

COURT OF APPEAL DECISION

Bluecrest: Significant Influence for
the Salaried Member Rules
(spoiler: not always who you'd expect)

29 January 2025

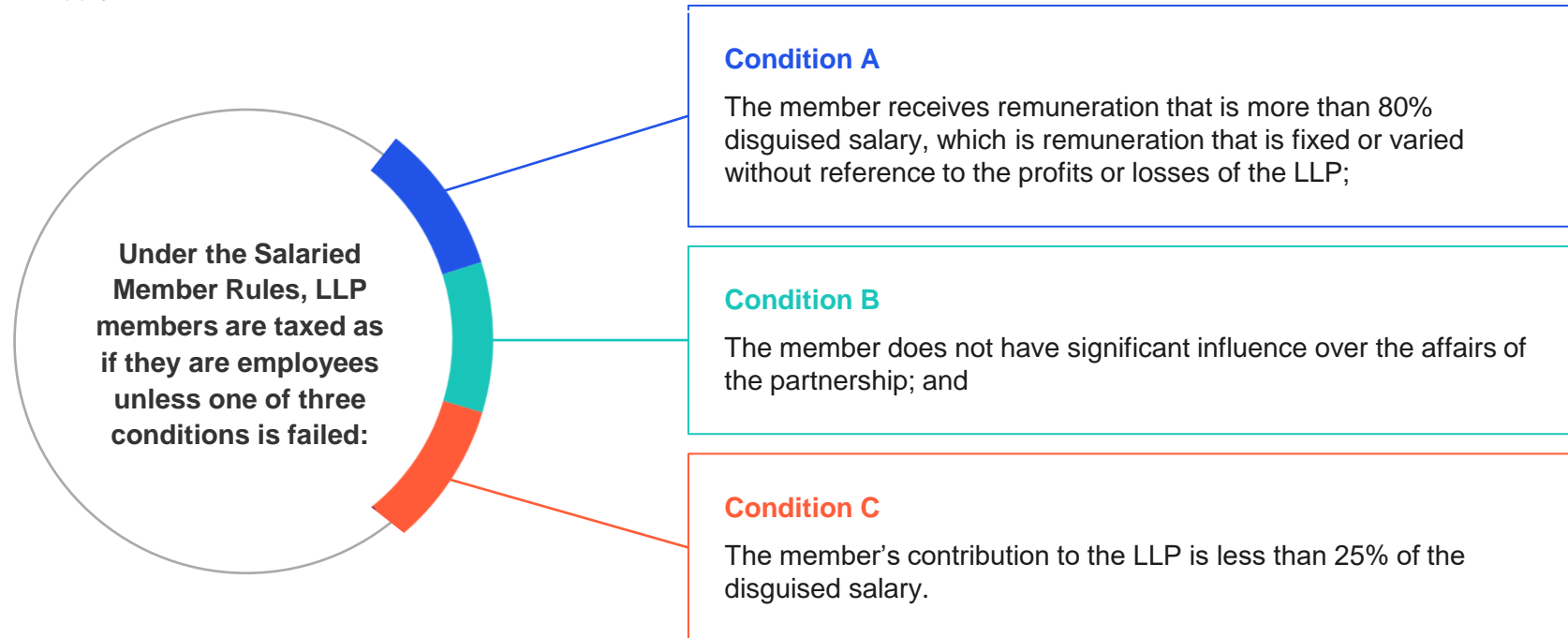
Court of Appeal Decision: Bluecrest

The Decision

Friday 17th January marked a significant day for UK LLPs and their members; the Court of Appeal published its decision in Bluecrest and re-framed the way that the Salaried Member Rules apply in the UK.

Summary

UK LLPs should be reviewing their current UK tax treatment of members for we anticipate that this decision will bring many more within the scope of the Salaried Member Rules, which, when they apply, subject the LLP to employers' national insurance on such members' drawings.



- ▶ The Bluecrest appeal predominantly concerned **Condition B** and how to determine whether someone has significant influence over the affairs of the partnership.

Establishing Significant Influence

- ▶ The key determination was that **significant influence needs to be established through either the LLP agreement or legislation** (referred to as “qualifying influence”) where such qualifying influence is also, in practice, significant influence. This represents a departure from not only the established market practice but also HMRC’s own guidance on this point, which to date has provided that taxpayers should take a realistic view of the facts and consider how the partnership operates in practice.

Affairs of the Partnership

- ▶ The Court of Appeal made scant reference to the question of what it means to have influence “over the affairs of the partnership”, concluding that it means “*the affairs of the partnership generally, viewed as a whole and in the wider context of the Group. The affairs of the LLP are broader than, although they include, the business of the LLP... More generally, a focus on decision-making at a strategic level, rather than on how individual members perform their duties in conducting the Business, seems to me to accord better with the basic purpose of Condition B...*” This conclusion was certainly influenced by the fact that the LLP agreement contained separate provisions dealing with the “business” and day to day management and control of the business and affairs of the partnership.

Type of Activity That is Significant

- ▶ No conclusions were drawn in this decision regarding the types of individuals and activities that satisfy this definition, and it will be for the First Tier Tribunal to consider. However, in our view, **the direction of travel appears to be narrowing the types of activity that are considered as part of this condition**. For example, in the earlier Bluecrest decisions, portfolio managers with a financial limit over a certain amount were considered to have significant influence over the business and affairs of the partnership; it is possible that this will now be seen as significant influence over the business but not the affairs of the partnership because they lack that strategic element.

Next Steps

- ▶ The Court of Appeal determined that the First Tier Tribunal had made an error in law in accepting that factors other than those contained in the LLP agreement could be considered to establish significant influence and has accordingly sent the decision back to the First Tier Tribunal to be re-decided. Therefore, without a change in law, this interpretation of “significant influence” will remain in force.

Application

- ▶ The form over substance approach taken by the Court of Appeal resulted in the bizarre conclusion in Bluecrest that the founder partner (if he had been a member) did not have significant influence, even though it was accepted that he could “usually, and perhaps always, ensure that his wishes were followed”. However, the influence that he did have could in practice prevent anyone with qualifying influence as determined under the Court of Appeal’s test also having significant influence in practice.

Interaction with Other Conditions

- ▶ The decision represents a further blow to LLPs and their members, who are already struggling with HMRC’s change in practice with regards to Condition C and the conclusion that adding capital to a partnership in order to fail Condition C triggers the targeted anti-avoidance provisions.

Wider Impact on Legislation by Guidance

- ▶ Finally, the decision has wider significance with respect to reliance on HMRC’s guidance. The Court of Appeal is very clear that the wording of the legislation and the judicial interpretation of such wording trumps anything else, including HMRC guidance. It has always been the case that HMRC guidance is purely that; internal guidance to HMRC officers on HMRC’s “house” position with regards to applying the tax code, and as such it is open to taxpayers to take contrary, more taxpayer friendly, positions. However, the increasing trend of legislation’s being drafted very broadly with the promise of clarification via guidance has somewhat changed the original purpose of guidance. This should definitely be taken into consideration during the re-drafting of the carried interest tax regime.

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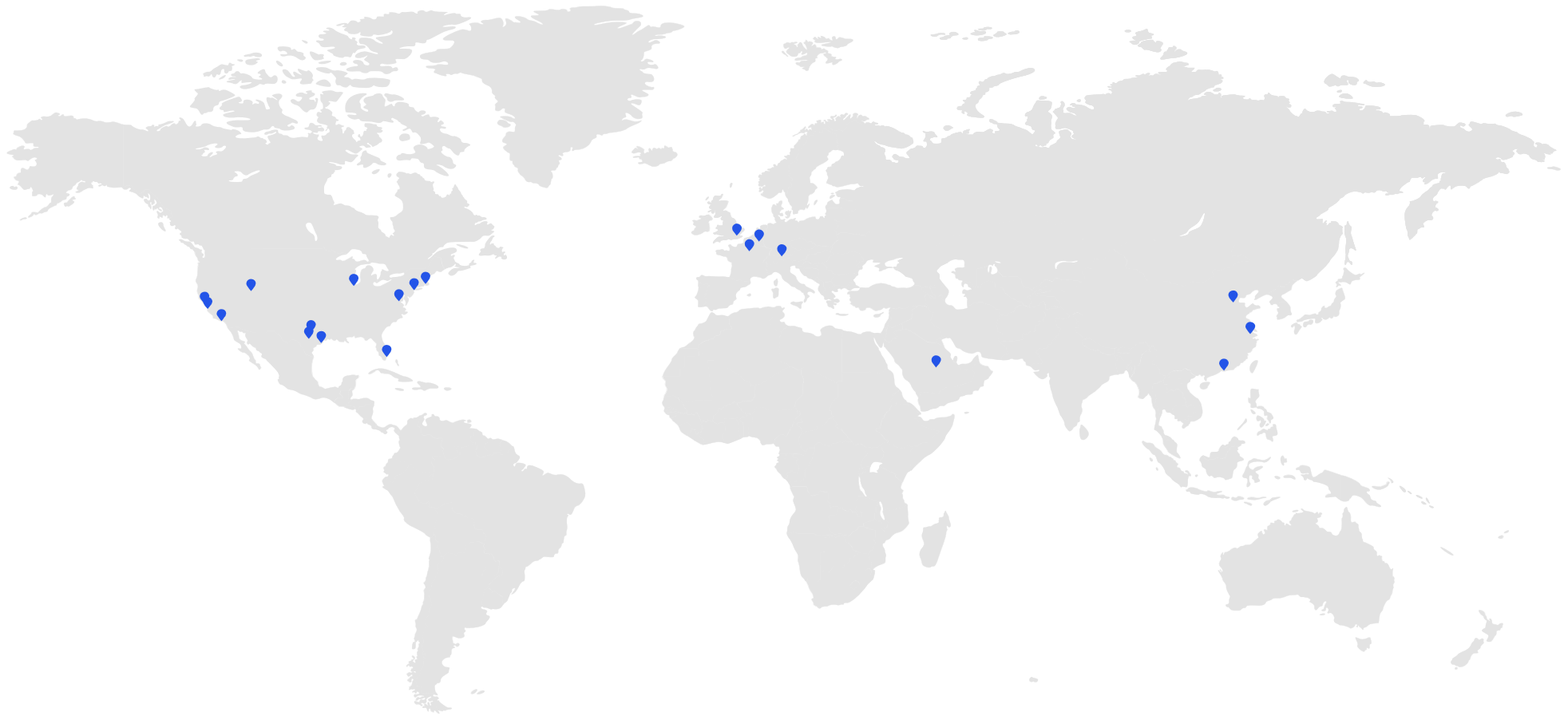
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