. As a class and individually they could potentially exercise significant influence over the affairs of the appellant, in particular its financial performance, through this investment activity. Furthermore, on an operational basis they were involved in the sort of activities which a traditional partner would have undertaken: hiring and firing, identifying and exploiting new business opportunities; bringing on junior members of staff, and managing counterparty relationships. However, the tribunal considered that significant influence was only exercised by portfolio managers with capital allowances of £100 million or more. Its reasoning was that a member who was allocated $100 million was someone who had demonstrated the demonstrated the qualities of a partner in a traditional partnership and although there were a small number of portfolio managers with capital allocations of less than that figure, the appellant did not suggest that they have significant influence.

In contrast, the non-portfolio managers only contributed indirectly to the operational activities undertaken by the portfolio managers, and while they assisted the portfolio managers to exercise significant influence, the nonportfolio managers did not exercise such influence directly. The tribunal concluded that any influence was exercised at second hand, and was not significant in any event. The role which they played was more akin to that of an employee than that of a traditional partner. As to the provision of back-office services to other members of the group, there was no evidence that the non-portfolio managers exercised significant influence over the provision of those services.

The tribunal concluded that all the members met Condition A. However, the portfolio managers with capital allocations of £100 million or more did not meet Condition B, and therefore the LLP's appeal against their taxation as salaried members was allowed. The other portfolio managers and the nonportfolio met Condition B, and so the appeal in respect of them was not allowed.

***Williams v Williams and others* [2022] EWHC 1717 (Ch)**

This case involved a family farming partnership. Both parents and all four children, made various contributions of money and work to the business over the years, but the primary workers were the father and the two sons. The parents purchased a farm as joint tenants and then entered into partnership with the one of their sons, the claimant. A second farm was then purchased in the joint names of all three partners. The claimant alleged that the two farms were partnership assets or, in the alternative, that an estoppel arose on the basis of promises made by the parents that the farms and the partnership would belong to him. The defendants were two of the other children, who worked on the farm, and the executors of the father's estate, the mother having predeceased the father and left all her estate to him.

In the face of conflicting evidence, the court concluded that both sons had made a substantial contribution to the work on the farms over 40 years. Although the parents had at one time made promises to the claimant that he would inherit the farm, this was on the basis that his brother was running a contracting business, and it was unlikely that these promises had been continued after that business ceased, and the parents made provision in a will for the farms and the partnership to be shared between the three children who remained working on the farm.

The court noted that ss20-21 of the Partnership Act 1890 set out principles relating to whether property was held as an asset of the partnership and held that this depended on the intention of the partners, and so was a question of fact. The court relied on the review of the caselaw set out in *Ham v Bell* [2016] EWHC 1791 (Ch).

- In *Miles v Clarke* [1953] 1 WLR 537 the court held that 'No more agreement between the parties should be inferred than is absolutely necessary to give business efficacy to that which has happened', and in *Ham* the court noted that it was not necessary in a farming partnership to imply that the farm on which crops grew or animals were grazed was a partnership asset.
- In *Eardley v Broad* [1970] 215 EG 823 the court concluded that the mere fact that the partnership paid the rent due under the tenancy of a farm did not make the tenancy a partnership asset.
- In *Geary v Rankine* [2012] 2 FLR 1409 the court held that 'The mere fact that there is a partnership in profits produced by a particular asset does not indicate that the asset itself is partnership property'.
- Finally, in *Ham* itself the court held that although partnership accounts may provide evidence as to whether there was an express agreement to make land a partnership asset, '[p]ractitioners should be wary of relaying on the accounts as evidence of the intention of the parties', since often such inclusion was made at the behest of the accountants 'solely in order to get tax relief and without addressing the consequent ownership issues'.

On the facts here there had been no express agreement that either farm would become a partnership asset, and so the other indications of the parties' intention must be considered and weighted. The court held that although there were indications both ways, those that indicated that they were not partnership assets substantially outweighed those that indicated that there were.

In respect of one farm, the fact that the vast majority of the purchase price was provided by the parents, with contributions from three of their children, that it was conveyed to them as beneficial joint tenants, and that the claimant was not aware it was a partnership asset, outweighed its treatment in the accounts as a partnership asset.

In respect of the other farm, the fact that the parents' wills made shortly after its purchase gave their share in the partnership to the claimant but their share in this farm to their other son, and the fact that the parents had provided half of the advance for the purchase, outweighed the fact that the mortgage was repaid from partnership monies, and the fact that the farms was treated in the accounts as a partnership asset.

As to whether there had been a change in the partners, the court concluded that there was insufficient evidence that the mother had retired from the partnership prior to her death, since although the accounts showed profits going only to the father and the claimant, there was no evidence that she was paid for her share. The court also rejected the allegation that the defendant son had joined the partnership, since although partnership could be inferred from conduct, and the court must look at the true nature of the relationship (*Dutia v Geldof* [2016] EWHC 547 (Ch) and *Patel v Barlows Solicitors (a firm)* [2020] EWHC 2753 (Ch)), there was evidence that the claimant had strongly objected to the defendant joining the partnership. The result was that the partnership dissolved on the death of the father, pursuant to s33(1) of the Partnership Act. The net assets should therefore, subject to estoppel, be divided between the father's estate and the claimant.

The court rejected the estoppel argument, since this required (*Thorner v Major* [2009] UKHL 18):

(a) an assurance of sufficient clarity
(b) reliance by the claimant on that assurance, and
(c) detriment to the claimant in consequence of his reasonable reliance.

The claimant could not reasonably have relied on his father's statement that he would inherit the farm if his brother was still working in a contracting business, decades after that statement was made, and long after his brother had returned to work on the farm, and indeed he had been told subsequently by his father that a share would be left to his brother. The claimant had also suffered no detriment, since the farms had provided him with a living for over 40 years.

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