Neutral Citation: [2023] UKFTT 00399 (TC)

Case Number: TC08806

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/00755

INCOME TAX - Sale of company - Restricted Share Units in Acquirer - whether consideration for sale of shares - no - whether related to employment - yes - appeal dismissed

Heard on: 2-4 November 2022
Judgment date: 25 April 2023

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

LOUIS DANIEL MOORE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Laurent Sykes KC, instructed by Crowe U.K. LLP

For the Respondents: Bayo Randle of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Mr Moore appeals against Closure Notices dated 19 December 2016 for the years 2008/09 and 2009/10 ("the relevant years") charging him to additional income tax of approximately £1,133,875.74. £378,913.44 relates to 2008/09 and £752,962.30 to 2009/10.

2. Mr Moore had been a minority shareholder in, and employee of, Wombat Financial Software Inc ("Wombat") that was sold to NYSE Euronext ("NYSE").

3. On 7 March 2008, on closing of the deal (the "Closing"), NYSE authorised a grant of 151,630 Restricted Stock Units ("RSUs") to Mr Moore. In each of the relevant years, shares in NYSE Group Inc vested in him.

4. The appeal relates to payments received by him on the anniversaries of the grant of the RSUs being 7 March 2009 and 7 March 2010.

5. In 2008/09, 50,544 shares, being a third of the total, with an agreed value of £540,804 were received pursuant to the RSUs. In 2009/10 a further third, being 50,544 shares but with an agreed value of £953,356, were received.

6. Mr Moore has been assessed by HMRC on the basis that his receipts on the vesting of the RSUs are taxable as income and subject to income tax and National Insurance Contributions.

7. He has amended and revised his grounds of appeal on several occasions but it is now common ground that the RSUs fall within Part 7 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") and are employment related securities options within the meaning of sections 420 and 471 ITEPA.

8. The only issue now in dispute is whether there was any consideration given for the acquisition of the RSUs which constitutes a "deductible amount" within the meaning of section 480(2) ITEPA. Whilst HMRC accepts that if Mr Moore proves that there was any such consideration then the question of valuation can be addressed after determination of liability; however, the explanation given for his valuation was deemed relevant to issues of liability.

9. The parties were agreed that the Tribunal should issue a decision in principle only, and that matters of valuation should be reserved for agreement between the parties, which failing that would revert to the Tribunal.

The hearing

10. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. A face-to-face hearing was not held because of the difficulty of ensuring the safety of all participants. The documents to which I was referred comprised a hearing Bundle extending to 1,550 pages, a supplementary Bundle extending to 143 pages and an authorities Bundle extending to 380 pages. In addition, HMRC lodged a copy of *E V Booth (Holdings) Limited v Buckwell* [1980] STC 478 ("Booth"). For Mr Moore, I heard evidence from him and from Messrs Verstapen and Lambert who were both equity holders in, and employees of, Wombat. (Mr Verstapen was a shareholder and Mr Lambert a holder of US holders of Vested Options and Vested SAR Units).

11. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

The appellant's grounds of appeal

12. Consideration equal to the $10 million of RSUs received was given in return for the RSUs and this is a deductible amount. There is no requirement for the consideration to be given by the recipient of the securities options. Some of the $10 million would in any event have been attributable to the shares held by Mr Moore. Mr Moore proposed that valuation was to be agreed after the determination of the issues of principle in this matter. However, the evidence shows that the company was worth $225 million and it is proposed that this is the value used for determination of the issues of principle. This would make the RSUs worth $10 million.

13. The RSUs granted to Mr Moore were granted by NYSE in consideration for the shares in Wombat previously held by him and the other shareholders. The fact that Mr Moore's receipt is disproportionate to that of other shareholders highlights that the other shareholders were content for him to receive an amount to which they would otherwise have been entitled.

14. There had been an alternative ground of appeal that Mr Moore had provided consideration to NYSE by ensuring that NYSE were able to complete the deal but, on the third day of the hearing, Mr Sykes KC withdrew that.

Overview of HMRC's case

15. HMRC argue that it is clear from the contractual arrangements, and in particular the appellant's RSU Agreement, that the RSUs were granted as part of an incentive scheme to encourage retention of employees. Therefore that is not consideration within the meaning of section 421A ITEPA which expressly excludes any consideration which can constitute the performance of any duties of, or in connection with, unemployment.

Approach to the Evidence

16. I had a reading day and it was evident that there were inconsistencies in the evidence which was not surprising because the key events in question happened in December 2007 and January 2008. I was not referred to it and, whilst it deals with a completely different part of the tax legislation, nevertheless, I agree with Judge Amanda Brown, KC and Member Duncan McBride in *Cry Me A River Limited v HMRC* [2022] UKFTT 182 (TC) where they state at paragraphs 11 to 14 as follows:-

> **"**11. There are a number of cases which, over the last decade, have considered the approach to be taken in respect of oral evidence received, particularly concerning facts and matters which occurred sometime before the giving of the evidence. These cases have been comprehensively reviewed in the judgment of Judge Brooks in *Hargreaves v HMRC* [2019] UKFTT 244.
>
> So far as material in the present appeal the Tribunal notes, from that judgment, that a certain degree of caution is to be taken because:
>
> '26 …
>
> - memories are fluid and malleable, being constantly rewritten whenever they are retrieved …
> - the process of … litigation … subjects the memories of witnesses to powerful bias …
> - witnesses, especially those who are emotional, who think they are morally right, tend very easily and unconsciously to conjure up a legal right that did not exist …'.
>
> The judgments summarised by Judge Brooks conclude that:
>
> 'The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. 'This does not mean that

> oral testimony serves no useful purpose … But its value lies largely … in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'

This approach is particularly relevant in the present appeal."

17. I have adopted that approach. In this appeal, on 18 July 2012, Mr Moore had signed a one page Affidavit which his agents produced to HMRC stating that he was "setting out the circumstances of how he was awarded the RSUs and explaining why there is no documentation". His witness statement was dated 19 October 2021 as was Mr Lambert's. Mr Verstappen's first witness statement was dated 18 October 2021 and the second was dated 29 October 2022.

The background

18. Mr Verstappen owned Wombat Consulting Inc and at the end of 2003, Mr Moore became the second full time employee; contractors were otherwise used. At some point it changed its name to Wombat Financial Software Inc ("Wombat"). In May 2004, Mr Moore was appointed Head of Global Sales, Marketing and Business Development and he reported to Mr Verstappen. Until 2017 he had never had a written contract of employment with any employer. He now does have a contract in relation to his current firm with which Mr Lambert is also employed.

19. After a probation period of approximately six months he was paid a one off bonus net of taxes. The gross amount was $120,000 and the net amount of $80,000 was used by him to purchase 10% of the equity in Wombat. In late 2004, Mr Moore became Chief Operating Officer ("COO") reporting to Mr Verstappen who was President and Chief Executive Officer ("CEO").

20. At the end of 2004 Wombat decided to create a Stock Appreciation Rights Scheme (SARS) which was effectively a bonus scheme linked to equity as the basis for an employee reward scheme. That meant that Mr Verstappen retained 90% voting control. In late 2005, SARS units were issued and they were known as phantom shares. What Mr Moore had not realised at the time was that when Wombat was sold, the phantom shares would be treated as income in the hands of the employees and taxed as such. Furthermore, employer contributions would also be deducted.

21. Mr Moore was based in New York, US resident and paid US taxes. He had built a big team in Belfast which he visited but he was non-resident in the UK for tax purposes until 2008.

22. In 2006, Merrill Lynch & Co., Inc ("Merrill") through one of their subsidiaries, ML IBK Positions, Inc, became a minority shareholder having invested $3.5 million. As a result of that investment Mr Verstappen realised approximately $1.5 million and stepped back from day to day involvement in the business, so Mr Moore was effectively acting as CEO.

23. Mr Verstappen appointed Mr Lambert as Chief Financial Officer ("CFO") in early 2007. Mr Lambert had worked for Wombat for the previous two years as a contractor. He had been involved in the negotiations with Merrill. He reported to Mr Moore. In his words he was brought in to "…help package up and run a process to sell" Wombat.

24. Mr Moore was anxious to increase his equity stake to reflect the significant increase in value that he was achieving for Wombat. Mr Verstappen declined to sell him more shares, albeit he intended to do so in the event that Mr Moore was formally appointed as CEO.

25. In early 2007, there were negotiations, instigated by Mr Verstappen, with a venture capital firm which valued Wombat at approximately $75 million. Mr Moore was very unhappy with the shape of the potential deal, not least because the capitalisation table ("cap table") meant that his equity share represented only 7.2% of Wombat and if the deal proceeded it would be diluted to under 5%. Given that he had been unhappy with 10% and the terms of the deal meant that Mr Verstappen would be very well compensated for his role as CEO, which Mr Moore considered to be titular only since he was performing it, Mr Moore planned to resign.

26. In the event Mr Lambert persuaded him not to do so and that deal did not proceed. Mr Verstappen agreed to reverse some of the cap table changes bringing Mr Moore's equity up to 9.2% and Mr Moore and Mr Lambert agreed to achieve a sale of Wombat on better terms within 12 months. In Mr Moore's words he was "forced to sell" by Mr Verstappen.

27. With effect from 15 June 2007, Wombat established the Wombat 2007 Stock Plan in terms of which employees could be allocated stock options. Mr Lambert introduced it as an incentive scheme that he considered to be preferable to RSUs. It was an "off the shelf" product. Mr Moore had very little involvement with it other than signing off the allocations of stock. He doubted that he had read the paperwork beyond scanning it very briefly before signing it. Mr Verstappen and Mr Lambert also signed the paperwork. They worked very informally and did not have Board meetings. Mr Moore relied on Mr Lambert to look at matters of detail. He agreed that he would not have been aware that it provided for accelerated vesting.

28. Mr Verstappen described the latter part of 2007 as being difficult because Mr Moore "clearly believed that he was entitled to more shares and a larger interest in the company" and he was "a little unstable and quite emotional" so Mr Verstappen decided to remain as CEO.

29. Merrill wished a sale as they had reported huge losses in the third quarter of 2007.

30. Mr Moore led the process for the sale working very closely with Mr Lambert who managed the relationship with the lawyers DLA Piper US LLP ("DLA"). Mr Moore engaged Financial Technology Partners LP known as FT Partners ("FT") as investment bankers and they handled the negotiations and reported to him.

31. An informal auction process in autumn 2007 attracted 13 bidders. Two were well known public companies, one of which was NYSE.

32. FT worked with the first round bidders and set a target date for final bids of 14 January 2008. Both public companies wished to pre-empt the second round bid date.

33. In or about the second week of December 2007, one of those two companies made a verbal offer of $225 million. FT told NYSE that they had competition and NYSE said that they had Board approval of their Investment Committee's recommendation that they offer $200 million plus Wombat's legal and banker fees.

34. Mr Moore had two meetings with NYSE in New York on Friday 21 December 2007 at 3 pm and 4 pm. At the first of those, which was with the COO of NYSE and the team, he simply listened having been told by FT that he should neither negotiate nor agree anything at the meeting. I have no detail.

35. The later meeting was with the CEO only and they went to a bar to discuss the deal. It was a short meeting. Mr Moore stated that he had told the CEO that NYSE needed to "get to $225 million", that the employees faced tax issues with the phantom shares and that it would "really help if they [NYSE] introduced a structure that would allow [him] to steer an extra slice of the proceeds to the team". He described the introduction of such a structure as being a "critical context" to that discussion. He also stated that "…the decision to divert $25m of that [$225 million] to me and the team was made unilaterally on our side, as to how that was split".

36. That evening the NYSE deal negotiators produced what DLA condensed into a "Preliminary, Non-Binding Summary of Principal Business Terms" (the "Terms"). The key features of the Terms included:

(1) NYSE would acquire 100% of the stock in Wombat for what was described as a "Purchase Price" of $200-225 million in cash which would be reduced by the value of Redistributed Shares converted into RSU's and the value of Unvested Options and SARS converted into NYSE Options.

(2) The "Form of Consideration" comprised three categories described as being

(a) Shares, Vested Options and Vested SARS: Cash,

(b) Redistributed Shares: NYSE RSUs, and

(c) Unvested Options and Unvested SARS: NYSE Options

(3) Mr Verstappen would contribute shares representing 5% of the total capital to Wombat for redistribution in the form of Wombat restricted stock (the "Redistributed Shares"). As a condition of Closing, those would be allocated by Mr Moore, in consultation with NYSE, to employees in four tiers, the first three being 10, 20 and 15 key employees and the fourth being all other employees. On Closing those would be exchanged for NYSE RSUs.

(4) The NYSE RSUs would be vested on the first, second and third anniversaries of Closing but NYSE in its sole discretion might cause some of those RSUs to vest immediately for certain individuals.

(5) The Terms do not say whether Mr Moore was included in that category of employees but it is suggested that he was not.

(6) As a condition of signing the Sale and Purchase Agreement ("SPA") Mr Moore would enter into a three year Employment Agreement including non-competition etc provisions.

(7) In connection with an associated Pledge Agreement, NYSE shares equal in value to 33% of the gross consideration received by Mr Moore at Closing would be escrowed but with the amounts reduced *pro rata* over three years subject to pre-defined conditions.

(8) As a condition of signing, key employees and certain shareholders would enter non-competition and non-solicitation agreements.

(9) Wombat would have to sign an exclusivity agreement by 4 January 2008.

37. Mr Moore flew home to Northern Ireland that night.

38. Mr Moore said that he had relied on Mr Lambert and professional advisers and he had not read the Terms until 2019; he always considered the "big picture" rather than the detail.

The emails

39. Because of the festive period the Terms were not reviewed until 26 December 2007 and at 8 pm UK time, FT sent an email to DLA copied to Mr Moore and Mr Lambert and four others. That email read:

"Eric

I just got off the phone with the NYSE deal person-I think they're trying to be a little too cute and we are going to have to completely re-architect things: they seem to want Danny to do unnatural acts (i.e. lock up 33% of his consideration while all the other shareholders walk with cash) among other things.

I'll give a better update on the phone, but essentially they're willing to pay $225mm, but need to feel that Danny is not going to walk and is highly motivated, etc. The scheme they laid out does not work in my opinion, so we will have to come up with one that does and present it."

40. Two minutes later FT emailed Mr Moore and Mr Lambert (copied to two others) and that email read:

"Danny-FYI-it was clear from talking with Courtney that they are NOT planning on putting the 33% 'on top'…they wanted to hold back 33% or have a pledge agreement where if you left within 3 years you'd lose a chunk depending on how long they wanted you to stay. I told her, kindly, that this was not going to work and we'd come back with a comprehensive plan that we think solves everyone's issues.

They are a bit clueless in how they are going to construct all this, so we are going to have to do it for them, They have it all wrong from an accounting/legal standpoint, as well as from what's acceptable to us from a fairness perspective."

41. Mr Moore left the family event that he was attending and there was then a conference telephone call between Mr Moore, Mr Lambert, DLA and FT lasting approximately two hours following which Mr Lambert emailed Mr Moore, FT, DLA and others stating:

"hi danny

from todays discussion with steve [FT] and dla we need to address the following issues:

-your retention: nyse want to take 30% of your vested stake and restrict it over 3yrs. not a fair deal to you!! would suggest that you are allowed to take your vested portion now (ie close to $20m) and your retention will be based upon your new incentive which i would suggest should be $10m which vests over 3 years (ie again bringing your retention to 30% of the total). you will really need to pass the look in the eyes test and ensure that nyse see you hungry for the additional comp and that the $20m is just not enough for you:

-allocation of the balance of the remaining $15m: I would suggest a model that rewards the top half of the company for example, eg 10 tier 1's get $550k ($5m) : 20 tier 2's get $250k ($5m): 40 tier 3s gets $125k ($5m). i believe the max is $25m for this pool and so making allocations across the whole company will be tough which maintaining meaningful numbers for the employees unless you were willing to allocate some of your $10m i note in the above:

this would pay the shareholders and employees with sars/options out at the $200m. i believe this will be acceptable to ron and ml. note that there would be about $10m unvested sars/options (out of this $200m) which would create some additional retention for the existing employees.

please think this over as we do need to get a response back to nyse asap please and also so that dla tax can consider the impacts of this and the best vehicles to make it happen." (no correction of punctuation, grammar or wording)

42. Mr Moore authorised proceeding on that basis.

43. On 27 December 2007, Mr Moore and FT had a telephone conversation with a Corporate Development Executive in the other public company that was interested.

44. On 28 December 2007, that company emailed enclosing a letter formally confirming their interest subject to the terms and conditions set out in the document and annex and that included:

(a) A purchase price in cash of $225 million provided that at closing there was a balance sheet working capital balance of $10 million and a cash balance in excess of $5 million.

(b) An exclusivity agreement to be signed by 31 December 2007 and lasting until 22 February 2008 unless terminated by one day's written notice by either party.

(c) The purchaser would establish a $6 million retention program for key employees in addition to the purchase price.

(d) There would be a holdback of $45 million (ie 20%) in respect of the purchase price to cover indemnities and, as appropriate, that would be released as to $25 million after 12 months and the balance after 24 months.

(e) Each party would bear their own costs.

That did not progress.

45. Mr Lambert stated that the default option if all else failed was a private equity firm which had bid $150 million.

46. Mr Moore then stepped back from the negotiation process until 6 January 2008 in order to concentrate on maximising sales since it was the year end for Wombat.

The SPA with NYSE

47. On 2 January 2008, two drafts of the SPA were produced.

48. Following discussions with NYSE, on 3 January 2008, a third draft was produced and it was accompanied by a three page document headed "Summary of Significant Changes to Purchase Agreement". Of note for these purposes were:-

(1) Section 2 which was headed "Stock Purchase Structure (Article II)" and read:

"We have left in your bracketed provision regarding certain Sections being subject to revisions, provided that we made the following changes thereto;

(a) RSUs: The issuance or (sic) $25 million of RSUs to DM (in the amount of $10 million) and employees (in the amount of $15 million);

(b) The RSUs to vest over two years (although we understand this to be an open issue); and

(c) RSUs to be redistributed as agreed by DM and LL if an employee's RSUs do not vest." (LL was the COO of NYSE)

(2) Section 4 which was headed "Escrow Amount and Release (Sections 2.5 and 9.5(b))" and read:

(a) We modified the aggregate escrow amount to $20 million.

(b) We propose that the Base Amount and IP Escrow Amount would be released after 18 months."

49. The draft SPA, at Article II, said that:-

(a) The purchase price was $200 million.

(b) $25 million RSUs, being $10 million to Mr Moore and $15 million for four tiers of employees, would be issued. In relation to the employees, Mr Moore and the COO of NYSE would decide the allocations.

(c) The RSUs would vest over three years (but that was understood still to be open) but in its sole discretion NYSE might cause any or all of the RSUs to vest immediately upon Closing.

50. A further draft was issued later that day and both drafts had the same wording in relation to RSUs.

51. The fifth draft was issued on 5 January 2008, again with the same wording for the RSUs.

52. On 6 January 2008, Wombat's advisers produced a document headed "Open Issues to Purchase Agreement". The material issues, for these purposes, are:

(a) Item 13: In relation to Section 6.8(c), NYSE wanted a three year vesting schedule for the RSUs whereas Wombat was still arguing for 2 years. (Section 6.8c is described at paragraph 64 below and relates to the issuance of the RSUs.)

(b) Item 17: "(Exhibit A Key Employees) – NYX wants Ron V. to enter into a Non-Compete Agreement even though he will not be an employee. This is unnecessary, as the Purchase Agreement contains the noncompetition (sic) provisions."

(c) Item 18: "Post-Closing Operating Concepts. Senior Team title, role, management structure, compensation; as well as general employment considerations post-closing (compensation, bonuses, etc.). These items have not been fully discussed with Danny and should be clarified. This is not a negotiating item relating to the Purchase Agreement, but an open issue that has not be (sic) clarified."

53. On 11 January 2008, Mr Moore allocated RSUs for the senior staff, reviewed their remuneration packages and transferred them to employment contracts based on the NYSE format. Five of them were each allocated RSUs to a value of $800,000. Two of those employees were also shareholders (218,076 shares each) and two were US holders of vested options and vested SARs. Those five were the individuals named, together with Messrs Moore and Lambert, in Exhibit A to the SPA. That allocation of the RSUs was approved by NYSE. The remainder of the RSUs comprising the $15 million were allocated by Mr Moore, and approved by NYSE, in the days before Closing on 7 March 2008. Some 120 staff were recipients and none received more than $800,000.

54. On the afternoon of 11 January 2008, one of the employees who held phantom shares apparently indicated that he would not be prepared to sign the necessary paperwork. He expressed the view that he could "block the deal" by not signing the paperwork. FT advised Mr Moore that NYSE would not sign the SPA unless the issue was resolved. On the morning of 12 January 2008, Mr Moore telephoned that employee and offered a further $500,000 additional payment in order to "close out" the issue. The employee in question signed the paperwork and a non-disclosure agreement. The $500,000 was paid from funds in the balance sheet before Closing on 7 March 2008. That employee left the company that day.

55. At that juncture, the Wombat cap table showed that Mr Verstappen held 47.37%, Mr Moore held 9.16%, Mr Lambert held 3.5% and Merrill held 23.02%.

56. On 12 January 2008, following a telephonic meeting of the Board of Directors of Wombat the final SPA, together with an "escrow agreement and other Ancillary Agreements contemplated" in the SPA were signed. The parties were Wombat, a wholly owned subsidiary of NYSE called TransactTools which was the vehicle for the acquisition, the "Sellers" (being the signatories and that did not comprise all of the equity holders), NYSE and Mr Verstappen as the "Seller Representative".

57. Regrettably, the full SPA was not included in the Bundle. An unsigned version which appeared to include everything described as either an Article or a Section in the Table of

Contents was included. What was not included were Exhibits B-1 to Exhibit F inclusive. The list of those exhibits differed from the list attached to the previous versions in that:-

(a) In the earlier versions, Exhibit A had been described as being "Key Employees" and that had included Mr Verstappen. Exhibit A in the final version was described as "Key Equity Holders" and excluded Mr Verstappen. However, it included another employee, who does not feature in the "Closing Consideration" as an equity holder but was one of the employees who was allocated $800,000 of RSUs (see paragraph 53 above).

(b) Exhibit C is simply described as "Reserved" but the sixth Recital indicates that it relates to Merrill and the previous versions of the SPA indicated that it was a form of waiver.

(c) Whilst the "Form of Escrow Agreement" featured in all of the drafts and the final SPA, Exhibit F which was the "Form of RSU Agreement" was included in only the final SPA.

58. Exhibit F has not been produced. The only RSU Agreement that has been produced is that signed by Mr Moore at Closing. On the balance of probability, given that the SPA makes it explicit that every recipient of an RSU would have to sign an RSU Agreement substantially in the form of Exhibit F, all of the agreements would have been in the same format.

59. The fourth Recital of the SPA stated that prior to or concurrently with the execution of the SPA, and as a condition and inducement to the buyer entering the SPA, the buyer and the Key Equity Holders had executed Key Equity Holder Agreements (non-competition agreements). There were seven Key Equity holders including Messrs Moore and Lambert but not Mr Verstappen (see paragraphs 52(b) and 57(a) above).

60. The first operative clause of the SPA read:-

"NOW, THEREFORE, in consideration of the foregoing premises, the mutual covenants, promises and agreements hereinafter set forth, the mutual benefits to be gained by the performance thereof, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and accepted, the parties to this Agreement hereby agree as follows …".

61. The "Closing Consideration Exhibit" was a schedule to be produced five days prior to Closing. That was a one page document showing the amount of the net payments to each of the 19 "Shareholders", 30 "US holders of Vested Options and Vested SAR Units" and 13 "UK Holders of Vested Options and UK EMI Options". The two employees referred to in paragraph 53 above, Messrs Moore and Verstappen and the Verstappen Trusts were in the first category and Mr Lambert was in the second category. It was dated 6 March 2008 and shows that Mr Moore and Mr Lambert were paid in excess of $17 million and $6 million respectively.

62. The "Enterprise Value" was stated to be $200 million.

63. I accept that headings are for reference purposes only but Section 2.3(b) ("Section 2"), under the Heading "Purchase of Stock, Vested Options and Vested SAR Units" states clearly that "In exchange for each share" the payment at Closing will be the amount shown in the Closing Consideration Exhibit, Escrow Agreements and other documents. There is no mention of the RSUs.

64. At Section 6.8 ("Section 6") under the heading "Employee Benefit Matters" at sub-paragraph (c), having dealt with benefit plans and base salaries, it provided that at Closing NYSE would issue RSUs which would:-

(a) Be substantially in the form attached as Exhibit F (the Form of RSU Agreement),

(b) Be subject to the NYSE 2006 Stock Incentive Plan,

(c) Vest in accordance with the terms of the RSU Agreement, and

(d) Be issued in accordance with Exhibit G.

65. Exhibit G stated that Mr Moore would receive RSUs to the value of $10 million, other key employees, but not including Mr Moore would be allocated RSUs by Mr Moore and NYSE to the value of $15 million. All recipients of the RSUs would have to sign and deliver to NYSE an RSU agreement. Ultimately some 120 employees were allocated RSUs before Closing and none received more than $800,000.

66. Article I of the NYSE Stock Incentive Plan ("the Plan") reads:-

> "The purpose of this Plan is to enhance the profitability and value of the Company for the benefit of its stockholders by enabling the Company to offer Eligible Employees and Non-Employee Directors stock-based incentives in the Company to attract, retain and reward such individuals and strengthen the mutuality of interest between such individuals and the Company's stockholders."

Articles II and III state that NYSE had the power to accelerate vesting at or after the grant and accelerate any vesting schedule. In various paragraphs accelerated vesting is described as being based on service, performance or such other factors or criteria, if any, that NYSE determine.

67. In the RSU Agreement, after the two Recitals it stated:-

> "NOW, THEREFORE, for and in consideration of the mutual promises herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows".

68. That RSU Agreement was signed on 7 March 2008, which was the date of the Closing. Clause 2 provided that the RSUs would vest on the first, second and third anniversaries of the grant date if Mr Moore remained in employment. It included at 2(d) a provision for earlier vesting, at NYSE's sole discretion, if his employment was terminated by death, retirement, disability or without cause.

69. Clause 3 provided that, subject to 2(d), in the event of termination of his employment all unvested RSUs would be forfeited. Clause 4 states that until Mr Moore became "the holder of record of the shares" (ie they vested) he would have no rights as a stockholder.

70. Clauses 6 and 7 included non-competition and non-solicitation clauses based on Mr Moore being an employee.

71. Clause 12 stipulated that the agreement was not a contract of employment, continuing employment was not guaranteed and NYSE retained the right to terminate or modify Mr Moore's employment or compensation.

72. As indicated at paragraph 58 above, similar agreements were signed by all of the other recipients of the RSUs.

73. On the same day as the SPA was signed, Mr Moore signed a Non-Competition agreement ("the NC Agreement"), as did the other Key Equity Holders. The Recitals state amongst other things that:

> (a) Mr Moore would receive "significant personal economic benefit from the consideration to be paid to him" at Closing,
>
> (b) It is contemplated by the parties that Mr Moore will remain an employee of NYSE after the acquisition,

(c) Execution of that agreement was a condition of the SPA and "is in consideration in part of the significant economic benefits to be paid" to Mr Moore at Closing.

The RSUs are not mentioned.

74. The NC Agreement is said to be in consideration of the Recitals and the promises and agreements in the SPA, the mutual benefits to be gained by the performance thereof and "for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged".

75. At paragraph 5, Mr Moore acknowledges that the NC Agreement is fair in light of not only the nature of the business and the need to protect the goodwill and proprietary rights of the business but also because execution of the agreement is a condition of the purchase of Mr Moore's equity in Wombat and "is in consideration in part of the significant economic benefits" to be paid to Mr Moore at Closing. It goes on to provide that any breach would lead to forfeiture of Escrowed Securities.

76. At paragraph 6 it provides that in order to secure Mr Moore's ability to pay liquidated damages in the event that he breached the NC agreement, Mr Moore agreed that from his share of the gross proceeds under the SPA, 15% would be withheld and invested in Escrowed Securities. That 15% would be released as to 50% on the first anniversary of Closing and 36.66% on the second year anniversary with the balance on the third year anniversary. The gross proceeds are defined as not only Mr Moore's equity stock but also vested options, phantom shares and the value of roll-over of unvested options and SARs. There is no mention of the RSUs.

77. In a joint Press Release issued on 14 January 2008, NYSE and Wombat stated that under the terms of the SPA, NYSE had purchased 100% of the share capital of Wombat for $200 million "and will also create a retention pool for employees." It went on to welcome Wombat's "entrepreneurial management team and employees".

78. Mirroring that, on 2 June 2008, in a press interview, Mr Moore described his biggest business achievement as:-

> "In March, we sold Wombat…in a landmark $200 million all cash deal with a very solid staff retention scheme on top….we…delivered the best possible deal for our stakeholders, staff and customers and provided a great platform for the company to grow and compete."

79. Both press reports were dismissed by Mr Lambert and Mr Moore as being mere "marketing" messages. They argued that part of the sale of equity had simply been packaged as being a retention pool or scheme.

80. FT produced a marketing "tombstone" stating that Wombat had been acquired for a cash consideration of $225,000,000. Mr Moore conceded that the value of the balance sheet in Wombat added to the fees incurred by Wombat in the deal, and paid by NYSE, would have come very close to that figure.

81. NYSE had reported the "employee retention pool" of $25 million as being precisely that to the Securities Exchange Commission ("SEC") in the United States.

82. In February 2008, before Closing, Mr Moore states that he unilaterally fixed his own base salary at $150,000 which he stated he considered to be "inoffensive".

83. Mr Moore fixed the salary levels for the other executives from Wombat and they were also signed off by NYSE. His own was not. He simply emailed Mr Lambert and Human

Resources (both of whom reported to him). I have been provided with no details of the salary levels of anyone else or their bonus targets or share options.

84. He confirmed that in the following years he earned what he described as "some very significant bonuses" because of restructuring work that he did for NYSE. He offered no detail as to the amounts involved. He also stated that he had added considerable value for NYSE. In fact, his tax returns were in the Bundle. His income from employment before tax in 2008/09 was £1,043,893.77 and in 2009/10 it was £1,465,534.

85. As part of the deal, Mr Verstappen resigned at Closing and at that point Mr Moore was, for a very brief part of the day, CEO. Mr Lambert left as an employee after Closing although he did some consultancy work "to ensure the administrative integration of the company" for approximately six months. Neither he nor Mr Verstappen received any RSUs.

86. Mr Lambert was paid a transaction bonus of $1.5 million which was authorised by Mr Moore.

87. Mr Moore's evidence was that by 2007, more than half of the Wombat team were based in Belfast. Mr Moore relocated to Belfast once the SPA was signed. He led the investment in Belfast in the following two years. He also restructured two parts of the European business and a commercial venture.

88. Mr Moore resigned on Thursday 11 March 2010. Two tranches of the RSUs had vested. At no stage had he requested accelerated vesting. He professed to have been unaware of the vesting provisions (as did Mr Lambert). He said that the escrow period had elapsed on 7 March 2010 but that is not consistent with paragraph 76 above and I can see no detail of that in the bundle. However, I observe that at a meeting with HMRC on 6 February 2014, ("the 2014 Meeting") Mr Moore said to HMRC that originally the warranties had been for three years "but he negotiated it down to two years".

89. The value of the RSUs reported to the SEC in 2007 was $99.50. Mr Moore stated that the CEO of NYSE had been bullish about the prospects of the NYSE stock rising in value. However, he also said that one of the concerns about concluding the deal quickly was the worry about a possible financial crash and indeed that is what happened. The banking crisis intervened and in 2008 the value was $63.98. Mr Moore stated that by 2011 the share price had halved so the third tranche would have been worth approximately $1.5 or $1.6 million. By contrast, the shares in the other public company in the bidding process did increase in value.

The Law

90. Insofar as relevant, sections 420 and 484 ITEPA read:-

> **420 Meaning of "securities" etc**
>
> (1) …
>
> (a) shares in any body corporate (wherever incorporated) or in any unincorporated body constituted under the law of a country or territory outside the United Kingdom
>
> …
>
> (8) In this Chapter and Chapters 2 to 5—
>
> …
>
> "securities option" means a right to acquire securities other than a right to acquire securities which is acquired pursuant to a right or opportunity made available under arrangements the main purpose (or one of the main purposes) of which is the avoidance of tax or national insurance contributions, and

…

484 Definitions

(1) In this Chapter—

"securities", and

"securities option",

have the meaning indicated in section 420.

…"

91. Section 471 sets out the circumstances in which Chapter 5 (which includes sections 471-484) will apply and provides relevant definitions for the purposes of that Chapter:

471 Options to which this Chapter applies

(1) This Chapter applies to a securities option acquired by a person where the right or opportunity to acquire the securities option is available by reason of an employment of that person or any other person.

(2) For the purposes of subsection (1) "employment" includes a former or prospective employment.

(3) A right or opportunity to acquire a securities option made available by a person's employer, or a person connected with a person's employer, is to be regarded for the purposes of subsection (1) as available by reason of an employment of that person unless—

(a) the person by whom the right or opportunity is made available is an individual, and

(b) the right or opportunity is made available in the normal course of the domestic, family or personal relationships of that person.

(4) A right or opportunity to acquire a securities option available by reason of holding employment-related securities is to be regarded for the purposes of subsection (1) as available by reason of the same employment as that by reason of which the right or opportunity to acquire the employment-related securities was available.

(5) In this Chapter—

"the acquisition", in relation to an employment-related securities option, means the acquisition of the employment-related securities option pursuant to the right or opportunity available by reason of the employment,

"the employment" means the employment by reason of which the right or opportunity to acquire the employment-related securities option is available ("the employee" and "the employer" being construed accordingly), and

"employment-related securities option" means a securities option to which this Chapter applies.

92. Sections 476 and 477 set out the circumstances in which employment-related securities (ERS) options will be treated as employment income (and therefore subject to a charge to tax as income). Insofar as relevant that reads:-

476 Charge on occurrence of chargeable event

(1) If a chargeable event occurs in relation to an employment-related securities option, the taxable amount counts as employment income of the employee for the relevant tax year.

(2) For this purpose—

(a) "chargeable event" has the meaning given by section 477,

(b) "the taxable amount" is the amount determined under section 478, and

(c) "the relevant tax year" is the tax year in which the chargeable event occurs….

477 Chargeable events

(1) This section applies for the purposes of section 476 (charge on occurrence of chargeable event).

(2) Any of the events mentioned in subsection (3) is a "chargeable event" in relation to the employment-related securities option unless it occurs on or after the death of the employee.

(3) The events are—

(a) the acquisition of securities pursuant to the employment-related securities option by an associated person,

…

(4) For the purposes of subsection (3)(a) securities are acquired at the time when a beneficial interest is acquired (and not, if different, the time when the securities are conveyed or transferred).

…

(7) For the purposes of section 476(5) (charge to income tax) the relevant person in relation to a chargeable event is—

(a) in the case of an event that is a chargeable event by virtue of subsection (3)(a), the person by whom the securities are acquired, and

(b) in the case of an event that is a chargeable event by virtue of subsection (3)(b) or (c), the person by whom the consideration or benefit is received.

93. Section 477(3) ITEPA refers to "associated persons" which, by virtue of sections 472(1)(a) and 484(6), includes (in relation to an ERS option) *"*the person who acquired the employment-related securities option on the acquisition".

94. Section 478 ITEPA provides the calculation of the taxable amount for the purposes of section 476: the gain realised on the occurrence of a chargeable event minus any deductible amounts.

95. Section 480 ITEPA sets out any deductible amounts for the purposes of the calculation under section 476 and insofar as relevant reads:-

480 Deductible amounts

(1) This section applies for the purposes of section 478 (amount of charge on occurrence of chargeable event).

(2) The amount of—

(a) any consideration given for the acquisition of the employment-related securities option,

…

is a deductible amount.

96. The meaning of consideration is set out at section 421A ITEPA and is as follows:-

"421A Meaning of "consideration"

(1) This section applies for determining for the purposes of Chapters 2 to 5 the amount of the consideration given for anything.

(2) If any consideration is given partly in respect of one thing and partly in respect of another, the amount given in respect of the different things is to be determined on a just and reasonable apportionment.

(3) The consideration which is taken to be given wholly or partly for anything does not include the performance of any duties of, or in connection with, an employment.

(4) No amount is to be counted more than once in calculating the amount of any consideration.

(emphasis added)

97. Mr Randle's alternative argument relies on the Supreme Court's brief summary of the provisions of sections 9(2) and 62 ITEPA at paragraph 35 in *RFC 2012 Plc v Advocate General for Scotland* [2017] UKSC 45 ("Rangers") and that reads:-

"35. Income tax on emoluments or earnings is, principally but not exclusively, a tax on the payment of money by an employer to an employee as a reward for his or her work as an employee. As we have seen from the use of the word "therefrom" in section 19 of ICTA (para 5 above), income tax under Schedule E was charged on emoluments from employment. In other words, it was a tax on the remuneration which an employer pays to its employee in return for his or her services as an employee. This concept also underpins the concept of "earnings" in ITEPA (para 6 above) which in section 9(2) refers to "taxable earnings from an employment" and in section 62 defines earnings in relation to an employment. Included in that definition in section 62(2)(c) is the catch-all phrase: "anything else that constitutes an emolument of the employment". That which was an emolument under prior legislation remains an emolument under ITEPA. What is taxable is the remuneration or reward for services: *Brumby v Milner* [1976] 1 WLR 29, 35 per Lord Russell of Killowen in the Court of Appeal; [1976] 1 WLR 1096, 1098-1099 per Lord Wilberforce in the House of Lords. That is not in dispute."

98. Section 62 ITEPA reads:-

(1) This section explains what is meant by "earnings" in the employment income Parts.

(2) In those Parts "earnings", in relation to an employment, means—

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) "money's worth" means something that is—

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).

The taxation history

99. NYSE had included the value of the vested RSUs in its payroll calculations and treated them as earnings from employment. Income tax and National Insurance Contributions ("NICs") had been deducted. Mr Moore did not agree with that tax treatment and sought repayment by making white space disclosures in his tax returns.

2007/08

100. In the year ended 5 April 2008, Mr Moore paid capital gains tax ("CGT") on the basis that the RSUs formed part of the consideration for the sale of the shareholding in Wombat in that tax year. The proceeds on the sale of the shares reflected not only the cash received or held on escrow but also the value of the RSUs. In summary, the $10 million was discounted for uncertainty by $1 million to arrive at a $9 million value. The sterling equivalent was £4,471,383. The chargeable gain was £3,521,587. On 10 December 2009, the return was amended to increase the gross gain to £14,291,205 and the gain net of taper relief to £3,572,801. No enquiry was opened into either the return or the amendment.

2008/09

101. Mr Moore filed his self-assessment tax return ("SATR") on 31 January 2010 and in the employment schedule he included his earnings and claimed a deduction of £540,804 in the computation. He included, as consideration paid for the stock, a third of the £4,471,383 which was the discounted value of the RSUs. That was greater than the value of the stock so no income tax arose under the calculation. In order to remove the £540,804 from tax, a notional deduction was claimed in the SATR to undo the inclusion of the same amount for payroll purposes.

102. The SATR showed an income tax overpayment of £178,894.53 and the CGT Schedule reflected net gains after losses of £847,883. (Net foreign exchange gains of £912,888 less EIS deferral relief of £65,005.)

103. An amendment to the return was received on 26 January 2011 whereby interest received was reduced, a claim to increase the basic rate band in respect of pension contributions was introduced and the CGT schedule was amended. That amendment introduced a capital loss claim in respect of the deferred gain arising from the receipt of the RSUs previously declared for 2007/08. Net gains after losses of £847,883 were reduced to nil and replaced by unused losses carried forward of £115,288 being a total reduction of £963,171. In the covering letter dated 25 January 2011, Mr Moore's agent said that, as the gains were now wholly covered by losses, the claim to EIS deferral relief was withdrawn.

104. On 9 December 2011, HMRC opened an enquiry into the amendment. The Closure Notice was issued on 19 December 2016, withdrawing the deduction of £540,804 claimed on the employment page and introducing a CGT charge of £912,888 at 18% being £164,319.84. This reduced the overpayment to £54,067.75 resulting in a net liability of £110,252.09. The conclusion in the Closure Notice was that Mr Moore's earned income had been understated by £540,804. The capital gains were understated by £912,888.

105. On review, a minor computational error was corrected so the CGT was reduced to £162,591.84 as the capital gains were understated by £903,288 (the annual exempt amount of £9,600 had not been deducted). Deducting the amended income tax overpayment led to an amended self-assessment of £72,698.16.

2009/10

106. Mr Moore filed his 2009/10 SATR on 31 January 2011. In the employment schedule he included his earnings and claimed a deduction of £953,536 for which no explanation was provided but the same figure appeared as disposal proceeds on the CGT schedule. In a note he explained that he had resigned immediately after the second issue and therefore was no longer entitled to the RSUs that would have vested in March 2011. Therefore, the final capital gains computation was that the value of the RSUs when issued was £953,536. The costs were the value of the right to receive the RSUs being £4,471,383 less the proportion of cost allocated against the part disposal in 2008/09 giving rise to a loss of £1,948,867.

107. That loss was set against capital gains arising in the year together with unused losses brought forward from 2008/09 of £115,288.

108. The SATR showed an income tax overpayment of £471,308.08 which was reduced by CGT due in the sum of £48,092.58.

109. On 9 December 2011, HMRC opened an enquiry into that SATR and on 19 December 2016 a Closure Notice was issued and the SATR was amended to withdraw the deduction of £953,536 claimed on the employment page of the original return. That reduced the overpayment to £89,893.68. Capital gains were increased by £2,064,155 disallowing the loss claimed in respect of the RSUs and the losses brought forward. The CGT charge was increased to £419,640.48 and the amended SATR resulted in £329,746.80 in tax due.

110. The conclusion in the Closure Notice was that the earned income had been understated by £953,536 and the capital gains were understated by £2,064,155. TH Closure Notice was upheld on review.

111. In summary, HMRC's position was that no consideration was paid for the RSUs and accordingly no deduction was available under section 480 ITEPA or under section 38 TCGA.

Discussion

112. As I have indicated, the primary issue for the Tribunal was whether consideration was given in return for the RSUs and, if so, whether that would be a deductible amount in terms of section 480(2) ITEPA.

113. Mr Sykes candidly conceded that that was not a straightforward matter but because there had been "skewing" of the sale price to Mr Moore, it must be possible to identify something as consideration, albeit not expressed as such.

114. Mr Sykes argues that the RSUs were granted in consideration for the shares in Wombat held by Mr Moore and the other shareholders on the basis that those shareholders were content that Mr Moore would receive an amount to which they would otherwise have been entitled.

115. Mr Randle's primary argument is that the RSUs were granted as part of an incentive and retention scheme; therefore that cannot be consideration within the meaning of section 421A ITEPA which expressly excludes any consideration which constitutes performance of any duties of, or in connection with, an employment.

116. His alternative argument was that on the vesting of the RSUs the sums arising were also taxable under Chapter 1 Part 3 ITEPA as general earnings from employment, and as I have indicated at paragraph 97 above, he relies upon paragraph 35 of *Rangers* for an explanation thereof.

117. Both parties referred to the Upper Tribunal decision in *Sjumarken v HMRC* [2017] STC 239 ("Sjumarken"). Both relied on paragraph 38 where Judges Berner and Falk (as she then was), having reviewed the authorities, found that it is clear that the question of what constitutes

consideration, and what consideration is given for, depends "on the correct construction of the relevant agreement".

118. Mr Sykes also relied on *Sjumarken* because at paragraphs 38 and 39 *Aberdeen Construction Group Limited v IRC* [1978] STC 127 ("ACG") was described as the leading case and Mr Sykes argues that it bears a close analogy with this case. Judges Berner and Falk explained that in *ACG* shares had been sold for £250,000 but subject to conditions. The most important of those conditions required the seller to waive a loan of £500,000. The House of Lords concluded that the shares had little value without the waiver so the price paid was for both the shares and for the waiver of the loan. That conclusion was reached by interpreting the contract "as any contract must be, against its background".

119. Judges Berner and Falk went on to cite with approval Lightman J at page 136 in *Spectros International plc v Madden* [1997] STC 114 ("Spectros") where he said, under the heading "Principle", that:-

> "What is the relevant consideration may depend upon the terms and form of the transaction adopted by the parties. The parties to a proposed transaction frequently can achieve the same practical and economic result by different methods…. The law respects the freedom of the parties to a transaction to frame and formulate their agreement as they wish and to suit their own legitimate interests (taxation and otherwise) and, so long as the form adopted is genuine, and not a sham, honest, and not a fraud on someone else, and does not contravene some established principle of public policy, the court will give effect to the method adopted. But as a corollary to this freedom, where the parties have chosen one method, it is not open to them to invite the court to treat as adopted some other method because it is more advantageous to them, because it leads to the same practical and economic result and because it is the more obvious and sensible method to have adopted. If the question is raised what method has been adopted and the transaction is in writing, the answer must be found in the true construction of the document or documents read in the light of all the relevant circumstances. If the terms of the documents are clear, that is the end of the question. If however there is any doubt or ambiguity upon the language used read in its proper context, it may be possible to resolve that doubt or ambiguity by reference to the inherent probabilities of businessmen entering into the transaction in one form rather than another."

120. At paragraphs 41 and 42, they pointed out that that quotation had been cited with approval by Henderson J in *Revenue and Customs Commissioners v Collins* [2009] STC 1077 who had also referred to Lightman J's summary of principles derived from *ACG* which included that:- "… <u>any written contract must be read as a whole construed in the light of all relevant circumstances</u> which include the value of the assets disposed of and business sense".

121. I have added emphasis because in his Skeleton Argument Mr Sykes had correctly pointed out that *Chartbook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 is often cited as authority for the proposition that pre-contractual negotiations should not be taken into account for the purposes of contractual construction. He relied on Lord Hoffmann at paragraph 42 where he said:-

> "42. The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

122. He then went on to argue about that in the context of valuation but I am not concerned with that in this decision. The point I make is that when I consider the history, the Terms, the

emails, the draft SPAs and the Open Issues I am doing so in order to consider all relevant circumstances.

123. I was referred to *Spectros* by both parties. Mr Randle stated that he accepted that the principles that Mr Sykes had derived from *Spectros* were correct. Mr Sykes had quoted the ante penultimate paragraph of the decision which reads:-

> "I wish to make it quite clear that the decision in this case is a decision on its own facts based on the terms of the documentation used….[commentary on the facts]… The parties have chosen this result, and the Court must respect their choice."

124. He argued that matters could have been arranged differently but that the commercial choice had been respected. By commercial choice he meant that consideration for Wombat was $225 million. I will revert to that, and for the reasons that I will give, I consider that argument to be a double edged sword.

125. I was not referred to the passage two pages earlier in *Spectros* where having stated the principle enunciated in the quotation cited in *Sjumarken*, I observe that Lightman J, having reviewed a number of authorities, including *ACG*, *Booth* and others to which I was referred, went on to say:-

> "In light of these authorities, I think that I must approach the question before me as a matter of construction of the composite of the three documents to which I have referred; I must identify and give effect to the form of transaction which the parties have entered into and what they sought to do; and in this process I must have regard first and foremost to the terms and language of the composite documents read as a whole in their proper context, but I am also to take into account business sense and reality and most particularly the value of the shares…
>
> The critical issue is to identify the consideration agreed and allocated to the disposal of the shares…".

126. In *Sjumarken* at paragraph 42, Judges Berner and Falk went on to find that the reference to "consideration given…must have its ordinary meaning, namely the price that the appellant gave in order to obtain the …shares" and that therefore one must ask for what the monies were paid.

127. At paragraph 48, they stated clearly that as far as contractual terms are concerned, "Whether a term does constitute consideration will be determined by what the parties agree."

128. So what did the parties agree?

129. HMRC argue that the relevant agreement is the RSU Agreement read with the Plan. It is argued for Mr Moore that there is a single bargain because of the first operative clause in the SPA after the Recitals (see paragraph 60 above). That clause refers to the SPA being "in consideration" of the mutual covenants and mutual benefits.

130. At this juncture it is appropriate to point out that I observe that much of that operative clause is mirrored in the RSU Agreement (see paragraph 67 above) and the NC Agreement (see paragraph 74 above). In fact, it is a boilerplate or standard clause which has no innate meaning save as expressed in the body of any agreement but simply confirms that the parties have agreed to enter into a binding contract.

131. As can be seen from *Sjumarken*, in a sense both parties are partially correct because neither the RSU Agreement nor the SPA can, or should, be construed in isolation. For that reason I do not agree with Mr Randle when he asserts that the SPA itself did not provide Mr Moore with any entitlement to the RSUs because they were subject to a separate bargain.

The RSU Agreement is an integral part of the SPA as are the other agreements. However, that does not necessarily mean that any of the agreements form part of the consideration.

132. I find that the SPA comprises one agreement that comprises a number of constituent parts not all of which, self-evidently, relate to consideration. I reject Mr Sykes' argument that the SPA grants the RSUs. On the contrary, it narrates the fact of the RSUs just as it narrates other facts such that Mr Moore had to repay a promissory note and that there were escrow arrangements and non-competition agreements which in one sense are separate but are also included in the body of the SPA.

133. Obviously, in 2021 and 2022 recollections of discussions held in 2007 were not clear, let alone the discussions that were freely admitted to have taken place after alcohol had been consumed. Therefore the contemporaneous documentation is very important.

134. Mr Verstappen's second witness statement referenced the first witness statement where Mr Verstappen stated that:

> "When I became aware that the sale price had been pushed up to $225m, I assumed that the additional $25m would be divided according to the shareholder ownership. Then when I discovered that Danny had carved out $10m for himself, I was not happy about it. Jon Lambert subsequently pointed out that there would likely be no deal at all unless Danny's arrangement was accepted by me, so I acquiesced. We just wanted to get the deal done quickly.".

135. In the second witness statement which consists of one paragraph he says that the suggestion that Mr Moore had carved out $10 million for himself had been Jon Lambert's recollection of the discussions when he had discussed the matter with him at the time of his first witness statement. On greater reflection he did not think he would have been unhappy with the deal outcome. He would have reconciled himself to it because the RSUs made no sense for him since he was leaving anyway, it was all that was on the table and to argue about a higher receipt in cash would have been too difficult at that time.

136. Clearly that first witness statement was prompted by Mr Lambert who confirmed at the end of his evidence that he currently works with Mr Moore.

137. In stating that an entitlement to RSUs made no sense for him, the second witness statement taken with his oral evidence suggests that more recently Mr Verstappen saw the $25 million as an RSU package and not part of the consideration for the equity. Mr Randle asked him if he had a good understanding of RSUs. He gave a very vague answer to the effect that there were "lots of ways of representing ownership" in the US which prompted the further question as to whether he was familiar with RSUs. The answer was "No". I do not accept Mr Sykes' suggestion in Closing Submissions that what Mr Verstappen had meant was that the RSUs could be payment for shares. He was not asked that question.

138. It transpired that all that Mr Verstappen had checked was as to when the RSUs vested. I find that, in all probability, he did that to ensure that there would be no vesting at Closing or shortly thereafter.

139. Mr Lambert's oral evidence was that Mr Verstappen was upset when he heard about the $10 million but that he "recovered" because he wanted the deal to be completed. In fact, of course, it was $25 million.

140. Mr Moore's evidence was that Mr Verstappen was "crotchety" but that Mr Lambert had talked him round because the process was very fragile and everyone was worried about a possible market crash.

141. Mr Lambert's witness statement and evidence also pose some challenges. Apart from the fact that he offers opinions and, of course, he is a witness of fact only, there are some curious inaccuracies. At paragraph 10 he states that "…the shareholders got $225m by the time the deal closed in March 2008." As can be seen they did not.

142. At paragraph 16 of the witness statement he states that rather than ask Mr Verstappen to contribute the 5% envisaged in the Terms the "excess $25m" would be redistributed across all shareholders. It certainly was not. Of the $15 million, I know that $2.4 million went to three employees who were not shareholders and $1.6 million to employees who were shareholders. I have no details but on the balance of probability, almost all of the balance of the $15 million, which in Mr Moore's words went to staff, would not have gone to shareholders (see paragraph 53 above).

143. In cross-examination, he stated that the issue of the RSUs had been triggered by the need to manage the $25 million and the perception of that. I say perception deliberately because of the issue of vesting of the RSUs.

144. At paragraph 21 of his witness statement he states that there were no references in the SPA to the vesting of the RSUs and opines that that supports "the nature of the payments made by NYSE". Of course, as can be seen from paragraphs 64 and 68 above, the vesting provisions were explicitly set out in the SPA which included the specimen RSU agreement.

145. Mr Randle took him to the relevant provisions in the SPA and although he conceded that he was wrong he argued that vesting had not been discussed. It had as can be seen from paragraphs 36 and 52 above and all of the draft SPAs. Furthermore, Mr Verstappen's evidence was that the only detail that he had checked in relation to the RSUs, beyond the amounts and the recipients, was the vesting conditions. He was not even involved in the negotiations.

146. More pertinently, Mr Lambert had to concede, as did Mr Moore, that it was absolutely explicit from the documentation that NYSE had the power to accelerate vesting of some or all of the RSUs immediately upon Closing. Mr Moore simply argued that they had not sought to accelerate vesting because Merrill and Mr Verstappen would have been unhappy because their share of that would have been "a lot of money". Mr Lambert went further stating that the shareholders would have objected and "the deal could have blown up".

147. Mr Lambert also argued that the RSUs were not issued or accepted with what he described as "incentive intent". That simply does not sit well with 120 staff receiving RSUs and NYSE's reports to the SEC.

148. In cross-examination Mr Lambert had to concede that his report of the meeting on 21 December with the CEO of NYSE was simply what he had been told by Mr Moore. He had no first-hand knowledge. Mr Moore's account of that meeting, apart from what is recorded at paragraph 35 above, is that he also explained some of the history of unhappy relations with Mr Verstappen.

149. Mr Randle took Mr Lambert to the exchange of emails on 26 December 2007 where Mr Lambert talked of "incentive" and "retention" and what transpired to be the ultimate scheme for the RSUs. Mr Lambert explained that those words had been used because he worried about a potential shareholder law suit. He said that he needed some documentation in simple terms that would "deter financial shareholders". His objective had been to ensure that Mr Moore was happy.

150. He argued that the RSUs had never been intended to be established as an incentive but rather it was a position to be taken if either the shareholders or NYSE queried the payment to Mr Moore.

151. Ultimately, he argued that it had had to "look, smell and taste like an incentive and retention package" in order to get the deal done both for NYSE and for Mr Verstappen. He argued that it was equity packaged as retention because it meant that Mr Moore would effectively be treated as having an equity stake of 15%.

152. Mr Moore said that he had known that Mr Verstappen and Merrill were happy with the deal at $200 million so he said that he did not consult with them when he pushed NYSE for the extra $25 million for himself and the staff.

153. He argued that two round numbers looked good and so the $25 million was broken up in a "palatable fashion". It was certainly palatable to him since he patently rejected the suggestion in the second bullet point of the email from Mr Lambert that perhaps some of "his" $10 million should be allocated to the other employees.

154. Mr Moore confirmed that the email from Mr Lambert had been drafted on the basis that either Merrill or Mr Verstappen might have pursued him for "hijacking some of their shared consideration". He agreed that it had been a "ruse".

155. He said that Merrill were told about it first and Mr Verstappen was told later. It is not known when they were told.

156. He said that when Merrill were told about it they were very upset and suggested that Mr Lambert and Mr Moore had "picked their pocket" for their share of the $25 million and they subsequently described it as a "heist". However, they were short of money and needed to recoup their investment so they had very reluctantly conceded that they would not contest the issue.

157. In summary, the narrative put to the Tribunal by Messrs Lambert and Moore was that Merrill and Mr Verstappen had been unhappy at the allocation of the $25 million to Mr Moore and to the staff. That does not sit at all well with the note of the 2014 meeting where he is reported as stating that Merrill were "very happy with the $200 million sale" and

> "Similarly the other shareholders accepted the terms of the sale, including the additional $10 million payable to DM as they were happy with the price they received and they recognised DM's role in the (sic) pushing the deal to completion. DM recalled only a short conversation with any shareholders with regard to his increased consideration of the $10 million RSUs: 'Fair enough, you've done a good job'".

That is in clear conflict with the evidence offered to this Tribunal in relation to Merrill and Mr Verstappen.

158. It is more consistent with Mr Verstappen's revised position that he was content because the RSUs made no sense for him. I find that it is far from clear what Mr Verstappen and Merrill knew or when.

159. For the avoidance of doubt, the notes of the 2014 meeting make it explicit that the notes of the meeting were to be agreed "to ensure that DM felt his points and comments had been correctly recorded". That point was reiterated in correspondence in 2018 and was not challenged.

160. Mr Randle asked why Mr Moore had not said to Mr Verstappen that the cost of Mr Verstappen getting approximately $100 million would be if Mr Moore were to get a greater price for his shares. The response was that he did not wish to be blatant and people do not like threats. I do not accept that explanation.

161. The allocation of $10 million of RSUs for Mr Moore was nothing if not blatant and Mr Moore made it explicit that he would be, and he was, the last to sign the documentation.

That was an implicit threat since it was clear that all had to sign or there was no deal. That was why Mr Moore had done a deal with the recalcitrant employee who received phantom shares (see paragraph 54 above). Effectively Mr Moore did what that employee had allegedly done.

162. Mr Moore agreed that, if the sale price truly was $225 million, then every shareholder's consideration for the shares had been diminished by carving out the $25 million. His rationale was that, since their view was that Mr Verstappen would never hand over the 5% which had been proposed by NYSE in the Terms, they needed a model where all of the shareholders funded the additional $25 million for the RSUs.

163. It was clear that Mr Verstappen had not been consulted about the proposal that he should release the 5%. Had he been consulted and agreed the proposal, the Restricted Shares, being the basis of the RSUs, would have been funded by Mr Verstappen. They were not.

164. Mr Randle put it to Mr Lambert that he noted the assumption that Mr Verstappen would not have consented to a release of 5% making the consideration $225 million, but had he done so he would have received approximately $112 million rather than the $100 million and no RSUs. (I have not checked the arithmetic.) Mr Lambert's answer was that the only deal that was on the table was the $200 million in cash and the allocated RSUs.

165. However, Mr Verstappen had never had the choice because Mr Moore and Mr Lambert unilaterally rejected the Terms and that led to the telephone conversation and emails on 26 December 2008.

166. I find that the real trigger for the RSUs was the proposal that one third of the consideration paid to Mr Moore would be withheld and released over a period of three years if he remained in employment. He was expecting $20 million at Closing so that would have had a huge impact on him and was totally unacceptable to him.

167. In summary, Mr Moore's view was that the position taken on 26 December 2007 was a simple story which "read well and never changed". The RSUs had to be separate from the sale in order to make, what he repeatedly described as, "the charade", work. Indeed, he said that it had worked too well.

168. Whilst Mr Moore accepted that the other Wombat employees saw the RSUs as being both a method of retention and incentive, he saw the RSUs for himself as being what he described as a "carve out".

169. He had been very angry that it was his work that had increased the value of Wombat so rapidly and that had not been recognised either in his job title or in his share of the equity. He said that the equity split was very unfair to him and the RSUs were a way "to get something back". He believed that he should have received significantly more than the amount strictly attributable to his shareholding. Indeed, he argued that he should have received the same amount as Mr Verstappen. He described the $10 million as a "slight readjustment" of the equity.

170. He said that he had no involvement with the negotiations after 26 December 2007 because he could not believe that he had "got away with" the $10 million, so he had kept very quiet.

171. When he was taken to the documentation he said that that was the first time that he had been through a lot of it. He was taken to the notes of the 2014 meeting where the SEC reporting by NYSE was recorded. When asked about that, he eventually stated that the employee retention pool was part of the $225 million and he could not comment beyond that. I observe from elsewhere in that note that he had told HMRC that the exact wording of the sale agreement

had not been known to him at the time of the sale as he did not read it fully until perhaps two years later. Of course he told the Tribunal that he had only read it many years later.

172. I also note that he told HMRC, inaccurately, that he had been CEO of Wombat before the bid process commenced.

173. I have no evidence that any holders of stock or shares other than Messrs Moore, Lambert, Verstappen and Merrill knew that the $25 million was considered to be anything other than a retention pool. Looking at the totality of the evidence, I consider it unlikely that the other holders would have considered the $25 million to be anything other than a retention pool. The two shareholders who were named in Exhibit A knew that their three colleagues who were not shareholders received RSUs and signed RSU Agreements. All of the shareholders who signed the SPA knew or should have known that $15 million would be shared amongst a number of employees and Mr Moore would get $10 million.

174. In the Affidavit signed by Mr Moore on 18 July 2012, to support his argument that there was consideration, he stated that the only documentation that he was aware of was the SPA itself which he described as being reflective of a verbal agreement at the eleventh hour. I disagree with that description. It was reflective of the email from Mr Lambert. The Terms and the various drafts and the eventual version of the SPA all reflected that. I can discern no material eleventh hour changes, beyond the inclusion in the SPA of the Form of RSU Agreement at Exhibit F, let alone any verbal agreement at that stage.

175. That Affidavit explains that Mr Moore had taken advantage of a fast moving situation because he held the balance of power "to secure maximum return for my equity". He said that NYSE had never intended to issue him with the RSUs but that rather they wished to hold a third of his sale proceeds in escrow for three years, subject to warranties etc. His explanation for that was that they were making a very large cash offer without the key figures from the fourth quarter being available. That being the case, he had "flipped their proposal around and counter proposed $10 million RSUs in addition to the approximately $20 million they were offering me - with nothing held in escrow other than the standard amount applicable to all shareholders". Yet again there is no mention of the $15 million.

176. That is consistent with the emails but Mr Moore describes both Mr Lambert's email and the subsequent SPA incorporating the RSUs as having been "designed for the optics" and not reflective of the fact that it was consideration.

177. I understand why Mr Lambert and Mr Moore anticipated a challenge from Merrill and Mr Verstappen, but the interesting point is that both Mr Moore and Mr Lambert articulated concerns about NYSE challenging the deal.

178. I find as fact that the reason for that concern was that the clear evidence was that the Board of NYSE had the approval of their Investment Committee for a purchase at $200 million. Those negotiating the deal had no authority to go beyond that figure. That was the deal. They could agree ancillary figures such as professional fees and also a retention pool. Mr Moore conceded that those ancillary figures for fees etc excluding the retention pool (ie the RSUs) amounted to close to $25 million. That may be the reason for the tombstone.

179. On the balance of probability, that was why NYSE reported the retention pool, as being such, to the SEC and accounted for the consequences through payroll and the consideration in the SPA and in press coverage etc, was reported as being $200 million.

180. This is a specialist Tribunal. I have Merger and Acquisition ("M&A") experience. As I told the parties, I did understand that the press coverage would have been produced by others and simply signed off by Mr Moore. However, that does not relieve him of responsibility for what was said. That was his choice. He chose to endorse it. He chose to sign documentation

which said that the consideration for the shares was $200 million. It was documentation that, by his account, he had not read in any detail. He chose the structure of the deal. Those too were his choices.

181. Mr Randle took Mr Moore to paragraph 6 of the NC agreement and, in particular, the definition of "gross proceeds" (see paragraph 76 above) and put it to him that if the RSUs were consideration for the shares then it would have been expected that they were included in that since every other possibility was listed. Whilst Mr Moore conceded that that was a "fair" point he argued that because everything was pulled together quickly in order to meet the deadline, the documentation was "kept simple" using a standard agreement.

182. M&A negotiations in 2007 and 2008, let alone more recently, were regularly last minute adjustments of deals. Last minute changes in documentation remain the meat and drink of M&A negotiations. Whilst, of course the lawyers will have used templates, very expensive teams, who probably worked through the night, will have been involved, and will have tailored and fine-tuned the documentation. I agree with Mr Randle that the documentation is not generic and is very specific. It is also comprehensive, as one would expect in a deal of this size. If Mr Moore's RSUs were viewed by the parties as consideration one would have expected to have seen them included in the description of gross proceeds for escrow purposes.

183. Furthermore, in my opinion the lawyers and other advisers will have consistently and routinely highlighted potential pitfalls. They have to do so because of the risks of professional negligence claims. Given that when the document dated 6 January 2008 was produced there were 18 open issues, one or more such documents and/or emails will have existed. Nothing of that type has been produced.

184. I am underwhelmed by the arguments that the $10 million must be linked to equity because

(a) Only Mr Moore's RSUs were actually quantified in the SPA.

(b) He had no performance targets in the RSU agreement.

(c) Mr Moore was allegedly offered no substantive role in NYSE after the acquisition.

185. It is correct that only Mr Moore's RSU allocation was quantified in the SPA but the mechanism for quantifying the other RSUs was identified in the SPA and was within Mr Moore's control. As can be seen, the RSU's for his key people (and their contracts going forward) were all cleared with NYSE before the SPA was signed on 12 January 2008 and all of the others were cleared before Closing. It is therefore incorrect to say, as had previously been argued, that because the value of Mr Moore's RSUs was specified in the SPA then that related to the disposal of shares and that differentiated him from the other recipients of the RSUs.

186. As I have indicated, the other employees appear to have signed exactly the same RSU Agreement as Mr Moore and he has conceded that they would have seen the RSUs as an incentive and as a retention measure.

187. Exhibit A to the Plan gives the Committee of NYSE making grants of the RSUs extensive powers to impose performance goals but that does not appear to have happened in respect of the RSUs involved in this acquisition. In any event Article 8 of the Plan refers to Exhibit A stating that the Committee may attach conditions for either a grant or vesting but gives the Committee sole discretion in the matter.

188. There were no performance targets in any of the RSUs. Some of those signing the agreements were shareholders but the majority were not.

189. It has been argued that the $10 million would have been disproportionate as an incentive for a man on a salary of $150,000 so the RSUs would not have been employment related. Firstly, that is a very curious figure since Mr Lambert had confirmed that his salary with Wombat was approximately $200,000. Mr Moore has not said what his salary would have been at that time or the level of bonuses.

190. Mr Lambert also had stock options and a bonus target. His stock options achieved in excess of $6 million. His explanation was that huge rewards were the nature of the economy at the time; one accepted a "small" base salary and trusted that the bonuses and stock options would deliver. In his case he agreed that had happened.

191. It clearly happened to Mr Moore since, as can be seen from paragraph 84 above, his actual income in the relevant years was in excess of £1 million in each year. That would have been rather more in terms of dollars at that time.

192. Lastly, as far as Mr Moore's role is concerned one of the arguments advanced was that there had never been a role for him post acquisition; that was the reason that a contract had never been finalised and he had been repeatedly "demoted". Mr Sykes went as far as arguing that Mr Moore had little practical role in the company and his continued employment "was simply a formality". That does not sit well with Mr Moore's admission that he had received "very significant bonuses" and he had added "considerable value" for NYSE because of the restructuring work that he had completed for them.

193. Mr Moore said that his bankers had asked about the issue of a contract repeatedly. I do not accept that because, as can be seen from paragraph 52(c) above, the documentation shows that Mr Moore's title, role, remuneration etc was not perceived by his advisers to be a negotiating item in relation to the SPA, albeit there had been discussions.

194. Further, in his witness statement Mr Moore states that he had a meeting with the COO of NYSE on 10 January 2008 and although he cannot remember what was said he states that the NYSE COO tried to raise the question of his contract and the RSUs but that Mr Moore deliberately declined to engage.

195. He now blames NYSE for the failure to give him a contract of employment. Certainly they did not do so. In principle, Mr Moore could have organised a contract for himself; he did not. He organised the contracts for all of his key employees before the SPA was signed. He conceded that until 2017 he had never had a contract with anyone.

196. I do not accept that the lack of a contract is in any way determinative particularly since he unilaterally fixed his salary without consultation with NYSE. Indeed, I find that on the balance of probability, Mr Moore avoided obtaining a written contract since he was tied to NYSE by the escrow arrangements and the possibility that the value of the RSUs would increase.

197. In a telephone conversation with HMRC in 2016, Mr Moore's then agents described him as a "serial entrepreneur". In my experience with business clients, a role without portfolio, as he described his role post acquisition, and his work on restructuring, fits with that description. None of that is inconsistent with the lack of a written contract of employment.

198. Although both Mr Moore and Mr Lambert argue that there was never a substantive role for Mr Moore post-acquisition, nevertheless:-

(a) In his witness statement Mr Moore unequivocally states that Mr Lambert had not been aware of NYSE's plans for him but had only been aware that they wished to "hold back" one third of his consideration for the shares. That does not sit well with Mr Lambert's witness statement where he opines that there never was a defined role for

Mr Moore and that from the beginning Mr Moore's ongoing "involvement was significantly challenged and unlikely to last".

(b) It is clear from the contemporaneous documentation that, at every stage, NYSE wished the ability to retain his services, if it suited them, for up to three years.

(c) Neither Mr Lambert nor Mr Moore were able to satisfactorily explain why, in the emails (see paragraphs 39 and 40 above) from FT it stated that NYSE needed Mr Moore to be "highly motivated", "not going to walk" and to stay with NYSE for up to three years. Mr Moore's argument that FT were flustered and that it meant that NYSE wanted him to be motivated to close the deal is not tenable in a context of a three year retention period. Mr Lambert had no explanation.

(d) In his witness statement, Mr Moore stated that by the week that the deal was announced, he had decided to move back to Belfast because there was no meaningful role. However, during the two years that he remained with NYSE he was paid what he described as very significant bonuses and, in his words, he had had a lot of impact.

199. Mr Sykes argued that the other recipients of the RSUs received them as consideration in relation to their ongoing contracts but that that could not be the case for Mr Moore since he had no contract and no role. There was nothing to incentivise so the RSUs could never have been an incentive. Firstly, as Mr Moore has demonstrated, one can be an employee for many years without having a written contract. Secondly, clearly NYSE proceeded on the basis that he was an employee and had a role and they paid him well for it.

200. I do not accept the suggestion that was made that NYSE had been unaware that Mr Verstappen had largely stepped back from day to day involvement since 2006. Mr Moore has made it clear at every stage that he led the negotiations, that he was effectively acting as CEO and that he wanted the $10 million for himself because of what he had achieved in growing Wombat. He had told the CEO of NYSE of the tensions with Mr Verstappen and the fact that he wanted the $25 million to go to the staff and to himself.

201. I do not doubt for a second that Mr Moore intensely resented the fact that prior to Closing he had not achieved his ambition to be CEO or achieved a higher equity stake in Wombat. He blamed Mr Verstappen for that. He was equally resentful about what he viewed as his consequential failure to be accorded what he believed should have been his appropriate status in NYSE. In my view, that undoubtedly drove his wish to "carve out" the $10 million for himself.

202. I do accept the fact that he resented and resents the fact that he was not at the same level in NYSE as other NYSE executives whom he considered to be far less accomplished than himself. He viewed that as a demotion because in his words "the political slights were crushing especially in an organisation where so much is signified by level in the hierarchy".

203. It is self-evident that there is nothing in the documentation to indicate that any part of the RSUs is consideration for shares. In fact the RSU Agreement, the emails and the Terms all point to the RSUs being clearly intended to be related to continued employment.

204. One issue in that regard is that it is difficult to see how the RSUs for Mr Moore relate to his shareholding where the RSUs awarded to the other two Key Equity Holders who were also shareholders, were not considered to be related to their shareholdings (and similarly for the two stockholders). Other shareholders who in some cases held greater amounts of shares than those two employees did not receive any RSUs. Clearly at least part of Mr Moore's RSUs related to his employment.

205. Equally clearly, for what I would assume to be commercial or business reasons, at every stage, at least up until Closing, NYSE wished to have the ability to employ Mr Moore for a period of up to three years thereafter. That is implicit in all of the documentation. The timing of the vesting of the RSUs and of the Escrow Securities make that clear.

206. It is conceivable that the RSUs for the other key employees at approximately $800,000 would have been proportionate to their value as employees to NYSE or to their earning capacity but I have no information. The $10 million for Mr Moore may or may not have been proportionate but in the context of the size of his bonuses the probability is that it was.

207. By definition the value of RSUs can, and in this case did, vary over the period so there was the potential for the employees, including Mr Moore, to achieve a greater windfall albeit the reverse happened. I make that point because Mr Sykes repeatedly stated that the value of the deal was $225 million. With respect I disagree. The value of the RSUs to those who received them did not crystallise at Closing.

208. In his oral evidence Mr Lambert stated that Mr Moore would not have been prepared to accept a sale of Wombat to the other public company; hence Mr Lambert's acknowledgement that the default position was the private equity firm at $150 million. Mr Moore was very clear that, for reasons that do not require to be narrated here, the interest expressed by the other public company would not have been pursued. He described Wombat as being "predators" and he had "locked in" on NYSE using the other offer as a tool in the negotiations.

209. I do not accept that, because the other public company had offered $225 million in principle, that meant the value of the shares in this instance was $225 million.

210. I observe that Mr Lambert was paid $1.5 million for his part in negotiating the deal. By his own admission Mr Moore's role in achieving the sale of Wombat was pivotal. I do not agree with Mr Sykes that managing the sale process had nothing to do with his role as an employee and everything to do with his role as a shareholder. He was involved in his capacity as an employee of Wombat and as a prospective employee of NYSE. It is common for the CEO (or in this case the acting CEO) and the CFO to be very involved in the sale of a company. The COO and his team and the CEO of NYSE were very involved. Although Mr Moore was a shareholder, he was only a minority shareholder, and as can be seen the shareholders were not really involved to any material extent.

211. At paragraph 161 above, I have found that in carving out the $10 million, and indeed the $15 million for the staff, Mr Moore acted in the same way as the employee with the phantom shares. It was the cost of achieving the sale. It was not a price for his, or anyone else's, shares. It was recognition of his role in facilitating the deal.

212. In summary, for the reasons given, I do not accept that any holders of stock or shares other than Mr Lambert and perhaps Mr Verstappen and Merrill were aware that the $25 million might have been something to which they were entitled to a share. As Mr Verstappen described it latterly, the RSUs (and that is not only the $10 million but also the $15 million) and the $200 million constituted the deal on the table. As can be seen at paragraph 44 above the deal on offer from the other public company was a $6 million employee retention pool and $225 million consideration.

213. As I have indicated, I do not know what Merrill and Mr Verstappen knew about the negotiations, and when, or if they were unhappy. As I have indicated, the notes of the 2014 meeting (see paragraph 157 above) and Mr Verstappen's second witness statement and oral evidence suggest a different narrative to that advanced by Messrs Moore and Lambert. The former are more consistent with the contemporary documentation.

214. At paragraph 124 above I suggested that it was a double edged sword to rely on the parties' choices. The choice of documentation here was clearly a deal portrayed as a sale at $200 million and in addition the issue of $25 million of RSUs.

215. Mr Sykes requested that I give consideration to, what he described as, the ambiguities in the documentation. There are ambiguities, as there would almost always be in such documentation. An example in this instance is the employee described as a Key Equity Holder, which he was not. However, I do not think the fact that there is an entire agreement clause in the SPA but not in the RSU Agreement is an ambiguity. As I have pointed out the latter is included in the former. I have already explained at paragraph 130 above why I do not consider the reference in the overarching clause in the various agreements to be ambiguous. The RSUs were all allocated before Closing so there was no ambiguity in that.

216. Furthermore, the contractual documentation must be considered as a whole, and in light of all the relevant circumstances. I have looked at the documentation in detail and it is in line with what I would expect in a deal of this nature. It is consistent with the other contemporary documentation. It was negotiated at arm's length with the assistance of very experienced advisers.

217. It all makes commercial sense. Overall I find that there is no material ambiguity in the contractual documentation.

218. Whilst I note Mr Moore's assertions that it was all a charade, and that may be how he saw it but, if it was, it was of his making. If his account of what Merrill and Mr Verstappen were told and knew is correct, then it was not a sham or a fraud. It was a form of contract to which they knowingly acceded. If, on the other hand, they had believed that it was a sale at $200 million plus the $25 million RSUs then they knowingly agreed to that. Incidentally, I observe that in those notes of the 2014 meeting Mr Moore made no reference to the additional $15 million for the staff.

219. I have not discussed the various authorities to which I was referred beyond those which I have referenced in this decision because, as in *Spectros*, this decision turns on the unique facts of this case. Those facts are derived from the contractual documentation considered in the light of the other relevant circumstances including commercial and business sense.

Conclusion

220. I find that on those facts, the value given by NYSE for the shares in Wombat was not $225 million. The value was $200 million. Every holder of stock or shares received the same amount for their stock.

221. In addition, the staff received a grant of $15 million RSUs as part of an incentive and retention package just as NYSE had reported to the SEC. The grant of $10 million RSUs to Mr Moore was at the very least in part an incentive and retention package, whether he viewed it as such or not. He chose to have it packaged as such.

222. The RSUs did not have a fixed value and the value only became quantified if, and when, they vested.

223. To the extent, if any, that the grant of the RSUs to Mr Moore was not part of an incentive or retention package, it was paid to him as the equivalent of Mr Lambert's payment for negotiation of the deal or as a reward to him, as an employee, for facilitating completion of the deal; as was the case with the employee with the phantom shares. In either event it is taxable as income.

Decision

224. For all these reasons, the appeal is dismissed and the value of $9 million was not properly deductible as consideration given for the RSUs.

Right to apply for permission to appeal

225. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 25th APRIL 2023