[2019] UKFTT 483 (TC)

CAPITAL GAINS TAX – whether payment exempt by virtue of s 51(2) Taxation of Chargeable Gains Act 1992 – No – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07286

Appeal number: TC/2018/03670

BETWEEN

JOHN ROBINSON **Appellant**

-and-

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

TRIBUNAL: JUDGE DAVID BEDENHAM

Sitting in public at Taylor House, London on 13 May 2019

The Appellant appeared in person

Keith Golder, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal is concerned with whether or not a payment of £1 million paid to Mr Robinson is chargeable to Capital Gains Tax. The payment made to Mr Robinson arose in the context of settlement of litigation that Mr Robinson had brought in Bermuda. Mr Robinson submits that this payment falls within the exemption in s 51(2) of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992").

2. In support of his appeal, Mr Robinson filed a witness statement with the Tribunal. Mr Robinson also made numerous factual assertions as part of his submissions. The Tribunal therefore invited Mr Robinson to confirm, from the witness box, the accuracy of his witness statement and the factual assertions made during his submissions, which he did. HMRC cross examined Mr Robinson.

3. In addition to the evidence given by Mr Robinson, there was a bundle containing the documents that the parties relied on.

BACKGROUND

4. As at 2009, Mr Robinson was a shareholder and member of the board of directors of Omega Holdings Limited ("Omega"), a Bermuda based company. In 2009, Mr Robinson was removed from the board of directors and, he says, shut out from Omega's business. Mr Robinson therefore instructed lawyers to "try to get to the bottom of what was happening with the Company". Mr Robinson asserts that between 2010-2012, Omega failed to comply with a number of its regulatory obligations, including in relation to providing him with information in his capacity as a shareholder. Mr Robinson also says that in the period 2010-2012, Omega made various comments about him that were damaging to his reputation.

5. Canopius Holdings Limited ("Canopius") made a bid to acquire Omega. Mr Robinson says he was not provided with the information that he was entitled to in relation to this bid. He also harboured other concerns about the way that the Canopius bid was dealt with by Omega (including that more attractive bids had not been pursued in favour of the Canopius bid). Despite Mr Robinson voting against it, the Canopius bid was successful.

6. In 2012, Mr Robinson commenced proceedings against Omega in the Supreme Court of Bermuda under s 106(6) of the Bermuda Companies Act 1981 ("the Bermuda litigation"). Mr Robinson states that in the course of the Bermuda litigation he made various applications for discovery which were largely successful.

7. In 2013, Mr Robinson and Omega signed a consent order which recorded that they had agreed terms set out in the attached schedule and that, save for the purpose of carrying into effect the agreed terms, the Bermuda litigation was stayed. The agreed terms contained in the schedule, to the extent that they are relevant to the present appeal, were that Canopius (as successor to Omega) was to pay Mr Robinson £1million:

> "in consideration of the full and final settlement of [the Bermuda litigation], inclusive of costs and/or interest; and any and all causes of action either party has had or may have [relating to Mr Robinson's involvement with Omega and the amalgamation between Omega and Canopius]…[and] any and all causes of action Robinson has had or may have…against any past, present or future directors [of Omega and Canopius and associated entities]."

8. I record at this stage that Mr Robinson did not provide to the Tribunal the claim form (or other originating document) that commenced the Bermuda litigation. Nor did he provide the

Tribunal with any primary documentation (other than a copy of one of the discovery orders made by Supreme Court of Bermuda) relating to the Bermuda litigation. This is despite Mr Robinson repeatedly stating that he has in his possession numerous bankers boxes of material relating to the litigation (albeit he did say that some of the relevant documentation could not be provided due to confidentiality constraints imposed by the Supreme Court of Bermuda).

HMRC'S CASE

9. HMRC's case, which was presented in a measured and helpful way by Mr Golder, can be summarised as follows:

(1) The £1million paid to Mr Robinson was to compensate him for a reduction in the value of his shareholding. This is clear from the fact that the payment was made to settle a claim commenced under s 106(6) of the Companies Act 1981 (Bermuda) which is concerned with obtaining fair value for shares. Further, Mr Robinson made a press statement in which he said the claim was about "fair value".

(2) The £1million (minus deductible costs) is taxable pursuant to s 22(1) TCGA 1992 because it was paid to Mr Robinson in return for forfeiture or surrender of rights (i.e the Bermuda litigation) (see also *Zim Properties Ltd v Procter (Inspector of Taxes)* [1985] STC 90).

(3) Section 51(2) TCGA 1992 excludes from a charge to tax payments compensating for personal loss (as opposed to pure economic loss) (see *Gadhavi v HMRC* [2018] UKFTT 600). Section 51(2) TCGA 1992 does not apply to the payment made to Mr Robinson because that payment was made to compensate him for a reduction in the value of his shareholding.

MR ROBINSON'S CASE

10. Mr Robinson's grounds of appeal were as follows:

> "HMRC have determined that the main purpose of the 2012/13 litigation was damage to the value of my shares in Omega and are seeking to tax the out of court compensation/settlement received ten days before the due date as a capital sum derived from an unquantified asset. The interpretation of the purpose of the litigation is incorrect and I do not believe that the amount received should be subject to capital gains tax.
>
> The case was about the failure of the company to comply with its long stated obligations of the Takeover Code and treatment of major shareholders. I was the only shareholder over 3% (see LSE regulations) to be treated in this way."

11. During his evidence and submissions, Mr Robinson said that, having been removed from the Omega board of directors and shut out from Omega's business (despite being a 7.5% shareholder), and because Omega was in breach of various regulatory requirements (including not providing him with information/documentation) and had made negative comments about him (including seeking to blame him for Omega's poor performance), he wanted access to information and documentation about Omega's dealings so that he could vindicate his position and protect his reputation. He was advised that the only way to access these documents was to commence a claim under s 106(6) of the Companies Act 1981 (Bermuda) and to then make applications for discovery. Ultimately, he says, Omega/Canopius paid the £1 million not to compensate him for a reduction in his share value but to make him "go away" because it did

not want the documentation disclosed during the discovery process to be referred to in a public hearing. Accordingly, Mr Robinson submitted, the payment was exempt from Capital Gains Tax by virtue of s 51(2) TCGA 1992.

THE LAW

12. Section 1 (1) TCGA 1992, at all material times, provided:

> "Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets."

13. Section 22 TCGA 1992 provides in relevant part:

> "(1) Subject to sections 23 and 26(1), and to any other exceptions in this Act, there is for the purposes of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum, and this subsection applies in particular to –
>
> …
>
> (c) capital sums received in return for forfeiture or surrender of rights, or from refraining from exercising rights…"

14. Section 51 (2) TCGA 1992 provides:

> "It is hereby declared that sums obtained by way of compensation or damages for any wrong or injury suffered by an individual in his person or in his profession or vocation are not chargeable gains."

15. Section 106(6) of the Companies Act 1981 (Bermuda) provides:

> "Any shareholder who did not vote in favour of the amalgamation or merger and who is not satisfied that he has been offered fair value for his shares may within one month of the giving of the notice referred to in subsection (2) apply to the Court to appraise the fair value of his shares."

EVIDENCE

16. The evidence showed the relevant chronology of events to be as follows:

17. From 2009, Mr Robinson was unhappy with the way that Omega was conducting its business and with its treatment of him (both in removing him from the board of directors and failing to provide him with information). He therefore retained lawyers who corresponded with Omega about Mr Robinson's concerns.

18. In 2012, following the Canopius bid being accepted, Mr Robinson commenced the Bermuda litigation.

19. In September 2013, the Bermuda litigation was settled. Mr Robinson received from Canopius (as successor to Omega) a payment of £1million.

20. On 31 January 2015, Mr Robinson filed his tax return for the year ending 5 April 2014. On the return, Mr Robinson declared the £1million paid to him by Canopius but indicated that he did not consider this payment to be chargeable to Capital Gains Tax. On 20 November 2015, HMRC opened an enquiry into Mr Robinson's tax return.

21. On 18 January 2016, Mr Robinson's tax advisors, RSM UK Tax and Accounting Limited, wrote to HMRC in relevant part as follows:

> "We are enclosing as requested a copy of the agreement 218 of 2012 in the Supreme Court of Bermuda dated 23 September 2013 under which our client was awarded the compensation payment of £1m from Canopius Holdings Ltd.
>
> In summary, the case concerned the discovery of facts about the management of Omega Insurance Holdings Limited following our client's removal from the Board in 2009/10. Mr Robinson was the third largest shareholder in the company, owning just over 3% of the share capital, had been a founder of the firm in 1979 and in effect the leader of the business from 1995 onwards. The share price had drifted down from a historic mean figure of circa 140 pence per share, down to a final share price of just 67 pence per share.
>
> There was much coverage of the matter in the business press from September 2009 onwards, and we are enclosing a number of publically available documents to assist in your understanding of the matter. We should just add that although it was listed on the London Stock Exchange, Omega was actually a Bermudian company which is why the legal action had to take place there. Our client actually incurred legal costs of over £700,000 in fighting the case.
>
> The details of this receipt were reported on the white space notes of the 2014 Tax Return simply to ensure that there could be no suggestion of any failure to disclose information. Our view is that this was compensation of a personal nature and therefore exempt under Section 51(2) Taxation of Chargeable Gains Act 1992."

Enclosed with this letter were a number of documents including the consent order settling the Bermuda litigation, an order for disclosure made in the Bermuda litigation, and a number of press articles and statements issued by Mr Robinson and Omega respectively, including a statement issued by Mr Robertson on 5 July 2012 which stated:

> "The purpose of the [Bermuda] Litigation is to determine a fair value of the Plaintiff's shares as at the time of the Acquisition, an application brought pursuant to section 106(6) of the Bermuda Companies Act 1981. In that context, it will be necessary to consider all relevant information pertaining to the financial state of the Company at the time of the Acquisition, including an assessment of the developments said to have impacted negatively upon shareholder value following a number earlier and more advantageous sale opportunities that were not pursued by the board…"

22. Also enclosed with the 18 January 2016 letter was a letter of 1 June 2012 written by Mr Robinson to Omega's Company Secretary in which he stated:

> "It is my view that the management of the Company during the course of the last two years has been deficient in certain fundamental respects…Those deficiencies have been the cause of an appreciable decline in shareholder value during that time, resulting in a proposed cash price under the acquisition that would represent a very significant loss to shareholders.
>
> …"

23. On 1 February 2016, HMRC wrote to RSM stating:

> "…From my understanding the action was taken because Mr Robinson felt his shares were undervalued and took the court action resulting in an additional £1million payment. I consider that the shares themselves were the underlying asset as without those, there would not have been any action in the courts.

> Please confirm your agreement that the £1million should be chargeable as a capital gain or alternatively let me have your detailed arguments as to why this would not be chargeable. If you do agree with my view, please forward evidence of the cost which will be set off against the capital gain."

24. On 2 March 2016, Mr Robinson wrote to HMRC as follows:

> "With reference to…your latest letter to RSM of 1 February. My dispute with Omega's non disclosure to me as a major shareholder started in May 2010 and the subsequent Bermuda legal action commencing June 2012 lasted for 18 months and generated over 20 bankers boxes of paperwork in addition to an extremely large DVD of other documents. Some of these are covered by the confidentiality clause that you will have seen in the settlement document (Consent Order)…
>
> The case was complex, not least because of the legal problems of Omega being a London Listed company but Bermuda domiciled and thus subject to differing laws and procedures. This is why I couldn't bring an action in the UK…"

25. On 10 March 2016, Mr Robinson spoke on the telephone with Ms Musgrave of HMRC. Ms Musgrave's note in relevant part records:

> "Mr Robinson explained that there were some 25 boxes of legal papers in respect of the court case with Omega and that he was trying to tie down exactly what we would like to see.
>
> I asked if there were summary documents that we could see that would provide an overview of the court case and the reasons that Mr Robinson had pursued the matter through the Bermudian courts.
>
> Mr Robinson advised that there weren't any such documents as the way the legal system in Bermuda works is very different to that of the UK…
>
> Mr Robinson…advised that as a major shareholder with over a 3% holding in the company, stock market rules dictate that he should have been made aware of takeover bids and offers being made to the company. Omega refused to share this information with Mr Robinson but were sharing it with their corporate and other smaller investors.
>
> As Omega is a Bermuda domiciled company he had to pursue his request for information through the courts there as there was no way of doing this in the UK.
>
> …"

26. In March 2016, there were a number of emails between Mr Robinson and HMRC. Mr Robinson provided HMRC with a link to a press article relating to his dispute with Omega, and provided to HMRC documentation relating to legal costs he had incurred in the Bermuda litigation.

27. On 2 June 2016, Mr Smith of HMRC wrote to Mr Robinson as follows:

> "I have reviewed all the documentation supplied and I am still of the opinion that the compensation payment was linked to your shareholding in Omega Insurance and as such is chargeable to Capital Gains Tax. I would take into account the costs you have incurred which total £767,765 as per the invoices supplied.
>
> …"

28. On 2 August 2016, Mr Robinson emailed Mr Smith and Ms Musgrave. That email attached further documentation relating to legal costs he had incurred in the Bermuda litigation, and stated:

> "…I have approximately eighteen bankers boxes full of the paperwork from this long drawn out affair so please let me know what documentation you wish to see, as to date and following a couple of lengthy phone calls, I have simply referred Ms Musgrave to a handful of the publicly available documents and press articles.

29. On 3 August 2016, Mr Smith emailed Mr Robinson stating that he "hope[ed] to provide you with a full response by Friday 12th August 2016".

30. On 11 August 2016, Mr Robinson emailed Mr Smith stating "Let me know what documents about the lengthy legal case you need me to provide as it will take me a few days to go through the multitude of banker's boxes and DVD contents", to which Mr Smith replied "…We think you have provided enough documents so hopefully my next letter will not prove too onerous." Mr Robinson replied to Mr Smith stating "I wasn't aware that I had provided any documents except the bulk of my legal costs invoices. However I did refer Emma Musgrave to a couple of contemporary press articles but this was all according to my records?"

31. On 12 August 2016, Mr Robinson wrote to Ms Musgrave as follow:

> "…Yesterday I received an email from Mr Smith saying that after a chat you both felt I had provided enough documents already. This rather surprised me as what I have provided is only the merest tip of the iceberg and I do not understand how HMRC could deduce anything about the case and out of court agreement from these few documents. Thus I am posting you a large envelope of papers ranging from Press reports to analysis as well as some of the legal issues that I raised with Omega's Board of Directors from 2009 onwards…I have 18 bankers boxes of hard copy papers so please let me know what aspect of the case you wish to see, albeit the Bermuda Judge issued strict restrictions on certain discovery and other court papers…"

Enclosed with this letter were 140 pages including an extract from Omega's LSE listing document and press articles, press releases and market research notes. No "primary" documents (e.g. claim form, skeleton arguments, witness statements) were included.

32. On 16 August 2016, Mr Smith wrote to Mr Robinson as follows:

> "From the invoices previously provided including the Memery Crystal ones, you have evidenced £787,110 of costs to be set against the compensation payment of £1 million.
>
> I do not require any further invoices. I attach a copy of the information provided so far so if you would provide me with a breakdown of the further costs you wish to claim I will incorporate this into the computation of the capital gain and advise you of any additional tax to pay."

33. On 26 September 2016, Mr Robinson emailed Mr Smith as follows:

> "In reply to your letter dated 16 August 2016, I'm somewhat puzzled regarding your reference to 'computation of the capital gain'.
>
> The original advice I received and have had reconfirmed in the last two weeks is that this award falls into No 51 of the 1979 Capital Gains Tax Act 1979, s 19(4), (5). And thus is not subject to capital gains tax. This we believe to be the correct tax treatment in respect of the out of court award granted in my favour in September 2013.

> Specifically it only consists of compensation/damages for the way in which the Board of Omega failed to provide me with equal information to other shareholders and also their general failure to conduct takeover matters correctly as a public (listed) company. If you have documentary evidence to illustrate otherwise then please let me know but it cannot have emerged from the modest number of papers RSM or myself have provided since the beginning of the year.
>
> I have obtained 99% of the bills applicable which total £841,000 to date."

34. On 30 November 2016, Mr Tsang of HMRC, who had taken over the enquiry from Mr Smith, wrote to Mr Robinson as follows:

> "…
>
> So that I can progress the enquiry further and make an informed decision on whether compensation was that of a personal nature, or whether it was due to the underlying asset, could you please provide copies of litigation papers and/or other legal documents which were presented before the court that pertain to the nature of the claim, and the damages you have suffered as a result."

35. On 3 January 2017, Mr Tsang emailed Mr Robinson having received no reply to the 30 November 2016 letter.

36. On 3 January 2017, Mr Robinson emailed Mr Tsang as follows:

> "Thank you and as I only returned to London after a lengthy Christmas/New Year break on Sunday evening I intended to respond this week.
>
> …
>
> As to the question posed in your letter, it is exactly the same one that I have answered to Mr Smith on several occasions and the correspondence will be on your file. In addition, I had a couple of lengthy telephone calls with Ms Musgrave around April/May to explain the different nature of Bermuda Court proceedings and how they are severely restricted and do not sit easily with LSE regulations involving disputes concerning London Listed companies. I subsequently forwarded to Ms Musgrave a number of links and permitted information and she acknowledged receipt.
>
> I do not know how I can answer the same question in any other way than I have done in the 13 months since Mr Smith first contacted me."

37. On 5 January 2017, Mr Tsang wrote to Mr Robinson as follows:

> "…
>
> Having reviewed the correspondence between yourself and HMRC; specifically the legal action taken at the Supreme Court of Bermuda supplied by your advisors RSM in January 2016. The legal documents refer to a consent order and penal notice which details the financial settlement regarding the legal action and a request to provide documentation respectively. From what I can surmise neither of the documents discusses the basis or provides a summary of the legal action.
>
> …We would need sight of litigation papers and/or other legal documents which summarise the grounds for the action, detailing the nature of the claim, and the damages you suffered as a result. This is to allow us to form an opinion on the nature of the payment and to conclude either that the compensation was of a personal nature and is therefore not taxable or that it was due to the underlying asset and therefore subject to tax.

…"

38. On 5 January 2017, Mr Robinson emailed Mr Tsang as follows:

> "…your request appears to be exactly the same question as the answer I provided to Mr Smith a year or so ago. I simply do not know what to say in the circumstances as nothing has changed.
>
> The reasons for the legal action and supporting papers were provided to Mr Smith in the spring of 2016, these included a significant number of LSE documents which have to be read alongside the Listed Companies regulations for overseas companies. In this case to be read alongside the regulations pertaining to Bermuda domiciled companies (but LSE listed) where the Court action and full details are a public record."

39. On 9 January 2017, Mr Tsang emailed Mr Robinson stating:

> "…
>
> Other than the legal documents supplied by your advisors in January 2016 and a large batch of invoices supplied by yourself from April 2016, I can identify no other legal style documents.
>
> It is therefore difficult for me to accept the claim that the compensation payment was of a personal nature when no litigation papers and/or other legal documents have been provided to support that view.
>
> …"

40. On 31 January 2017, Mr Tsang wrote to Mr Robinson as follows:

> "Having reviewed the information you have supplied to date together with our recent exchanges of email, it is my view the sum of £1,000,000 (the 'compensation') received from Canopius Holdings Limited is chargeable within section 22(1)(a) Taxation of Chargeable Gains Act 1992. I believe the nature of the compensation is due to the underlying asset and related to the valuation of your shareholding in Omega…
>
> I have been unable to identify any legal documentation presented to the courts that supports your view the compensation was of a personal nature and therefore exempt under Section 51(2) Taxation of Chargeable Gains Act 1992.
>
> From your most recent email on 9 January 2017, I note the only way in which one can take action against a Bermuda domiciled company is that of 'value'. Again, this suggests the value of the shares being at issue. The motivation for legal action may have been to seek damages of a personal nature, however it does not affect the conclusion that the compensation was made due to the underlying asset.
>
> Without sight of litigation papers and/or legal documents which summarises the grounds of action, suggesting the nature of the claim is of a personal nature and the damages you have suffered as a result. I intend to apply the necessary amendments to your 2014/15 tax return to reflect my view.
>
> The costs attributed to the compensation from your email of 26 September 2016 of £841,000 will be set against the compensation of £1,000,000. This will result in a chargeable amount of £44,520.
>
> …
>
> Before I apply the proposed amendment, if you could please review your legal paperwork in a bid to identify any documents to suggest the compensation was of a personal nature. Please provide this by 2 March 2017.

…"

41. On 22 February 2017, Mr Robinson replied to Mr Tsang as follows:

> "Further to your letter dated 31 January, I am writing to advise you that I will need an extra 7 days before I can reply fully to your letter. This is because I have struggled to find some of the pertinent 2011,12 & 2013 papers in my archive boxes and have thus asked for copies from both firms of lawyers, London and Bermuda.
>
> Specifically, I am searching for a number of documents involving the six previously unsuccessful takeover/merger proposals that directly led to the Canopius deal of April 2012 as well as the redacted meeting notes from my UK barrister. Some of the papers I need have never been in my possession as the restrictions placed on them by the Bermuda Judge…stated that they must remain at all times with the lawyers involved in Bermuda and to a lesser degree Taylor Wessing LLP in London. Some documents from discovery were not even allowed to be shown to me during or since the legal process..."

42. On 8 March 2017, Mr Robinson sent a lengthy email to Mr Tsang "to summarise from a 'high level'…the major salient points I have previously made to your colleagues Mr Smith and Ms Musgrave…". The email detailed Mr Robinson's experience and involvement with Omega and the difficulties Mr Robinson says he encountered with the Omega Board. The email then records:

> "The action I commenced in mid 2012 was to obtain the details of the Canopius transaction which had been withheld from me but which I know was explained and discussed extensively with all the other major holders at meetings and presentations at the time. This was a breach of the company's articles and also the 2006 undertaking to follow the Takeover Code…The case centred on discovery which, due to Omega's refusal to provide me with the information provided to all the other major holders entailed three separate and very expensive Bermuda Court discovery actions…This is the reason why I took the action to discover the complete 'terms' of not just the Canopius transaction but all the other failed transactions since 2010…Omega were able using Bermuda corporate law to turn this into a question of 'value', albeit we managed to turn this into value in its broadest sense and covering most of the previous failed transactions…
>
> You have chosen to pluck some words from the Consent Order and I can understand why at first sight one might conclude as you have but the key issue is to remember that this document was drafted by Omega/Canopius and not by our side. This was to ensure that there was no reference or implication to any past Board or advisor historical conduct or failings from March 2010 to September 2013 as this would have certainly opened up a huge can of worms for UK lawyers to explore, particularly as the Board had overseen a halving of the share price during their tenure.
>
> This is why the last thing Omega were going to do was to allow all this information to be exposed in an open court hearing and thus well before the hearing date they offered me a sum to simply go away and ensure that all the information I had obtained through discovery remained hidden…
>
> Thus the Consent Order is a facade to disguise the true nature of the case…
>
> It is important to note that at no time other than describing my shareholder status was there any reference to quantum of my shareholding and there was no settlement calculation based upon this. Furthermore, if I had been seeking specific payment for my shares it is inconceivable that anyone would spend almost £850,000 in legal fees only to recover slightly more. My case was to

> discover what had been going on in the company I jointly founded and to potentially expose the truth as Omega's fall from grace after my departure in 2009 had been a source of great concern to me as well as creating reputational doubts aimed in my direction. As a result of disclosure I am relieved to have 99% of the necessary facts to explain what took place from 2010 onwards."

43. On 13 April 2017, Mr Tsang wrote to Mr Robinson as follows:

> "…it is difficult for me to accept your claim without [the] documents I have requested. Again, I would like sight of copies of litigation papers and/or other legal documents which were presented before the court that pertain to the nature of the claim, and the damages you have suffered as a result.
>
> …
>
> Please provide a response by 13 May 2015…"

44. On 11 May 2017, Mr Robinson acknowledged Mr Tsang's 13 April 2017 letter and said he would respond as soon as possible.

45. On 20 June 2017, Mr Tsang emailed Mr Robinson chasing a response to the 13 April 2017 letter.

46. Due to various issues arising from Mr Robinson's professional advisor moving firms, Mr Robinson did not reply to the 13 April 2017 letter until 22 September 2017. In a letter of 22 September 2017, Mr Robinson stated:

> "In my lengthy summary to you of 8 March, I reiterated…the nuances of the Bermuda legal process and the difficulties we faced over the very severe conditions placed upon us by the judge…which from the spring of 2013 stopped my own legal team, from sharing most of the discovery documents and thus court submissions with me personally…
>
> …
>
> I do not have and have not seen "the legal documentation presented to the courts" as this included masses of the privileged information, save for the initial two submissions for discovery which occurred many months before the period leading up to the proposed Court date of 30 September 2013…
>
> I have provided all the initial documentation that were the reason I commenced this action in May 2012, these include formal London Stock Exchange documents and a plethora of contemporary material which lays bare the scope and scale of the mistreatment I uniquely received during the period from 2010 to April 2012…This mistreatment was in complete breach of the regulations governing shareholder contact and information sharing at the time.
>
> …"

47. On 2 October 2017, Mr Tsang wrote to Mr Robinson as follows:

> "I have not received the information which I have requested and I have been unable to identify any legal documentation presented to the courts that supports your view the compensation was of a personal nature and therefore exempt under Section 51(2) Taxation of Chargeable Gains Act 1992.
>
> I have to draw conclusions from what has been provided that the compensation payment was taxable as it related to the value of your Omega shares.
>
> …"

The letter then went on to say that Mr Tsang was considering whether or not to impose a penalty under Schedule 24 of the Finance Act 2004.

48. During October and November 2017 further correspondence passed between the parties in relation to the proposed penalty. Mr Robinson also repeated points made in earlier correspondence as to why he believed the compensation payment to be exempt from Capital Gains Tax.

49. On 7 December 2017, HMRC issued a closure notice amending Mr Robinson's self-assessment return for the year ending 5 April 2014 to include an additional tax liability of £44,520. A penalty pursuant to Schedule 24 of the Finance Act 2017 was issued in the sum of £6,678.

50. Mr Robinson appealed against the 7 December 2017 decisions and requested that HMRC conduct a review.

51. On 24 February 2018, Mr Robinson emailed the Review Officer stating that he did not believe that HMRC had received the full details of the Bermuda litigation. However, no further documentation was provided to HMRC during the course of the review.

52. On 14 May 2018, HMRC concluded its review. The decision to amend Mr Robinson's self-assessment return for the year ending 5 April 2014 to include an additional tax liability of £44,520 was upheld. The decision to impose a penalty was cancelled.

53. In his evidence before me, Mr Robinson stated:

(1) At all material times he held 7.5 % of the shares in Omega, a company he had co-founded. He was also on the board of directors until 2009.

(2) In 2009 he was the "victim of a pincer movement by other board members and was suspended as a director".

(3) He was subsequently "shut out from the business".

(4) In 2009, he instructed UK lawyers to "try to get to the bottom of what was happening with the Company".

(5) Between 2010 and 2012, he suffered reputational damage because the Board were making comments about him including telling shareholders that the business needed to be "cleaned up" following the involvement of Mr Robinson.

(6) Throughout 2010, 2011 and 2012 there was "lots of incorrect information coming out of Omega which went from profit making to loss making". The Board said that these losses were due to the poor quality of the business that Mr Robinson had introduced to the business.

(7) Omega breached various regulatory obligations, including by not providing Mr Robinson with information that he was entitled to.

(8) Canopius made a bid to acquire Omega. Omega failed to comply with the City Code on Takeovers and Mergers including by not providing Mr Robinson with documentation relating to the Canopius bid (despite his request for this).

(9) He voted against the Canopius bid, but the bid was approved by the other shareholders.

(10) He took advice from Taylor Wessing who told him that his only route of challenge was s 106(6) of the Companies Act 1981 (Bermuda) as there was no separate way to challenge failure to comply with the Code on Takeovers and Mergers.

(11) He was advised that bringing a defamation action in the UK would not work in practice because Omega (based in Bermuda) would simply not turn up. Also, "to bring

any sort of reputation claim, I needed access to facts and documents and the only way to get those was through a s 106 claim".

(12) He "made a stock exchange announcement and had to refer to 'fair value' because if I had said it was about my reputation, it would not have been heard as the judge would have said this is not for the Bermudian courts."

(13) Having filed the s 106(6) application, Mr Robinson made applications for discovery.

(14) He retained Mazars to give an opinion/report on what "fair value" for his shares would have been. He "had to do this because the s106(6) claim was progressing under the heading of 'fair value'". But no report/opinion on fair value was ever filed with the Court or served on Omega.

(15) The purpose of commencing the claim was to facilitate applications for discovery. "the purpose of getting all this information was to vindicate my position – to prove that what Omega had said about me wasn't true, I wanted to preserve my reputation."

(16) The discovery applications were broadly successful, and Omega was obliged to disclose certain documentation.

(17) Shortly before the substantive hearing, Omega offered to settle the case.

(18) He "felt he had to settle as threats were made by some of the Omega directors that if I lost the claim in Bermuda they would look to bring a claim against me personally because I was making allegations of dishonesty."

(19) The £1million settlement figure was not arrived at "by any reference to my shares – just came up with a figure."

(20) If the s 106(6) claim had not settled, the judge hearing that case would have needed to determine what "fair value" was for his shares.

(21) The Claim Form (or other originating document) commencing the s 106(6) claim could not be provided to the Tribunal because of the confidential nature of the settlement.

(22) He has 18 boxes of documents relating to the Bermuda litigation and could produce further documents explaining the Bermuda litigation if need be.

DISCUSSION AND DECISION

54. A payment made to settle legal proceedings is clearly a "capital sum received in return for forfeiture or surrender of rights, or for refraining from exercising rights" within the meaning of s 22(1)(c) TCGA 1992.

55. There is no dispute that the Bermuda litigation was brought under s 106(6) of the Companies Act 1981 (Bermuda). That provision is concerned with "fair value" for shares. It is that s 106(6) claim that was settled and which resulted in the £1million payment being made to Mr Robinson.

56. I agree with the observations made in *Gadhavi v HMRC* [2018] UKFTT 600 at [71] that s 51(2) TCGA 1992 applies to damages for personal injury and defamation (although there may also be other causes of action that can be said to arise from "wrong[s] or injury suffered by an individual in his person or vocation"). In my view, a payment made for settlement of a claim that was brought under a provision relating solely to fair value for shares cannot be said to be damages/compensation for "any wrong or injury suffered by an individual in his person or in his profession or vocation" such as to bring the payment within the exemption provided

for in s 51(2) TCGA 1992. This is so regardless of the motives behind the commencement of the claim and/or the motives behind settling the claim. I am of the view, therefore, that the payment made to Mr Robinson is chargeable to Capital Gains Tax and is not exempt by virtue of s 51(2) TCGA 1992.

57. The above is sufficient to dispose of this appeal. However, even if the motive of Mr Robinson in bringing the claim (or the motive of Omega in settling the claim) could be relevant to whether the payment falls within s 51(2) TCGA 1992, I would still dismiss Mr Robinson's appeal.

58. Mr Robinson did not persuade me that the predominant motive behind his bringing the Bermuda litigation was anything other than obtaining fair value for his shares. Mr Robinson *now* says that this claim was really about protecting his reputation and vindicating his position. However, Mr Robinson has not produced any primary documents from the Bermuda litigation that support that contention. Mr Robinson said this is because he is prevented from so doing by confidentiality restrictions imposed on him (albeit he also said that he has 18 boxes of documentation relating to the Bermuda litigation that could be produced if need be). In the absence of such documentation (which Mr Robinson has had ample opportunity to provide, either from the 18 boxes in his possession, by asking his lawyers for further documents, and/or by seeking a release from any confidentiality restrictions), I am of the view that the predominant motive behind, and purpose of, the Bermuda litigation was to "determine a fair value of the Plaintiff's shares as at the time of the Acquisition" as was recorded in the statement that Mr Robinson released on 5 July 2012. That statement is also consistent with the letter sent to Omega on 1 June 2012 (which complains about reduction in share value).

59. I fully accept that Mr Robinson felt aggrieved by Omega's conduct and may well have thought that if the disclosure obtained during the s 106(6) claim revealed other causes of action he might well have considered taking further action and possibly bringing further claims. However, that there may have been other potential benefits to bringing the Bermuda litigation does not alter the fact that this was, both in form and substance, a claim relating to fair value for Mr Robinson's shares.

60. Nor has Mr Robinson persuaded me that Omega's reasons for settling the claim (in relation to which I have no evidence) were such as to mean that the payment made to Mr Robinson should be treated as a payment for a "wrong or injury suffered by an individual in his person". I acknowledge that the payment was made pursuant to an agreement which, in addition to settling the Bermuda litigation, also required Mr Robinson to waive any other claims he might have had (which would include any claim for loss suffered by Mr Robinson "in his person", such as a claim in defamation), but such releases are commonplace when litigation is settled. I am of the view that the presence of such releases cannot on the facts of this case alter the fact that the payment was made to settle litigation which, as I have found, was, both in form and substance, a claim relating to fair value for Mr Robinson's shares.

61. Accordingly, Mr Robinson's appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

DAVID BEDENHAM
TRIBUNAL JUDGE

Release date: 26 July 2019