NATIONAL INSURANCE CONTRIBUTIONS – member of an LLP – whether contributions payable as an employee or a partner – nature of the relationship between the appellant and the LLP

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Appeal number: UT/2020/0106

BETWEEN

PETER WILSON **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MR JUSTICE ADAM JOHNSON
JUDGE JONATHAN CANNAN

Sitting in public by way of video hearing using MS Teams on 18 June 2021

Rebecca Murray instructed by Born & Co Chartered Accountants for the Appellant

Joanna Vicary instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal ("the FTT") released on 20 May 2020 ("the Decision"). The FTT dismissed an appeal by the appellant ("Mr Wilson") against a decision of the respondents ("HMRC") dated 21 March 2018 that he was a self-employed earner for national insurance purposes in the period 31 October 2012 to 31 March 2014. The decision of HMRC was made pursuant to s 8 Social Security Contributions (Transfer of Functions etc) Act 1999 and had the result that Mr Wilson was liable to Class 2 and Class 4 national insurance contributions.

2. Mr Wilson is a chartered accountant and an international tax specialist. He was engaged, to use a neutral term, by Haines Watts London LLP in November 2011. Haines Watts are an international firm of chartered accountants and Mr Wilson was engaged with a view to developing a separate international tax department within the London Office of the UK firm. Haines Watts London LLP ("Haines Watts" or "the LLP" as appropriate) operates as a limited liability partnership. We set out below the FTT's findings of fact as to the circumstances in which Mr Wilson came to be engaged by Haines Watts. For present purposes we note that on 1 November 2011 various documents were signed by Mr Wilson in connection with his engagement with Haines Watts:

   (1) An agreement whereby Mr Wilson became a member of the LLP ("the LLP Agreement").

   (2) A deed of variation to the LLP Agreement ("the Deed of Variation").

   (3) A side letter setting out further variations to the LLP Agreement ("the Side Letter").

3. It is not clear why HMRC's decision did not cover the period from 1 November 2011 to 31 October 2012, but nothing turns on that for the purposes of this appeal.

4. We shall consider the legislative framework governing liability to national insurance contributions ("NICs") in detail below. For present purposes, we note that where a person is a self employed earner, that person is liable to Class 2 contributions. Liability to Class 4 contributions depends on whether the person is liable to income tax on the profits of a trade, profession or vocation. Where income tax is charged on a member of an LLP in respect of the LLP's profits of a trade or profession, Class 4 contributions are payable by the member if they would be payable were the trade or profession carried on in partnership by the members.

5. The income tax liability of partners is dealt with by Part 9 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005"), which the FTT referred to as "the Partnership Code". Section 863 ITTOIA 2005 makes provision for the application of the Partnership Code to LLPs carrying on a trade, profession or business with a view to profit.

6. The issues before the FTT required it to consider the effect of s 4(4) Limited Liability Partnerships Act 2000 ("LLPA 2000") which concerns the question of whether a member of an LLP can also be employed by the LLP. There are a number of authorities in the context of employment law which consider the effect of s 4(4) LLPA 2000, including the Court of Appeal decision in *Tiffin v Lester Aldridge* [2012] EWCA Civ 35 and the Supreme Court decision in *Clyde & Co LLP v Bates van Winklehof* [2014] UKSC 32. We consider these authorities in detail below. In short, Mr Wilson's case before the FTT was that he was in substance an employee of Haines Watts and not liable to Class 4 NICs.

7. There is an issue as to exactly what the FTT decided in some respects. The FTT summarised its conclusions at [181] of the Decision as follows:

181. As a member of an LLP for the period 31 October 2012 to 31 March 2014 I have decided that:

(1) Mr Wilson was taxable on payments made to him by Haines Watts under the Partnerships Code by virtue of Section 863 ITTOIA;

(2) If, despite the wording of Section 863, there was scope in the tax rules for Mr Wilson to be taxed as an employee, the words of Section 4(4) LLPA do not enable a person to be treated as an employee for tax purposes when a member of an English LLP;

(3) Even if Section 4(4) LLPA means that a person could be an employee and a member of an English LLP, the payments made to Mr Wilson were as a member of Haines Watts as if a partner and not as an employee.

8. The FTT went on to consider and give reasons for each of these conclusions under the following headings: *Tax treatment set out in Section 863 ITTOI* at [182] – [188]; *Ability to be an employee of and member of an LLP* at [189] – [203]; and *Payments made to Mr Wilson as a member in any event* at [204] – [212]. On the basis of those findings the FTT held that HMRC was right to decide that Mr Wilson was a self-employed earner in the relevant period, and liable to NICs. The appeal was therefore dismissed.

9. The Upper Tribunal (Judge Herrington) granted permission to appeal on grounds which may be summarised as follows, by reference to the FTT's findings at [181]:

(1) In relation to the first finding, the FTT based its decision on an argument not put by HMRC to the effect that s 863 ITTOIA 2005 deems the income of a member of an LLP to be partnership profits and overrides any question of whether the individual is an employee who receives employment income under a contract of service.

(2) In relation to the second finding, the FTT relied upon case law not cited by either party to establish that it was not bound by the construction given to s 4(4) LLPA 2000 by the Court of Appeal in *Tiffin*. Instead, the FTT wrongly relied upon non-binding observations of the Supreme Court in *Clyde & Co*.

(3) In relation to the third finding, whilst the FTT accepted that labels in the LLP Agreement were not determinative of the true nature of the relationship between Mr Wilson and the LLP, in fact the FTT did rely on certain labels and failed to give effect to the substantive terms of the Deed of Variation.

10. We shall address these grounds of appeal as "Ground 1", "Ground 2" and "Ground 3" respectively. It is necessary for Mr Wilson to establish errors of law pursuant to all three grounds of appeal if we are to set aside the decision of the FTT. HMRC have served a notice pursuant to Rule 24 of the Upper Tribunal Rules in which they take issue with each ground of appeal. We shall deal with the arguments raised by HMRC in our discussion of the issues below. First, we shall set out the legislative framework in more detail and describe the FTT's findings of fact.

LEGISLATIVE FRAMEWORK

11. Amendments to the income tax and national insurance treatment of members of LLPs were made in 2014. For present purposes, we are concerned with the provisions prior to those amendments.

12. The Social Security Contributions and Benefits Act 1992 ("SSCBA 1992") makes provision for categories of earners who are liable to Class 1 or Class 2 NICs as follows:

2(1) In this Part of this Act and Parts II to V below —

(a) *"employed earner"* means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with earnings; and

(b) *"self-employed earner"* means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment).

13. Generally, employed earners may be liable to pay Class 1 employee NICs pursuant to s 6 SSCBA 1992. A self-employed earner is not liable to pay Class 1 contributions but may be liable to pay Class 2 NICs pursuant to s11 SSCBA 1992. We understand that Class 2 contributions in 2012-13 were payable at the rate of £2.65 per week.

14. Section 15 SSCBA 1992 makes provision for Class 4 contributions, which are payable by reference to the profits of a trade profession or vocation chargeable to income tax. Class 4 contributions are payable in the same manner as income tax and by the person on whom income tax is or would be charged. Section 15(3A) SSCBA 1992 makes specific provision for members of an LLP:

15(1) Class 4 contributions shall be payable for any tax year in respect of all profits which–

(a) are immediately derived from the carrying on or exercise of one or more trades, professions or vocations,

(b) are profits chargeable to income tax under Chapter 2 of Part 2 of the Income Tax (Trading and Other Income) Act 2005 for the year of assessment corresponding to that tax year and

(c) are not profits of a trade, profession or vocation carried on wholly outside the United Kingdom.

(2) Class 4 contributions in respect of profits shall be payable –

(a) in the same manner as any income tax which is, or would be, chargeable in respect of those profits (whether or not income tax in fact falls to be paid), and

(b) by the person on whom the income tax is (or would be) charged,

in accordance with assessments made from time to time under the Income Tax Acts.

(3) …

(3A) Where income tax is (or would be) charged on a member of a limited liability partnership in respect of profits arising from the carrying on of a trade or profession by the limited liability partnership, Class 4 contributions shall be payable by him if they would be payable were the trade or profession carried on in partnership by the members.

15. It is notable that section 15 does not provide that liability to Class 4 contributions is by reference to the status of the individual as a self-employed earner. Class 4 contributions are payable by any person who is liable to income tax on the profits of a trade, profession or vocation.

16. We have previously mentioned that Section 863 ITTOIA 2005 applies the provisions of the Partnership Code to LLPs. The Partnership Code essentially provides that a partnership firm is not to be regarded for income tax purposes as a separate legal entity. Instead, the profits and losses of the firm for any tax year are allocated to the individual partners in accordance with the firm's profit sharing arrangements, subject to certain provisions in ITTOIA 2005 concerning the allocation of profits and losses. Section 863 then provides as follows in relation to LLPs:

(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.

THE FTT'S FINDINGS OF FACT

17. Mr Wilson qualified as a chartered accountant in Australia in 1975 and subsequently gained wide experience of international tax law and practice both as an employee and a partner in various firms. By 2008, together with other shareholders, he had established a company called Gateway Partners UK Limited ("GPUK") which intended to acquire and operate London-based accounting firms. In 2011 steps were being taken to sell GPUK and the shareholders entered into negotiations with Haines Watts.

18. The FTT made certain findings about the negotiations with Haines Watts. The result of those negotiations was an agreement between Mr Wilson and Mr Matthew Perry, who was the managing member of Haines Watts. Mr Wilson was to concentrate on developing an international tax department without the burden of any general practice management. Haines Watts was to take over the relationships with accounting clients of GPUK. At [29] the FTT found as follows:

> 29. Mr Wilson was offered a compensation structure in which he would be employed through GPUK, but in an email from Mr Wilson to Mr Perry on 19 October 2011 he declined that suggestion as he said that he wanted his tax affairs to be "simple and self-evident". Mr Wilson stated that his very clear preference was "to be a partner in your LLP and be compensated as we have discussed as an individual partner in the LLP".

19. The negotiations led to GPUK being sold to another limited company, which licensed the use of GPUK's goodwill to Haines Watts. The sale took place on 1 November 2011 and at the same time Mr Wilson entered into the LLP Agreement, the Deed of Variation and the Side Letter. The FTT found that the drafting of those documents reflected the parties' intentions.

20. It will be necessary for us to consider the terms of the LLP Agreement and the Deed of Variation in some detail in due course. The FTT included in the Decision a detailed summary of those documents and we shall refer to specific terms as necessary.

21. The members of the LLP were divided into "Client Members" and "Management Members". There were four Client Members, including Mr Wilson, and three Management Members, including Mr Perry. Mr Perry was also defined as the "Managing Member".

22. Client Members were required to devote the whole of their time and attention to client matters and the day-to-day management of the LLP business as requested by the Management Members and to use their best endeavours to further the interests of the LLP Business and promote all aspects of the LLP Business.

23. Management Members were responsible, together with the Managing Member, for establishing the detailed local commercial strategy of the LLP. The Managing Member was answerable to the members for the effective day-to-day management of the LLP business, consistent with policies and strategy established with the Management Members.

24. The Deed of Variation was entered into by Mr Wilson, defined as "the Fixed Income Member", and the Management Members. It made certain variations to the LLP Agreement. It defined "Fixed Income Member" as a Member who had executed the Deed of Variation and added a new clause 3.5 to the LLP Agreement which provided as follows:

3.5 FIXED INCOME MEMBERS

3.5.1 A Fixed Income Member shall not be entitled to vote in relation to any matter to be decided pursuant to clauses 9.1, 10, 14.2, 15.6, 20.1.3, 20.2, 21, 23.8, 24.3, 24.4, 24.5, 25.1, 25.3, 27.1, 28.2 and 29.2 … For the avoidance of doubt any reference (within the aforementioned clauses) to the required consent of the Members shall exclude the requirement for the consent of the Fixed Income Members.

3.5.2 The Members shall provide a Fixed Income Member with such financial information arising out of or in connection with matters concerned with the activities of the Partnership as a Fixed Income Member may from time to time reasonably request but shall not be entitled as of right to receive the financial information to be provided to the Members under the Agreement and such right is hereby waived by the Fixed Income Members.

3.5.3 Those Client Members and those Management Members listed in paragraphs (a) and (b) of Schedule 1 hereby undertake jointly and severally with each Fixed Income Member to pay and discharge all liabilities and to perform all the obligations of the Partnership whensoever and howsoever arising and to indemnify each Fixed Income Member and save he or she harmless from and against all such liabilities and obligations and all proceedings, claims, costs, expenses and demands in respect of or arising from such liabilities and obligations.

25. The Deed of Variation also provided as follows:

2.1.3 **THAT** in relation to the Fixed Income Members only, Clauses 13.3, 17.4, 20.1.1(b), 21, 29.2, 30 and 31 shall not apply.

3. **PROFIT SHARE**

3.1 The Fixed Income Member shall receive a first charge of £180,000 adjusted by

3.1.1 An amount equal to less than £400,000 of chargeable time annually by the Fixed Income Member

3.1.2 Car expenses of £5,000 per annum and parking

3.1.3 Tax payable on the earnings of the firm as described in this agreement shall be borne by Haines Watts London LLP

3.1.4 25% of the profits arising from International Tax Work over and above the amounts included in 3.1, 3.1.1, 3.1.2 and 3.1.3

26. It can be seen that the new clause 3.5 inserted by the Deed of Variation removed certain voting rights Mr Wilson would otherwise have had as a member of the LLP. It also provided for more limited access to financial information and made provision for an indemnity to Mr Wilson and other Fixed Income Members by the Client Members and Management Members.

27. Clause 2.1.3 of the Deed of Variation removed certain rights and obligations Mr Wilson would otherwise have had as a member. Clause 3 made provision for Mr Wilson's remuneration under the heading "profit share".

28. Before the FTT, Mr Wilson contended that he was not a Client Member of the LLP. In support of that argument he relied on the terms of the indemnity inserted as clause 3.5.3 of the LLP Agreement which he said would otherwise involve Mr Wilson as a Client Member indemnifying himself as a Fixed Income Member. The FTT observed that the clause was poorly drafted but at [48] rejected Mr Wilson's contention that he was not a Client Member:

48. Given the definitions used, the nature of the changes made by the Deed of Variation (described in detail below) and the listings in Schedules 1 and 4 of the LLP Agreement, the combined effect of the LLP Agreement and the Deed of Variation was to make Mr Wilson a Member, a Client Member (albeit with some amended rights, liabilities and obligations) and a Fixed Income Member.

29. There is no challenge on this appeal to the FTT's finding that Mr Wilson was a Member, a Client Member and a Fixed Income Member for the purposes of the LLP Agreement.

30. The FTT outlined at [50] and [51] the various voting entitlements under the LLP Agreement. It summarised those matters where voting rights were removed from Mr Wilson by the Deed of Variation and those matters where Mr Wilson retained voting rights. We can set them out as follows:

Voting rights removed in connection with:

Clause 9.1: admission of new Members;

Clause 10: variation or amendment of the LLP Agreement;

Clause 14.2: provisions dealing with the valuation of any created goodwill or write back of prior year amortisation in the books of Haines Watts;

Clause 15.6: changing the requirement that 21 days' written notice must be given for Members' meetings;

Clause 20.1.3: variation of the First Charges and shares of the LLP profits;

Clause 20.2: deciding the monthly cash withdrawals which Members could receive on account of their First Charges and shares of the LLP profits;

Clause 21: sharing of net losses;

Clause 23.8: permitting an outgoing Member to deal with specified clients;

Clauses 24.3, 24.4, 24.5, 25.1 and 25.3: certain provisions as to the removal of any Member, Management Member or Managing Member from office;

Clause 27.1: payments made to outgoing Members;

Clause 28.2: any decision to allow a suspended member a share of the Haines Watts profits whilst suspended;

Clause 29.2: the sale, charging or disposal of the undertaking and assets of the LLP.

Voting rights retained in connection with:

Clause 8.3: appointment and removal of Designated Members;

Clause 9.3: appointment of Management Members;

Clause 11: authorisations for bank signatories and applications for an overdraft or other borrowing;

Clause 12: location where the business would be carried on;

Clause 13.2: permission for Members to invest in or lend to clients;

Clause 16: Members accepting appointments with clients;

Clause 24.6: determining the period of notice after a Member has given notice of early retirement or resignation;

Clause 26.2: extending the sick leave and maternity leave of Members;

Clause 26.4: waiver of a reduction in the entitlement of a Client Member's profit share on sick leave or maternity leave;

Clause 28.1: suspending a Member.

31. The FTT also noted certain provisions of the LLP Agreement dealing with rights and obligations of Mr Wilson in connection with the following matters:

Clause 15: entitlement to notice of and minutes of meetings of members;

Clause 18.8: annual accounts to be laid before a meeting of the Members, including Mr Wilson, for approval by, and to be distributed to, Members as required by the Companies Act;

Clause 6: a change to the nature of the business of Haines Watts which required agreement in writing by the parties to the LLP Agreement including Mr Wilson;

Clause 11.1: as a Member Mr Wilson could sign cheques, promissory notes and other instructions to Haines Watt's bankers together with any other Member, although in practice he did not do so;

Clause 13.2: restrictions on a Member and the Member's family from investing in or lending to any client of Haines Watts or related Haines Watts' entities, or accepting any appointments in any capacity with a client of Haines Watts or other Haines Watts entities where the service required by the client was available through the usual service departments operated by Haines Watts or other Haines Watts entities;

Clause 15.9: provisions excluding the right to vote where a Member had a conflict of interest;

Clause 18.11: charging reasonable motor car running expenses, professional subscriptions and reasonable telephone expenses to the LLP. The Deed of Variation did not amend the clause in the LLP Agreement dealing with these expenses even though Mr Wilson's payment clause made specific provision for car expenses;

Clause 22: Members' holiday entitlement which was greater than that of employees at Haines Watts;

Clause 23: restrictive covenants applying to outgoing Members;

Clause 24.2: no more than two Members being permitted to retire early in any accounting year, although the Side Letter gave Mr Wilson an absolute right to retire on 1 November 2021;

Clause 24.4: possible removal of a Member who has been in receipt of benefits under a permanent health insurance policy for more than six months;

Clause 24.5: possible removal of a member who has been absent on sick leave for longer than a permitted period; ;

Clauses 26.2 and 26.3: entitlement to profits whilst on sick leave or maternity leave;

Clauses 27.2 and 27.5: preparation of financial accounts for the LLP to the date of a Member leaving and the payment of interim payments calculated by reference to the estimate of the amount that would be due to the outgoing Member once those accounts have been finalised;

Clause 27.10: entitlement on leaving Haines Watts to receive a sum or sums representing a Member's proportion of contingent fees in respect of any work commenced while he was a Member;

Clause 28.2: possible removal of entitlement to profits of a suspended Member

Clause 33: provisions as to confidentiality;

Clause 34: provision of life assurance policies to be in force for all Members and for the cost to be borne by Haines Watts;

Clause 35: an indemnity from Haines Watts in respect of payments made or personal liabilities incurred by a Member in the performance of duties as a Member in the ordinary and proper conduct of Haines Watts' business;

Clause 35: the ability to charge and be refunded all out-of-pocket expenses properly incurred by a Member in connection with the LLP business (subject to any upper limits decided upon by the Members (including Mr Wilson);

Clause 40: the irrevocable appointment of any Management Member or the Managing Member as an attorney for a Member for specified purposes, including to give effect to the decisions of Members;

Clause 44: dispute resolution provisions.

32. The FTT noted that the following provisions of the LLP Agreement did not apply to Mr Wilson as a result of the Deed of Variation:

Clause 13.3: revaluation of Haines Watts premises and investments and allocation to Members' capital or current accounts on the death, retirement or removal of a Member or admission of a new Member;

Clause 17.4: requirement to provide additional capital to Haines Watts following a decision that such was required by the Designated Member;

Clause 20.1.1(b): scaling down of allocations of First Charges where the LLP profits were insufficient to pay all of the First Charges;

Clause 21: sharing of losses in proportion to Members' First Charges.

Clause 29.2: dealing with the distribution of any excess consideration over net value on the sale, charging or disposal of the LLP's undertaking and assets;

Clause 30: entitlement to a beneficial interest in any Haines Watts company;

Clause 31: entitlement to a share in any repayment of a professional indemnity excess.

33. The FTT considered the provisions of the LLP Agreement and the Deed of Variation relevant to the allocation of profits and Mr Wilson's remuneration. It found on the basis of those provisions that Mr Wilson was entitled by way of First Charge to annual sums which included an amount of £180,000, reduced by some amount if his chargeable time was less than £400,000, and 25 % of the profits from the International Tax Practice. The First Charge was only payable out of the profits of Haines Watts. If there were insufficient profits to pay all the First Charges, the effect of the Deed of Variation was that Mr Wilson's entitlement was not scaled back. However, the FTT found that if Haines Watts had made a loss overall then Mr Wilson was not entitled to any payment by way of his First Charge.

34. The FTT acknowledged that the LLP Agreement provision dealing with the sharing of net losses amongst Members did not apply to Mr Wilson, but that did not alter its conclusion that Mr Wilson was not entitled to payment if Haines Watts made losses in any accounting year.

35. The Side Letter provided as follows:

> 1. Notwithstanding the terms of the Partnership Agreement, including Clause 24, you shall be entitled to work full time as a Member of the Partnership for a period concluding ten (10) complete years from the Completion Date; namely 1 November 2021 ("Cease Work Date").
>
> 2. At the Cease Work Date or Cessation Date (any date before 1 November 2021), as you will then cease being a Member of the Partnership, the Partnership shall purchase from you, your 25% net profits interest in the Partnership's International Tax Practice ("ITP") for a consideration to be calculated as follows…

36. The value of Mr Wilson's interest in the International Tax Practice was to be calculated by reference to 4x the average net profit of the International Tax Practice allowing for the allocation of overheads and less the annual compensation of an individual to carry on that practice on Mr Wilson ceasing to do so.

37. The FTT considered that the provision in relation to purchasing Mr Wilsons interest in the International Tax Practice was consistent with membership of the LLP rather than employment by the LLP.

38. The FTT also made various findings at [76] – [91] under the heading "*Other relevant findings*" as to how Mr Wilson and the LLP conducted themselves after 1 November 2011 and concluded at [91] as follows:

> 91. I find that these matters do not "hollow out Mr Wilson's membership as he claims. They do not negate the previous findings about his rights and obligations as a Member of Haines Watts. The fact that there were different categories of Members with different rights and exercising different levels of management control is consistent with the legislative framework for LLPs described later.

39. The reference to "hollow out" was a reference to the way in which Mr Wilson's case had been put to the FTT. Essentially, it was Mr Wilson's case that he was in substance an employee of the LLP and a member in name only.

40. The FTT then made findings of fact as to the basis on which Mr Wilson completed his self-assessment returns for tax years 2011-12 to 2013-14. In particular, for years 2011-12 and 2012-13 he declared his income from Haines Watts as a share of partnership profits, but in 2013-14 he declared such income as employment income. The FTT records that Haines Watts paid the income tax and NICs due on Mr Wilson's income from Haines Watts for 2011-12 and payments on account for 2012-13.

41. Mr Wilson left Haines Watts on 31 March 2014, although there was a dispute about his exit arrangements. This included a dispute as to who had the liability to pay tax due.

THE DECISION UNDER APPEAL

42. The decision under appeal before the FTT was a decision of HMRC dated 21 March 2018 that Mr Wilson "*was self employed in respect of his engagement with Haines Watts LLP for the period from 31 October 2012 to 31 March 2014*". It was common ground that this was a decision pursuant to s 8 Social Security Contributions (Transfer of Functions etc) Act 1999 ("SSCA 1999") which provides as follows:

> 8(1) Subject to the provisions of this Part, it shall be for an officer of the Board—
>
> (a) to decide whether for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 a person is or was an earner and, if so, the category of earners in which he is or was to be included,
>
> (b) …
>
> (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay,

…

(2) Subsection (1)(c) and (e) above do not include any decision relating to Class 4 contributions other than a decision falling to be made —

(a) under subsection (1) of section 17 of the Social Security Contributions and Benefits Act 1992 as to whether by regulations under that subsection a person is or was excepted from liability for Class 4 contributions, or his liability is or was deferred, or

(b) under regulations made by virtue of subsection (3) or (4) of that section or section 18 of that Act.

43. The appeal rights in relation to decisions under s8 SSCA 1999 are contained in s11 of the same Act.

44. We understand from the parties' arguments in this case that the real issue between the parties concerns Mr Wilson's liability to Class 4 contributions. Hence we were referred, and the FTT was referred, to s15(3A) SSCBA 1992 as being the test for liability to Class 4 contributions. Further, Ms Murray in her skeleton argument put her overall submission in terms that Mr Wilson was an employee of Haines Watts and therefore an employed earner rather than a self employed earner, with the result that he was not liable to Class 4 contributions pursuant to s15(3A).

45. We were not taken to the provisions which govern Class 2 contributions or the distinction in the provisions which we have described above as to the basis on which Class 2 and Class 4 contributions become payable. The point is significant to this extent: A decision under s 8 SSCA 1999 relates to the category of earner and not liability to Class 4 contributions. The matter under appeal is a decision that Mr Wilson was a self-employed earner. However, the parties appear to accept that for present purposes if Mr Wilson were a self employed earner then that would lead to liability to Class 4 contributions pursuant to s15(3A) SSCBA 1992 and vice versa. We will proceed on that basis.

GROUND 1

46. Ground 1 concerns the FTT's decision at [181(1)] that:

Mr Wilson was taxable on payments made to him by Haines Watts under the Partnerships Code by virtue of Section 863 ITTOIA

47. Mr Wilson contends that the FTT made its decision on the basis that s 863 ITTOIA 2005 deems the income of a member of an LLP to be a share of partnership profits and overrides any question of whether the individual is an employee who receives employment income under a contract of service. It is said that no argument to this effect had been relied on by HMRC.

48. HMRC say that this aspect of the decision must be looked at in context, in particular the context of the immediately preceding paragraph which reads as follows:

180. Mr Wilson accepts that he was a member of Haines Watts (at least for the period under consideration in this appeal). He has argued that his membership was "hollowed out" and of no real substance, but having regard to my findings in this case and for the reasons I set out later I do not accept that to be the case.

49. HMRC say that the FTT had already found that Mr Wilson was a member of the LLP and it had rejected Mr Wilson's argument that his membership of the LLP was "hollowed out" and of no real substance. Once that finding had been reached, the application of s 863 ITTOIA 2005 necessarily followed.

50. In support of this submission, HMRC also referred us to what the FTT subsequently said in its decision refusing Mr Wilson's application for permission to appeal on this ground:

> 4. As a general matter, the Application does not engage with the analysis contained in the Decision or recognise its structure. As made clear in paragraphs 181-188 of the Decision, the primary reason for the dismissal of the appeal was the application of the Partnerships Code and in particular, Section 863 ITTOIA. I found as a matter of fact that the Appellant was a member of the LLP with substantial rights and obligations as such having regard to all of the evidence and applying the approach required by caselaw as explained at paragraphs 205-212 of the Decision. Once it was decided that the Appellant was a member of the LLP, that his membership was one of substance and not hollowed out to be no more than a name, and that payments were made to him as such, the application of Section 863 ITTOIA followed.

51. On one view, the FTT had already reached a conclusion at [91] that Mr Wilson's membership of the LLP had not been "hollowed out". However, if that is the case it is difficult to understand why the Tribunal re-visited the question in the context of its third finding at [181(3)] which is the subject of Ground 3.

52. Looking at the Decision itself, notwithstanding what the FTT has said in refusing permission to appeal, we can see why Mr Wilson considers that the FTT did view s 863 ITTOIA 2005 as a deeming provision. In the paragraphs following [181], the FTT considered each of the three aspects of its decision. It looked at the tax treatment required by s 863 and said as follows:

> *Tax treatment set out in Section 863 ITTOI*
>
> 182. The Partnership Code sets out the tax treatment for partnerships including LLPs. In particular, Section 863 provides that *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) and *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* [italics in the original].
>
> 183. LLP members are therefore treated as partners for all the activities of the LLP. The LLP provisions do not contemplate that the treatment is subject to the application of other provisions in the Taxes Acts and the provisions of Section 863 override consideration of whether a person is in fact employed.
>
> 184. Indeed, the fact that the Partnerships Code, and in particular the LLP tax provisions, were determinative of the tax treatment of LLP members gave rise to reliance on them in situations where the members were far less able than Mr Wilson to show that they were in any real sense "partners" and in turn to the anti-avoidance provisions introduced in 2014.
>
> 186. The conclusion that the LLP provisions in the Partnerships Code determine the treatment of members in an LLP is supported by the decision in *Altus* [Altus v Baker Tilly [2015] EWHC 12 (Ch)] where Judge Keyser QC at paragraph 163 of his decision relied in part on the position that "Partners in firms and members of limited liability partnerships are regarded as self-employed for tax purposes" …
>
> 187. On this basis alone Mr Wilson's appeal must be dismissed.
>
> 188. However, the parties have engaged in detailed arguments predicated on the basis that this is not the complete answer and I have therefore also addressed whether the application of the cases relied on by the appellant would lead to a different conclusion.

53. It is clear to us from these paragraphs that at [181(1)] the FTT did regard the application of s 863 as a free-standing basis on which to determine the appeal. That conclusion is entirely consistent with the language used by the FTT in [181(2)] where the FTT goes on to decide in the alternative that s 4(4) LLPA 2000 has the effect that a member of an LLP cannot be treated as an employee for tax purposes. It prefaces that conclusion with the words "*if, despite the wording of Section 863, there was scope for Mr Wilson to be taxed as an employee …*". It is clearly the wording of s 863 which has drawn the FTT to a conclusion that Mr Wilson as a

member of the LLP was taxable as a partner in the partnership which is treated as carrying on the business of the LLP.

54. Having said that, for present purposes neither HMRC nor indeed the FTT in refusing permission to appeal have sought to suggest that s 863 does operate in this way. Ground 1 therefore appears to be academic. It is not sufficient for Mr Wilson to succeed on Ground 1 alone. If Mr Wilson is right as to his interpretation of the Decision then it is accepted that the FTT erred in law but he must still succeed on Grounds 2 and 3. If Mr Wilson is wrong, there is no error of law and the real issue arises under Ground 3.

55. In the circumstances it is not necessary for us to reach a conclusion on the substance of Ground 1 (i.e. whether s 863 ITTOIA 2005 operates as a deeming provision) and we say no more about it.

GROUND 2

56. Ground 2 concerns the FTT's finding at [181(2)] of the Decision that:

> If, despite the wording of Section 863, there was scope in the tax rules for Mr Wilson to be taxed as an employee, the words of Section 4(4) LLPA do not enable a person to be treated as an employee for tax purposes when a member of an English LLP.

57. Section 4(4) LLPA 2000 provides as follows:

> 4(4) A member of a limited liability partnership shall not be regarded for any purpose as employed by the limited liability partnership unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership.

58. Mr Wilson contends that the FTT relied upon case law not cited by either party to establish that it was not bound by the construction given to s 4(4) LLPA 2000 by the Court of Appeal in *Tiffin*. As a result, he says that the FTT wrongly relied upon observations of Lady Hale (with whom Lord Neuberger and Lord Wilson agreed) in the Supreme Court in *Clyde & Co*.

59. Ground 2 raises a difficult question as to the effect of s 4(4) LLPA 2000 and whether in English law a member of an LLP can also be an employee of the LLP. The Court of Appeal in *Tiffin* answered that question in the context of a member of an LLP seeking to make a claim of unfair dismissal based on his status as an employee under the Employment Rights Act 1996.

60. In the course of his judgment, Rimer LJ (with whom Wall and Jackson LLJ agreed) held as follows:

> 31. The drafting of section 4(4) raises problems… because in law an individual cannot be an employee of himself. Nor can a partner in a partnership be an employee of the partnership, because it is equally not possible for an individual to be an employee of himself and his co-partners: see Cowell v Quilter Goodison Co Ltd [1989] IRLR 392. Unfortunately, the authors of section 4(4) were apparently unaware of this. The subsection is directed to ascertaining whether a particular member (call him A) of a limited liability partnership is or is not for any purpose an employee of it. The statutory hypothesis which the subsection requires in order to answer that question is that A and the other members of the limited liability partnership were partners in a partnership. That hypothesis, if it is to be read and applied literally, must in every case produce the same answer, namely that A cannot be an employee of the limited liability partnership for any purpose. If that had been Parliaments intention when enacting section 4(4), it might just as well have ended the subsection immediately before the word unless. That, however, was plainly not its intention. The subsequent words must be contemplating a practical inquiry that, in particular factual circumstances, will yield a yes or no answer to the question whether a particular member of a limited liability partnership is an employee of it. The subsection must, therefore, be interpreted in a way that avoids the absurdity inherent in a literal application of its chosen language so that it can be applied in a practical manner that will achieve the result that I consider

it obviously intended. The presumption is that Parliament does not intend to enact legislation whose application results in absurdities, and section 4(4) must therefore be interpreted with that in mind.

32. In my judgment the way section 4(4) is intended to work is as follows. Subject to the qualification which I mention below, it requires an assumption that the business of the limited liability partnership has been carried on in partnership by two or more of its members as partners; and, upon that assumption, an inquiry as to whether or not the person whose status is in question would have been one of such partners. If the answer to that inquiry is that he would have been a partner, then he could not have been an employee and so he will not be, nor have been, an employee of the limited liability partnership. If the answer is that he would not have been a partner, there must then be a further inquiry as to whether his relationship with the notional partnership would have been that of an employee. If it would have been, then he will be, or would have been, an employee of the limited liability partnership.

61. A judgment of the Court of Appeal is binding on the FTT and on this tribunal as a matter of precedent. If the authorities were limited to *Tiffin*, then the FTT's conclusion that s 4(4) LLPA 2000 prevents a member of an LLP from also being an employee of the LLP would be wrong as a matter of law.

62. In *Clyde & Co* the Supreme Court was concerned not with whether a member of an LLP could be an employee of the LLP, but whether a member could be a worker for employment law purposes. The FTT appears to have applied dicta of Lady Hale in *Clyde & Co* where, having referred to the decision of the Court of Appeal in *Tiffin*, she states as follows:

21. But once it is recognised that the 2000 Act is a UK-wide statute, and that there is doubt about whether partners in a Scottish partnership can also be employed by the partnership, then there is no need to give such a strained construction to section 4(4). All that it is saying is that, whatever the position would be were the LLP members to be partners in a traditional partnership, then that position is the same in an LLP. I would hold, therefore, that that is how section 4(4) is to be construed.

22. The issue in *Tiffin* was whether a member of an LLP could make a claim for unfair dismissal against the LLP. That, of course, depends, not upon whether she is a "worker" in the wider sense used in section 230(3)(b) of the 1996 Act, but upon whether she is an employee under a contract of employment. On any view, "employed by" in section 4(4) would cover a person employed under a contract of service.

23. The question for us is whether "employed by" in section 4(4) bears a wider meaning than that and also covers those who "undertake to do or perform personally any work or services for another party to the contract . . .". In my view, it does not.

…

28. For all those reasons, I conclude that section 4(4) of the 2000 Act does not mean that members of an LLP can only be "workers" within the meaning of section 230(3) of the 1996 Act if they would also have been "workers" had the members of the LLP been partners in a traditional partnership.

29. This means that there is no need to consider the subsidiary but important questions which would arise had section 4(4) borne the meaning for which Clyde & Co contend: (i) is it indeed the law, as held by the Court of Appeal in *Cowell v Quilter & Goodison* and *Tiffin v Lester Aldridge LLP* that a partner can never be an employee of the partnership …

63. In reliance on these passages the FTT concluded that in English law a member of an LLP cannot also be an employee of the LLP and that *Tiffin* was no longer good law. It did so despite its conclusion that the dicta were not necessary for the decision of the Supreme Court and did

not form part of the reasoning for that decision. It then purported to rely on a principle recently stated by Lord Burnett CJ in *R v Barton and Booth* [2020] EWCA Crim 575 at [104] in the context of the meaning of dishonesty. We add what was said at [103] and the whole of [104] for context:

> 103. The rules of precedent exist to provide legal certainty which is a foundation stone of the administration of justice and the rule of law. They ensure order and predictability whilst allowing for the development of the law in well-understood circumstances. They do not form a code which exists for its own sake and must, where circumstances arise, be capable of flexibility to ensure that they do not become self-defeating.
>
> 104. We conclude that where the Supreme Court itself directs that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly *obiter*. To that limited extent the ordinary rules of precedent (or *stare decisis*) have been modified. We emphasise that this limited modification is confined to cases in which all the judges in the appeal in question in the Supreme Court agree that to be the effect of the decision. Such was a necessary condition before adjusting the rules of precedent accepted by this court in *James* in relation to the Privy Council. Had the minority of the Privy Council in *Holley* not agreed that the effect of the judgment was to state definitively the law in England, it would not have been accepted as such by this court. The same approach is necessary here because it forms the foundation for the conclusion that the result is considered by the Supreme Court to be definitive, with the consequence that a further appeal would be a foregone conclusion, and binding on lower courts.

64. It is clear to us that if the dicta of Lady Hale in *Clyde & Co* as to the meaning and effect of s 4(4) LLPA 2000 were not part of the reasoning of the Supreme Court then those dicta would not fall within the limited exception to the rule of precedent described by Burnett CJ. The FTT was therefore wrong to treat the dicta as overruling *Tiffin* in the way it did.

65. HMRC had not invited the FTT to take that approach. They had argued that the dicta of Lady Hale formed part of the reasoning of the Supreme Court and had the effect of overruling *Tiffin*. In contrast, Mr Wilson had argued that the dicta did not form part of the reasoning of the Supreme Court and therefore *Tiffin* was binding and the FTT was required to follow the reasoning of Rimer LJ in that case.

66. Ground 2 on the present appeal essentially involves the same arguments. They are not easy arguments. In *Reinhard v Ondra LLP* [2015] EWHC 26 at [44] and [45], Warren J left open the question as to whether what was said by Lady Hale formed part of the reasoning of the Supreme Court in *Clyde & Co*. When he returned to the question in *Reinhard v Ondra LLP No 2* [2015] EWHC 1869 at [38] he stated that Lady Hale's dicta was part of the reasoning in *Clyde & Co* and that the approach in *Tiffin* could not stand with that reasoning.

67. For reasons which follow, we have come to the conclusion that Mr Wilson's appeal on Ground 3 must be dismissed. That finding determines this appeal. In those circumstances it is not necessary for us to deal with Ground 2 and in our view it would not be helpful for us to add our thoughts to the debate in a case where it is not determinative.

GROUND 3

68. Ground 3 concerns the FTT's finding at [181(3)] that:

> Even if Section 4(4) LLPA means that a person could be an employee and a member of an English LLP, the payments made to Mr Wilson were as a member of Haines Watts as if a partner and not as an employee.

69. It appears to be common ground for the purposes of Ground 3 that if Mr Wilson would be a partner in the notional partnership identified in s 4(4) LLPA 2000, then he would be a self-employed earner and liable to Class 4 contributions.

70. The FTT approached this aspect of the Decision on the basis that *Tiffin* was good law and should be applied. Mr Wilson contends that whilst the FTT accepted that labels in the LLP Agreement were not determinative of the true nature of the relationship between Mr Wilson and the LLP, in fact the FTT did rely on certain labels and failed to give effect to the substantive terms of the Deed of Variation. Essentially, Mr Wilson says that the FTT should have found that he was not in substance a partner in the activities of the LLP which by virtue of s 863 ITTOIA 2005 are treated as carried on in partnership. It ought to have found that he was in substance an employee of the LLP.

71. As to reliance on labels, the FTT said this:

> 205. I recognise that a label put on a relationship by the parties may not determine the true agreement between them and any written agreement is usually only part of the material to be used to determine the real nature of the relationship. In *Autoclenz v Belcher* [2011] ICR 157, the Supreme Court confirmed that the written deed may only be a part of the true agreement, particularly where the relative bargaining power of parties is taken into account. However, in this case I am satisfied that there was not any significant inequality in bargaining power between Mr Wilson and Haines Watts as shown by the meeting notes and emails at the time of the negotiations.
>
> …
>
> 208. Rimer LJ [in Tiffin] relied on the case of *Stekel* in reaching his conclusion and the importance of identifying the parties' intentions, to determine whether a partnership was created. Again in *Stekel* it was made clear that the label used to describe a relationship is not determinative, but its true substance…

72. In the context of the exercise being conducted pursuant to s 4(4) LLPA 2000 and *Tiffin*, it is clearly right not to place reliance on labels put on the agreements between Mr Wilson and the LLP. The exercise is only required because the written agreements constitute Mr Wilson as a member of the LLP and Mr Wilson accepts that he was a member of the LLP. His case is that notwithstanding that he was a member, he was in reality an employee of the LLP pursuant to section 4(4).

73. Ms Murray's submissions under Ground 3 went beyond asserting that the FTT wrongly relied upon labels. She sought to challenge the FTT's finding that Mr Wilson was in substance a partner and not an employee, regardless of the use of labels.

74. The FTT considered at [206] – [211] the approach of the Court of Appeal in *Tiffin* to the question of whether Mr Tiffin was a partner. It also referred to the well-known case of *Stekel v Ellice* [1973] 1 WLR 191, which Mr Wilson had relied on before the FTT and which was extensively referred to by the Court of Appeal in *Tiffin*.

75. By way of summary, the FTT found that whilst Mr Wilson was not required to contribute to capital and had no right to any surplus assets on a winding up, he did have a voice in the management of the affairs of the LLP and an interest in its profits. That interest was not just in the profits of the International Tax Practice but also the profits of the firm as a whole, because he was only entitled to his First Charge if Haines Watts made a profit. If it made a loss, he was not entitled to his First Charge. The FTT also relied on what it considered to be the intentions of the parties that Mr Wilson should be a member of the LLP and not an employee. It did not accept that Mr Wilson's position as a member was in some way "hollowed out".

76. Mr Wilson had given evidence before the FTT of circumstances where in practice Haines Watts exercised control over his work in relation to clients of the firm. The FTT did not consider that those practices undermined his position as a member of the LLP.

77. In conclusion the FTT stated at [212]:

> 212. As a result, I conclude that even if I were to apply the *Tiffin* approach, the payments made to Mr Wilson by Haines Watts were payments made to him as a member of an LLP and "as if" a partner in a partnership and not as an employee.

78. Ms Murray criticised this conclusion as being wrong in law for the following reasons:

(1) The FTT failed to ask itself whether there was a contract of service between Mr Wilson and the LLP.

(2) If the FTT had properly asked itself that question, then it would have concluded that Mr Wilson was an employee of the LLP and therefore an "employed earner" for the purposes of *SSCBA 1992*. It was clear from the evidence and applying *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 and subsequent authorities that there was sufficient mutuality of obligation and control by the LLP of Mr Wilson's work to establish Mr Wilson as an employee of the LLP. The provisions of the LLP Agreement and the Deed of Variation were consistent with Mr Wilson being an employee of the LLP.

(3) Further, the FTT was wrong to find that the expressed intention of the parties was to create a partnership and not an employment, and was wrong to rely on that finding. Ms Murray relied on what was said by Henderson J as he then was in *Dragonfly Consultancy Limited v Revenue & Customs Commissioners* [2008] EWHC 2113:

> 53. Having dealt at some length with the issues of substitution and control, I can now deal more briefly with the two remaining grounds of appeal. The main reason for this, so far as intention is concerned, is that statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them. It is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other: see Ready Mixed Concrete at 513B and Massey v Crown Life Insurance Co [1978] 1 WLR 676 (CA). In the majority of cases, however, such statements will be of little, if any, assistance in characterising the relationship between the parties.

(4) The FTT wrongly concluded that if the LLP were a partnership then Mr Wilson would be a partner. In doing so it wrongly relied on labels in the written agreements.

79. We shall deal with the last point first because it is clear that Mr Wilson has permission to appeal on that ground. Ms Murray criticises the FTT as having relied on the following labels in the agreements:

(1) The fact that Mr Wilson was defined as a "Client Member" and "Fixed Income Member".

(2) The fact that Mr Wilson's entitlement to remuneration was described as a "First Charge" which led the FTT to wrongly conclude that if the LLP made a loss in any accounting year then Mr Wilson would not be entitled to any remuneration for that year.

80. Megarry J in *Stekel v Ellice* was concerned with whether an individual described as a "salaried partner" was a partner. In relation to "labels" he said as follows:

> It seems to me impossible to say that as a matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or may not be a partner, depending on the facts. What must be done, I think, is to look at the substance of the relationship between the parties; and there is

> ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is, and not on any mere label attached to that relationship. A relationship that is plainly not a partnership is no more made into a partnership by calling it one than a relationship which is plainly a partnership is prevented from being one by a clause negativing partnership: see, for example, *Lindley on Partnership* , 13th ed. (1971), p. 66.

81. We do not consider that the FTT relied on the labels by which Mr Wilson was described in the LLP Agreement and the Deed of Variation, as opposed to the substantive rights and obligations of the parties. It expressly recognised that labels may not determine the true nature of an agreement. Ms Murray submitted that the FTT relied on its finding that Mr Wilson was a Client Member as defined in the LLP Agreement and a Fixed Income Member as defined in the Deed of Variation. Nowhere in the Decision is there any real suggestion that the FTT's finding that Mr Wilson was a Client Member and a Fixed Income Member played a part in its conclusion that he was a partner for the purposes of the notional partnership in s 4(4) LLPA 2000. The FTT's reasons for concluding that Mr Wilson was a partner appear at [204] – [212] where there is no mention of Mr Wilson being a Client Member or a Fixed Income Member.

82. As to the labelling of Mr Wilson's entitlement to remuneration as being by way of "First Charge", the FTT was careful to analyse the precise nature of Mr Wilson's entitlement. The FTT concluded that whilst Mr Wilson's entitlement to remuneration by way of First Charge would not be scaled down in the event that there were insufficient profits to pay the first charges of all the members, in the event that the LLP made a loss Mr Wilson would have no entitlement to remuneration. Ms Murray challenges that conclusion and says that it is wrongly based on the label "First Charge".

83. We are satisfied that the FTT was correct to construe Mr Wilson's entitlement to a First Charge in the way it did. We have quoted above the terms of clause 3 of the Deed of Variation which sets out, under the heading "Profit Share", Mr Wilson's entitlement to a First Charge of £180,000 adjusted for the matters in the following sub-paragraphs. In particular that sum is reduced if Mr Wilson had less than £400,000 in chargeable time in the accounting year, is increased for car expenses and tax payable on earnings of the firm, and also increased to reflect 25% of the profits arising from international tax work.

84. The significance of amounts being payable to members by way of First Charge and the significance of LLP losses appears in the LLP Agreement. In particular, clauses 20 and 21 of the LLP Agreement provide as follows:

> **20. PROFITS**
>
> 20.1 **Allocation of profits**
>
> The profits of the LLP for any accounting year of the LLP (the "LLP Accounting Year") shall be determined by reference to the LLP Accounts for the relevant accounting year and shall be allocated between the Members as follows:-
>
> 20.1.1 a non-cumulative first charge (the "First Charge") on the LLP Profits for each of the Members per the LLP Accounting Year as set out in Part 1 of Schedule 4
>
> PROVIDED THAT:-
>
> (a) any Member who is absent on Sick Leave or Maternity Leave shall have his entitlement to Monthly Cash Withdrawals in any LLP Accounting Year reduced pursuant to the provisions of Clause 26 and his/her entitlement to a First Charge in that year shall be reduced by the same proportion by which the aggregate of his/her entitlement to Monthly Cash Withdrawals for that year is so reduced; and

(b) if the LLP Profits shall not be sufficient to pay the full amount of the First Charges, the amount of the Client Members' and the Management Members' allocation thereof shall be scaled down pro rata to the allocation which would otherwise have been made of the unreduced amount of the said First Charge if the LLP Profits had been sufficient as aforesaid.

20.1.2 a share of the LLP Profits after deduction of the Members' First Charges as set out in Part 2 of Schedule 4;

20.1.3 the First Charges and shares of the LLP Profits referred to in Clauses 20.1.1 and 20.1.2 may only be varied by the unanimous decision of the Members.

20.2 **Monthly Cash Withdrawals**

Subject to Clause 26.2, each Member shall be entitled to draw from the LLP such sum or sums (if any) per month ("Monthly Cash Withdrawals") as the Members from time to time shall decide by Simple Majority (the Member concerned shall not be entitled to vote on the decision as regards himself) and all sums so withdrawn shall be deemed to be drawn on account of such Member's First Charge and share of the LLP Profits in accordance with Clause 20.1

21. **LLP LOSSES**

In the event that the LLP Accounts shall show a net loss in respect of any LLP Accounting Year (before any First Charges), such loss shall (save as may be unanimously decided by all the Members) be borne by the Members in proportion that the First Charges in Clause 20.1.1 bear to each other.

85. Schedule 4 of the LLP Agreement set out details of the Members' First Charges for the purposes of Clause 20. Various figures were given for Members between nil and £228,000. Mr Wilson's First Charge and that of one other Client Member was expressed to be "in accordance with deed of variation". 100% of the share of profits after deduction of Members' First Charges was allocated to the Management Members, although for the four Client Members the share was expressed to be "in accordance with deeds of variation".

86. It is clear to us that the fact Mr Wilson's entitlement was described as a First Charge in the Deed of Variation brought it within clause 20 of the LLP Agreement. Clause 20.1.1(b) and clause 21 did not apply to Mr Wilson and Mr Wilson was not entitled to a vote pursuant to clauses 20.1.3 and 20.2. The FTT acknowledged that these clauses did not apply to Mr Wilson. However, the FTT properly addressed its mind to the position if the LLP made a loss in any accounting year, and whether Mr Wilson would still be entitled to his remuneration as set out in the Deed of Variation. It concluded that he would not be so entitled:

> 67. … The Fixed Charge (sic) was only payable out of the profits of Haines Watts. If there were insufficient profits to pay all the First Charges, the result of the Deed of Variation was that Mr Wilson's was not scaled back. So, for example if the profits were £190,000 he remained entitled to £180,000 (plus the other elements of his profit share calculated under the Deed of Variation). In that sense his First Charge was first before the other First Charges.
>
> 68. However, if Haines Watts had made a loss overall Mr Wilson was not entitled to any payment under his First Charge. That is the result of the combination of the LLP Agreement profit sharing provisions and the Deed of Variation amendments to that Agreement…

87. We consider that is the correct construction of the LLP Agreement as varied by the Deed of Variation. If Mr Wilson was simply entitled to his remuneration regardless of whether the LLP made a profit or a loss in any particular accounting year then the Deed of Variation could easily say so in straightforward terms. It does not. Indeed, the parties went out of their way to define Mr Wilson's entitlement as a "First Charge" and to retain the bulk of clause 20 of the LLP Agreement. Once a Member's entitlement to remuneration is described as a "first charge", the question immediately arises as to what it is charged upon. The answer to that is clearly that

it is a charge on the profits of the LLP and implicitly it is only payable if there are profits out of which it can be paid. This construction of the LLP Agreement does not amount to relying on a label. It is simply giving the words their natural and ordinary meaning.

88. That is sufficient to deal with the challenge under Ground 3. The Court of Appeal in Tiffin described a finding as to the existence of a partnership as a finding of fact, albeit one requiring a recognition of the applicable legal principles. The FTT must be taken to have found as a fact that there was a partnership.

89. It is not clear to us that Mr Wilson has permission to challenge the FTT's finding that there was a partnership other than by reference to the argument that the FTT relied on labels rather than the substance of the agreements. As Ms Vicary points out, there is no challenge to the FTT's finding by reference to the criteria in *Edwards v Bairstow* [1956] AC 14. Further, to the extent that the FTT's conclusion was an evaluative exercise based on its findings of primary fact, this tribunal should be slow to interfere with such a conclusion (see for example *Fage v Chobani UK Limited* [2014] EWCA Civ 5 at [114] and *Proctor & Gamble UK Limited v HM Revenue & Customs* [2009] EWCA Civ 407 at [9]).

90. However, we are conscious that the FTT only gave brief reasons for concluding that Mr Wilson was in substance a partner. In the circumstances, and notwithstanding what appears to be the limited basis on which permission was granted, we shall deal with Ms Murray's other criticisms of the Decision and say why we consider that the FTT was entitled to reach that conclusion.

91. Ms Murray submitted that the FTT ought to have first applied the well-known line of authorities commencing with *Ready Mixed Concrete* which distinguish a contract of service or employment from a contract for services or self-employment. She relied on s 2(1) SSCBA 1992 which defines a "self-employed earner" as someone who is gainfully employed otherwise than in an employed earner's employment, and an "employed earner" as someone who is employed under a contract of service. She submitted that the logical starting point is therefore whether Mr Wilson was employed under a contract of service. If he was, then he was an employed earner and could not be a self-employed earner. Ms Murray also submitted that s 15(3A) SSCBA 1992 requires one to assume that the LLP is a partnership, and then ask whether Mr Wilson was an employed earner or a partner in the hypothetical partnership.

92. We do not accept that is the right approach to the issue on this appeal. Section 4(4) LLPA 2000 provides that a member of an LLP shall not be regarded for any purpose as employed by the LLP unless, if the other members were partners in a partnership he would be regarded as a partner rather than an employee. The first question therefore is whether Mr Wilson would be a partner in that notional partnership. If he were not a partner, then he might be providing services to the LLP either as an employee of the LLP or pursuant to a contract for services with the LLP. However, that question is not relevant to the issues on this appeal.

93. This approach is clearly supported by the Court of Appeal in *Tiffin*, the authority relied upon by Mr Wilson. Rimer LJ described the approach required by s 4(4) LLPA 2000 as follows:

> 32. … [Section 4(4) LLPA 2000] requires an assumption that the business of the limited liability partnership has been carried on in partnership by two or more of its members as partners; and, upon that assumption, an inquiry as to whether or not the person whose status is in question would have been one of such partners. If the answer to that inquiry is that he would have been a partner, then he could not have been an employee and so he will not be, nor have been, an employee of the limited liability partnership. If the answer is that he would not have been a partner, there must then be a further inquiry as to whether his relationship with the notional partnership would have been that of an employee. If it would have been, then he will be, or would have been, an employee of the limited liability partnership.

94. It was on this basis that the Court of Appeal in *Tiffin* focussed on whether Mr Tiffin would have been a partner. It found that he would have been a partner and therefore it did not need to consider the question of whether he would have been an employee.

95. Further, as we have noted above s15 SSCBA 1992 does not provide for Class 4 contributions to be payable by self-employed earners. It provides for them to be payable by members of an LLP who would be charged to income tax in respect of profits arising from the carrying on of a trade or profession by the LLP. In those circumstances, Class 4 contributions are payable by that member if they would be payable were the trade or profession carried on in partnership by the members. The parties and the FTT have treated the test under s 2(1) SSCBA 1992 for self- employed earners and the test under s15 SSCBA 1992 for liability to Class 4 contributions as the same test.

96. The first question therefore, is whether Mr Wilson would have been a partner, together with the other members of the LLP in the notional partnership described by s 4(4) LLPA 2000. As such, the FTT was right not to embark upon an analysis as to whether Mr Wilson was an employee of the LLP or providing his services pursuant to a contract for services.

97. In considering whether Mr Wilson would be a partner in the hypothetical partnership, the FTT did not refer to the definition of partnership in the Partnership Act 1890 ("PA 1890") or the rules in that Act for determining the existence of a partnership. Those provisions really ought to have been the starting point for the FTT. However, it did refer to the analysis of the Court of Appeal in *Tiffin* and of Megarry J in *Stekel v Ellice* and we bear in mind that the FTT engaged in this analysis for the sake of completeness given its findings at [181(1)] and [181(2)]. As a result, it appears to have set out its reasoning quite briefly.

98. Ms Murray submits that the FTT failed to give due regard to the matters which pointed towards Mr Wilson not being a partner:

(1) The other Members controlled Mr Wilson's work.

(2) Mr Wilson had the benefit of an indemnity from the other Members.

(3) On a true construction of the LLP Agreement and the Deed of Variation, Mr Wilson was entitled to his remuneration whatever the profits or losses of the LLP.

(4) The FTT wrongly treated Mr Wilson's entitlement to what it viewed as a share of the profits as a decisive factor. Even if Mr Wilson was entitled to a share of the profits in the way described by the FTT, then this would not be a decisive factor.

(5) There were no other features of the relationship other than what the FTT considered to be Mr Wilson's entitlement to a share of profits that point towards a partnership relationship.

(6) Mr Wilson's limited rights to vote on certain matters were not sufficient to constitute him a partner, and the FTT failed to have proper regard to the substantive matters on which the Deed of Variation removed Mr Wilson's rights.

99. The definition of a partnership appears in s 1 PA 1890, with s 2 then setting out various rules to which regard must be had in determining the existence of a partnership:

> **1 Definition of partnership.**
>
> (1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit….
>
> **2. Rules for determining existence of partnership.**
>
> In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) …

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(a) …

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

100. In *Stekel v Ellice*, Megarry J found that the plaintiff who was described as a salaried partner was on the facts of the case in partnership with the defendant. The finding was made despite the fact that the plaintiff made no contribution to capital, the capital belonged solely to the defendant and all the profits belonged to the defendant. However, the nature of the agreement and the conduct of the parties accorded with the concept of partnership. The absence of a share of profits did not outweigh the other evidence of partnership.

101. *Tiffin* also concerned a salaried partner in a firm which later converted to an LLP. The Court of Appeal held that it was obvious from a reading of the members' agreement that the parties intended to set up a relationship which could fairly be regarded as a partnership. The case was more clear-cut than *Stekel v Ellice*. The claimant made a capital contribution to the partnership, was entitled to share in surplus assets on a winding up, had a fixed share of profits to be taken as monthly drawings together with a further share of profits and a voice in the management of the firm.

102. Rimer LJ also referred to the decision in *M Young Legal Associates Ltd v Zahid* [2006] 1 WLR 2562. In that case, the Court of Appeal rejected arguments that it was a condition of partnership that each partner must be entitled to participate in the profits of the business. Further, whilst an interest in the capital of the firm or a dominant (in the sense of influential, material or significant) role in the management of the firm might be a strong indicator of partnership, they were not pre-requisites.

103. Ms Murray submitted that there was no sense in which Mr Wilson was carrying on a business in common with the other members of the LLP. He was subservient to them in every respect.

104. We do not accept that submission. We are satisfied that the FTT was entitled to find that Mr Wilson was in substance a partner in the notional partnership postulated by section 4(4) LLPA 2000 and for the purposes of s15(3A) SSCBA 2002. In particular:

(1) Mr Wilson's entitlement to remuneration as a First Charge on the profits of the LLP amounted to a share in the profits of the LLP. For the reasons we have given, Mr Wilson would not be entitled to any remuneration if the LLP suffered a loss in any particular accounting year.

(2) It is also significant that Mr Wilson's First Charge included an entitlement to 25% of the profits arising from international tax work.

(3) We agree with the FTT that Mr Wilson retained significant and substantial voting rights which we would not expect of an employee. In particular, he could vote on the

appointment of Management Members, authorisations for bank signatories and bank borrowings, where the business would be carried on and on the suspension of Members.

(4) We agree with the FTT that Mr Wilson had significant rights and obligations under the LLP Agreement. He was entitled to notice of and minutes of meetings, copies of the LLP accounts and auditors report, an indemnity in respect of payments made and personal liabilities incurred by him as a Member. He was subject to the restrictive covenants applicable to outgoing Members and to possible suspension. He was also entitled to inspect the books and records of the LLP in his position as a Fixed Interest Member, subject to his request being reasonable.

(5) The FTT stated at [75] that the provisions of the Side Letter dealing with calculating a purchase price for Mr Wilson's interest in Haines Watts was consistent with his being a member of the LLP rather than employed by the LLP. It seems to us that the FTT was fully entitled to reach that conclusion. Indeed, we would go further and say that it was a significant factor pointing towards Mr Wilson being a substantive member of the LLP. It effectively gave Mr Wilson an interest in the capital of the LLP because on ceasing to be a member of the LLP he was entitled to the capitalised value of future net profits of the International Tax Practice of the LLP.

105. We acknowledge that the LLP Agreement enabled the other Members to amend the LLP Agreement without Mr Wilson's consent and Mr Wilson was not entitled to vote on any proposed amendments. However, that does not cause us to view Mr Wilson's relationship with the partnership in a different light. His rights and obligations existed at all times during the period relevant to this appeal and it is not suggested that they were ever varied in that period.

106. Ms Murray relied upon *Cobbetts LLP v Hodge* [2009] EWHC 786. In that case, Mr Hodge was an "employed partner". As such, he had significant autonomy in his work and was paid a salary plus a commission based on newly introduced business. He was not entitled to share in net profits, attend partners' meetings or take part in the management or conduct of the partnership business. He was entitled to attend partners' meetings and was held out as a partner to third parties. He was also required to observe the provisions of the partnership deed, although if he was not a partner there were no provisions to observe.

107. Floyd J held that Mr Hodge was not a partner for reasons given at [87]:

> 87. I have come to the conclusion that Mr Hodge was not in law a partner in LC. Whilst not conclusive, the Deed is powerful evidence that the intention of LC was to distinguish clearly between partners and employees and to place Mr Hodge in the latter category. The degree of his autonomy was consistent with that of a senior solicitor employee. He did not receive a share of the profits in the sense in which that expression is used in partnership law: his remuneration did not depend on the gross profits of the partnership. The decision to place Mr Hodge on Sch D tax was something arranged for his benefit, but did not alter the nature of the relationship. The reference in his letter of appointment to the relevant provisions of the Deed does not make him a partner, nor does it make provisions which do not apply to employee partners apply to him.

108. Ms Murray submitted that Mr Wilson's position was analogous to that of Mr Hodge in *Cobbetts LLP*. We do not find factual comparisons between cases helpful. No two cases are the same and once the correct legal principles are applied an evaluative judgment is required to determine whether the relevant individual is a partner.

109. Finally, Ms Murray submitted that the FTT was wrong to find and rely on the intention of the parties for Mr Wilson not to be an employee. We can see that the FTT did find at [29], quoted above that Mr Wilson had said in negotiations that he wanted to be a partner and not an employee. However, we cannot identify any part of the Decision in which the FTT places

reliance on the expressed intentions of the parties. Its analysis was based on the effect of the legal agreements.

110. In our view, the FTT was entitled to find that Mr Wilson was a partner in the sense that he was carrying on a business in common with the other Members of the LLP with a view of profit. Looking at the facts as a whole, we would have reached the same conclusion.

CONCLUSION

111. For the reasons given above, we are satisfied that the FTT made no error of law as alleged in Ground 3 and we dismiss this appeal.

Signed on Original

MR JUSTICE ADAM JOHNSON
UPPER TRIBUNAL JUDGE CANNAN

Release date: 29 September 2021