TC08025

CORPORATION TAX - Accountancy treatment and amortisation of assets sold - Nature of assets - Finance Act 2002 Schedule 29 - Whether assets were intangible assets or financial assets? - Intangible assets - Whether treatment in accounts UK GAAP compliant? - Yes - Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/00361

BETWEEN

ROGER PRESTON GROUP LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in private, using the Tribunal's Video Platform, on 11-15 May 2020, and receiving written submissions dated 17 May 2020 from the Appellant and 1 June 2020 from the Respondents

Jolyon Maugham QC and Colm Kelly, Counsel, instructed by Squire Patton Boggs (UK) LLP, for the Appellant

Richard Chapman QC and Jennifer Newstead-Taylor, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal, brought by a Notice of Appeal dated 12 December 2017, challenges HMRC's decisions (communicated in a letter dated 17 June 2016 and upheld at departmental review on 17 November 2017):

   (1) To disallow Corporation Tax deductions claimed by the Appellant in respect of the amortisation of intangible assets acquired in 2008; and

   (2) Correspondingly, to issue Closure Notices with revenue amendments in respect of six successive accounting periods ending 31 December 2008 to 31 December 2013 inclusive.

2. The amounts in the Closure Notices are:

   (1) APE 31.12.08 £333,974.34 Additional Tax Liability

   (2) APE 31.12.09 £208,120.22

   (3) APE 31.12.10 zero

   (4) APE 31.12.11 £44,339.76

   (5) APE 31.12.12 £80,201.78

   (6) APE 31.12.13 £71,962.80

3. The appeal was originally listed to be heard conventionally, 'face to face', at the Tribunal's main hearing centre, Taylor House in London, but, due to the Covid-19 restrictions which had then (relatively recently) been brought into effect, a hearing in that way could not go ahead. However, the parties were swift and agile in responding to the public health emergency. They seized the initiative and, through co-operation, were able to retain the hearing dates, but using the Tribunal's Cloud Video Platform. As such, this was amongst the first substantial multi-day hearings to be dealt with by the Tribunal 'remotely'.

4. At the time, remote working was a new experience to many of the participants - including me - and I wish to commend and record my thanks to the parties, and to their respective legal teams, led by Jolyon Maugham QC and Richard Chapman QC, for their efforts in surmounting the challenges which this brought. I also thank them for producing readily navigable electronic bundles (again, a new challenge) and for the economy and skill of the oral submissions and cross-examination of competing expert evidence which I heard. I was entirely satisfied that dealing with the appeal remotely was fair and just.

5. I have decided to allow this appeal for the reasons which are set out more fully below. The matters subject to this present decision extend only to liability (ie, accountancy treatment) and not to quantum (ie, valuation) but I have made some short non-binding observations as to valuation at the end of this decision.

6. In order to clarify some of the matters discussed in the first section of this decision:

   (1) 'The Partnership' means J Roger Preston and Partners (a partnership regulated by written agreement and the Partnership Act 1890);

   (2) 'RPPL' means Roger Preston and Partners Ltd (a company registered in England and Wales)

   (3) 'The Licence' means a licence agreement in 1994 between the Partnership as licensor and RPPL as licensee.

CASE MANAGEMENT: THE APPELLANT'S APPLICATION

7. On the first morning of the hearing, I was invited to consider a case management application by the Appellant, made by way of a Skeleton Argument from Mr Maugham QC and Mr Kelly. The formal response to this was contained in a Skeleton Argument from Mr Chapman QC and Ms Newstead-Taylor. HMRC accepted that the application should be heard and determined notwithstanding the absence of an Application Notice.

8. The parties agreed - sensibly - that I should not decide the application then and there, but, having heard submissions, should go on to hear the remainder of the appeal on a *de bene esse* basis. That meant that neither I nor the parties needed to winnow out, as we went along, any material which might otherwise have needed to be excluded.

9. The Appellant's application was founded on what was said to have been "HMRC's decision to raise for the first time in their Skeleton Argument, new allegations of fact in respect of the 1994 Licence Agreement".

10. It is common ground that the 1994 Licence Agreement (the details of which I shall set out at more length below) is an extremely important document in this appeal.

11. The matters complained of appear in Paragraphs 23(3), 25, 34, 49, 53, 66(3), and 68(1) of HMRC's Skeleton Argument. They are (in summary):

> (1) The activities of the Partnership were 'far removed from any comparison with franchisors or otherwise trading in the provision of licences';
>
> (2) The Licence and the separation of apparent rights and interests in 1994 should be treated as an artificial structure, with the Licence relationship being an artificial one, and the economic and commercial reality being that the business was within RPPL;
>
> (3) The Licence is wholly uncommercial, with the Licence merely being a mechanism to facilitate the tax efficient withdrawal of profits from the trading entity, this being evidenced (inter alia) by an alleged lack of enforceability of the restrictive covenants in the Licence.

12. It is contended these are new matters because they do not appear in HMRC's Statement of Case.

13. I must therefore begin by determining whether these matters do already appear within HMRC's Statement of Case, which is dated 29 March 2018. There is no application by HMRC to amend its Statement of Case.

14. In my view, and without engaging in minute textual analysis of the Statement of Case, none of those matters do appear in HMRC's Statement of Case:

> (1) Paragraphs 34 and onwards of HMRC's Statement of Case deal with the 1994 Licence Agreement. There is no real suggestion in that Statement of Case (which is carefully drawn, albeit not by either Counsel who appeared for HMRC in the hearing of this appeal) that the Licence Agreement was artificial, or uneconomical, or somehow otherwise (for want of a better word) a sham of some kind. Rather, the Statement of Case proceeds on the footing that the Licence Agreement was genuinely reflective and genuinely dispositive of rights and obligations;
>
> (2) Paragraph 39 states, unequivocally, that 'the Licence Agreement required JRP to provide advice and assistance in connection with the management and conduct of the business of RPPL including providing persons to act as directors of RPPL'. There is no suggestion there that the requirement was specious, or was not intended by either party in fact to be binding, or to be acted on. Nor is there any suggestion of any other feature

or circumstances which would stand to vitiate the meaning force or effect of the terms as stated on the face of the Licence Agreement;

(3) Paragraph 93 of the Statement of Case is framed as a submission by HMRC that RPG 'did not acquire any contractual rights over RPPL in 2008 as the rights that JRP may have originally held under the 1994 Licence Agreement would be unenforceable by 2008'. Although this paragraph does use the word 'enforceability', it is not particularised in any way to allow HMRC's contention as to enforceability to be understood, or interrogated. I do not consider that it would be fair or just to allow HMRC to use this Paragraph - in effect - as a springboard to advance, more or less 18 months after the Statement of Case, and shortly before the hearing, the sort of detailed attack on enforceability of covenants that it does;

(4) I also have regard to Agreed Fact 4.16, which in my view, referring to Clause 5.20 of the Licence Agreement, and the post-termination restrictive covenants, connotes that that it was common ground that those covenants were binding and enforceable on RPPL (and, correspondingly, that their bindingness and enforceability was not in issue);

(5) Although Paragraph 101 of the Statement of Case is framed as a submission by HMRC that the 1994 Licence Agreement 'is not like a sole franchise agreement ... RPPL did not make any substantial investment in the business; RPPL gained virtually no benefit from the 1994 Licence Agreement'. I do not consider that an allegation of artificiality more widely can be read down into this Paragraph.

15. At Paragraphs 44 and 45 of its Statement of Case, HMRC identifies, with clarity and succinctness, two points at issue, namely:

"1. Whether any Intangible Assets existed in 2008 in JRP to be purchased by RGPL

2. Whether the deduction for amortisation is allowable in the RPGL return"

16. Those issues, as put, cannot be read in the way in which HMRC seeks to advance its case latterly in its Skeleton Argument. That conclusion is even stronger when the issues are read in the context of the preceding passages in the Statement of Case, which I have set out.

17. Moreover, the Agreed Statement of Facts and Issues sets out, as 'The Issue':

> "The issue in this case is whether the debits are allowable.
>
> The Respondent maintains that the existence of any Intangible Assets in 2008 and whether they passed as a matter of fact is also an issue. The Appellant does consider this to be a separate issue."

18. In broad terms, I disagree that the matters in the Skeleton Argument which are now objected to, if not explicit in the Statement of Case, can nonetheless be read as necessarily implicit in the Statement of Case.

19. Without seeking to lay down any rule of general application, it seems to me that this is an appeal of sufficient value, importance, and complexity, that any important matters which HMRC intended to raise and rely upon in resisting the taxpayer's appeal should have been set out, expressly, in its Statement of Case. If a fresh look at the case (even at a late stage) happens to identify points which it is considered should have been taken in the Statement of Case, then the right approach (even if at a very late stage) is to apply to amend the Statement

of Case. The matter is then squarely before the Tribunal, which will allow or disallow the amendments, as the case may be. No such application is made here.

20. Substantive amendments to a case (as opposed to differences in presentation or emphasis, which these were not) cannot be done in a Skeleton Argument. A Skeleton Argument is not any party's 'case' for these purposes.

21. If amendments to a Statement of Case are proposed, then it is (usually) the Applicant's position that the matters comprised in the amendments (i) were not there previously, and (ii) need to be there now. The obvious advantage to amendments being addressed in that conventional way is that there does not then need to be last-minute semantic or intricate analysis to work out whether or a point has previously been raised or not.

22. In my approach, I do not think that I am falling into the trap - described by Mummery LJ in *Boake Allen v HMRC* [2007] 1 WLR 1386 - of being pernickety about pleadings when "the material facts" have been pleaded and I can gather inferentially what is in dispute, and what is not. Unlike *Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376 [2017] 1 WLR 4031, I do not consider that the present appeal is one where anyone reading the pleadings (in this case, me) would have had very little idea about what was actually in issue. Unlike in *Prudential* (where even the list of issues was framed in very general terms: see Para [12]) the issue in the present appeal was identified - as I have already said - with clarity and succinctness.

23. The question then becomes how to dispose of the Appellant's Application.

24. The Appellant's primary submission is that I should make 'a limited barring order' under Rules 5 and 7(2)(d). Its secondary position is that I should make an order under Rules 7(2)(c) and 8 'debarring the Respondents from taking part in the proceedings to the extent that they wish to rely on certain paragraphs of their skeleton argument dated 28 April 2020'.

25. This is a matter of case management. As part of my powers of case management, I may regulate my own procedure: Rule 5(1).

26. Rule 7(2) ('Failure to comply with rules etc') says that if a party has failed to comply with a requirement in the Rules, then I may make such order as I consider just, which may include (i.e., the list is illustrative, and not exhaustive) exercising my power under Rule 8 (Rule 7(2)(c)), or restricting a party's participation in proceedings (Rule 7(2)(d)).

27. HMRC accepts that if the Artificiality Issue and the Enforceability Issue (as it characterises them) are not, but should have been in the Statement of Case (as in my view, if they were to be advanced, they should have been) then Rule 7(2)(d) would be engaged by a failure to set out the issues in a Statement of Case in breach of Rule 25. This chimes with the approach of the Tribunal (Judge Jonathan Cannan and Mr John Wilson) in *Moreton Alarm Services (MAS) Ltd v HMRC* [2016] UKFTT 0192 (TC), where the Tribunal remarked that that Rule 7(2) was engaged "because the Respondents failed to set out their case in the statement of case": at Paragraph [67]. A Skeleton Argument is not a Statement of Case, nor even a draft Statement of Case. Rule 25 does not apply to Skeleton Arguments.

28. HMRC has argued that it does not need to apply to amend, but I have rejected that argument. As far as Statements of Case go, that is it. Without wishing to be trite, a 'case' is 'stated' in a 'Statement of Case'. If a matter is not stated in a Statement of Case, but should (if to be advanced as part of a case) have been, then, in the absence of an application to amend, HMRC is fixed with the case stated in its Statement of Case, and cannot go beyond it. The Tribunal in *Moreton* reached a similar conclusion: see Paras [49-50]. In *Moreton*, and in contrast to this case, HMRC did make an application to amend (which was refused).

29. I do not consider Rule 8 is the right route. I have some doubt whether any order could properly lie under Rule 8, which is headed "Striking out a party's case". My power extends to striking out 'a whole or a part of the proceedings'. I am sceptical whether something (anything) said in a Skeleton Argument, but not in a Statement of Case, could (in the absence of amendment to the Statement of Case) be said to part of anyone's 'case', within the proper meaning and effect of the heading of Rule 8, or is even a 'part of the proceedings' within the meaning of Rule 8(3). I do not necessarily agree that deployment of Rule 8 is capable of giving rise to the ostensibly unattractive and binary choice of debarring (which is Draconian) or not debarring (which would, put colloquially, 'allow HMRC to get away with it'). It may do in some cases, but in my view it does not here.

30. I have the power to control the evidence and submissions which I hear: Rule 15 (**'Evidence and submissions'**). It seems to me that the word 'submissions' more neatly captures the situation which has arisen in this case. The complaint is not made of HMRC's Statement of Case; it is made of HMRC's submissions contained in its Skeleton Argument.

31. Rule 15 is expressed broadly, and refers back to the non-exhaustive powers in Rule 5. Like Rule 5, Rule 15 is also a case management power. I remind myself that this power is exercisable in accordance with the overriding objective in Rule 2. I have the power to give directions as to issues on which I require evidence or submissions - i.e., bringing issues into the case. The necessary corollary of that power is the power to give directions as to issues on which I do not require evidence and submissions - i.e., excluding issues from the case. That is the power which I exercise here.

32. In my view, the right order ends up being the simplest one, which is that the Artificiality Issue and the Enforceability Issue are not before the Tribunal in this appeal, are not properly the matter of evidence or submissions, and do not therefore fall for determination.

33. In consequence, I do not permit HMRC to rely on submissions or evidence in relation to the matters set out in Paragraphs 23(3), 25, 25(2), 25(3), 34, 49, 53, 66(3) or 68(1) of its Skeleton Argument.

34. That conclusion has a corresponding impact on the scope of the facts which I need to find (save insofar as those facts are agreed) and the law which I must consider. At some points, it may be inevitable for me to have some regard to the inadmissible features, being intertwined (in the way which I had allowed) in the evidence and submissions which I heard. But my comments in those regards will not form part of the ratio of this decision.

THE PARTIES' ARGUMENTS

35. In the simplest summary, the parties' core arguments are as follows.

36. HMRC says:

(1) RPGL's accounts are not GAAP compliant because in 2008 there was no goodwill and intangible fixed assets that could properly be recognised in accordance with FRS 10; i.e., there were no assets which answered to the statutory definitions in Schedule 29 of the Finance Act 2002 Paragraphs 2(1) and 4(2);

(2) If the accounts are not drawn up in accordance with GAAP, then they are not 'correct accounts' within the meaning of Schedule 29 Paragraph 5.

37. The Appellant says:

(1) The purchase of assets in 2008 included the purchase of intangible asset, which were properly recognised;

(2) Those assets had value, were capable of being amortised, and, so amortised, are an allowable deduction.

THE KEY ISSUES FOR DECISION

38. I have already referred to HMRC's identification of 'The Issues' in its Statement of Case, namely:

(1) "Whether any Intangible Assets existed in 2008 in JRP to be purchased by RGPL

(2) Whether the deduction for amortisation is allowable in the RPGL return."

39. In resolving (1), I identify the following as the key issues for consideration:

(1) What did the 1994 Licence permit RPPL to do?

(2) Between 1994 and 2008, what was the Partnership entitled to?

(3) Between 1994 and 2008, was the Partnership carrying on a business?

(4) What was transferred from the Partnership under the 2008 SAPA?

40. The parties agree that, if I decide that the taxpayer's accounts are not UK GAAP compliant, then I should receive further valuation evidence.

THE FACTS

41. On the basis of the information and materials before me, I find the following facts. I have been assisted by a useful Agreed Statement of Facts and Issues.

42. In the mid 1920s, a partnership known as 'J Roger Preston and Partners' (**'the Partnership'**) was established. Its members were known as 'Partners' (**'the Partners'**). The Partnership's terms were reduced to writing in Deeds of Partnership dated 30 January 1990 and 21 March 2007.

43. The Partnership's registered office was in Maidenhead in Berkshire. It carried on a business of consulting engineers, providing services not only in the UK, but also in Hong Kong, Germany, Poland, and the US.

44. In 1994, there were four Partners in the Partnership: Messrs Tuddenham; Mulquiney; Farnfield; and Rigg. The then-partners decided that the Partnership's UK trade should henceforth be carried on by a limited company, 'Roger Preston and Partners Limited' ('**RPPL**').

45. RPPL had been incorporated in September 1992, but had hitherto only held a modest sum of investments and some cash at the bank, and had been the vehicle used in a joint venture with an associated German company.

46. The Partners' decision in 1994 was not one which was taken lightly or on the spur of the moment. The commercial rationale for this appears in the Memorandum written by Mr Tuddenham dated 4 February 1994 and headed 'Practice Incorporation'. The Memorandum is a careful and detailed contemporary exploration of the advantages and disadvantages of conducting business as a partnership as against conducting business as a limited liability structure. Part of the Memorandum is a succinct one-side table headed "A Reminder of the Pros and Cons".

47. The background was said to be that "a combination of "Service Partnership" and "Consultancy Company" would hold [the Partners'] future options open", including the Partners' ability to maintain much of the benefit of its existing Retirement Annuity schemes.

48. HMRC now take a fair point that (as Mr Tuddenham identified) there could be financial costs and ongoing tax disadvantages in any move away from Partnership, mainly in terms of

National Insurance Contributions on salaries and increased Corporation Tax (albeit that the latter was identified as perhaps not significant). Mr Tuddenham recommended beginning the process of moving the technical work to RPPL, but retaining the Partnership in the background.

49. In accordance with his Memorandum, and a timescale which he had set down, a licence agreement was entered into between the Partnership and RPPL on 25 April 1994 (**'the Licence Agreement'**).

THE 1994 LICENCE AGREEMENT

50. This is the single most important document in this appeal, and I must consider its provisions in detail.

51. I have already decided, by virtue of my decision in relation to the Application, that the issues of 'Artificiality' and 'Enforceability' are not in dispute in this appeal.

52. Consequently, my main task is to ascertain the meaning and effect of the Licence.

53. However, I should note that, insofar as I may have been called upon to decide, I would nonetheless have had no hesitation in finding that the Licence was not artificial, or a sham for the reasons set out below.

54. As to its juridical or susbtantive status, I am sure that the Licence is a true licence. I reject HMRC's latter suggestion that it is not a licence, but is instead something else (for example, an option).

55. It seems to me that the status of the Licence as a licence is plainly consonant with its language and terms. This is a feature which cannot lightly be disregarded. The parties' own descriptions and lexicon are important in the exercise of determining the status of a document. I do not consider that this is a colourable, misleading, or contrived instrument of the kind considered by the House of Lords in *Street v Mountford*. I consider that the Licence was a purposive document which was intended to, and did in fact give rise to, reciprocal rights and obligations as between the contracting parties.

56. The Partners owned the issued share capital in RPPL. Latterly, from 16 July 1999, that was subject to a Shareholders' Agreement between RPPL and Messrs Tuddenham, Mulquiney, Farnfield, and Rigg. In broad terms, that shareholders' agreement provided for buy-outs of outgoing shareholders and (as per Agreed Fact 7.2) ensured that the Partners in the Partnership and shareholders and directors of RPPL were, and would remain, the same persons.

57. Although the Shareholders' Agreement postdated the Licence Agreement, it nonetheless is good contemporary evidence as to the existence of a genuine commercial relationship between the Partnership and RPPL and recognition that the substance of the Licence Agreement, and its benefit to both parties, could be undermined if the Partners, if departing as shareholders, could introduce other persons as shareholders.

58. The terms of the Licence, on its face, are simple and straightforward.

59. The Licence is for a period of one year, renewable at the Partnership's absolute discretion. Although the Licence does not contain any provision whereby the licensee, RPPL, could terminate it, my conclusion as to its status is not affected by this. Prima facie, all licences are revocable, and this Licence was revocable. RPPL would always have had an implied right to terminate: see *Winter Garden Theatre (London) v Millennium Productions Ltd* [1948] AC 173 e.g. at p 195 *per* Lord Porter.

60. The Preamble sets the scene. It reads:

"A. [The Partnership] has for many years carried on the practice as consulting engineers under the name J Roger Preston and Partners and has developed goodwill and know how and established a reputation within the industries in which it operates.

B. [RPPL] has sought and [the Partnership] wishes to grant [RPPL] certain rights that will permit [RPPL] to take advantage of the goodwill know how and reputation of [the Partnership] subject to the terms and conditions of this Agreement."

61. The "Business" was "the use (for mutual benefit) of the Mark, the Assets, the Client Data and the Know-How in the practice of Consulting Engineering under the Permitted Name in the style and manner stipulated by [the Partnership]."

62. By Clause 2 ("The Licensee's Licence") the Partnership granted RPPL, subject to the covenants, conditions and agreements on the part of [RPPL] "a licence to use the Mark (designs and logos); the Assets (the premises, fixtures and fittings, office equipment and other assets); the Client Data (the client list and other information concerning clients); and the Know-How ('the operational systems, procedures, data and methods of [the Partnership], as divulged [by the Partnership] to [RPPL] from time-to-time during the term of the Licence Agreement.

63. Those were the only assets licensed. Clause 7.1 ("Reservation of Rights") provided that any rights not specifically and expressly granted to RPPL were reserved to the Partnership.

64. The Licence did not license the Partnership's goodwill to RPPL. That goodwill therefore remained in the Partnership. I am entirely satisfied that the Partnership had goodwill at the time of the 1994 Licence Agreement, as Preamble A recorded.

65. Clause 4 contained the Partnership's obligations, principally (Clause 4.1) which was the Partnership's agreement "to permit [RPPL] to operate and promote the Business ...".

66. There was to be a close and continuing nexus between the Partnership and RPPL.

67. As to the Partnership vis-a-vis RPPL:

(1) The Partnership undertook "...to provide advice and assistance [to RPPL] ... in connection with the management and conduct of the Business as it is able and willing to provide..." (Clause 4.2);

(2) The Partnership also agreed "... to assist with and co-operate in any advertising active marketing and promotional activity for the Business in such manner as it considers appropriate..." (Clause 4.4).

68. As to RPPL vis-a-vis the Partnership, Clause 5 set out an extensive series of rights not only securing the Partnership's control of RPPL but also preventing the forging of such control by RPPL:

(1) By Clause 5.1 ('notification') RPPL agreed to notify the Partnership whenever RPPL employed new staff in the Business "so that [the Partnership] can give its approval (Clause 5.1.1) and "not to permit any person to be employed in the Business unless such person is first trained or approved as competent by [the Partnership] (Clause 5.1.2);

(2) By Clause 5.4 ('Safeguarding Goodwill') RPPL agreed "To protect and promote the goodwill attached to the Business and the Permitted Name (which the Licensee acknowledges is of great value and belongs to the Licensor) (Clause 5.4.1); and "To hold any additional goodwill generated by the Licensee for the Business or the Permitted Name as bare trustee for the Licensor" (Clause 5.4.2);

(3) By Clause 5.6 RPPL agreed that it would not, without the prior approval of the Partnership, permit any other business venture or operate or trade at or from the premises licensed (Clause 5.6.1) nor to extend the scope or range of business at the premises licensed (Clause 5.6.2);

(4) By Clause 5.11, RPPL agreed to have its books and accounts audited at the expense of RPPL by a firm of chartered accountants nominated by the Partnership;

(5) By Clause 5.18 ('Promotion') RPPL agreed "To promote the Business ... in accordance with the requirements of the Licensor" (Clause 5.18.1) and "To participate in such promotional activities ... as the Licensor may require during the Term" (Clause 5.18.2).

69. Assignment or sub-licence of any of the assets or rights under Licence Agreement by RPPL were expressly prohibited without prior written approval from the Partnership: Clause 5.19

70. Clause 5.20 ("No competition") contained a number of post-termination restrictive covenants, agreed to by RPPL. Those were to be for 2 years after expiry or termination:

(1) Clause 5.20.1 was "Not to engage directly or indirectly in any capacity in any business competitive with or likely to damage the surviving goodwill of the Business ...".

(2) Clause 5.20.2 was that RPPL was prevented, for a period of two years from the expiration of the Licence, from soliciting "the clients or former clients as referred to on the Client Data with the intent of taking their custom" (Client Data including "such additional clients and contacts as are added during the Term");

(3) Clause 5.20.3 was that RPPL was prevented from employing "any employee or former employee" who was employed by the Partnership.

71. Clause 5.21 ("Information") was that RPPL was to provide the Partnership "at regular intervals all relevant information pertaining to the Business including, without limitation, project data work in progress records and management accounts and projections."

72. Clause 6 provided that RPPL was, immediately upon the expiry or termination of the Licence:

(1) To cease carrying on the Business immediately (Clause 6.1);

(2) To return possession of "the Premises, the Assets and the Client Data and any other matter that is owned by the Licensor that the Licensee has been permitted by the Licensor to use in the Business" (Clause 6.4).

73. Work of a technical nature for clients or advice to clients was to be carried out under the terms of individual service contracts with RPPL.

74. I agree with the Appellant that the cumulative effect of the above clauses was to secure to the Partnership:

(1) A very significant degree of ongoing control over the licensed Assets and Business;

(2) The ability to ensure that the value of the licensed Assets and Business was being maintained;

(3) The ability to bring RPPL's business to a halt;

(4) The ability to force RPPL, if needed, to transfer back to the Partnership the Business and Assets which had been licensed.

75. Looked at in the round, it is very hard to see what things of substance or importance RPPL was entitled to do, during the currency of the Licence, without seeking the permission of the Partnership. It is likewise very hard to establish anything which RPPL (which had not had any role in creating the Licensed Assets or the Business) would still in reality be seized of if or when the Partnership were to being the Licence to an end. Flowing from that, it is difficult to envisage circumstances where a person would be interested in acquiring RPPL without also seeking to capture the benefit of the Licence. But, in my view, none of that connotes any inherent absence of commerciality or commercial reality.

76. I have already considered the permissible scope of the 'Enforceability Issue' in this appeal. Even had the issue been open, for decision I would nonetheless have considered the restrictive covenants in the Licence to be enforceable at the suit of the Partnership. I do not readily apprehend any reason, whether of fact or of law, why they would not have been. It does not seem to me as if either a UK wide restriction or a two year term could realistically, in the circumstances of this industry, and the Partnership's business, and RPPL's activity, to be unlawful (for example, as restraints of trade).

77. In this regard, it is a good point that the duration of the restrictions in the Licence is the same as the duration of the restrictions in the Share Asset and Purchase Agreement in 2008.

The Annual Fee

78. An Annual Fee was payable by RPPL to the Partnership: Clause 5.8 and Schedule 1.

79. The Annual Fee was not a fixed fee, but was rather the Partnership's right to receive an income stream from RPPL, the amount of which was to be calculated in accordance with a formula in the Licence Agreement.

80. There, the Annual Fee (d) equalled (a / b) x c x 0.08, provided that (d) did not exceed 95% of the annual pre-tax profit of the Licensee:

(1) (a) was the number of hours provided by the Partnership under Clauses 4.2 and 4.4 (mistakenly stated as Clause 4.3)

(2) (b) = 2400

(3) (c) = gross turnover of RPPL in the relevant financial year.

81. The effect of the 95% cap was that RPPL would always get to keep (at least) 5% of its income. RPPL would never be working for nothing. In fact, RPPL, as matters developed, on average retained somewhat more than that - up to about 13%.

82. The more hours that the Partnership provided to RPPL in rendering services under Clauses 4.2 and 4.4 (='a'), then the higher the figure (a/2400) and hence the greater the multiplicand for the multiplicatory operation of c (gross turnover) and 0.08.

83. Another effect is that, if the Partnership did not provide any hours to RPPL under Clauses 4.2 and 4.4, then (a) would be zero, and the Annual Fee would be zero. I therefore agree with the Appellants that the payment of any fee was entirely dependent on the provision of services by the Partnership to RPPL.

POSITION BETWEEN 1994 AND 2008

84. HMRC's stated position, at Paragraph 35 of its Statement of Case, that between 1994 and 2008 RPPL "carried out the work of specialist and electrical engineers using the Roger Preston name and paid an annual licence fee [to the Partnership]". That is to say, HMRC accepts that the Licence was operative.

85. Agreed Fact 4.2 is that "In summary, the Licence Agreement permitted RPPL to trade in the UK using the Roger Preston name".

86. This is consistent with Paragraph 6.1 of the Statement of Agreed Facts and Issues, which reads that "Post 1994, within the UK, [the Partnership] licensed the Licensed Assets and the New Business Services to [RPPL] in exchange for the relevant fees".

87. Over the years, the management and licence fees paid by RPPL to the Partnership increased from about £400,000 (1997) to £3.4m (a nine months period ending at the SAPA).

88. It is also an Agreed Fact (§4.8) that the Licence Agreement did not provide for the transfer of the Partnership's business as a going concern to RPPL; nor was there any novation by the Partnership to RPPL of the contracts already entered into and on foot at the time of the Licence Agreement between the Partnership and its customers.

89. This is also consistent with Paragraph 5.3 of the Agreed Facts, which reads: "[the Partnership] also provided advice and assistance with the management and conduct of the business ... [the Partners] received management fees for technical work performed by [the Partners] for RPPL clients".

90. Agreed Fact §5.3 is an important Agreed Fact because it recognises that work was actually done and services provided.

91. RPPL's annual report and accounts for the year ended 30 April 1995 were submitted to Companies House in October 1996. They are its accounts for the first accounting period following entry into the Licence Agreement. Those accounts were prepared and audited by BSG Valentine, Chartered Accountants and Registered Auditors. They certified that the accounts gave a true and fair view of the state of RPPL's affairs. They (and the series of accounts which followed them) are good contemporary evidence as to the operation of the Licence, and its accountancy treatment, and I place particular reliance on them.

92. The accounts for subsequent years are also audited. From 1997 onwards (but not for earlier years), the accounts record, as transactions with related parties, RPPL's receipt from and payment of service charges to the Partnership "in respect of management and licence fees."

93. That situation pertained until the accounts for the year ended 30 April 2007 (being the last complete year before the Share and Purchase Agreement), in which year BSG Valentine certified that the financial statements gave a true and fair view "in accordance with IFRSs adopted by the European Union" of RPPL's affairs.

94. I agree with the Appellant that it is important that the accounts were audited. Although there is no explanation for the omission to record the related party transaction or to otherwise acknowledge the Licence Agreement before 1997, I consider that falls away in the light of the consistent accounting treatment over the course of the next decade.

95. I also agree with the Appellant that the position as shown by RPPL's 2007 accounts, showing significant variance between the 2006 and 2007 positions, shows that the Licence Agreement was operating in a way which did not consistently denude RPPL of economic content, because RPPL made an operating profit of almost £1/2m in 2006, but only about £40,000 in 2007. Insofar as I would have been called upon to do so, I would have agreed that the 2006 and 2007 figures, set alongside each other, were clear evidence that the Licence Agreement was not a sham, but was genuinely reflective of RPPL's trading position.

96. The Partnership was not only entitled to, but actually received, management and licence fees; fees for work done; and service charges for business expenses. In the year to 30 April 2007, these were, illustratively, £1.829m; £650,000; and £244,000.

97. The Annual Licence fee paid for the period ending 5 April 2008 (i.e. the day before the Licence Agreement was transferred to RPGL) was £3,405,600.

98. The other side of the coin is to look at the Partnership and how it approached the Licence. I have seen the Partnership's annual accounts for the years ending 30 April 2003, 2004, 2005, 2006 and 2007. For the years ending 2003, 2004 and 2005, they are audited by BSG Valentine who have certified the accounts as giving a fair and true view of the state of affairs. They record the Partnership's receipt of management and licence fees and service charges. In 2006 (the first year of such an entry) there was also, as an addition to turnover, 'work done' of £700,000 and in 2007, there was 'work done' of £650,000'.

99. In January 2006, HMRC opened an inquiry into the Partnership's tax return for the year ending 5 April 2004. On 25 April 2006, HMRC was provided with the Licence Agreement as part of its enquiry... as well as with information (it is agreed, as a fact: see Agreed Fact 9.1) "setting out the commercial rationale for the re-structure in 1994:" and see the letter at page 1441 of the bundle.

100. As part of the enquiry, HMRC was told that almost all the Partnership's expenditure was incurred in connection with the services provided under the Licence Agreement.

101. The enquiry was concluded by HMRC in October 2006 without any amendment to the Partnership's return for the year ending 5 April 2004.

102. On 13 February 2007, HMRC opened an inquiry into RPPL's return for the period ending 5 April 2005. HMRC asked BSG Valentine for "An analysis of the management and licence fees expenditure amounting to £1.214m".

103. That enquiry was concluded by HMRC in October 2007 without any amendment to RPPL's return for the period ending 5 April 2005.

104. The above features lead me to conclude, to any extent that it was or remains in dispute, that the commercial relationship between the Partnership and RPPL (i) existed; and (ii) was genuine, with real world effects.

THE BACKGROUND TO THE SHARE AND ASSET PURCHASE AGREEMENT

105. In 2008, and whilst the Licence Agreement was still operative, the Partnership was approached by a Dutch consulting engineer group called Grontmij which was interested in acquiring the operations both of the Partnership and of RPPL.

106. The present Appellant ('**RPGL**') is a company in the Grontmij group, registered in England and Wales with number 6546246. It was previously known as Hamsard 3123 Ltd.

107. In March 2008, Grontmij undertook some due diligence, which involved a Share Purchase Information Request, relating to the proposed acquisition of the whole of the issued share capital of RPPL. That was to be on the footing that the business and assets of the Partnership were to be transferred to RPPL, in accordance with a structure paper. Question 1.3 asked for a list of all assets to be transferred from the Partnership. The answer was that "other intangible assets will also transfer, such as goodwill, as referred to in [the Licence Agreement]."

108. The clear representation was that the purchaser was getting all the goodwill, including that referred to in the Licence Agreement.

109. On 5 April 2008, Deloitte and Touche LLP produced a Due Diligence Report for the directors of Grontmij Group in connection with the proposed acquisition of RPPL and its subsidiaries. It was observed that HMRC had reviewed the Licence Agreement and had not sought to challenge the tax treatment adopted. That was correct: see above.

110. One part of the Deloitte report sets out the "Legal structure" and is headed "The current group structure has been determined by tax planning for the equity partners." There is a note, said to be founded on 'Management Information' that the group structure (here, relevantly, the Partnership sitting alongside RPPL) "was set up to provide a tax efficient way for the equity partners to extract profits from the business ... profits are extracted from RPPL via management charges and a licence fee, principally for the use of the Roger Preston case."

111. This is expanded upon at page 71 of the Deloitte report which, after setting out some of the history of HMRC's interest, observes that "payments under [the Licence Agreement] should be on arms' length terms. HMRC could argue that unconnected parties would not sign up to an agreement where they transfer our 90% to 95% of their profits." However, that fails to adequately capture the whole scope of the SAPA, which, as I shall set out, included detailed provisions to capture the services of the Partners and (insofar as different) RPPL's directors.

112. I decline to give any weight to this aspect of the Deloitte report. It is not the SAPA, nor is it incorporated by reference to the SAPA. It would only be admissible to assist interpretation of the SAPA, if interpretation were called for. But I consider the terms of the SAPA, on their own face, to be sufficiently clear.

113. But in any event, in my view, far too much has been made by HMRC of those comments in the Deloitte report, made 14 years after the Licence Agreement, and without any reference to the 1994 Memorandum.

114. Even at its highest, all that the Deloitte report says is that the Partnership-RPPL structure was considered to carry tax efficiencies. Even if that were unarguably correct (and I am not certain that it is, because it is not consistent with Mr Tuddenham's Memorandum 14 years earlier; nor is the comment of 'increasing commercial risks' accurately reflective of the overall tenor of that Memorandum) it simply describes a motive. The motive of seeking to achieve tax efficiency does not, in and of itself, connote that the structure is uncommercial or artificial (even if the Artificiality Issue were before me).

115. But in any event, (i) the way in which the annual Licence fee was structured, including the cap (and its preservation of at least 5% of the profits for RPPL, but which on average was about 13%) and (ii) the way in which it was in fact consistently operated for several years preceding any interest from Grontmij (including during the period when HMRC opened and closed two inquiries, one into each the parties at each end of the Licence Agreement) on the face of it militates strongly against any suggestion that the Licence Agreement was a sham or otherwise artificial. Had I been called upon to decide the Artificiality Issue, I would have decided that the Licence Agreement was not a sham or otherwise artificial.

116. However, the Deloitte report is useful in another way, in that it shows that Grontmij were focussed on the Partners of the Partnership - their ages, lengths of service, and their contractual notice periods - and was aiming to capture the services of the Partners with earn-out payments "to retain and incentivise the equity partners ... to continue managing and growing the business."

117. That is a strong feature showing that all contracting parties - the Partners qua partners in the Partnership, and qua shareholders in RPPL, and the (then, prospective) purchaser were interested and attached genuine commercial value to the natural persons who were the Partners - who they were, what they knew, and how long they were likely to continue working. As a matter of common sense, and commercial reality, that is most easily explicable on the basis that the Partners were repositories of knowledge and experience without which the purchase of the shareholdings in RPPL alone would be denuded of genuine value.

THE 2008 SHARE AND ASSET PURCHASE AGREEMENT

118. Against that background, I must now turn to consider a Share and Asset Purchase Agreement dated 5 April 2008 (**'the SAPA'**) whereby Messrs Tuddenham, Mulquiney, and Farnfield:

(1) As Partners, sold the Partnership's Business and Assets (each, as defined therein) to the present Appellant (as 'the Business Buyer') for an aggregate consideration, before adjustments, of just under £14.5m (**'the Business Sale'**); and

(2) As shareholders, sold their shareholdings in RPPL and associated companies to Grontmij Limited (**'Grontmij UK'**, now known as Sweco UK Ltd) for a consideration, before adjustments, of just under £0.5m (**'the Share Sale'**).

119. The Business Sale and the Share Sale together are **'the Transaction'**. The Business Sale and the Share Sale were to be completed simultaneously.

120. It is Agreed Fact §8.4(b) that, at the time of the Transaction, the vendors and purchasers were arms' length commercial parties, and the Transaction was on arms' length terms.

121. Most of the price was therefore put on the Partners' interests in the Partnership, rather than in their shareholdings in RPPL.

122. As to the Business Sale:

(1) "Business" was defined in the SAPA as meaning "the business of licensing the Assets for fees by the Partnership to RPPL including the Goodwill and all other rights under the Licence Agreement, and the business of professional engineers and specialist technologists carried on by the Partnership at the date of Completion;"

(2) "Assets" included (inter alia) those listed in Clause 3.2, which included the Goodwill (as defined); the Business Intellectual Property Rights; the Client Data; the Know-How; the benefit (subject to the burden) of the Licence Agreement;

(3) "Goodwill" means "all goodwill owned by the Partnership including without limitation the goodwill licensed under the terms of the Licence Agreement together with the goodwill to which the Partnership has become beneficially entitled under the terms of the Partnership Agreement"

123. By Clause 3.4, the Partners covenanted with the Business Buyer that they were entitled to sell and transfer the full legal and beneficial ownership of the Business and Assets to the Business Buyer without the consent of any third party.

124. Schedule 2 of the SAPA contained a series of warranties. Clause 2 was a series of warranties given in relation to the Partnership. Clause 2.1 dealt with the Licence Agreement. It recorded (and the Partners warranted) that the Licence Agreement constituted "valid and binding obligations on the parties which are enforceable in accordance with their terms"; and had been continually in effect since 25 April 1994. The Partners also warranted that the Partnership did not own or use any intellectual property relating to the Business other than the Goodwill, the Mark, and the Permitted Name.

125. The total consideration was not payable in one tranche, bur was to be paid in tranches - some on completion; and then by way of two 'Additional Payments' (see Schedule 5 Part 1 of the SAPA) on 30 April 2009 and 30 April 2010; and then by way of two earn-out payments.

126. In my view, the structure of the Additional Payments is important because Additional Payments are conditioned on a Seller being employed at the relevant date. The Earn-out Payments were conditioned on a turnover exceeding £12.7m in Year 1 and £13.7m in Year 2.

127. The conclusion which I draw is that each Seller was positively incentivised to remain employed by the business until 30 April 2010, and to devote their energies to improving the prosperity of RPGL. These are factors which were regarded as important by Grant Thornton in its subsequent report (see below): they 'effectively locked in the three principal sellers for twenty five months plus their respective notice periods." I agree. The importance of this flowed from management's assessment that the departure of any of the principal directors would have a negative impact of up to 20% of total revenue. That seems to me a reasonable view to have held, taking into account the nature of the business being conducted and as analysed in Part 6 of the Grant Thornton report.

128. RPPL and each of the Sellers and the Executives (who were 5 named directors of RPPL in addition to the Partners) were to enter into Service Agreements with RPGL with effect from and at completion - that is to say, RPGL was capturing their services: see SAPA Clause 6.2(i). I have seen and considered Service Agreements with RPPL, dated 5 April 2008, for Messrs Tuddenham and others. Each provides for six months' notice, and sets out a series of post-termination restrictive covenants at Schedule 2 Part 2, principally relating to the Protection of Confidential Information.

129. Clause 7.2 of the SAPA provided that the Partners, at any time after completion, were to (inter alia) "give the Business Buyer reasonable access to the books, accounts, records and returns of the Partnership relating to the Business and the Assets...".

130. SAPA Clause 13 was a series of restrictive covenants binding on the Sellers for (variously) two years (which is equivalent to the stipulated period in the Licence Agreement) and 1 year.

131. I agree that these provisions are, on the face of it, manifestly inconsistent with any assertion that the Partnership had nothing to sell in 2008. They are manifestly consistent with the fact that the Partnership did have something to sell, and that what the Partnership had to sell was not only valuable but was far more valuable than the Partners' shareholdings in RPPL.

GRANT THORNTON'S VALUATION AND 2009 REPORT

132. In October 2008, Grant Thornton LLP was commissioned by Grontmij Group Ltd to produce an independent valuation for the purposes of the Grontmij Group's consolidated accounts. Grant Thornton was asked, for IFRS (International Financial Reporting Standards) 3 purposes, to assess the fair value of the assets (including intangible assets) and the liabilities on the balance sheets of three recently acquired companies, of which one was RPPL, and to allocate the associated acquisition cost. Its report is dated 9 February 2009.

133. For the purposes of the matters which I am called upon to decide in this decision, in my view, limited weight, either way, can be placed on the GT report. It is an IFRS 3 report, and not a UK GAAP report. It was prepared for the group accounts of Grontmij, and not for this taxpayer. The purpose of a group account is not intra-group indebtedness as (put colloquially) it all comes out in the wash. The same has to be true of intra-group licences of assets where the paying and the receiving ends of the Licence are in the same group. The appellant's expert, Mr Marsden, put this more elegantly: the appropriate accounting treatment of the Licence in the taxpayer's individual accounts is different to the accounting treatment adopted at the group level, in the parent company's consolidated accounts, because, in those, intercompany transactions are ignored as there is no relationship with a party outside the group.

THE POST SAPA ACCOUNTS

134. In September 2009, RPGL filed its Directors' report and financial statements for the 9 month period ending 31 December 2008. These were audited by KPMG LLP in Leeds. That report is accompanied by an Independent Auditors' report to the members of RPGL in accordance with sections 495 and 496 of the Companies Act 2006.

135. CA 2006 Section 495(3)(b) provides that the report must state clearly whether, in the auditor's opinion, the annual accounts "have been properly prepared in accordance with the relevant financial reporting framework."

136. David Morritt, a Senior Statutory Auditor, on behalf of KPMG LLP, gave his opinion that the financial statements gave a true and fair view of the state of RPGL's affairs:

(1) In the version at page 907 of the bundle (which does not have a sticker showing the report beginning at page 901 to have been filed at Companies House) he said that the financial statements had been properly prepared "in accordance with UK Generally Accepted Accounting Practice" and there is no mention of IFRS;

(2) But in the version (logged in by Companies House both on 30 September 2009 and 8 October 2009: see page 1413) later in the bundle this instead reads that the financial statements had been properly prepared "in accordance with IFRSs as adopted by the EU", and there is no mention of UK GAAP: see page 1420;

(3) The certification is otherwise identical, including as to signatures and dates. I have treated the latter document, received by Companies House, and referring to IFRS, as the final, definitive, version, but I do have regard to the fact that the auditor had previously been prepared to put his signature to a document which made express reference to UK GAAP.

137. Those audited financial statements show a turnover of £2.683m and amortisation of £993,000 in the period. £12.250m is shown as an Intangible Fixed Asset. £12.250m is the net book cost. It is an acquisition cost of £13.243m minus amortisation of £993,000.

138. Note 1, which forms part of the Financial Statement, deals with "Accounting Policies". In relation to "Intangible Assets" it says as follows:

> "Intangible assets comprise the licences purchased by the company from J Roger Preston & Partners. The licence gives the user access to the Roger Preston brand name, customer lists and other intangible assets. The directors' view is that these assets have a finite life of ten years and to that extent they are amortised over this period with provision for any impairment made if required..."

139. "Turnover" is said to "represent the management fee received from [RPPL] for the use of the licence.

140. On 25 October 2010, the taxpayer filed its directors' report and financial statements for the year ended 31 December 2009. Those were also audited by KPMG and supported by a letter from David Morritt dated 26 July 2010. These are of like content to the preceding year's reports, save that these record that the subsidiaries had failed to meet pre-agreed post-acquisition results leading to the withdrawal of a deferred earn-out payment.

SOME GENERAL OBSERVATIONS ON THE EVIDENCE

141. Before I turn to further analysis of the issues for resolution which I have identified, and in relation to which I have already made some findings of fact, I make some general observations on certain aspects of the evidence.

The contemporary accountancy treatment

142. The Appellant's position is supported by a very significant weight of contemporary accountancy evidence.

143. Both the pre- and post- 2008 accounts of RPPL, showing deductions from profits in relation to fees paid under the 1994 Licence, were initially audited by BSG Valentine and were subsequently also audited by KPMG. Grant Thornton LLP also produced an independent valuation for the purposes of the consolidated accounts of the Grontmij Group. There are also post acquisition accounts audited by Deloitte. These documents are all consistent. That is to say, several firms of professionals have, over a number of years, adopted the same approach. A striking feature calls for recognition and articulation - if the Appellant is wrong, then so were all these firms of accountants and auditors beforehand. I accept that consistency does not necessarily equate to correctness: but nor can it properly be ignored.

144. I remind myself that this evidence is not itself conclusive of the issues in dispute, one way or the other. It is not unknown for accountants or even auditors to make mistakes, or to work from assumptions which are later discovered to have been wrong in fact or wrong in law. The past treatment of an issue in accounts is not determinative, and certainly does not oust the Tribunal's jurisdiction. Nor does the fact that those accounts have been audited. The accounts and the accountancy treatment do not operate to bar or estop HMRC for arguing that the accounts are wrong.

145. But this evidence is not nothing. It is much more than straws in the wind. I agree with Mr Maugham QC's description of it as 'a strong tide'. It is solid, contemporary (and, at the time, unchallenged) professional treatment of the Appellant's true financial position. I agree that the Tribunal should be slow to upset accounts which have been given audit sign off as GAAP compliant accounts (see, for example, *GDF Suez Teeside* [2015] UKFTT 0413 (TC) at Para [134] (Judge Rachel Short and Mr Nigel Collard).

146. This evidence weighs heavily in the scales in favour of the Appellant. Moreover, all that evidence antedates this appeal. None of it was prepared in contemplation of this appeal. None of that evidence can therefore be criticised as partisan.

147. HMRC faces (and, in my view, do not overcome) another difficulty in this regard, which is the well-established principle that if a company draws up its accounts in accordance with GAAP, then that is the basis on which the tax is determined, even if presenting them in another proper GAAP way might have a different effect: see *Greene King plc v HMRC* [2014] UKUT 0178 *per* Mann J at Para [16].

HMRC's enquiries

148. I should also properly take into account, as part of my overall evaluation, the fact that HMRC opened and concluded two enquiries - one into the Partnership, and one into RPPL - albeit not for the same year of return, but for successive years; and closed each enquiry without making any Revenue amendment.

149. The best (indeed, the only reasonable) inference is that HMRC, at that time, and on the basis of the information and material which it then had (which included the Licence Agreement), was of the view (arrived at twice, in succession, looking at the position both of licensor and licensee) that the accountancy and taxation treatment applied by the Partnership and RPPL in relation to the Licence fees was correct.

HMRC's decision under appeal

150. It should not be forgotten that this is an appeal against a decision, and it is appropriate to look at the reasons given for that decision. Even though HMRC can, in the course of

responding to an appeal, develop its reasons, or even give new ones, the reasons given at the time of the decision nonetheless give the best snapshot of HMRC's thinking at the time.

151. This is an appeal from the decision of HMIT Skehan to issue closure notices with Revenue amendments in June 2016. His June 2016 letter was an important letter. It related to a significant disallowance. It is therefore not unfair to look at this letter, as the taxpayer and its advisers would have done, with close attention.

152. In the same way, I also have regard to HMRC's 'Position Paper' dated 12 September 2014, sent by HMIT Skehan to Grontmij's Head of Legal which sets out the background to his reasoning.

153. The underlying premise is the same. It is that the taxpayer's recognition of the Licence as an intangible asset in its accounts for the period ended 31 December 2008 was incorrect.

154. HMRC founded its legal analysis therein on two sources:

(1) HMRC's definition of goodwill as summarised in its Capital Gains manual;

(2) The decision of the First-tier Tribunal in Iliffe News and Media Ltd (and others) v HMRC.

155. The treatment in the Capital Gains Manual is simply HMRC's interpretation of the law, and is not itself a source of law. I shall discuss the decision in Iliffe below.

THE EXPERT EVIDENCE

156. I received written expert accountancy evidence from Mr Alex Marsden (on behalf of the Appellant) and Mr Andrew Simms (on behalf of HMRC). Mr Marsden and Mr Simms met on 27 February 2019 and produced a joint memorandum as to accountancy issues (divided into areas agreed, and areas not agreed) dated 14 March 2019. I also heard oral evidence from Mr Marsden and Mr Simms. Both were carefully cross-examined by Mr Chapman QC and Mr Maugham QC respectively.

157. I also received expert valuation evidence from the same Mr Marsden (for the Appellant) and from Nigel Bingham of HMRC's Shares and Asset Valuation Office (for HMRC). The had a conference call on 28 February 2019 and produced a joint memorandum as to valuation issues dated 14 March 2019.

158. I am grateful to the experts for their evidence.

159. The accounting experts and the valuation experts all agree that the enforceability of the rights under the 1994 License is not a matter within their expertise.

160. I remind myself:

(1) None of this expert evidence exists in a factual vacuum;

(2) None of it should be regarded in isolation from the accountancy treatment which has already been applied;

(3) Expert evidence is still a species of evidence, and this appeal is decided by the Tribunal and not by the expert. But this is nonetheless to some degree an evaluative exercise as to the strength of the respective experts' positions, although I should be careful as not to set myself up as an expert in place of them;

(4) Even in the event of preferring one expert to another, I should be cautious not to slavishly follow what the expert says.

The accountancy joint memorandum

161. In their carefully worded joint memorandum, Mr Marsden and Mr Simms agreed:

(1) Purchased goodwill may only be recognised in individual company accounts where a business has been acquired directly by the company (e.g., not through a share purchase);

(2) Purchased goodwill is not itself an identifiable asset;

(3) The presentation of an asset as either an intangible asset or purchased goodwill would not change the quantum of the amortisation charge in the accounts, assuming that RPGL's use of a 10 year useful economic life was maintained and was appropriate.

162. The most important area of agreement was §12 ("Intangible versus financial asset"):

> "It is agreed that the fundamental difference between an intangible asset and a financial asset is that an intangible fixed asset needs to be used, or exploited, by an entity in order to gain financial benefit, whereas a financial asset gives a direct right to future cash flows ... It is agreed that if an asset is recognised as an intangible asset, it cannot also be recognised at the same time as a financial asset".

The evidence of Mr Marsden for the Appellant

163. Mr Marsden's report is dated 14 February 2019. It stands in place of a report from Mr Brent Wilkinson dated 15 October 2018 (which I have also seen). Following a period of illness, Mr Wilkinson was unable to continue to be instructed and Mr Marsden was instructed as an expert in his place. But Mr Marsden's work was carried out under the supervision and control of Mr Wilkinson (who, at the time, was a forensic accounting partner in BDO, a Fellow of the Institute of Chartered Accountants in England and Wales and a member of the Academy of Experts). Against this background, it is not surprising that Mr Marsden's report largely reproduces Mr Wilkinson's report.

164. Mr Marsden is a practising chartered accountant. He became an Associate of the Institute of Chartered Accountants in England and Wales in 1989, and a Fellow in 2003. He joined BDO's Forensic Accounting Department in 1990 and is a Forensic Accounting and Valuations Partner.

165. His written report deals with a number of issues, but the anterior issue is his view of the GAAP treatment of the SAPA in the accounts of RPGL and especially his view as to whether RPGL acquired a financial asset for GAAP purposes. That is the crux of this dispute.

166. His primary conclusion is that RPGL's accounts complied with UK GAAP. His view was that RPGL did acquire an asset (namely, the benefit of the 1994 Licence). He was satisfied that the benefit of the 1994 Licence met the definition of asset set out in the Accounting Standard Board's Financial Reporting Standard (FRS) 5 ('Reporting the Substance of Transactions') (April 1994) and that representing it as such in the accounts was faithful, and in accordance with the Objective of FRS 5.

167. He was satisfied that the asset was an intangible asset, in accordance with FRS 10 ('Goodwill and Intangible Assets') and UITF (Urgent Issues Task Force) Information Sheet 34 ('Classification of Licences and Similar Assets', January 2000). I note that the UITF Information Sheet is non-mandatory, but it is from an authoritative expert source and I do not consider it to be proper to disregard it.

168. He cross-checked his conclusion. As an intangible asset, the benefit of the Licence could not also be a financial asset: see FRS 25 ('Financial Instruments: Disclosure and Presentation'). He concluded that it was reasonable for RPGL to account for a separate intangible asset acquisition in its accounts, and to record the Licence at its cost. He considered that the 10 year amortisation was appropriate.

169. Mr Marsden's evidence was carefully tested by Mr Chapman QC in cross-examination. But this was largely on the footing of alternative facts, flowing from an analysis of the Licence as an option. Mr Marsden's analysis of the Licence if a licence was not subject to significant challenge.

The evidence of Mr Simms for HMRC

170. Mr Simms produced a report dated 29 January 2019. He has been a chartered accountant since 1999 and a Fellow of the Institute of Chartered Accountants of England and Wales since 2015. He was an audit manager for KPMG before joining Inland Revenue in 2002. For HMRC he has worked as an advisory accountant with the Large Business Directorate, and is now part of the leadership team of the Financial Professionals Unit.

171. His starting point was to outline the UK GAAP requirements, generically, for recognising and measuring purchased goodwill in a company's individual accounts at 31 December 2008. He was then asked to consider the SAPA and to comment on whether the asset "recognised as a licence" was an intangible fixed asset in accordance with UK GAAP, and, if not, what should the appropriate accounting treatment have been.

172. I am bound to say that I found his written report significantly more difficult to follow and digest than Mr Marsden's (and that of Mr Wilkinson before him). In part, this was because his written analysis overall was less securely anchored to the language of the underlying FRS than Mr Marsden's. He does however identify that, if the benefit of the Licence were an asset, then difference between the parties as to its status in part relates to the question of control.

173. He had based many of his opinions on an instructed assumption that RPGL did not acquire a business: see Mr Simms §3.12 and 5.5. This, without more, was not the optimal place to start the analysis because it runs counter to the definition the 'Business' said in the SAPA to have been acquired by RPGL from the Partnership (which would therefore have had to be grappled with by Mr Simms as a counter-factual). It meant that Mr Simms' analysis was correspondingly vulnerable if the granting of licences is capable of being a business. This fed into my impression that Mr Simms was not approaching the matter as an entirely fresh slate, but that he considered that his hands were somewhat tied by his instructions.

174. His written evidence was likewise carefully tested by Mr Maugham QC. He made significant inroads into Mr Simms' approach and analysis. Mr Simms had not considered whether the Licence could be characterised as something else (e.g, an option) and so his answers in that regard were necessarily limited.

My overall approach to the expert evidence

175. My overall impression was that Mr Simms' evidence was less sure than Mr Marsden's. `

176. During the course of cross-examination, Mr Maugham QC challenged Mr Simms (in my view, properly and fairly) on more than one occasion that he was to bear in mind that his overriding duty was to the Tribunal and not to the party instructing him. That emerged especially in relation to Mr Simms' oral evidence about the potential status of the Licence not as a licence but as something else (e.g., an option). That was not something which he had considered in his written report.

177. In my view, his oral evidence can fairly be said to have been somewhat adaptive - that is to say, tacking to suit the way in which HMRC's position as to the status of the Licence had evolved. In my view, Mr Simms' oral evidence did stray into the partisan from time to time. I am sure that this done so as to mislead the Tribunal. But the impression at times was that he was arguing HMRC's case rather than giving neutral and independent evidence about it. This

factor leads me to conclude that I cannot safely rely on his evidence where it is in conflict with that of Mr Marsden.

178. Even if that had not been the case, overall, and on reflection, I comfortably prefer the totality of the evidence of Mr Marsden. His written evidence was clear and careful. The underlying analysis was sound and he arrived at his conclusions by a process of reasoning which was readily intelligible and capable of being followed by someone who is not an accountant (i.e., me). His oral evidence was engaging, and he was intellectually engaged with Mr Chapman QC's cross-examination. He was not dogmatic, but made sensible concessions, acknowledging where he was in doubt about matters. His evidence did not seem to me to be affected by any partiality.

DISCUSSION

179. I have already referred to HMRC's identification of 'The Issues' in its Statement of Case, namely

(1) Whether any Intangible Assets existed in 2008 in JRP to be purchased by RGPL

(2) Whether the deduction for amortisation is allowable in the RPGL return"

180. In resolving (1), and in deference to the submissions which I have heard and read, the following are the key issues for decision:

(1) What was the nature and effect of the 1994 Licence?

(2) What was happening between 1994 and 2008?

(3) Between 1994 and 2008, was the Partnership carrying on a business?

(4) What was transferred from the Partnership under the 2008 SAPA?

181. I will set out my observations briefly. I will not recapitulate, but am incorporating, my findings already set out above.

1. What was the nature and effect of the 1994 Licence?

182. The Licence was a licence.

183. The effect of the Licence, as any agreement, must always be tested as a matter of commercial common sense, but bearing in mind that in the case of agreements between commercial companies for regulating their trade relations, the parties are usually the best judges of what is reasonable: see *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 320C per Lord Hodson.

184. The Partnership licensed certain of the Partnership's assets to RPPL, and granted RPPL rights to use those assets in operating a business of consulting engineers in the UK: see, e.g., Clauses 4.2 and 4.4. The right in relation to the assets was expressed as a right to use. It was not a purported assignment or parting with property in the licensed assets. The right in relation to the business was the right to operate and promote the business.

185. The Licence entitled the Partnership to receive an annual fee, to be calculated in accordance with the Licence formula, in exchange for the licensing of those assets and the management and marketing assistance provisions of the Licence.

186. I reject HMRC's submissions that the Licence was an option and/or a 'put' option. It is significant that it was never treated as such in the accounts, prepared and signed off by different firms of accountants, and auditors, over many years. Nor was it so regarded or treated by HMRC when HMRC came to enquire into both ends of the Licence. A further significant difficulty with the submission is that it does not go beyond submission, because it is not the way in which any of the accountancy experts saw fit to approach the matter.

Therefore (insofar as it amounts to a positive case advanced by HMRC) it is unsupported by any evidence.

187. Whilst the Licence does (in effect) give the Partnership a share in the profits of RPPL, I agree with the Appellants that this is entirely unremarkable. In my view, characterising the Licence as a 'profit share' is too simplistic, because it looks only to the money moving to the Partnership qua licensor and ignores the *quid pro quo*, which is the management and other services moving from the Partnership to RPPL. "Profit share" simply does not reflect the inter-dependency of the profit to be distributed and the means whereby the distributable profit is generated. It also seeks to characterise the Partnership's rights qua licensor as quasi-shareholders, and I reject such an analysis. The Partnership was possessed of a suite of powerful and far-reaching rights over RPPL's use of the Assets and operation of the Business. Insofar as I need to make any remark, in the light of my refusal to admit the Artificiality Issue, I nonetheless (for the same reasons already set out in this Paragraph) reject Mr Chapman QC's submission that the Licence was an artificial structure created as a means to extracting profits from RPPL.

188. The Partnership did not part with the ownership or property in the licensed assets. The Partnership continued to own the licensed assets.

189. The Licence was not an assignment in gross of the Partnership's goodwill.

190. In this regard, it differs from *Iliffe News and Media Ltd v HMRC* [2012] UKFTT 696 (TC) [2014] FSR 6 (Judge John Walters QC and L Salisbury) which was one of the mainstays of HMRC's decision: see my outline of the 2014 'Position Paper', above. *Iliffe* is a decision of a Tribunal of equivalent jurisdiction and does not bind me. The Tribunal considered the assignment of various unregistered trade marks (being the mastheads of certain local newspapers) by certain subsidiaries in a group to Iliffe and Iliffe's licensing-back to the subsidiaries. The assignments were of "the Trade Marks and all and any rights, title and interest in and to the Trade Marks and any common law rights and all the goodwill attaching to the Trade Marks." The Tribunal decided that the assignments to Iliffe were void as a matter of law because they were assignments in gross: see Para [136], relying on *Thorneloe v Hill* [1894] 1 Ch 569 (Romer J) and *In Re John Sinclair Limited's Trade Mark* [1932] 1 Ch 598.

191. But the situation I am called on to consider is not the same. In *Iliffe* the assignment was in gross. But the package of assets and rights which were licenced in the present case significantly broader than in *Iliffe*.

192. I do not seek to impugn the established law that goodwill cannot be assigned in gross, "but must remain in the same ownership as the business to which it relates": see Wadlow, op cit, §3-195. But that proposition, as put, represents one end of the spectrum - ie an assignment or transfer of goodwill in gross simpliciter. The other end of the spectrum is the assignment or transfer of the business as a whole, which prima facie carries with it the goodwill. But there are other scenarios, where a transaction purports to deal (for example) with only specific brands or marks (that is, part of a business) where the transaction can be interpreted as one which deals with the goodwill not of the whole business but of those parts of the business in which those brands or marks are used. That is to say, there is middle ground where giving effect to the common intention of the parties as expressed in the words they have chosen to use tends away from an assignment in gross.

193. As Professor Wadlow recognises (§3-123) where the owner of goodwill in business prima facie licenses another business to do any act which, but for the license, would amount to passing-off, it is permissible to speak of licensing goodwill, "although what is licensed is not properly the goodwill as such but the right to do something which would otherwise infringe the licensor's rights in it." As he later remarks (see §3-195 "Transmissibility of

goodwill"), words such as "goodwill" are sometimes used in ways at variance with their strict legal meaning. I agree. Goodwill has long presented a challenge to lawyers. As Lord Macnaghten remarked in *IRC v Muller and Co's Margarine* [1901] AC 217, at 223:

> "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start."

194. The shades of meaning identified by Professor Wadlow chime with the approach to goodwill adopted by the Tribunal. For example, in *Neill Dyer v HMRC* [2020] UKFTT 72 (TC) the Tribunal (Judge Sinfield, CP, and Mrs Farquharson) rejected the taxpayer's claim that he personally owned any goodwill at the time of a sale of that goodwill to a company of which he was a director and majority shareholder, so as to permit him to claim CGT entrepeneurs' relief on the disposal. The Tribunal remarked that whether goodwill exists is a question of fact, and, there, Mr Dyer had failed to discharge the burden on him of establishing that goodwill had in fact existed.

195. At Para [78] of *Neill Dyer* the Tribunal set out a helpful summary of certain principles of goodwill (derived from the decision of the Special Commissioner (Michael Tildesley OBE) in *Balloon Promotions* [2006] USPC 524) inter alia, and in my view relevantly for present purposes:

> (1) Goodwill should be looked at as a whole and includes whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers and absence from competition;
>
> (2) The precise composition of goodwill will vary in different trades and in different businesses in the same trade;
>
> (3) The authorities caution against an overanalytical approach to goodwill.

196. I respectfully agree.

2. What was happening between 1994 and 2008?

197. It has not been contended that the position as set out in 1994 thereafter changed substantively.

198. I nevertheless agree that there was no relevant change in the position between 1994 and 2008.

199. The composition of the Partnership remained substantially the same: only one of the four Partners named in 1994 (Mr Rigg) had departed.

200. RPPL was carrying on a business of consulting engineers in the UK, paying the licence fee to the Partnership in exchange for licensing the use of the underlying intangible assets and the Partnership's provision of management and marketing assistance.

3. Between 1994 and 2008 was the Partnership carrying on a business?

201. Yes, the Partnership was carrying on a business between 1994 and 2008.

202. Firstly, it continued, as a Partnership, to carry on its own business as consulting engineers in territories outside the scope of the Licence, i.e, outside the UK. It continued to generate goodwill independently of RPPL, reflected in the recording in its accounts of substantial 'work done' (for example, £700,000 in APE 31.4.2006 and £650,000 in APE 30.4.2007)

203. Secondly, in relation to the UK, it was licensing the use of the underlying intangible assets and the Partnership's provision of management and marketing assistance.

204. The granting of licences can be a trade: see *Noddy Subsidiary Rights Co Ltd v Inland Revenue Commissioners* [1966] 1 WLR 1 (Pennycuick J) where the taxpayer company had been formed for the purpose of exploiting "Noddy" and other associated Enid Blyton characters such as "Big Ears" and "Mr Plod". It did this by way of granting licences. A surtax direction had been made against the company on the ground that it was an investment company. Pennycuick J allowed the company's appeal and concluded without hesitation that the activities amounted to a trade. He remarked that a person who owed a particular piece of property and granted licences under it might, depending on the circumstances, be carrying on a trade. I respectfully agree.

205. The Court expressly rejected the wide proposition, contended for by the Crown, that there cannot be a trade where the person concerned merely owns an item of property and supplies to outsiders nothing beyond the use of the property: see p 16B-C.

206. As the Court in *Noddy* recognised, the answer is fact-specific. In *Noddy*, the taxpayer had invited the Court to have regard to a number of features of its licences including that it exercised a power of selection of licencees (see p 14B) and the licensor was required to prepare and supply to the licensees, pictures, photographs and the like (see p 14C).

207. Those are features which also appear in the Licence: see above.

208. The granting of licences can be a business. For example, in *Ramsay v HMRC* [2013] UKUT 226 (TC) [2013] STC 1764, Judge Berner allowed the taxpayer's appeal that her activity letting out 10 flats in a building constituted a business for the purposes of roll-over relief. That analysis was unaffected by the taxpayer transferring the property to a limited company in exchange for its shares. He applied the well-known guidance that the word 'business' must be construed in its ordinary sense. It suits its meaning to the context in which it is found. Where that context is a company incorporated for the purpose of making profits for its shareholders, then any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business.

209. Looking at the totality, I consider that to have been the situation here. Mr Maugham QC asked Mr Simms whether, if he assumed that the Partnership provided services to RPPL (as it did), incurred costs in doing so (as it did), and derived revenues (as it did), whether that was a business, and he agreed. In my view, that was an entirely appropriate concession to make.

210. There is no definition of 'business' in GAAP. But FRS 7 (Fair Values in Acquisition Accounting) sets out the principles of accounting for a business combination for the purposes of recognising goodwill (positive or negative) in the accounts of the acquiring entity. A 'business combination' is 'the bringing together of separate entities into one economic entity as a result of one entity uniting with, or obtaining control over the net assets and operations, of another."

211. I agree that the correct analysis here is to look at whether RPGL obtained control over the net assets and operations of the Partnership so as to recognise goodwill in its accounts. In my view, it did.

212. The counter-factual, against which the above can be cross-checked, is what would have happened had the Partnership terminated (or not renewed) the Licence.

213. The answer to that is that RPPL's business would have reverted to the Partnership, including the goodwill and the licensed assets.

214. RPPL was always exquisitely vulnerable to the actions of the Partnership. The Partnership could have decided not to renew the Licence. I am quite satisfied that would have ended RPPL's business. I agree that the value of RPPL's shareholding cannot be looked at in isolation from the Licence. If (say) RPGL had purchased only the shares in RPPL, but had not purchased the benefit of the Licence from the Partnership, then RPGL would either have had to pay the licence fee or be put out of business.

215. Any goodwill built up by RPPL during the Licence always belonged to the Partnership.

216. One commercial purpose of the Licence was to license the use of the Partnership's name, in relation to which it had goodwill, to RPPL which, at the time, had no such goodwill. RPPL's use would otherwise have been actionable as a passing-off. There was no agreement that the goodwill was to accrue to RPPL. Therefore, the business carried out by RPPL under the Roger Preston name accrued to the Partnership and not to RPPL: see Wadlow, The Law of Passing-Off (5th edition, 2016) §3-150.

217. This is not new law. The second (1995) edition of Wadlow at §2.26 says the same: "If a valid licence of a name or mark is in operation then the goodwill in respect of the business so carried on accrues to the licensor rather than the licensee....the licencee acquires no interest in the name or mark, and must cease using it on the termination of the license..." (cited with approval by Lindsay J in *Gromax Plasticulture Ltd v Dow and Low Nonwovens Ltd* [1999] RPC 367 at 388).

218. The proposition (Wadlow, op cit, §3-153) that the provision of know-how and technical assistance "do not result in the licensor having any interest in the goodwill of the business carried on by the licensee" is a general one, and does not exclude that possibility where the parties' contractual agreement (express or implied) is different.

219. *Fine & Country Ltd and others v Okotoks Ltd* [2013] EWCA Civ 672 [2014] FSR 190 is a good illustration of this. There, the Court of Appeal (Lloyd, Lewison and Gloster LJJ), affirming Hildyard J, dismissed the Defendant's argument that the relevant goodwill in licensed trade names of an estate agency did not belong to the Claimant (a party to the claim) but belonged instead to the local estate agent licencees (not parties to the claim) and therefore the Claimant did not have title to sue. The Claimant licensor, despite the licence, still had title to sue and was therefore entitled to maintain an action in passing-off. The Claimant was in substance the franchisor of the 'FINE & COUNTRY' brand, and, if that brand was damaged its ability to attract licence fees would also be damaged. That ability to attract licence fees was itself goodwill: see per Lewison LJ at Para [57].

220. I do not see that the situation here is materially different. In my view, *Fine* is a closer fit to the situation I am called upon to consider here than *Starbucks (HK) Ltd and another v British Sky Broadcasting Group and others* [2015] UKSC 31 (where the Supreme Court considered whether the claimant could bring a passing-off action in the UK in relation to its Hong Kong TV service 'Now TV' and held that the claimant had to establish goodwill in the UK, which was more then merely reputation).

221. This conclusion also reflects a series of cases involving franchisees. For example, in *Prontaprint plc v Landon Litho Ltd* [1987] FSR 315, Whitford J considered the terms of a franchise agreement and whether the Defendant, a former franchisee of the Claimant, was bound by a post-termination restrictive covenant so as to justify the grant of an interlocutory injunction. He held that the success of the Defendant's business had been achieved by the use of the trade mark 'PRONTAPRINT' and by the assistance which the Claimant had provided throughout the duration of the franchise agreement. The Defendant was not merely purchasing know-how and goodwill, but was purchasing a protected interest under a franchise. Although the Defendant had made a not inconsiderable contribution to the success

of the outlet, the fact remained that the success achieved was achieved by use of the Prontaprint name, the use of information originally given to the Defendant, and the assistance given by the Claimant. The business so created could not effectively be regarded as a business of the Defendant, in relation to which it was not open to the Claimant to claim an interest: see p323.

222. In *Kall-Kwik Printing (UK) Ltd v Frank Clarence Rush* [1996] FSR 114, HHJ Roger Cooke, sitting as a Judge of the High Court, granted an interlocutory injunction restraining the Defendant franchisee from operating a competing business in breach of a post-termination restrictive covenant. He followed Prontaprint, but noted that one way of looking at the franchise agreement was that it is a form of lease of goodwill for a term of years, with an obligation on the tenant, as it were, to re-transfer the subject matter of the lease at the end of the lease in whatever state it is in. In *Kall-Kwik*, the goodwill hand-back obligation was express, but HHJ Roger Cooke remarked "though I am inclined to think that obligation would be implied in any event": see p119. He was not troubled by the absence of any identified consideration for this transfer as 'it is all part of a wider commercial deal in which profits and losses pass between both sides'. I agree.

4. WHAT WAS TRANSFERRED FROM THE PARTNERSHIP UNDER THE 2008 SAPA

223. The Partnership's business, as already described, was transferred. This included both the benefit of the goodwill in its own business of licensing the assets to RPPL, and also the goodwill attached to the Roger Preston name by virtue of RPPL's business.

224. The SAPA's description of the Business which was the subject matter of the Business Sale is accurate. It was "the business of licensing the Assets for fees by the Partnership to [the Taxpayer] including the Goodwill and all other rights under the Licence Agreement, <u>and</u> the business of professional engineers and specialist technologists carried on by the Partnership at the date of Completion."

225. The underlining of 'and' reflects emphasis placed by the Appellant. I consider that the Appellant is right to do this. On the face of it, the SAPA was not simply effecting a sale of the business of licensing the Assets for fees, but was also, in tandem, effecting a sale of "the business of professional engineers and specialist technologists carried on by the Partnership at the date of completion". I do not regard those words as surplusage or otiose, nor do I regard them as simply descriptive of what has gone before.

226. I am fortified in my conclusion as to the substantive meaning of this provision by other provisions of the SAPA. In particular, the Partnership entered into restrictive covenants in favour of the Appellant, including a two-year non-compete covenant.

227. Moreover, each of the Partners (as they then stood, Mr Rigg having retired in 2001) was obliged to and did enter into service agreements with RPGL which contained further restrictive covenants. The restrictive covenants served an obvious and legitimate commercial purpose. They were not specious or a sham.

The Licence as an Asset

228. Turning to the accountancy treatment of the Licence, I agree with Mr Marsden that the Licence was an asset for the purposes of FRS 5. I consider that the Licence does answer to the description of 'asset' in FRS 5 Paras 2 and 3, namely:

(1) (Para 2) "Assets:- Rights or other access to future economic benefits controlled by an entity as a result of past transactions or events" and

(2) (Para 3) "Control in the context of an asset:- The ability to obtain the future economic benefits relating to an asset and to restrict the access of others to those benefits."

229. It seems to me that the Partnership's rights under the 1994 Licence, not only as expressed in the 1994 Licence, but as operated from 1994 to 2008, easily meet the descriptions in FRS 5 Paras 2 and 3. Rights and access are given to future economic benefits controlled by the Partnership as a result of past transactions or events. The Licence acquired by RPGL from the Partnership did give RPGL the right to the future economic benefits flowing from the Licence - these being the rights to future licence fees from RPPL for the granting of the licence each year and the use of the licensed assets: see Mr Marsden's report §4.26

230. That means that RPGL as acquirer exercised control over any economic benefits arising from these terms as realised through the rights it acquired under the Licence Agreement.

231. Similarly, the ability to obtain the future economic benefits is inherent in the Licence, and the Licence contains the mechanism to restrict the access of others to those benefits. RPGL controlled the future economic benefits by being the licensor of the licence and being able to renew the licence each year with RPPL: see Mr Marsden's report §4.27

The nature of the asset - financial versus intangible

232. The relevant law in force at the time (since repealed) was Schedule 29 of the Finance Act 2002 ('Gains and Losses in Respect of Intangible Fixed Assets'). Para 1(2) provides that Schedule 29 is to have effect for determining how a company's losses in respect of intangible fixed assets are brought into account for the purposes of corporation tax. Para 2(1) provides that "In this Schedule "intangible asset" has the meaning it has for accounting purposes." Para 2(2) provides that references in Schedule 29 to an intangible asset include, in particular, any intellectual property, including any trade mark. and information or technique having industrial, commercial or other economic value, or any licence or other right in respect of any trade mark, or any information or technique.

233. As an asset, the Licence then has to be measured against FRS 10 Paragraph 2.

234. "Licences, quotas, patents, copyrights, franchises and trade marks are examples of categories that may be treated as separate classes of intangible assets". "Intangible assets" are "Non-financial fixed assets that do not have a physical substance but are identifiable and are controlled by the entity through custody or legal rights."

235. I accept Mr Marsden's analysis in this regard. I agree that the Licence was "non-financial". He has cross-checked this against FRS 25 (IAS 32) Financial Instruments: Disclosure and Presentation (issued by the Accounting Standards Board in December 2004, and being the version in force at the time of the SAPA. The version I was shown is from Accounting Magazine in March 2005).

236. A 'financial asset' is defined as any asset that is .. (c) a contractual right (i) to receive cash or another financial asset from another entity. The Appendix sets out Application Guidance ('AG'). The Application Guidance is 'an integral part of the Standard'.

237. AG10 deals with physical assets, leased assets, and intangible assets ('such as patents and trademarks') which are not financial assets, because 'Control of such physical and intangible assets creates an opportunity to generate an inflow of cash or another financial asset, but it does not give rise to a present right to receive cash or another financial asset."

238. Financial assets and intangible assets are mutually exclusive. A financial asset includes "..any asset that is .. a contractual right to receive cash or another financial asset from another

entity." I do not consider the Licence to be such a thing. FRS 25 Paragraph 11 contains the full definition which includes things such as equity investments in the share capital of another company and cash. This gives a useful insight into the sort of asset which FRS 25 seeks to capture (*nascitur e sociis*). I do not consider that the benefit of the Licence is genuinely akin to an equity investment by the Partnership in RPPL.

239. FRS 13 (Derivatives and other financial instruments: disclosures) Appendix II Paragraph 13 says "Although control ... of intangible assets, such as patents and trade marks, creates an opportunity to generate an inflow of cash or other assets, it does not give rise to a present contractual right to receive cash or other financial assets. Such assets are therefore not financial assets."

240. Mr Marsden concludes, on this wording, that the benefit of the Licence was not a financial asset, and I agree. There was no fee payable for entering into the Licence, and no guaranteed annual fee or income arising from the Licence (cf. eg *Kall-Kwik Printing (UK) Ltd*, loc cit at p116). The income formula only guaranteed up to the cap; but there was no threshold or entry level. It could have been zero.

241. I acknowledge (as does Mr Simms, adopting a passage from the Price Waterhouse Coopers IFRS 2015 Manual of Accounting, volume 2, §15.8) that the distinction between an intangible asset and a financial asset might be difficult to determine in practice. The examples given there neatly capture the analytical difficulties which can arise and serve to fortify my conclusion that the benefit of the Licence was an intangible asset and not a financial asset.

242. I agree that an entity that purchases the rights to a proportion of the revenue that a football club generates from ticket sales (without itself having any discretion as to the pricing or sales of those tickets) is buying a contractual right to receive cash, and will generally have acquired a financial asset as opposed to an intangible asset. If, on the other hand, an entity has purchased the rights to sell tickets and was responsible for selling the tickets itself, this would represent an intangible asset.

243. Even taking those two examples, the Licence is, to my eyes, more akin to the second scenario than the first.

244. But PwC's second example of an intangible asset is even closer to the Licence. An entity that creates and capitalises intellectual property grants the right to use that IP to a third party for a fee (whether a proportion of the grantee's revenue - as here - or a fixed fee). Even though the entity has a contractual right to receive cash, the royalty income stream is not a financial asset (and, therefore, is an intangible asset) "because the royalty income represents economic benefits generated by the IP which is already recognised as an intangible asset".

245. I find that scenario materially indistinguishable from the Licence. The Licence is licensing a variety of intangibles. The right to receive a proportion of the revenue stream is therefore also, parasitically, an intangible.

246. The Licence:

(1) Was not of physical substance;

(2) Is an identifiable asset capable of being disposed of separately; and

(3) RPGL controlled the Licence through the rights set out in it: see Marsden's report §4.33.

247. It therefore follows that RPGL was correct to record an intangible asset in its 2008 financial statements.

VALUATION

248. Schedule 29 Paragraph 105 deals with "Assets acquired or realised together". Para 105(1) provides that any reference to the acquisition or realisation of an asset includes the acquisition or realisation of that asset together with other assets.

249. Here, there were "assets acquired or realised together", within the proper meaning and effect of Finance Act 2002 Schedule 29 Paragraph 105. Intangible fixed assets were acquired or realised with other assets. The SAPA was one bargain. Assets acquired or realised as a result of one bargain are treated as acquired or realised together even though "separate prices are, or purport to be, agreed for separate assets" (Paragraph 105(2)(a)) or "there are, or purport to be, separate acquisitions or realisations of separate assets" (Paragraph 105(2)(b)).

250. Accordingly, Schedule 29 Paragraph 105(3) is then engaged:

> "Where assets are acquired together
>
> (a) any values allocated to particular assets by the company in accordance with generally accepted accounting practice shall be accepted for the purposes of this Schedule;
>
> (b) if no such values are allocated by the company, so much of the expenditure as on a just and reasonable apportionment is properly attributable to each asset shall be treated for the purposes of this Schedule as referable to that asset"

251. Here, I must tread with caution because I have not heard any valuation evidence nor full submissions on it. The furthest I can safely go is to say, in a non-binding and interlocutory way, that, on the basis of my findings of fact, it seems to me that it would be difficult to contend that the Partnership's rights subject to the Business Sale were of no or no substantial value.

252. The statutory question in Paragraph 105(3)(a) is whether the allocation was done in accordance with GAAP (and, if it is, then those values "shall" (not may) be accepted for the purposes of Schedule 29). Here, it is also important to note that Parliament chose to adopt a qualitative and not a quantitative test. Even if Paragraph 105(3)(a) were not satisfied, Paragraph 105(3)(b) refers to a "just and reasonable" apportionment, which words are was otherwise unqualified. I simply observe that those seem to establish a broad test, which is not made expressly referable to GAAP.

DECISION

253. The appeal on the matter of principle is allowed.

254. If any consequential issues arise from this decision which cannot be agreed (for example, in terms of costs) then I shall deal with any such issues, if practicable, on the papers.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

255. 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.

DR CHRISTOPHER MCNALL

TRIBUNAL JUDGE

RELEASE DATE: 09 FEBRUARY 2021