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Case Number: TC09116

FIRST-TIER TRIBUNAL
TAX CHAMBER

London: Taylor House

Appeal reference: TC/2022/01445
TC/2022/12132
TC/2022/12130

CORONAVIRUS JOB RETENTION SCHEME – whether employees were fixed or variable rate employees – variable – whether certain payments were contrary to the exceptional purpose of the scheme – yes – whether we should exercise our powers to increase the assessments - yes

Heard on: 28 – 29 February 2024
Judgment date: 22 March 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC
DUNCAN MCBRIDE

Between

AEMTRIE LIMITED
AEMYRIE HOLDINGS LIMITED
TRUE WOOD GRILLS LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr S Brodsky of Counsel instructed through direct access by the Appellants

For the Respondents: Ms Ameerelly litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns assessments (**Assessments**) raised by HM Revenue & Customs (**HMRC**) pursuant to paragraph 9 Schedule 16 Finance Act 2020 (**FA20**) issued to each of Aemyrie Limited (**AL**), Aemyrie Holdings Limited (**AH**) and True Wood Grills Limited (**TWG**) (collectively **Appellants**) in respect of payments concluded by HMRC to have been incorrectly made to those Appellants under the coronavirus job retention scheme (**CJRS**).

2. The Assessments under appeal were initially made and subsequently revised by HMRC such that we were invited to consider the Assessments in the sums set out in the table attached as Appendix A. The Assessments are made on the basis that Peter Walsh (**PW**) and Claire Hallett-Walsh (**CHW**) were variable rate employees under the terms of the various Treasury Directives issued pursuant to section 76 Coronavirus Act 2020 (**CA20**) and by which entitlement to CJRS was determined.

3. There is no dispute between the parties as to the quantum or calculation of the Assessments at Appendix A if we are satisfied that PW and CHW were variable rate employees.

4. However, and by their statement of case and subsequent skeleton argument, HMRC invite us to increase the amounts assessed against AH and TWG. They do so on the basis that those companies were not entitled to claim CJRS at all predominantly on the basis that payment of CJRS claims to those companies are contrary to the exceptional purposes of the CJRS. HMRC also make certain allegations that the contracts of employment with those companies have been fabricated. It was not entirely clear to us, but we interpret the allegation of fabrication as having been pleaded as evidence that payments were contrary to purpose. The amounts we are invited to increase these assessments to are shown in Appendix B.

5. For the reasons given below we dismiss the appeal and increase the assessments determining the amounts in respect of which the Appellants received payments under CJRS which they were not entitled to. These amounts are shown in Appendix B.

BACKGROUND

6. AL, AH and TWG are related companies under common control. PW is the sole director and shareholder of each company.

7. AL claimed CJRS payments for PW for CJRS claim periods running from 1 March 2020 to 31 October 2020 and for both PW and CHW for the claim periods running from 1 November 2020 to 31 March 2021. AH and TWG claimed CJRS payments for both PW and CHW for the period 1 November 2020 – 31 March 2021. Each of the claims was made on the basis that PW and CHW were paid £3,125 for the months in which the claims were made i.e. one twelf of an annual salary of £37,500 by each of the Appellant companies.

8. On 11 November 2020 HMRC opened an enquiry into the CJRS claims made by AL. AL cooperated with the enquiry providing the information requested by HMRC. On the basis of that information HMRC concluded that in the period prior to 19 March 2020 in the case of PW and in the period prior to 1 November 2020 in the case of CHW each had been remunerated at a variable rate such that the claims to CJRS were incorrect. AL was notified on 30 April 2021 of HMRC's intention to assess and confirming that AL should not make further claims. The initial assessments were raised on 17 June 2021. Those assessments were appealed, reviewed and the appeal was then notified to the Tribunal. The first assessments were subsequently revised on 16 May 2023 (to take account of the fact that the claims fell within two accounting periods and thereby two tax years, the first assessments were split between the relevant two tax years); the revised assessments were also protected by an appeal.

9. An enquiry was opened in respect of the claims by AH and TWG on 9 August 2021. AH and TWG provided what HMRC considered to be more limited cooperation with the enquiry. However, on the basis of the information provided, HMRC concluded that CJRS payments had been incorrectly made by AH and TWG and assessments were duly raised on 16 December 2021. Those assessments were appealed, reviewed and the appeal notified to the Tribunal. These assessments too were revised for the same reasons as those issued to AL.

RELEVANT LEGISLATION

10. CJRS was facilitated and enabled by section 76 CA20 which granted HMRC such functions as may be directed by the Treasury in relation to coronavirus.

11. Pursuant to section 78 CA the Treasury issued seven Directions providing the framework pursuant to which CJRS payments were made. In this appeal the critical Directions are the First (dated 15 April 2020) (**First Direction**) and Fifth (dated 12 November 2020) (**Fifth Direction**).

12. CJRS was introduced under the First Direction and responsibility for its payment and management was delegated to HMRC. The purpose of the scheme was set out in paragraph 2 which, so far as relevant to this appeal provided:

> "2.1 The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.
>
> 2.2 Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a claim under CJRS are only made by way of reimbursement of the expenditure described in paragraph 8.1 incurred or to be incurred by the employer in respect of the employee to which the claim relates.
>
> …
>
> 2.5 No CJRS claim may be made in respect of an employee if it is abusive or otherwise contrary to the exceptional purpose of CJRS.

13. A qualifying employer was defined in paragraph 3. Under the First Direction a qualifying employer, as defined, was required to have had a pay as you earn (**PAYE**) real time information (**RTI**) system registered with HMRC on 19 March 2020. Qualifying costs were defined in paragraphs 5 and 7. They were costs:

(1) relating to a furloughed (and current) employee;

(2) to whom the qualifying employer had made a payment of earnings in the tax year 2019-20 which had been shown in a PAYE return submitted prior to the relevant CJRS day (defined as 28 February or 19 March 2020);

(3) related to the payment of earnings during the period of furlough;

(4) which did not exceed 80% of the employee's reference salary capped at £2,500.

14. For a variable rate employee the reference salary was determined in accordance with a formula set out in paragraph 7.2 of the First Direction which took account of the amounts paid to that employee in the tax year 2019/20 or corresponding calendar period in the previous year. The reference salary for a fixed rate employee was simply the amount "payable" to the employee in the latest salary period ending on or before 19 March 2020 (subject to exclusions not relevant in this appeal).

15. Importantly in this appeal and, so far as relevant, a fixed rate employee was defined in paragraph 7.6 as:

> "A person … if-
>
> (a) the person is an employee …,
>
> (b) the person is entitled under their contract to be paid an annual salary,
>
> (c) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract ("the basic hours"),
>
> (d) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary,
>
> (e) the person is entitled under their contract to be paid, where practicable and
>
> regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments ("the salary period"), and
>
> (f) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations."

16. Paragraph 7.7 provides:

> "The reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020 (but disregarding anything which is not regular salary or wages as described in paragraph 7.3)."

17. The expenditure to be reimbursed to the employer was defined in paragraph 8 and represented the "gross amount of earnings paid or reasonably expected to be paid by the employer to an employee".

18. The description of the purpose of the scheme was subject to minor amendment by the Third Treasury Direction:

> "2.2 Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a CJRS claim are used by the employer to continue the employment of employees in respect of whom the CJRS claim is made whose employment activities have been adversely affected by the coronavirus and coronavirus disease or the measures taken to prevent or limit its further transmission."

19. This amendment had the effect that the provisions of what was previously paragraph 2.5 became 2.6 but in the same terms.

20. Flexi furlough (not relevant in this appeal) was introduced by the Third Treasury Direction.

21. The Fifth Direction extended the scheme in consequence of the second lockdown which began on 5 November 2020. The purpose of the extension was provided in a new paragraph 2.2 (the previous paragraph 2.2 becoming paragraph 2.3):

> "2.2 The extension of CJRS by this direction is necessary for the purpose of CJRS described in paragraph 2.1 arising from the emergency resulting from the resurgence of the incidence of coronavirus and coronavirus disease and the measures taken to reduce further transmission, loss of life, demands upon healthcare resources and damage to economic activity in the United Kingdom."

22. Qualifying employers were redefined (again in paragraph 4 of the Fifth Direction) to include employers with a qualifying PAYE RTI scheme registered with HMRC on or before 30 October 2020. Qualifying employees were now also to include any employee who had been included in a PAYE return submitted to HMRC after 19 March 2020 and before 31 October 2020. As previously, an employee was not a qualifying employee if their employment had ceased. However, where cessation had occurred after 22 September 2020 it was to be disregarded (paragraph 6.4) where the employee had been reengaged. In all other relevant regards the scheme remained the same.

23. Schedule 16 FA20 provides the statutory infrastructure for the taxation of coronavirus support payments including CJRS payments. Paragraph 8 introduces a charge to income tax in respect of amounts paid by way of coronavirus support payment including, inter alia, by way of CJRS, to which the recipient was not entitled. The amount of the charge is equal to the amount of the coronavirus support payment incorrectly paid. Paragraph 9 provides the power for HMRC to assess for the charge arising under paragraph 8.

24. Finally, section 50 and in particular subsection (7) Taxes Management Act 1970 (**section 50(7)**) provides the Tribunal with the power, on an appeal against (inter alia) an income tax assessment, to increase any assessment which undercharges the appellant.

MATTERS AGREED AND MATTERS IN DISPUTE

25. The parties are agreed that:

(1) AL was a qualifying employer in respect of PW under the First Direction

(2) AL was not a qualifying employer in respect of CHW under the First Direction

(3) Neither AH nor TWG were qualifying employers in respect of either PW or CHW under the First Direction.

26. There is one procedural issue for us to determine: whether HMRC are entitled invite us to increase the Assessments raised in respect of AH and TWG pursuant to section 50(7) and/or uphold the Assessments for each of the Appellant companies on the basis that CJRS payments are contrary to the exceptional purposes of the CJRS.

27. The substantive issues we must determine are:

(1) Whether PW and CHW were paid on a fixed or variable rate?

(2) Dependant on the outcome of the procedural, whether the payment of any of the claims is contrary to the exceptional purpose of the CJRS?

PROCEDURAL ISSUE

Appellant's submissions

28. The Appellants contend that the Assessments were raised on the basis that PW and CHW were employed by each of the Appellant companies on a variable rate basis. That was the relevant conclusion reached by the assessing officer (Officer Davis) justifying the making of the Assessments with the consequence that HMRC may not now seek to increase the Assessments by reference to an alternative and new conclusion that either the contracts of employment were fabricated or that payment under the CJRS is contrary to its exceptional purpose.

29. In this regards our attention was drawn to the Court of Appeal authority in *Clark v HMRC* [2020] EWCA Civ 104 at paragraph [106]:

> "… the scope of the assessment, and of any appeal from it, must be defined by the subjective discovery that the assessing officer has made. That is the only assessment which the officer has jurisdiction to make, and the scope of

> the assessment, as opposed to the arguments which may be used to support it, cannot in my view be extended by virtue of the appeal process. The correct approach was in my judgment that stated by Kitchin LJ (as he then was) in the *Fidex* case at [45], in the context of an appeal from a closure notice:
>
> > 'In my judgment the principles to be applied … may be summarised in the following propositions:
> >
> > (i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
> >
> > (ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
> >
> > (iii) The closure notice must be read in context in order properly to understand its meaning.
> >
> > (iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice.'"

30. The Appellant contends that as the relevant conclusion here was that PW and CHW were variable rate employees the Tribunal's powers under section 50(7) are limited to correcting the maths/amending the quantum if the calculations of variable pay entitlement lead to an undercharge in the Assessments.

31. The Appellant accepts that HMRC may be able to defend the AH and TWG assessments by reference to the new arguments introduced but not so as to increase them. However, they contend that it is not open to HMRC now to assert the legislative contrary to purpose test in respect of AL as to do so would be unfair and inconsistent with effective case management as the pleading of contrary to purpose was limited to the AH and TWG assessments.

HMRC's submission

32. HMRC made no substantive submission on the procedural issue simply contending that the Tribunal did have power under section 50(7) to increase the AH and TWG assessments were it established either that the contacts were fabricated and/or that the payments claimed and made were contrary to the exceptional purpose test of the CJRS. HMRC accepted that both were new arguments but, at least implicitly, invited us to conclude that they had been raised early enough in the proceedings that they should be allowed to run them.

Discussion

33. HMRC issued the Assessments because Officer Davis concluded that each to the Appellant companies had appeared to claim sums by way of coronavirus support payments to which they were not entitled. Officer Davis formed the view that there was some entitlement in each of the Appellant companies in respect of payments made to each of PW and CHW, but it was not in the amount which had been claimed. This was on the basis that PW and CHW were properly considered to be variable rate employees.

34. The notices of Assessments issued to AH and TWG state that payments were incorrectly claimed and do not particularise the basis on which that conclusion is reached. The review conclusion letters however, particularised that the decision to assess was made on the basis that there is insufficient evidence to conclude that PW and CHW were fixed rate employees.

35. By the statement of case HMRC invite us to increase the overall assessment position to deny any entitlement to CJRS payments for both AH and TWG. These points are reiterated in the skeleton argument.

36. HMRC did not contest that the test we should apply is as set out in *Clark* i.e. that the scope Assessments and therefore the appeal in respect of them is defined by the subjective conclusion of the assessing officer and, by reference to the quote from *Fidex*. We therefore proceed to consider the four propositions identified above.

37. By reference to Officer Davis's evidence (see paragraphs 92 to 96 below) and the correspondence concerning the enquiry and Assessments we consider that the conclusion underpinning the Assessments is that coronavirus support payments had been incorrectly claimed. The reason that conclusion was reached was because Officer Davis had formed the view that PW and CHW were variable rate employees. By their statement of case HMRC put forward an alternative reason for the conclusion that coronavirus support payments had been incorrectly claimed, namely that they had been claimed contrary to the exceptional purpose of the CJRS. We therefore consider that HMRC are entitled to advance that argument subject to the requirements of fairness and proper case management.

38. Applying the requirements of fairness and proper case management:

(1) As regards the AH and TWG we determine that the alternative argument can be run. This is because it was raised at the commencement of the litigation. Thus there can be no question of the Appellants' being unfairly prejudiced as they were made aware of it in plenty of time to address it by way of evidence and legal argument.

(2) That is not however the case for AL. It is not entirely clear to us whether HMRC even seek to advance a contrary to purpose case in respect of AL (at times it appeared they might but by reference to the schedule of Assessments that they invite is to uphold by reference to the argument they do not appear to do so). However, if they were looking to do so we consider that it is too late, and the AL would be unfairly prejudiced.

39. In view of our conclusion on this procedural issue we consider it is also within our jurisdiction to determine, as relevant, whether the AH and TWG have been undercharged by the Assessments and if so to increase the amounts accordingly.

BURDEN OF PROOF

40. In light of our conclusion on the procedural issue it was for HMRC to show that the Appellant companies received payments to which they were not entitled under the CJRS in the case of all three companies because the Appellants failed to comply with the terms of the Treasury Directions making claims for fixed rate employees rather than variable rate employees and in the case of AH and TWG only if entitlement is to be denied on the basis that the claims were contrary to the exceptional purpose of the CJRS.

41. The Appellants accepted that HMRC raised within the statutory time limits. Further, there was no dispute as to the quantum of the claims on the assumption that PW and CHW were variable rate employees.

42. The standard of proof is the civil standard of on the balance of probabilities.

EVIDENCE

43. We were provided with a bundle of documents consisting of 1095 pages. We were also provided with witness statements for PW, CHW, Guy Etherington (advisor to the Appellant companies) and Office Joan Davis. PW in fact provided two statements. All four witnesses gave oral sworn testimony, and each was subject to cross examination.

Evidence

PW

44. PW enjoyed a successful career providing business consultancy. However, his personal passion was eating and cooking good quality food, particularly wood smoked barbeque food

and collecting and drinking fine wine. He is a certified barbeque judge with the Kansas City Barbeque Society.

45. In 2015 he started working on an idea to start a business producing and selling luxury barbeque and outdoor cooking equipment. TWG was established on 27 October 2015. PW invested £125,000 personally into the business and was able to raise a £25,000 start up loan.

46. PW undertook the necessary research to develop and market products for his chosen market, developing the design for the Aemyrie barbeque aimed at ultra-high net worth individuals and with a price point of £25,000. A specialist design agency was appointed and over the latter part of 2015 to early 2018 a bespoke product was designed, and prototypes were built. A significant marketing campaign was run through 2017 and 2018. The proposed product featured in a number of high-end publications. Awards were won for the digital and social medial campaigns run.

47. As the concept and product developed PW considered that there was an opportunity not only to produce and supply the barbeque/outdoor kitchen. He considered it possible to offer servicing and accessories. This possibility led to the incorporation of AL on 11 April 2016. It was intended that AL would manufacture and supply the core product; with TWG offering servicing accessories and other related products.

48. On the basis that the product itself was as successful as it appeared it might be and given the significant shipping and import duty costs associated with the product PW took the view that there was a business opportunity in licencing the know-how and brand in other global jurisdictions. In order to service this opportunity AH was incorporated on 25 July 2018 with an initial view of accessing the US market.

49. PW considered that the three companies would operate synergistically but by establishing the business in this way a future disposal of one or more of the businesses would be simpler.

50. In March 2018 PW was approached by a member of a foreign royal family who wanted to be the first to own the Aemyrie branded product. At that time the product was still in development. Producing the item to order for this customer resulted in the identification of a number of design, fabrication and assembly issues which needed to be resolved before the product could be launched more widely pushing out the possible launch to at least spring/summer 2019.

51. However, issues in the resolution of the design difficulties led to a parting of the ways with the first design agency who were replaced in February 2019. In light of this it was apparent that the product would not be ready for the peak outdoor cooking season of spring/summer 2019 and it was accepted that it would be better to aim to launch in spring 2020.

52. Interest in the ultimate product continued with Encompass Furniture and Accessories Ltd (**Encompass**) expressing an interest in being the (or one of the) UK distributors. Encompass were appointed on a commission basis to drive leads for AL. Leads were provided in February, March, April and June 2020.

53. The Appellant also developed a social media presence with followers who were interested in downloading brochures and quotations.

54. We were told, but no business plan was made available to us, that by the end of 2019 and with a few months left until the anticipated formal launch, PW planned on being able to supply the first unit in May 2020. He claimed that he considered it possible that he could have had £500,000 profit in the business. In cross examination PW accepted that there was no evidence to prove whether this was reasonable and certainly not that it was guaranteed.

55. PW explained that shortly following incorporation in November 2016 AL set up the PAYE RTI system with HMRC. The PAYE RTI system for AH was set up on 5 September 2018 but backdated to 25 July 2018. However, as, at that time, there were no employees the registration was cancelled in May 2019.

56. PW said that he signed a contract of employment with AL on 1 January 2018. The terms of that contract are summarised in paragraph 99 below. PW explained that the salary set in the contact (£37,500) was chosen because he had calculated that, together with the income he received from property income he needed gross income of £36,500 but that £37,500 was a "rounder" number.

57. Despite having signed a contract of employment entitling him to be paid a salary PW explained that he did not in fact call for the full salary to be paid. The business was in its infancy, he had invested significant sums into it to get it off the ground and it was counter intuitive to then take that money out of the business. PW explained that he discussed the position with Mr Etherington and understood that it was both legal and common practice for entrepreneurs to informally waive the whole or part of a contracted salary entitlement. PW understood that PAYE RTI submissions, payslips and other PAYE records were required to reflect actual payments made as distinct from contractual entitlement. So, for all periods where salary was waived in whole or in part the formal records reflected only the actual payments made and not the amounts which would have been due under the contract without waiver.

58. During the course of the enquiry which led to the Assessments and before us PW sought to contend that he now appreciated that the PAYE RTI submissions might have been incorrect and should be retrospectively rectified to reflect his contractual entitlement rather than the payments made. He readily accepted that additional tax and NI would be due and was frustrated that HMRC were not prepared to accept what he considered to be the rectification of an error made on his behalf in this regard.

59. PW explained that the decision whether to take salary were taken month to month and it was always envisaged that as soon as the business began making sales deriving an income then salary would be paid. This was a position that he maintained in cross examination also accepting that the Appellant companies required turnover in order to pay salaries. He readily accepted that there had been no formalisation of the waiver either generally or by reference to what he asserted as the monthly decision taken.

60. In cross examination PW accepted that the monthly waivers had been binding and that the practical effect of the waivers had been that he was paid at a variable rate rather than the fixed rate specified in the contract. However, he also stated that he believed that he could have, though did not, claim back pay.

61. In January 2019 PW was provided by his advisors with a new form of employment contract which subsequently became the template for all future contracts. In substance however, the template differed little from the contract used for PW by AL.

62. In late 2019 as the business planned for the spring 2020 launch of the product PW agreed with CHW to formalise, by way of employment contract, the work she had already been performing for AL. The 2019 template contract was used and signed on and with effect from 1 January 2020. CHW's salary too was set at £37,500. During cross examination PW provided two differing explanations for the replication of £37,500. At one point he explained that this figure was used simply because it was included in the template and at another he said that it was because it was always intended that he should be paid £112,000 by the three companies as this broadly reflected the salary he had received from his previous employments. HMRC were notified through the PAYE RTI system of her employment on 6 February 2020.

63. PW said that both he and CHW signed contracts with AH in the standard form on 1 March 2020. These contracts also provided for a salary of £37,500 each. PW explained that these contracts provided for full time work for each of himself and CHW because he considered that the work which needed to be undertaken was for the benefit of each of the companies simultaneously; developing and bringing the product to market led immediately to turnover for AL which in turn enhanced the brand and the potential to licence it in other jurisdictions. PW did not consider there to be any issue with having contracts with multiple employers each of which required him to work a full working week in order to be paid the contracted salary.

64. On 23 March 2020 an online application to reinstate the PAYE RTI for AH was submitted. The application was for reinstatement with effect from 1 January 2020.

65. The same form of contract was also signed by both PW and CHW on 1 March 2020 with TWG again for a salary of £37,500 each. As with AH, PW did not consider there to be any conflict in a requirement to work full time for TWG alongside the same obligation owed to AL and AH.

66. As TWG had not previously registered with HMRC under the PAYE RTI; the first such application was made on 23 March 2020. As with AH this application was backdated to 1 March 2020.

67. PW's evidence was that the decisions to employ CHW in AL, AH and TWG and his own employment by AH and TWG were not driven by the covid pandemic. With regard to the AL contracts he emphasised that the contracts were signed (for himself) in 2018 and for CHW on 1 January 2020 before there was any awareness of the impending pandemic. He explained that the critical decisions as to employment for AH and TWG were taken in late February 2020 because he wanted to formalise the position in advance of the proposed launch in spring. He stated that he could not have known on 1 March 2020 what was coming. He pointed to the announcement by the Prime Minister on 3 March 2020 that business should continue as usual. He also referenced that, even when the first lockdown was announced, there was continued political optimism that the situation would be short lived with an early return to normality anticipated. Throughout the early part of 2020, and even at the start of the pandemic, PW remained optimistic that the product would be able to launch as planned and thereby quickly become the primary source of income for the household as the business took off.

68. On the basis that both he and CHW were employees of the three companies at the start of the pandemic, PW prepared furlough agreements for each of them in respect of each of the employments. He followed the terms of the guidance. Each letter was in identical form. He had the formal conversation with CHW who signed her furlough agreements on 22 March 2020, 1 May 2020 and 1 November 2020.

69. PW confirmed that he had not worked whilst on furlough.

70. PW explained that he carefully read the terms of the CJRS and discussed the matter with Guy Etherington. PW formed the view that it was only his employment with AL which would qualify under the First to Fourth Treasury Directions as there had been no PAYE RTI return made prior to 19 March 2020 in respect of CHW's employment with AL and both their employments with AH and TWG.

71. In respect of his own employment by AL he formed the view, and claimed CJRS payments on the basis that, he considered himself a fixed rate employee. He discussed that conclusion with Mr Etherington who had confirmed his analysis and the basis of that conclusion.

72. As it became apparent that the pandemic and associated lockdown would not be over quickly and given that both he and CHW had been furloughed PW realised that a launch in

spring/summer 2020 would be impossible. Without such a launch, plans needed to be deferred by another year as they had assessed that to be successful the launch had to be in a period immediately prior to traditional outdoor cooking/barbeque season in the UK/Europe. PW said that he took the view that the inability to trade through the spring and summer bought with it a concern that the three Appellant companies faced potential insolvency including by reference to the obligations arising under the employment contracts.

73. PW also accepted in cross examination that by this point the household was facing financial difficulties. The property rental income had reduced as PW had given his tenants rent reductions because they too had been furloughed and family savings were diminishing. With the anticipated end of the CJRS and no possibility of the income derived through that funding both he and CHW needed to put themselves in a position where they could claim jobseekers' allowance and thereby could not be employed.

74. It was claimed that this led to a decision to issue redundancy letters to both himself and CHW from each of the Appellant companies. A week's notice was given on 24 October 2020 in accordance with the contracts which were then due to terminate on 31 October 2020.

75. On 31 October 2020 as it was announced that the CJRS would continue and was to be extended to include employees who had been employed post 19 March 2020. PW considered the communications represented a clear invitation to re-employ employees who had been made redundant during the pandemic and to then claim CJRS in respect of future payments made to such employees. PW had a further conversation with Mr Etherington to confirm his understanding of the terms of the Fifth Direction. PW saw the opportunity to re-employ himself and CHW in each of the Appellant companies on the same terms and salary as previously as a very welcome opportunity to address the financial hardship they were facing. He also considered that re-employment funded by the CJRS might well enable the companies to bide their time through to the end of the winter lock down before returning to work and pushing forward for a spring 2021 launch thereby generating turnover from which it was expected that the contractual salary entitlement for each of them could then be met going forward.

76. Having re-employed both employees in each Appellant company CJRS claims were made in accordance with what PW considered to be the terms of the Fifth Treasury Directive and on the basis that each employee was a fixed rate employee. PW did not consider a voluntary and informal waiver of either his or CHW's contractual entitlement to salary in the period prior to 31 October 2020 caused them to be variable rate employees. Particularly in light of HMRC's public statement in May 2020 that they were "keen to support people who chose to waive – or give up – part of their income."

77. PW said that he believed that all claims to CJRS had been made in accordance with the terms of the Treasury Directions, all sums claimed represented reimbursement of expenditure incurred by the Appellant companies relating to employment activities adversely affected by the pandemic. PW was adamant that he had expected that the product would or could have launched in the spring of 2020 and that the pandemic halted the business. He confirmed that in the end it became impossible to launch and the product has never gone to market.

78. PW vehemently denied that any of the employment contracts had been fabricated or were a sham. He stated repeatedly that the contracts were created and signed on the dates shown on them. He produced metadata where available which he said demonstrated that the documents were created on or about the date on which they were signed. He accepted that some of the data must have been corrupted (as for instance it showed an impossible editing time) but he maintained that there had been no fabrication of the documents.

79. When challenged in cross examination as to why the documents were apparently dated 1 March 2020 with payments also having been said to have been made on 1 March 2020 why it had taken until 23 March 2020 to have set up or restarted the PAYE RTI registrations PW indicated that it remained his intention that salary be waived under the new contracts with AH and TWG, as had been the case under the AL contracts. This is, however, no explanation given that full salary payments were in fact made by each Appellant to each employee on 1 March 2020.

CHW

80. By her statement and sworn evidence CHW explained that from the start of the business venture she had assisted her husband in the strategy, marketing and general development of the business. She stated that towards the latter part of 2019 it was expected that the product would launch in summer 2020 following which all three businesses would begin to trade generating turnover such that PW considered that it was appropriate to formalise her position by way of employment in AL. It was therefore agreed that she would be appointed as an employee of AL with effect from 1 January 2020. Her contract provided for a salary of £37,500 but pending launch (which was expected to be in late spring/early summer 2020) she would waive such salary month to month depending on her financial situation. She understood that her salary was determined at this level because it topped up the family's income from property to the amount needed to run the household.

81. Despite it being put to her that the contract was not signed on or about 1 January 2020 CHW confirmed that it was. This she said was consistent with the metadata of the document and despite the fact that the signed copy had not been supplied to HMRC in error until comparatively close to the hearing.

82. CHW could provide no explanation as to why she had not received any documentation in respect of pay from January 2020 to March 2020.

83. In her statement CHW asserted that that she waived her salary month by month according to her financial need in that month but claimed that she believed she was entitled to payment under the terms of the contract. However, when HMRC cross examined as to the basis on which she had been paid £3.125 in March 2020 and subsequently paid only £100 for April 2020 and £10 in each of May and June 2020 she could provide no explanation for the pattern of the payments and did not say that each payment was made by reference to her decision to waive (apart from March 2020).

84. On 1 March 2020 she stated that she had signed contacts with AH and TWG pursuant to which she agreed to work for each of them and in addition to her obligation to also work for AL on a full-time basis. Her salary under each contract was recorded as £37,500.

85. CHW's response when cross examined as to when the contracts with AH and TGW were signed reflected those in respect of the AL contract. She was certain that they had been signed on the day they were dated.

86. She was furloughed from each of the roles by furlough letter dated 22 March 2020. Furlough was extended by letter dated 1 May 2020 until 31 October 2020 or further notice.

87. CHW was served with a notice of redundancy on 24 October 2020 but was reinstated effective from 1 November 2020 by letter dated 31 October 2020 pursuant to which she claimed she was again entitled to £37,500 per annum but because she was immediately furloughed payments would be limited to 80% of her salary.

Guy Etherington

88. Mr Etherington is a qualified accountant and director of GCAP Services Limited. His statement purported to support the business rationale for the establishment of three different companies.

89. Under cross examination it was however, established that Mr Etherington had only ever been engaged by AL to review and lodge the accounts prepared by PW for AL. Mr Etherington confirmed that he had never sought to challenge the accounts or the basis on which accounting decisions had been made by PW. In particular and for instance, he accepted PW's assessment that no creditor relationship arose in consequence of the waiver of salary. When we asked him to explain how the remuneration figures in the accounts had been determined he could not answer. He had never seen the contracts and was not involved in payroll for any of the Appellant companies.

90. Mr Etherington also confirmed that his understanding of the business model and operations was based only on what he had been told by PW and he had not sought to verify any of the information by reference to underlying documents.

91. Perhaps in the context of the formal engagement to review and submit AL's accounts Mr Etherington did have a number of conversations with PW as to the interpretation of the various Treasury Directions. However, it was established in cross examination that he did not, as asserted in his statement, undertake a detailed review of any documentation and could not therefore form a coherent or definitive view on entitlement as he had asserted in his statement.

Officer Davis

92. Officer Davis was the assessing officer. In the main her evidence was not contested by the Appellant as they accept that to the extent that we find that CJRS payments were overpaid to the Appellant companies on the basis that PW and CHW were variable rate employees there the Assessments (as restated) are accurate.

93. Officer Davis explained that as regards each of the Appellant companies she formed the view that PW and CHW were variable rate employees. Calculations of overpayment were made on that basis by reference to the relevant sums actually paid to each of them in the pay reference period applicable under the relevant Treasury Directions for each of the periods 19 March 2020 – 31 October 2020 and 1 November 2020 and, in this case, 31 March 2021 (for AL) and 31 July 2021 (for AH and TWG) when further CJRS payments were blocked.

94. We do not set out the detail of that evidence because it is not in dispute and not relevant to the issues we have to determine.

95. The principal point of contention in respect of Officer Davis's evidence was that her evidence did not support the revision of the assessments that HMRC urged on us and in particular that HMRC were not entitled to invite us to assess on an entirely alternative basis to that of Officer Davis.

96. Officer Davis confirmed that for the purposes of her assessment she had determined that PW and CHW were both employees of all three Appellant companies. She had not determined that the employment contracts were shams or fictitious and, as such the contracts should be given their proper effect which Officer Davis had determined was that they were variable pay contracts. On that basis CJRS had been over claimed (as it had been paid assuming PW and CHW were fixed rate employees). She did not accept that PAYE RTI had been mistakenly completed without reference to what was later claimed to have been PW and CHW's pay entitlement (as distinct from actual payments). She did not consider it appropriate for the Appellant companies to amendment their historic PAYE information so as to now justify the basis on which CJRS was payable.

Documentary evidence

97. Within the bundle we were provided with a range of articles from online publications regarding the product (including The Telegraph and Mail Online). It was described as a bespoke, built to order wood-fired oven which delivered "gastronomic perfection".

98. We were also provided with evidence of the leads generated by Encompass supporting PW's evidence in this regard. These demonstrated that there were three leads dated 31 March 2020 from a Bulgarian architect interested in technical specifications for fire pits and the Aemyrie product; 15 April 2020 from the US and a second US lead dated 17 June 2020.

99. The various contracts of employment were provided to us. All employment contracts were in substantially the same form and titled "written statement of employment particulars". The contracts all provided for 1) name of employee and employer, 2) start date and date of continuous employment, 3) job title and brief description of the job, 4) pay (in each case £37,500 pa. to be paid monthly); 5) place of work (in each case Burwood, Cemetery Lane, Emsworth, Hampshire); 6) working hours (in each case Monday to Friday 9am to 5pm), 7) holiday entitlement (in each case 42 days), 8) other benefits (including discretionary bonus in each case), 9) provision regarding absence and sick pay and other paid leave, 10) pension arrangements (notification that the employee would be enrolled in an occupational pension scheme to be notified once the employee had joined), 11) that training would be provided if required, 12) no probationary period, 13) and one week's notice period.

100. A complete set of signed contracts and documents were provided for both PW and CHW. We note that the reemployment contracts all state that the "start date and continuous employment" was 1 November 2020 and not, as would have been expected, 1 January 2018 (for PW at AL) and 1 January 2020 (for CHW at AL) and 1 March 2020 for both PW and CHW at AH and TWG, there in fact having been no break in the period of continuous employment her notice period under the redundancy letters having expired on 31 October 2020.

101. Particular comments relating to the contracts seen:

(1) PW was re-employed (in the case of each of the Appellant companies as a Director with the description of his job being "to act as a Director and to undertake any reasonable duties necessary to mee the needs of the business.

(2) CHW's job description was as a consultant to undertake any reasonable duties necessary to meet the needs of the business.

102. We were shown copies of each of the Furlough letters said to have been issued by each of the companies to each of PW and CHW. They were all in precisely the form indicated as necessary within the Treasury information. Each had a consent section but the copies we were provided with were not signed.

103. The redundancy letters, one from each of the Appellant companies notified each of PW and CHW that they had been selected for redundancy and that alternative suitable work could not be identified. Employment was to terminate on 31 October 2020. All the letters stated that there was no entitlement to redundancy pay. We note that was a correct statement of affairs for all contracts other than PW's contract with AL. As he had been employed since 1 January 2018 he should have been entitled to redundancy.

104. The evidence of the metadata and file information we were provided indicated:

Document	Created	Editing time
PW Employment Contract AL	01/01/2018	No metadata provided

CHW contract of employment AL	30/12/2019	1 minute
PW Furlough Agreement AL	22/03/2020	1 minute
CHW Furlough Agreement AL	22/03/2020	1 minute
PW Furlough extension AL	30/4/2020 but last modification 06/09/22	1 minute
CHW Furlough extension AL	30/04/2020	0 minutes
PW Redundancy letter AL	24/10/2020 (file information shows 23/10/2020 as the date of last modification)	1 minute
CHW Redundancy letter AL	24/10/2020 (file information shows 23/10/2020 as the date of last modification)	0 minutes
PW Reinstatement Agreement AL	31/10/2020	1 minute
CHW Reinstatement Agreement	31/10/2020	1 minute
PW Furlough Agreement AL	01/11/2020 (file information shows 31/10/2020 as the date of last modification)	1 minute
CHW Furlough Agreement	No metadata but file information shows 31/10/2020 as the date of last modification)	No metadata provided
PW Employment Contract AH	29/02/2020	1 minute
CHW Employment Contract AH	28/02/2020	Over 4m minutes
PW Furlough Agreement AH	No evidence of furlough	
CHW Furlough Agreement AH	No evidence of furlough	
PW Redundancy letter AH	No metadata provided but file information shows 23/10/2020 as the date of last modification	
CHW Redundancy letter AH	24/10/2020 (file information shows 23/10/2020 as the date of last modification)	Over 4m minutes

PW Reinstatement Agreement AH	No metadata provided but file information shows 31/10/2020 as the date of last modification)	No metadata provided
CHW Reinstatement Agreement AH	31/10/2020	2 minutes
PW Furlough Agreement AH	01/11/2020 (file information shows 31/10/2020 as the date of last modification)	Over 4m minutes
CHW Furlough Agreement AH	01/11/2020 (file information shows 31/10/2020 as the date of last modification)	1 minute
PW Employment Contract TWG	29/02/2020	3 minutes
CHW Employment Contract TWG	28/02/2020	Over 4m minutes
PW Furlough Agreement TWG	No evidence of furlough	
CHW Furlough Agreement TWG	No evidence of furlough	
PW Redundancy letter TWG	24/10/2020 (file information shows 23/10/2020 as the date of last modification)	1 minute
CHW Redundancy letter TWG	No metadata provided but file information shows 23/10/2020 as the date of last modification	No metadata provided
PW Reinstatement Agreement TWG	No metadata provided but file information shows 31/10/2020 as the date of last modification)	No metadata provided
CHW Reinstatement Agreement TWG	31/10/2020 (file information shows 31/10/2020 as the date of last modification)	1 minute
PW Furlough Agreement AH	01/11/2020 (file information shows 31/10/2020 as the date of last modification)	1 minute
CHW Furlough Agreement AH	01/11/2020 (file information shows 31/10/2020 as the date of last modification)	1 minute

105. By reference to the documents provided to us, the following payments of salary were demonstrated to have been made to each of PW and CHW by each of the Appellant companies and were recorded on HMRC's PAYE RTI system in the period from 6 April 2018 to 31 August 2021:.

Individual	AL	AH	TWG

PW	Nil prior to 1 September 2019 £500 for month to September 2019 £550 each month October to January 2020 Nil for February 2020 £3,125 for March 2020 £2,500 from May to August 2020 £2,187 for September 2020 £1, 875 for October 2020	Nil prior to March 2020 £3,125 for March 2020 – August 2021	Nil prior to March 2020 £3,125 for March and April 2020 £100 for May 2020 £10 for June 2020
CHW	Nil prior to March 2020 £3,125 for March and April 2020 (each paid on 1st of the month) £100 for May 2020 £10 for each of June, July and August 2020	£3,125 for March and April 2020 (each paid on 1st of the month) £100 for May 2020 £10 for June 2020 £3,125 for November 2020 – August 2021	£3,125 for March and April 2020 (each paid on 1st of the month) £100 for May 2020 £10 for June 2020 £3,125 for November 2020 – August 2021

106. There were a number of payslips included in the bundle for both PW and CHW. From these payslips it would appear that no pension contributions were collected from either PW or CHW indicting that either, contrary to the terms of employment, they were not enrolled in an occupational pension scheme or that they opted out.

107. We were provided with the AL accounts for the accounting periods ended 30 April 2018, 2019, and 2021 but not 2020. However, as is customary, the accounts showed a comparison to the prior year ended 31 July 2020.

108. The 2018 accounts showed staff costs of £7,900, this was £900 lower than the amounts declared to HMRC for that period by way of PAYE. Creditors falling due within one year were shown as £80,748 but we were informed by PW that this figure did not include the differential in salary between the declared or paid staff costs and PW's asserted salary entitlement as per the contract of employment. There is also no note of any director's loan account or related party transactions. Mr Etherington could provide no explanation for the figures despite having been engaged to check their accuracy and submit them to companies' house.

109. The 2019 accounts showed £7,250 in staff costs as compared to £0 on the PAYE records. Creditors falling due within 1 year were shown as £43,135 but again we were told that this sum did not include differential in salary between the declared or paid staff costs and PW's asserted salary entitlement as per the contract of employment. As with 2018 there was no note of any director's loan account or related party transactions. Mr Etherington could provide no explanation for the figures.

110. The accounts for accounting period ended 31 April 2021 indicated that salary costs for 2020 were £38,169 and for 2021 were £62,204. Neither PW nor Mr Etherington could provide any explanation as to how these figures had been calculated or reconciled with the PAYE records. Creditors falling due in one year were stated to be £22,941 (for 2020) and £36,214 (for 2021). As for the other years we do not understand that these sums include what was claimed to be salary to which PW and CHW were entitled by way of back pay or otherwise. Again no related party transactions are recorded.

111. The accounts for accounting periods ended 31 July 2019 for AH were prepared on the basis that they were dormant.

112. We struggled to understand the AH accounts for accounting period ended 31 July 2020 as originally submitted with AH's corporation tax return. Staff costs were shown as £400 but these could not be readily reconciled to the PAYE information. Creditors falling due within one year reflected that the £400 had not been paid to the relevant staff. The amended accounts showed £0 staff costs. The AH accounts for the accounting period ended 31 July 2021 as originally submitted showed income from covid support grants of £30,000 and staff costs of £43,389 for one (rather than 2) employees. PW could give no explanation for these figures and as these accounts were not prepared or checked by Mr Etherington he could not shed any light on the figures either. The amended accounts showed £40,000 received in covid support grants and £56,250 as staff costs. These figures could be reconciled by us as representing the payments said to have been made to PW and CHW (18 x £3,125 November 2020 to August 2021) and the related CJRS payments which were stopped after July 2021 (i.e. the final two salary payments were not matched by CJRS payments). Though we note that the accounts continued to show there was only one employee.

113. The accounts for TWG for accounting period ended 31 July 2019 were prepared on the basis that TWG was dormant. Those for accounting periods ended 31 July 2020 and 2021 simply showed £0.

114. PW's self-assessment tax return indicated that AL had paid PW £8,950 for the tax year ended 5 April 2020. That amount included the £2,700 paid prior to 28 February 2020 and the two payments of £3,125 on 1 March and 1 April 2020. Income from AL was declared as £18,750 from AH for the tax year ended 5 April 2021 (6 payments of £3,125).

115. There was a complete set of enquiry correspondence in the bundle. We do not summarise its terms as the Appellants do not challenge the administrative validity of the appealed assessments.

116. However, it is important to note that through the course of correspondence in respect of each of the Appellant companies HMRC accepted that the terms of the contacts of employment appeared to represent contracts for fixed rate payments for example the letter dated 10 February 2022 in which it was stated:

> "I have reviewed the employment contract provided and agree that it does contain clauses which would indicate that you meet the conditions set out in the Treasury Directives for 'fixed' employees …"

117. A similar "concession" appeared in paragraph 118 of HMRC's statement of case.

PARTIES SUBMISSIONS

118. We are grateful to the parties for their detailed skeleton arguments and comprehensive oral submissions. In reaching our decision on this appeal we have considered everything drawn to our attention by way of submission. It is, however, inevitable, given the detail of the arguments that not everything in the appeal is given specific mention in this judgment.

Appellant's Submissions

119. The Appellants contend that they were entitled to CJRS in the amounts claimed as they meet the criteria set out in the CJRS Treasury Directions in particular that PW was a relevant fixed rate employee of AL for the period from 1 March 2020 to 31 October 2020 and that both PW and CHW were relevant fixed rate employees of all three companies from 1 November 2020.

Fixed v variable rate employment

120. The Appellant contends that determining whether PW and CHW are fixed or variable rate employees is a simple matter of applying the terms of the relevant Treasury Directions. Applying those terms, it is contended, that PW and CHW are fixed rate employees on the basis that they are each entitled under a contract of employment to an annual salary in respect of a basic number of hours. The contracts are in evidence, and each provides for an annual salary of £37,500 for a fixed 35 hour working week. As such the maximum amount that can be claimed (and was claimed) is determined by reference to the contractual salary entitlement in the relevant pre-CJRS period (February 2020 for PW's employment with AL and October 2020 for both PW and CHW for all three Appellant companies) and, in order to meet the reimbursement requirement, the amount paid in the period covered by the CJRS.

121. The effect of this submission is that we are to look at 1) the AL salary entitlement for February 2020 for PW (one twelfth of £37,500 - £3,125) and then the amounts paid from March to October 2020 (in each case £3,125); and 2) the AL, AH and TWG salary entitlement for October 2020 for each of PW and CHW (one twelfth of £37,500 - £3,125) and then the amounts paid from November 2020 (in each case £3,125 per month).

122. It is contended that the decision made on a month-by-month basis by each of PW and CHW whether to waive all or part of their salary entitlement does not affect their status as fixed rate employees. The Appellant challenges HMRC's approach of looking at the actual sums paid in the relevant pre-covid period as replacing the statutory test.

123. In this regard Mr Brodsky carefully took us through the terms of the Treasury Directions with a view to demonstrating that the focus of attention in respect of a fixed rate employee is their contractual entitlement to receive salary rather than whether the sums were, as a matter of fact, paid. Actual payments are the focus of attention for variable rate employees. He pointed to the language of paragraphs 7.2, 7.6 and 7.7 in which all references to fixed rate employees are by reference to "entitlement" and an "amount payable" in contrast to references to "paid" in the case of variable rate employees.

124. It was submitted that PW and CHW both had a contractual entitlement to receive their stated salary from each of the Appellant companies and that the sums were therefore payable. The fact that for the majority of the period prior to March 2020 PW had, on an informal and voluntary basis, waived his entitlement did not disqualify his entitlement to the sums which remained payable whether he looked to recover them or not. Similarly for the sums waived by each of PW and CHW in the period from April to October 2020.

125. Mr Brodsky referred to HMRC guidance dated 19 May 2020 regarding waiver of salary in support of an argument that waiver did not affect entitlement to CJRS. The guidance stated:

> "If an employee and employer agree to a reduction in the employee's remuneration before they are paid, for example to support company cashflow during the pandemic, then no Income Tax or National Insurance contributions (NICs) will be due on the amount given up.
>
> This is provided the agreement is not part of any wider arrangement to divert the amount to a particular recipient or a cause. For example, if it was waived on condition that the sum would be donated to a particular charity, this would still be liable to tax."

126. The Appellants emphasised that HMRC had accepted in correspondence that PW and CHW the contract terms reflected those for fixed rate employees under the terms of the Treasury Directions (see paragraph 116 above).

127. Further, Mr Brodsky argued that it was not open to HMRC to argue that if the contracts were not fabricated or sham contracts (see below) that the waiver of salary represented a binding amendment to the contracts because that argument was not pleaded. He also submitted that such a variation was not supported on the evidence. He referred to the national minimum wage implications for an employee agreeing to waive salary below the prescribed equivalent hourly rate. He also emphasised that the evidence given by PW and CHW was that the waivers had been informal and that they had simply acted in the interests of the business of which PW was the owner and principal investor and in the hope and belief that the companies would be successful at which time as director and employees they could expect to be appropriately compensated for the salary previously sacrificed.

Fabrication of contracts/sham

128. The Appellant contends that there is no evidence that any of the contracts were dishonestly fabricated or that they are sham contracts in the sense identified by the Court of Appeal in *Snook v London & West Riding Investments Ltd* [1997] 1 All ER 518 i.e. that the contracts are intended to give an appearance of creating legal rights and obligations between the parties which are different from the actual legal rights and obligations between them.

129. It was contended that the employment contracts precisely reflected the intention of the parties at the time they were signed: for each of PW and CHW to perform duties in return for payment which would result in the successful launch of the product which would then facilitate servicing and accessory sales and exploitation of intellectual property rights.

130. Reliance was placed on the metadata for each of the documents which established that they were created on or shortly before the dates on which PW and CHW said that they had been signed as evidenced by the physical signatures on them. These creation dates demonstrated that HMRC's allegation that the contracts said to have been signed on 23 March 2020 following the CJRS announcement was incorrect.

131. It was submitted that there was sufficient evidence as to the development AL's business and the overall business strategy for AH and TWG to conclude that there was a sound business rationale for the decision to formalise the employment status initially of CHW in AL from 1 January 2020 and subsequently each of PW and CHW within AH and TWG. The fact that AH had initially registered for PAYE RTI also demonstrated that it had been a long-held plan that it would hire employees.

132. Mr Brodsky also sought to point out that in large part the question as to whether the employment contracts were, or were not, backdated from 23 to 1 March 2020 (as asserted by HMRC) was a red herring. It was not a matter which we needed to determine because there had been no claim for CJRS payments in respect of any contract originally signed in January or March 2020 as the associated employments were otherwise outside the scope of the scheme and no claims had been made under the CJRS in respect of them. Mr Brodsky submitted that

what was undeniable was that by 31 October 2020 both PW and CHW had contracts of employment with AH and TWG, there had been "a payment" made to each of them pursuant to those contracts which had been returned to HMRC through the PAYE RTI between 19 March and 31 October 2020 which thereby drives entitlement under the Fifth Directive.

Contrary to purpose

133. It was denied that the CJRS claims were contrary to the exceptional purpose of the CJRS. Relying again on *Clark* it was contended that the purpose of the CJRS was to be determined solely by reference to the terms of paragraph 2 of the Treasury Directions. Thus provided the purpose so drafted was met the claims could not be contrary to the purpose of the CJRS.

134. As such, CJRS was intended to provide reimbursement to employers for expenditure incurred in respect of employees whose employment wad been adversely affected because of coronavirus disease or the measures taken to prevent transmission (i.e. lockdown). In that context each of the payments made and for which a claim had been made had been so incurred. The country went into lockdown, PW and CHW could not work towards the product launch and the payments were made by each of the Appellant companies under the terms of the contracts of employment. Once that position was established there was no requirement to test a counterfactual and ask: "would the amounts have been incurred were it not for the CJRS?"

135. Focused on 1 November 2020 the Appellants contended that their behaviour was precisely the behaviour which the Fifth Direction encouraged: the re-employment of those who were made redundant in the face of the envisaged end of the CJRS as the country returned to a period of lock down.

136. Mr Brodsky considered that HMRC had made an important concession when it was acknowledged the redundancy and reemployment had been motivated by the financial difficulties faced by the household.

137. Countering HMRC's contention that the claims were contrary to purpose because neither AH nor TWG were trading the Appellant's pointed out that there was no requirement under the terms of the Treasury Directions for a qualifying employer to be a trading company. It was however contended that there was an intention for both AH and TWG to trade as soon as the product was launched and there was a reasonable expectation that would happen no later than May 2020.

138. The Appellants also sought to demonstrate, by reference to the timeline of events (and on the basis that they consider it was amply evidenced that the contracts were signed on 1 March 2020) that the contracts were not entered so as to obtain CJRS payments because on 1 March 2020 there was no indication that CJRS would be available, and it was believed that the pandemic would be short lived. On 1 March 2020 the Appellant companies were focused on launching the product in May 2020 and a successful summer in which the business of all three companies would take off and each would be trading. Any timing co-incidence was just that, a co-incidence.

139. With regard to the requirement that each of PW and CHW be contracted to work full time for each of the Appellant companies the Appellants contended that the terms of the CJRS recognised that individuals might have more than one job with each employer being entitled to claim CJRS in respect of payments made. Further, in the present context, it was suggested that all work undertaken fulfilled the obligations to each company it was therefore perfectly feasible and reasonable that PW and CHW might be expected to work 3 x 35-hour weeks. The work was described as complimentary.

Conclusion

140. On the basis of the above arguments the Appellants invited us to allow the appeal as the Appellants had properly claimed all sums to which they were entitled under the CJRS such that HMRC could not demonstrate that there was a charge to income tax arising under paragraph 8 Schedule 16 FA 20.

HMRC's submissions

Fixed v variable rate employees

141. HMRC accepted that PW had been an employee since 1 January 2018 and that he had worked for AL since its incorporation in 2016. By reference to the contract as written they accepted that it was a contract that appeared to meet the requirements necessary to be a fixed rate contract. However, we were invited to identify the substance and reality of the agreement between AL and PW in the period prior to the CJRS announcement which, they said, demonstrated that the true agreement was that PW was employed as a variable rate employee.

142. By reference to paragraphs 49 and 50 in *Firthglow Ltd (t/a Protectacoat) v Szilagyi* [2009] EWCA Civ 98 we were invited make a clear finding that the terms of the contract which purported to entitle PW to payment of a £37,500 salary did not reflect the "real agreement" between him and AL.

143. They pointed to the evidence that in the period prior to March 2020 PW had never actually been paid £3,125 in any month. In the early period after the contract was signed he had been paid £900 or £550 per month but that throughout the accounting period ended 30 April 2019 he had received no payments at all. The small payments totalling £2,700 had been made between May 2019 and February 2020.

144. It was contended that there was no contractual right for PW to sue AL for the waived sums, they were not shown as owing to PW in the accounts as a creditor, there was no directors loan account and no related party transactions. In short, and as accepted by PW, in cross examination the waivers were binding as between himself and AL. As a consequence the terms of the contract were not that PW would be paid an annual salary for basic hours but that his salary would be waived in whole or in part at least until AL had sufficient turnover to support payment of salary of £37,500 and that he was therefore entitled only to the payments made.

145. That this was the contractual pattern of pay was supported by the PAYE RTI and the annual accounts each of which recorded only the amount actually paid and no greater entitlement to salary as apparently provided for under the written terms.

146. Further, it could not be said, as required by paragraph 8.1 of the First Direction, that any amount paid under the contract was an amount which was reasonably expected to be paid by AL to PW. Even on a month-to-month basis, and pending the launch of the product, there was no expectation by either party that any amount and certainly any specific amount would be paid. As such a CJRS payment reflecting one twelfth of the stated annual salary was not to reimburse.

147. Entitlement under the First Direction was determined by reference to a backwards look to the pre-CJRS period for the purpose set out in paragraph 2 of the Directive i.e. to reimburse future expenditure incurred or to be incurred by employers in respect of existing employees who had been furloughed as a result of measures introduced because of coronavirus but replicating the basis of on which payments had previously been made.

148. In this context, HMRC submitted, that it could be seen that if the submissions on behalf of AL were to be accepted the CJRS would permit AL to incur costs which had not previously been incurred and would not have been expected to have been incurred. Whilst there was a hope that a sale of product would materialise in May 2020 there was no guarantee that was the

case, there was no evidence of a business plan to support the expressed hope and as such it was not consistent with the purpose of the CJRS to assume that the business would have taken off and generated sufficient turnover from which to pay PW's salary and thereby meet that cost from public resources. In short there was no evidence that AL's employment activities were adversely affected by coronavirus (as per paragraph 2.3 Third Direction). AL's trading and employment position remained as it had been prior to the coronavirus restrictions subject to a contingent hope (but no more) that the design issues identified in 2019 would be resolved and ultimately the product would launch and be successful.

149. In the alternative, it was contended that the original contract was a sham (in a *Snook* sense) and that it was never intended that PW would be paid £37,500. Ms Ameerelly referred to *The Brain Disorder Research Limited Partnership v HMRC* [2017] UKUT 176 (TCC) to support her contention that if the reality was that PW did not expect a salary to be paid (or certainly not the full salary) until AL began selling product the terms of the written contract should not form the basis on which PW's status as a fixed rate employee should be determined.

150. The same position applies in respect of CHW's contract with AL.

Fabrication of contracts/sham

151. HMRC challenge the authenticity of each of the contracts signed in March 2020.

152. They say that the contracts were provided on a piecemeal basis some signed some not signed but signed copies then subsequently provided. And in circumstances in which payments apparently made pursuant to the contracts were made without payslips.

153. Further, they say that the metadata cannot be relied upon as confirming when documents were created as it has, in an number of instances, clearly been corrupted.

154. HMRC point to the fact that all the contracts are identical with the same purported salary entitlement and the same requirement to work full time when it would be nigh on impossible for PW and CHW to comply compelling them each to work 105 hours per week.

155. Further, and as set out below, their submissions on coincidence are said to support fabrication.

Contrary to purpose

156. HMRC's contrary to purpose argument begins with HMRC painting a picture of extraordinary coincidences:

(1) Contracts were signed on 1 March 2020 with AH and TWG despite:

(a) the product not having launched and the prospect of servicing, accessories and exploitation of IP being wholly contingent on launch

(b) Without (a) above neither AH nor TWG had any reasonable expectation of a trade generating the turnover to require or pay employees, and

(c) neither company having any assets from which to meet its obligations and thereby strictly and immediately becoming insolvent;

(2) PAYE RTI registration 22 March 2020 for AH and TWG;

(3) furlough agreements are signed on 22 March 2020;

(4) payments of £3,125 were made to each of PW and CHW in March and April by each of the companies whereas for AL in every month previously purported entitlement had been waived in whole or substantial part (no payment ever exceeding £900 and those being some 2 years previously);

(5) as soon as it became obvious that in respect of all CHW's contract and PW's contracts with AH and TGW would not meet the requirements for CJRS the salary payments dropped initially to £100 then £10 and then were not paid.

157. This picture, they submit, demonstrates that the salary payments made to each of PW and CHW were breathed into life with the only of purpose of meeting entitlement to CJRS payments under the Treasury Directions.

158. HMRC contend that the position is compounded when taking into account the redundancies and reemployment contracts. They submit that there was no reason for at least AH and TWG to have employed PW and CHW (for the reasons set out in paragraph 156(1) above) but given that they had been so employed no change in circumstances prompted the redundancies. There was no business or reasonably potential trade in March 2020 that had been lost by October 2020. There was no greater risk of insolvency. The real reason for the redundancies was as expressed by PW, he and CHW wanted to claim benefits and could not do so whilst under a contract of employment. Those were personal reasons.

159. There could, in HMRC's view, be no clearer demonstration that the actions of AH and TWG, were for the purposes of making CJRS claims, than the decision to reemploy PW and CHW. This was not, HMRC submitted, to be equated with the purpose of the Fifth Directive to encourage employers who had run out of rope and could not fund employment costs as the country went back into a further period of lockdown, unable to trade and without the support of the CJRS. AH and TWG recreated (with a hoped for more successful outcome) the same situation as had been sought in March – meeting the conditions to receive payments under the CJRS for businesses entirely unaffected by the pandemic as they were and remained de facto dormant.

160. Consistent with the view taken by the FTT in *Ark Angel Limited v HMRC* [2023] UKFTT 705 (TC) (***Ark Angel***) HMRC contended that as the CJRS claims would give the Appellants a far greater level of income than might have been expected but for the pandemic payment of the claims would be contrary to the exceptional purpose of the CJRS which in that Tribunal's view was summarised as "so that [employers] could maintain their workforce in the way they might reasonable have expected to do but for the pandemic."

FINDINGS OF FACT

161. We consider that PW and CHW gave evidence which they believed to be true. There were some evidential conflicts which we have needed to resolve as set out below in our findings. In the main, however, we have accepted the majority of the factual aspects of their evidence. That is not to say however, that we have accepted their evidence in its entirety.

162. We found Mr Etherington's evidence to be of no assistance at all. His statement materially overstated his involvement.

163. We accept Officer Davis's evidence. However, it was primarily relevant to the procedural issue which we have dealt with above.

General findings

164. We accept PW's evidence as to the business rationale for the establishment of three limited companies and that his evidence honestly reflected his ambition for the businesses at the time they were established.

165. It is plain to us that considerable effort was made to develop a product which met the perceived and targeted market. The product was pitched and marketed with favourable reviews in publications likely to be accessed by prospective interested parties. Given the very niche market, and by reference both to the leads established by Encompass and the number of

brochures where requested, we accept that there was interest in the product which could have been serviced assuming that the design issues could have been addressed such the product met the high-quality requirement which would be expected of it.

166. However, we find that there is no evidence as to whether or not the design issues could have been addressed for a launch in May 2020. We know with the benefit of hindsight that the product has not been launched.

167. We find it almost incredible that PW could not produce a business plan for AL which would have substantiated whether a launch in May 2020 and the anticipated subsequent growth of the business was reasonable. We have accepted PW's evidence that this is what he intended and hoped for but whether that was realistic is a different matter on which we cannot speculate and in respect of which there is no evidence. PW said that the business plan was on an excel spreadsheet which he constantly overwrote and, given the issues in this appeal with the metadata for the employment contracts, he did not want to produce the excel spreadsheet.

168. The evidence available to us as to whether the hope of a May 2020 launch was realistic is therefore limited. We have evidence that there were three enquiries through Encompass. We have no means of measuring whether those were likely to result in sales. It is at least implicit from PW's evidence that a conversion rate of 1 in 3 and no more was expected.

169. We also have evidence that there had been design issues which had not been resolved. We therefore find that whilst it might not be unreasonable to have expected that there may be some sales in 2020 the prospect of quickly driving turnover in AL sufficient to fund salary as per the sums included in the employment contracts was so unlikely that any belief to that effect was unreasonable.

170. As regards AH and TWG we find that TWG was intended to be a business servicing product and selling accessories. Its business had no prospect of any turnover until sometime after the product had been launched and there had been some (more than one) item sold. The prospect of turnover in AH was even more remote. We accept PW's evidence that it was incorporated to exploit the intellectual property that was being developed in the Aemyrie product and the associated brand. However, it is fanciful to consider that there was any market in such exploitation before even a single unit had been sold irrespective the apparent market hype. As at March 2020 there remained design issues which had, the prior year, precluded launch of the product it is not therefore realistic that AH would imminently have a trade and turnover until the product launch.

171. We also find that as of October 2020 there was no realistic prospect that any of the Appellant companies would be in a position prior to Summer 2021 at the earliest, to have any turnover. Between March and October 2020 both employees had been furloughed, the window for launch had been missed and, given the conditions of furlough, no progress could have been made in bringing the product to market and thereby driving exploitable value into the brand. We do not understand that any progress was made on the design issues in this time.

Fabrication of contracts/sham

172. Not without some hesitation we find that there is insufficient evidence to conclude that any of the employment contracts were fabricated. Like HMRC we are deeply uncomfortable with the coincidences they identified.

173. We accept that in early March 2020 no one knew what was going to happen and certainly prior to the announcement on 22 March 2020 no one knew that the government would effectively use the payroll of companies to meet what might otherwise have become an unmanageable burden on the benefits system.

174. We have some concerns with the metadata provided. Unfeasible editing time coupled with documents which Microsoft indicates were created later than the date on which the same document was last modified indicates that the data is incorrect.

175. Further, we are concerned that PW's explanation of events does not quite hang together. In particular the explanation that contracts were signed on 1 March 2020 but that the PAYE RTI registration was not sought until 22 March 2020 because it was the intention to continue to waive salaries cannot be reconciled with a payment of £3,125 having been recorded as made to each of PW and CHW from each of the Appellant Companies on 1 March and 1 April 2020.

176. However, HMRC did not plead dishonesty and led not evidence of it. We consider that to have actually fabricated the Microsoft data as well as asserting that the contracts were signed on 1 March 2020 requires a level of dishonest intent that was not evidenced to us.

177. More importantly, however, we do not consider that a finding of fabrication would determine this appeal for the reasons advanced on behalf of the Appellant (and as set out at paragraph 132 above). The contracts dated 1 March 2020 do not form the basis of any claim to CJRS because by the time of the claims made in the post 1 November 2020 period new contracts were in place and the terms of the CJRS did not require a payment to be made under a contract of employment in the pre-covid reference period only that a payment was made and recorded on a PAYE return.

178. The question of sham is more difficult to determine on the facts. We certainly know (and find) that the contracts were not performed as prescribed, for instance the evidence indicates that no pension contributions were made.

179. It is also plain that certainly within 21 days of signature in March 2020 neither party intended, for the foreseeable future, that either PW or CHW would work a 35-hour week and in the case of the 1 November 2020 contracts the furlough agreements were signed on the same date. The 1 November 2020 contracts could not have reflected the intention of the parties save on an aspirational and "at some point in the future maybe" basis.

180. There is also the question as to whether the parties ever intended or were capable of fulfilling a clause requiring full time employment across three entities. In our experience the more normal arrangement would have been for PW and CHW to have been jointly employed by the three entities to work full time across the companies as each required. Such a contract might well have been for a salary of £112,500 but three full time contracts is, in our view, unlikely to reflect the true intention of the parties.

181. Further, there was the question whether an employment contract for AH and TWG was needed at all given that each company had no basis on which to trade and thereby no turnover with which to pay salaries and no assets such that the obligation to pay immediately put each of the companies into a position of insolvency.

182. In our view the AH and TWG contracts were premature and there was no intention that they would immediately be carried out in accordance with their terms, but the contracts were open ended and, given the aspiration for the business, on balance we do not consider there is sufficient evidence to find that the contacts were a sham.

Fixed or variable rate

183. In this regard we must determine whether there is evidence to conclude that in each case there was an agreement between each of PW and CHW and each Appellant company to pay an annual fixed salary for the performance of basic hours.

184. There were a number of evidential conflicts we must determine.

185. The first concerns the purported fixing of a salary at £37,500 under each of the six contracts. As indicated in paragraph 56 we were told that in 2016 the figure was selected because, together with the property income received by PW at that time, it was anticipated to be sufficient income for the household subject to it being "rounder" than the calculated sum of £36,500. Given that in 2016 AH had not been incorporated and TWG was dormant (and plainly had no intention to represent a source of employment as it was not registered for PAYE RTI) we cannot accept the later evidence given by PW that he considered that £112,000 was a reasonable salary shared across the three companies.

186. We are prepared to accept that the template created in 2019 used £37,500 and that it was simply replicated for CHW's contract with AL and then for all four contracts with AH and TWG without further thought.

187. We must then determine whether the contracts provided for the payment of that salary or whether the contract clause to that effect was the future intended position once there was sufficient turnover to support the payments.

188. The second conflict of evidence arises in this regard. PW's evidence was that he considered the waiver of salary to be binding but also claimed he would have been entitled to back pay. Mr Brodsky sought to marginalise this admission that the waiver was binding as PW having given an answer to a technical question he did not understand. We do not accept Mr Brodsky's submission in this regard. We consider PW gave a plain and honest answer to the question put without realising the consequence of it. We also consider that the evidence given regarding back pay adopted a style of language which PW had picked up in discussions with those advising him rather than reflecting his understanding at the time of waiver. For the record we do not consider PW to have been tutored in his answers simply that the terms of the contract were discussed with his advisors' and he adopted that language.

189. We prefer the evidence that the waiver was binding because PW also accepted that the accounts had not been prepared on the basis that there was any liability to pay salary which had been waived. He was not a creditor of any of the Appellant companies in this regard. We do not accept his evidence that the accounts were a mistake. PW signed the accounts as a director of the company declaring them to be a true and fair view which they were not if there had been no binding waiver of the contracted salary. Further, the accounts had been checked and submitted (but not audited) by Mr Etherington.

190. For completeness we note that we do not accept that having waived the salary there was any intention that back pay would be paid or payable to either PW or CHW. Both PW and CHW were somewhat equivocal on the question of back pay and the accounts for AL, which were checked and considered by Mr Etherington did not show a liability for back pay. Further, at no point prior to 31 March 2021 (or indeed since) has there been turnover in any of the companies sufficient to fund the payment of any back pay.

191. As to the frequency of the decision as to whether or not to waive salary we have concluded that there was a general agreement that full salary would not be taken until turnover facilitated otherwise; but there was a month-on-month decision taken as to whether there would be any payment at all. This is reflected in the variety of payments in fact made.

192. We have little evidence as to the basis on which the monthly decisions were taken. There is a conflict between PW's statement that he fixed the salary in 2018 by reference to what he needed to maintain family finances and the immediate decision to then take less than a third of the salary he had said he needed. However, we do not need to resolve that conflict.

193. It was put to both PW and CHW that the decisions taken as to salary in the period March to October 2020 were taken because of CJRS and that was denied. We do not accept such

denial. We find it inconceivable that the decision to pay £3,125 in March and April 2020 was not driven by a desire to claim CJRS rather than because there was a business justification for doing so. The pattern of payments following confirmation that AH and TWG were not entitled to claim CJRS and there was no entitlement in AL for CHW supports this conclusion. Payments of £3,125 appear only to have been made where there was a hope that the government would step in and meet £2,500 of the payment.

Contrary to purpose

194. In light of our decision on the procedural issue we only need to make findings about purpose for AH and TWG and as regards the period post 1 November 2020.

195. We repeat the findings at paragraph 170.

196. We also find that the reasons behind the redundancy of PW and CHW from AH and TWG were personal to PW and CHW. The business circumstances of AH and TWG had changed very little between the decision to enter the contracts and the decision to make the redundancies nevertheless as of 31 October 2020 the contracts of employment were bought to an end.

197. On the evidence available to us we can only conclude that the purpose of signing new contracts of employment with AH and TWG was to access what was believed to be a greater right to income under CJRS than would have been available through benefits. The prospects for the business had not, at that point improved. Re-employment was to be immediately followed by a new period of furlough during which nothing would happen to facilitate a launch of the product in 2021. As such, and without the new CJRS commitment there was no improved prospect for the conditions for salary to be paid by reference to the contract.

DISCUSSION

198. Our decision in this appeal is largely determined by the factual findings we have made.

Fixed or variable rate employees

199. As HMRC accepted on the face of the contracts PW and CHW appeared to be fixed rate employees.

200. However, we have found as a fact that the terms of the various contracts of employment were that the specified salary of £37,500 would be paid subject to the employing company having the turnover or otherwise sufficient funding from which to make the payment. Until that time and on a month-by-month basis the whole or part of the specified amount would be waived. The waiver was binding. It was informal only in the sense that it was not recorded in writing.

201. Accordingly, we determine as a matter of law that the contracts of employment did not provide for an entitlement to be paid an annual salary for specified hours whether or not those hours were worked (as per paragraph 7.6 First Direction). Accordingly, there is no fixed amount payable under the contract which was capable of representing the reference salary for a fixed rate employee as per paragraph 7.7 of the First Direction. Further, there was no amount which could reasonably be expected to have been paid under the contacts in any month in respect of which a claim could be made such that the terms of paragraph 8.1 might be met.

202. We find that PW and CHW were variable rate employees.

203. We are not dissuaded in that view by reference to the document published on 19 May 2020 quoted at paragraph 125. This document was relied on by the Appellants in support of their contention that PW and CHW were entitled to waive their salary without an adverse impact on the Appellants' entitlement to claim CJRS payments. We cannot see what in the document supports this position. It is plain that HMRC would not collect tax and NI on

sacrificed sums. This supports the position previously adopted by AL in particular in respect of payments which were waiver by PW in periods prior to the pandemic and by CHW in the period from April 2020 to October 2020. The sums were not declared as payments subject to PAYE and NICs. There is nothing in the document to indicate the impact of waiver on the conclusion whether an employee was, in consequence of waiver, a fixed or variable rate employee.

Contrary to purpose

204. Our decision on the procedural issue means that contrary to purpose is relevant only to the claims made by AH and TWG.

205. We have found that payments were made to PW and CHW in March and April 2020 with a view to establishing whether there would be entitlement to CJRS under the First Direction. As soon as it was obvious that there would be no claims payments were reduced and then stopped. As no claim to CJRS was made in respect of those payments we do not need to determine that they were contrary to purpose however, had we needed to do so we would have so concluded.

206. Following redundancy for purely personal and not business reasons new contracts of employment were signed in order to come within the formal terms of the Fifth Direction. However, and in doing so, AH and TWG were aiming to secure reimbursement for payments that were made only in order to facilitate the claim to CJRS.

207. We accept the Appellants' submission, based on *Clark*, that we must determine whether the claims made by AH and TWG from 1 November 2020 were contrary to the exceptional purposes of the CJRS solely by reference to the purpose as articulated in paragraph 2 of, in this case, the Fifth Direction.

208. Taking the terms of paragraph 2 as a whole and so far as relevant in this appeal as it applied from November 2020, it is our view that the purpose of CJRS was to provide a scheme of reimbursement for employers who incurred costs of employment in respect of employees who were unable to work for the employer because of the coronavirus restrictions (lockdown) and so as to maintain the workforce they might reasonably have been expected to have required but for the pandemic.

209. Our view in this regard aligns with that expressed, albeit on an obita dicta basis, by Judge Baldwin in *Ark Angel* [96].

210. That purpose was not met in respect of the payments made to AH and TWG in the period post 1 November 2020. Neither company had a need to employ or reemploy PW and CHW there was no work for them to do in connection with the non-existent activities of AH and TWG. Activities which had been non-existent in March 2020 in respect of which on 1 November 2020 there was any evidence that there was a reasonable prospect of the activities commencing. Accordingly, neither company incurred costs of employment which was adversely affected by coronavirus.

211. They incurred costs with a view to providing an income source for PW and CHW far greater than the level of income that they might reasonably have expected to have earned in the period from November 2020 to March 2021 but for the pandemic (again see *Ark Angel* [96]).

212. In our view therefore the claims made by AH and TWG were contrary to the exceptional purposes of the CJRS.

213. The Assessments in Appendix A assume that AH and TWG are entitled to reimbursement of sums paid to PW and CHW post 1 November 2020 on the basis that the were variable rate employees. In doing AH and TWG are undercharged to income tax as, in our view, neither

Appellant was entitled to claim under the CJRS. In exercise of our powers under section 50(7) we increase the assessments for those Appellants as set out in Appendix B.

DISPOSAL

214. For the reasons stated above we dismiss the appeal.

215. In light of our conclusion on the preliminary issue and contrary to purpose we increase the assessments.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 22nd MARCH 2024