NCN: [2021] UKFTT 237 (TC)

TC08186

Appeal number: TC/2016/04598
TC/2016/02742

INCOME TAX – relief for gifts of shares to charity – preliminary issue – market value of shares at three valuation dates

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) NEIL McARTHUR **Appellants**
(2) THOMAS BLOXHAM

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public by way of video hearing using the Video Hearing Service on 25 – 29 January 2021, 1 February 2021 and 19 February 2021

Mr Michael Firth of counsel instructed by way of direct access for the Appellants

Mr James Henderson and Mr Thomas Chacko of counsel instructed by HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

DECISION

INTRODUCTION

1. These appeals are lead cases pursuant to Rule 18 of the Tribunal Procedure (First-tier)(Tax Chamber) Rules 2009. The common or related issues of fact or law concern the market value of shares in Baa Bar Group Plc as at 19 February 2007, 13 August 2008 and 16 October 2009. The lead case directions provide that issues of valuation on these dates shall be determined as preliminary issues in the appeals.

2. Baa Bar Group Plc ("BBG") was the subject of a placing of shares and admission to the Channel Islands Stock Exchange ("CISX") on 21 November 2006. At the same time, BBG acquired the entire share capital of Baa Bar Limited ("BBL"). BBL's business was a well-established bar and pub operator, which at that time operated 7 bars and pubs in North West England.

3. The appellants acquired their shares in BBG in different circumstances. The first appellant, Dr McArthur invested in BBG in anticipation that it would purchase a business with the shares in BBG then being floated on a stock exchange. His holding amounted to 631,863 shares at the time of flotation.

4. The second appellant, Mr Bloxham had originally started the business of BBL in Liverpool in 1991. Mr Bloxham was a director and shareholder in BBL and in 2006 he and the other shareholders wished to sell the business. I set out below details of the deal. Briefly at this stage, the shares in BBL were sold to BBG for some £12m in cash, deferred consideration of £250,000 together with a number of shares in BBG being issued to Mr Bloxham and the other shareholders in BLL. Mr Bloxham's holding in BBG amounted to 1,551,608 shares at the time of flotation.

5. Since the flotation, both appellants have gifted shares in BBG to charity and have claimed income tax relief on those gifts based on what they contend was the market value of the shares at the time of the gifts. I understand that the relevant gifts with the price and value on which the appellants claimed relief are as follows:

Dr McArthur	**No of Shares**	**Price p**	**Value £**
3 Apr 2007	36,863	97	35,846
4 Apr 2007	234,632	97	228,156
13 Aug 2008	360,368	90	324,311
Mr Bloxham			
19 Feb 2007	250,000	110.5	276,250
11 Dec 2007	250,000	110.5	276,250
5 Aug 2008	250,000	115	287,500
3 Sept 2008	150,000	115	172,500
23 Jun 2009	200,000	115	230,000
16 Oct 2009	450,000	115	517,500

6. HMRC opened enquiries into Dr McArthur's tax returns for 2006-07 and 2008-09, and into Mr Bloxham's tax returns for 2006-07, 2007-08, 2008-09 and 2009-10. Closure notices were issued to Dr McArthur on 9 March 2016 and to Mr Bloxham on 22 February 2016. The closure notices amended the returns to reflect HMRC's view that the shares were valued 31.5p at each gifting date.

7. On the basis of the evidence in this appeal the parties invite me in their closing submissions to value the shares at the dates under consideration as follows:

	Holding being valued %	**Appellants' Valuation p**	**Respondents' Valuation p**
19 Feb 2007	1.44	108	8
13 Aug 2008	2.08	41	16
16 Oct 2009	2.60	56	16.5

8. It is not a binary choice and subject to issues of law I may find in the light of all the evidence that the value of the shares is anywhere in the ranges indicated above, or indeed outside those ranges.

9. Both appellants gave evidence and I also heard evidence from Mr Ian Currie, a corporate financier who was involved in the flotation of BBG and its acquisition of the business of BBL, and from Ms Elaine Clarke who was a director of BBL and BBG and was responsible for the day to day operation of the business in both companies.

10. I heard expert evidence from two experts in share and business valuations. Mr David Bowes, a partner in Bruce Sutherland & Co for the appellants and Mr David Mitchell, a partner in BDO LLP for the respondents. Both experts produced written reports and a joint statement identifying matters which were agreed and matters which were not agreed.

11. The parties' submissions addressed detailed and, in some respects, highly technical evidence from the experts. I am grateful to all counsel for their written and oral submissions which have helped me to assess that evidence. I have taken all the evidence and submissions into account, although of necessity I have not recited all the evidence and submissions in detail.

THE LAW

12. In the tax years relevant to these appeals, disposals of certain shares which were qualifying investments were eligible for income tax relief when gifted to charity. This was pursuant to *section 587B Income and Corporation Taxes Act 1988* ("ICTA 1988") in 2006-07 and *section 431 Income Taxes Act 2007* ("ITA 2007") in the later years. Relief was given by reference to the market value of the qualifying investment at the date of gift.

13. It is common ground that the shares in BBG were qualifying investments and that the market value of any qualifying investment is to be determined in accordance with the *Taxation of Chargeable Gains Act 1992* ("TCGA 1992"). The relevant provision is section 272 TCGA 1992 which at the material times read as follows:

> 272(1) In this Act 'market value' in relation to any assets means the price which those assets might reasonably be expected to fetch on the open market.
>
> (2) In estimating the market value of any assets no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole of the assets is to be placed on the market at one and the same time.

14. There are a number of authorities as to the basis on which a court or tribunal should approach the task of identifying the market value of assets including company shares pursuant to section 272. The following summary of the principles to be applied was common ground:

(1) The sale is hypothetical. It is assumed that the relevant property is sold on the relevant day (see *Duke of Buccleuch v IRC* [1967] AC 506 at 543 per Lord Guest).

(2) The hypothetical vendor is anonymous and a willing vendor, in other words prepared to sell provided a fair price is obtained (see *IRC v Clay* [1914] 3 KB 466 at 473, 478).

(3) It is assumed that the relevant property has been exposed for sale with such marketing as would have been reasonable (*Duke of Buccleuch v IRC* at 525B per Lord Reid).

(4) All potential purchasers have an equal opportunity to make an offer (*re Lynall* [1972] AC 680 at 699B per Lord Morris).

(5) The hypothetical purchaser is a reasonably prudent purchaser who has informed himself as to all relevant facts such as the history of the business, its present position and its future prospects (see *Findlay's Trustees v CIR* (1938) ATC 437 at 440).

(6) The hypothetical purchaser embodies whatever was actually the demand for the asset at the relevant time in the real market (*IRC v Gray* [1994] STC 360 at 372).

(7) The market value is what the highest bidder would have offered for the asset in the hypothetical sale (*re Lynall* at 694B per Lord Reid).

15. The parties made a number of submissions arising out of the application of these principles to the valuation of the BBG shares which I deal with in the discussion section of this decision.

16. The provisions of section 273 TCGA 1992 also featured in the expert evidence and in submissions and it is convenient to set them out here:

> 273(1) The provisions of subsection (3) below shall have effect in any case where, in relation to an asset to which this section applies, there falls to be determined by virtue of

section 272(1) the price which the asset might reasonably be expected to fetch on a sale in the open market.

(2) The assets to which this section applies are shares and securities which are not quoted on a recognised stock exchange at the time as at which their market value for the purposes of tax on chargeable gains falls to be determined.

(3) For the purposes of a determination falling within subsection (1) above, it shall be assumed that, in the open market which is postulated for the purposes of that determination, there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if he were proposing to purchase it from a willing vendor by private treaty and at arm's length.

17. It was common grounds that CISX was a recognised stock exchange and that section 273 therefore had no direct application to the valuation of shares in BBG.

FINDINGS OF FACT AND EVIDENCE

18. It is convenient to set out my consideration of the evidence and my findings of fact under the following headings:

(1) Background to BBL

(2) The setting up of BBG

(3) The purchase of BBL's business by BBG

(4) The flotation of BBG

(5) BBG following flotation

(6) Dr McArthur's acquisition and gifting of shares

(7) Mr Bloxham's acquisition and gifting of shares

19. I shall then go on to consider in separate sections, the relevant valuation principles, the expert evidence and my decision on valuation at the three relevant dates.

(1) Background to BBL

20. Tom Bloxham is a successful and well-known entrepreneur who founded Urban Splash, a property business specialising in urban regeneration. In 1991 he owned a mixed-use property in Fleet Street, Liverpool called the Liverpool Palace. The building was occupied by creative businesses and he wanted a facility for tenants and retail customers to have somewhere in the building to eat, drink and relax. In due course he set up BBL with Mr Miles Falkingham and Mr Jonathan Falkingham. Miles Falkingham was a graphic designer and Jonathan Falkingham was an architect and they designed the bar, which became known as Baa Bar.

21. Mr Bloxham held 50% of the shares in BBL and the Falkinghams each held 25%. They needed someone to run the bar and knew Ms Clarke from her work at a local café bar. She was employed to manage the business and was also to receive 10% of the

profits. The business became highly profitable and after a year or so instead of a 10% profit share Ms Clarke received a 10% shareholding which reduced Mr Bloxham's holding to 40%. Further shares were issued to Ms Clarke based on performance targets and she eventually come to hold 18.2% of the shares.

22. The business continued to be profitable. By 30 November 2005 it had an annual turnover of about £8m and profits after tax of some £924,000. This was despite operating conditions being described in the accounts for that year as "very difficult". The shareholders were all directors of BBL, together with Mr Mark Siney who had been appointed as finance director in January 2005.

23. By 30 November 2005 BBL had 7 bars as follows:

Bar	**Location**	**Opened**
Baa Bar	Liverpool, Fleet St	1991
Modo	Liverpool, Concert Sq	1997
Baa Bar	Manchester, Deansgate	2000
Baa Bar	Manchester, Sackville St	2002
The Bumper	Liverpool	2004
Oxnoble	Manchester	2004
Baa Bar	Wigan	2004

24. All the BBL bars, apart from the Oxnoble were aimed principally at students. The Baa Bar venues were fitted out to a formula with common design and materials included pop themes and colour. To a greater or lesser extent all the bars also served city centre residents, workers and visitors. The Oxnoble was a more traditional city centre gastropub which also offered accommodation.

25. At all material times, Fleet Street and Modo were the two most profitable sites. Ms Clarke described them as the "two powerhouses". With good summer weather, Modo in particular would be extremely profitable because it had a large outdoor area in Concert Square, Liverpool.

26. The business was to an extent weather dependent and seasonal. Good and bad summers could have a significant effect on sales, with more sales in a good summer. September and October were good times of the year for student customers and the run up to Christmas could also be a good time for business depending on the weather. The summer of 2006 was exceptionally good because of the weather. The World Cup was also played that summer, but it was predominantly the weather that had a positive impact on trade.

27. By 2006, Mr Bloxham and the other shareholders had decided that they wished to sell the business. Mr Bloxham in particular wanted to sell and concentrate on Urban Splash. Jenics, a firm of agents specialising in the sale of licensed premises was appointed to handle the sale in or about March 2006. Jenics and the shareholders had a figure of £15m in mind for a sale of the shares and potentially interested parties were circulated with details.

28. Separately, BBL was also intending to sell its premises in Wigan. Those premises comprised both trading premises and non-trading premises. Trading in Wigan had been extremely challenging in 2005.

(2) The setting up of BBG

29. Mr Currie was instrumental in the incorporation of BBG, its acquisition of BBL and the flotation on CISX. He has worked in corporate finance for many years and has extensive experience in floating companies on the London Stock Exchange and smaller markets. He has had considerable experience from 1990 onwards in floating smaller businesses on the Alternative Investment Market, including the use of what are known as shell companies. In the early 2000's, Mr Currie and Mr Richard Hughes set up Zeus Partners ("Zeus") as a corporate finance house which utilised "cash shells".

30. Typically, a cash shell would be a company which was incorporated and would then raise equity funding from investors with a view to purchasing an existing business and be floated on AIM. The business to be purchased might not have been identified at this stage but it was hoped that whatever business was identified would enjoy good growth. The hope was that when the business was identified, a combination of a strengthened board of directors, the introduction of cash to fund growth and a listing of the company shares would generate significant additional value for shareholders, including Zeus and its associates.

31. A key aspect of Mr Currie's approach to cash shells was to identify successful individuals or management teams and then to identify a business to harness their abilities. Zeus identified Mr Richard O'Sullivan as someone in this category. He had grown and subsequently sold the business of Millie's Cookies.

32. Mr Currie gave examples of flotations, including cash shells he had been involved in bringing to market. Clearly, the prospects of any company on flotation must be considered on its own merits. As Dr McArthur recognised, some cash shells would be successful whilst others would not. I am satisfied that Zeus had a good reputation amongst certain investors for creating value from cash shells.

33. In or about June 2006, Mr Currie was made aware that the Baa Bar business was for sale and thought that the Baa Bar brand would be perfect to roll out to a wider market by increasing the size of the chain. Mr Currie had previously been involved in a similar flotation on AIM of Inventive Leisure plc which rolled out a chain of bars called Revolution. In January 2006 he had been involved in a buy-out of the shares in Inventive Leisure plc by a private equity group. Mr Currie also wanted to take advantage of Liverpool's position as European Capital for Culture in 2008. Zeus researched the sector and considered that listed pubs and bars were an attractive proposition.

34. Later in 2006, Mr Currie identified Yorkshire Bank as being keen to support the purchase, flotation and expansion of the BBL business. By this stage Zeus were having certain difficulties with AIM in relation to their use of cash shells and so they met with CISX which wanted to compete with AIM.

35. BBG had already been incorporated by Zeus on 11 April 2003 with the name WC Co (17) Limited. A single subscriber share was issued to Mr Currie. The material before me included evidence of various name changes and dealings in the authorised and issued share capital of the company. There is no need for me to set out any detail of those dealings. By August 2006 it was known as Sharp Creation Plc ("SC Plc"). The following findings of fact are sufficient for the purposes of this decision.

36. By 25 August 2006, some 72% of the shares of SC Plc then in issue were held by Mr Currie and Mr Hughes. Other shares were held by individuals who were connected with Zeus or associates with whom Zeus had business dealings. The intention at that time was that the company would raise funds as a cash shell with a view to purchasing a business and then being floated on a suitable stock exchange.

37. The company launched an offer for subscription on 29 August 2006, seeking to raise approximately £3m through the offer of 3,351,650 ordinary shares at 91p per share ("the August Offer"). The shares ("the Subscription Shares") were to be the subject of a lock-in, precluding subscribers from disposing of the shares for a period of 2 years without the consent of SC Plc, save in certain specified circumstances. Subscribers also committed to subscribing a further 25% of the cost of their investment in additional shares by way of a share placing on flotation of the company. In the case of SC Plc, as in other cases, the target business was not identified to investors. Neither BBL nor its business were identified in the documentation as the target business. Further, CISX was not identified as the market on which the shares would be floated. The group of investors who were invited to subscribe and who did subscribe were content to invest without knowledge of the target business because of Zeus' reputation and track record.

38. Mr Currie's evidence was that whenever he was involved in the flotation of a cash shell at this time, the subscription shares would be locked in. The companies would always consent to a disposal by way of gift to charity, although the charity would also be subject to the lock-in. The placing price would also be set so as to give an uplift of 3x or 4x over the subscription price.

39. In the context of BBG, Mr Curry identified the placing price of 108p and in his evidence he sought to justify this by reference to the following matters:

(1) His assessment of the value of the business.

(2) The involvement of Mr O'Sullivan which would be looked upon favourably by the market.

(3) The fact that the business was going from being an unlisted private company to a listed public company.

40. Mr Currie said that he assessed the value of the business, and hence the flotation price of 108p and worked that back to a pre-flotation investment equivalent to 26.76p per share, taking into account changes to the share capital after the August Offer.

41. Dr McArthur applied for shares in the August Offer and paid the equivalent of 26.76p per share.

42. At some stage, which may have been before or after 29 August 2006, Zeus decided that BBL would be the target and SC Plc would be floated on CISX. At this time, AIM was concerned about cash shells being abused for the purposes of tax avoidance on gifts of shares to charity. Mr Currie had met CISX and was satisfied that CISX was diversifying from being a market for investment trust companies to competing with AIM for private company listings. Mr Currie accepted that the flotation of BBG shared the following common features with other cash shells he had been involved in floating:

(1) It was acquiring a trading entity on, or shortly before listing on a stock exchange.

(2) It involved private investors for whom a key motive for investing in such companies pre-admission was the availability of gift relief.

(3) An initial offer for subscription pre-admission was followed shortly after by a placing on admission at a price significantly higher than the subscription price; and

(4) Lock-in arrangements were in place for most shareholders going well beyond those usually required by the exchange rules

43. Mr Henderson described these features in closing submissions as a "charity shell scheme". I consider the relevance of this below.

44. The August Offer was undersubscribed, but it did raise £1,920,000 through the issue and allotment of 2,109,890 ordinary shares at 91p per share. The shares were issued on 15 November 2006. Subsequently there was a bonus issue and consolidation of the shares in SC Plc such that the equivalent cost per share of subscribers in the August Offer was 26.76p per share. The subscribers to the August Offer had therefore committed to invest a further £480,000 on flotation of BBG.

45. On 30 October 2006 the company changed its name to Baa Bar Group Plc.

46. At this stage Mr Currie and Mr Hughes owned 28% of the issued shares in BBG with a cost price of £2,895.

47. On 17 November 2006, BBG contracted to purchase the entire issued share capital of BBL ("the Acquisition Agreement"). I deal with the terms of that agreement and the circumstances of the acquisition in the next section.

48. By this time, the directors of BBG were as follows:

Richard O'Sullivan – non-executive chairman
Elaine Clarke – chief executive officer
Mark Siney – finance director
Stephen Charnock – non-executive director

49. It was not clear from the evidence how or why Mr Charnock came to be a non-executive director of BBG, but nothing turns on his involvement.

(3) The purchase of BBL's business by BBG

50. By June 2006 there were various offers on the table for the business of BBL in the range £9-13m. On or about 22 June 2006 a further offer was received from Zeus in the sum of £14.5m, subject to due diligence. Zeus had not been one of the interested parties identified by Jenics and it is likely that Mr Bloxham introduced Mr Currie and Zeus to the deal. He knew Mr Currie through a business leaders' organisation. The Zeus offer was conditional upon the existing management team remaining involved in the business, in particular Ms Clarke.

51. The shareholders of BBL considered that Zeus had made the best offer and Ms Clarke was happy to remain involved in the business. The Zeus deal involved a purchase of BBL by BBG and was intended to be conditional upon BBG shares being admitted to trading on CISX.

52. In September 2006, Hurst & Co Accountants LLP ("Hurst") were preparing a working capital review of BBL. A draft version was available in evidence ("the Working Capital Review"). Hurst were BBL's accountants and became accountants of BBG. The Working Capital Review included cashflow and profit and loss forecasts for the four years ending 30 November 2009. Ms Clarke had little recollection as to the preparation and detail of the Working Capital Review but I am satisfied that as the managing director of BBL shortly to become the CEO of BBG she would have been involved in providing information to support the Working Capital Review.

53. The Working Capital Review assumed eight site openings between January 2007 and September 2009. Six were described as small sites and two were described as large sites.

54. A draft sale agreement showed the consideration payable to the shareholders of BBL comprising an initial payment of £14,313,000, subject to certain adjustments. £500,000 of this sum was to be satisfied by the issue of shares in BBG to Ms Clarke. It was initially intended that the other shareholders would receive the whole of their entitlement to the proceeds of sale in cash. In the event, Mr Bloxham and the other shareholders agreed to roll over part of their entitlement into shares of BBG. This was at the suggestion of Zeus.

55. At this stage, BBG intended Mr O'Sullivan to be a non-executive chairman of BBG. Mr Bloxham spoke with Mr O'Sullivan about the business and was impressed with him. He already knew Mr O'Sullivan through a business leaders' group. Mr Bloxham believed that the business could be successfully rolled out.

56. The parties to the Acquisition Agreement were the shareholders in BBL as sellers and BBG as the buyer.

57. The final version of the Acquisition Agreement made provision for an initial payment of £13,363,224 together with a deferred payment amounting to £250,000. £1,350,000 of the initial payment was treated as being satisfied by the issue of shares in BBG. The deferred payment was payable one year after the date of completion, although in the event the repayment was restructured with interest being payable.

58. The consideration payable to the shareholders of BBL was therefore made up as follows:

(1) £12,063,224 in cash.

(2) Deferred consideration of £250,000 (“the Deferred Consideration”).

(3) 5,185,000 ordinary shares in BBG (“the Consideration Shares”).

59. The value attributed to the Consideration Shares in the Acquisition Agreement was £1,350,000 which was the equivalent of 26.04p per share.

60. It seems likely and I find that the provision for Consideration Shares to Mr Bloxham and the Falkinghams and the provision for deferred consideration were negotiated because the August Offer raised less cash than had been hoped.

61. The entitlements of Mr Bloxham and Ms Clarke pursuant to the Acquisition Agreement were therefore as follows:

	Holding in BBL %	**Cash Consideration £**	**Deferred Consideration £**	**Consideration Shares**
Mr Bloxham	40.9	5,040,558	102,250	1,551,608
Ms Clarke	18.2	1,932,106	45,500	2,081,784

62. The Consideration Shares were subject to a lock-in pursuant to clause 12 of the Acquisition Agreement for a period of 2 years. The holders were not entitled to sell the Consideration Shares during the lock-in period without the prior written consent of BBG, subject to certain exceptions.

63. The Acquisition Agreement was conditional on the admission of BBG’s shares to dealing on CISX. Mr Bloxham’s recollection was that the listing was intended to fuel growth in the business. He could not recall whether he or his advisers received asssurances as to the risk of this condition not being met.

64. On 17 November 2006, BBG entered into a facility agreement with Yorkshire Bank plc. Yorkshire Bank agreed to provide the following sums pursuant to the facility:

(1) £10.7m term loan facility,

(2) £1.4m revolving credit facility, and

(3) £1m bridging loan facility.

65. The term loan was repayable in instalments over 16 years. The revolving credit facility was repayable at the end of each interest period but subject to being renewed annually at the discretion of Yorkshire Bank. The bridging loan was repayable on receipt of the net proceeds of sale of BBL’s Wigan premises but in any event not later than 17 November 2007.

(4) The flotation of BBG

66. BBG published various documents in anticipation of its shares being listed on CISX. The documents included a "Listing Document" dated 17 November 2006 whereby BBG proposed to raise £480,000 before expenses by a placing of 444,444 new ordinary shares ("the Placing Shares") at a price of 108p per share. The Placing Shares represented the additional investment to which subscribers in the August Offer had committed themselves at the time of the August Offer.

67. The Listing Document set out historical financial information in relation to the business of BBL and in relation to its future prospects. This included the following information as to its financial performance and extracts from the narrative:

	y/e 30/11/03 £'000	**y/e 30/11/04 £'000**	**y/e 30/11/05 £'000**	**9m to 31/8/06 £'000**
Turnover	6,225	6,889	8,019	6,015
Cost of Sales	(1,886)	(1,814)	(2,023)	(1,469)
Gross Profit	4,389	5,075	5,996	4,546
Profit after Tax	935	1,259	924	926

> Trading up to and since 31 August 2006 has been in line with Directors' expectation and the Directors consider that this will continue to be the case for the remainder of the financial year. In addition, no material change to the business activities of the Group is anticipated.
>
> The strategy for the Company is to develop the Baa Bar brand by implementing a controlled roll out in city/town centres with high student populations, where the Baa Bar concept has typically proven to be most effective.
>
> The value of the investment in the Company is dependent upon the Company executing the roll out successfully. Whilst the Directors are optimistic about the prospects for the Company there is no certainty that the Company's anticipated revenues or desired level of organic growth will be achieved.
>
> The roll out strategy will involve the acquisition of new freehold/leasehold premises. Whilst the Directors are confident they can identify new sites for the Company there is no certainty that such sites will become available to purchase.
>
> The Directors are of the opinion that, having made due and careful enquiry, the working capital available to the Group will, from the time the Existing Ordinary Shares, Consideration Shares and Placing Shares are admitted to the DOL of the CISX, be sufficient for its present requirements that is for at least 12 months from the date of Admission
>
> At Admission the Company will have a relatively high level of borrowings. Poor trading and/or an increase in interest rates may create the risk that the borrower is unable to service the interest or debt repayment obligations or comply with the other requirements of the loan agreements.

> Admission to Listing on CISX should not be taken as implying that there will be a liquid market for the Ordinary Shares.

68. There was information in the Listing Document about a bonus paid to the directors in the year ended 30 November 2005. I shall consider that information and the relevance of it in my discussion of the issues below.

69. The 2005 accounts of BBL also included the following narrative in the Chairman's Statement:

> The financial year to 30 November 2005 has continued the strong development of the company, with the integration of our recent acquisitions (The Bumper, Liverpool and The Ox, Manchester) we operated 7 sites for the whole year.
>
> Despite very difficult operating conditions, overall sales have grown for the 13th consecutive year by a strong 16% to £8m, with gross profit margins improving by over 1 percentage point to 74.8%. However, pressure on overheads continued especially with increases in wages, utilities and insurance costs.
>
> Capital expenditure in the year was almost £1m, funded without the need for additional borrowing. Net debt is now less than £1.5m with interest charges covered 16 times.
>
> Modo and Baa Fleet also recorded their highest ever gross weekly takes in 2005, generating sales of £97k and £59k respectively during a single week in September. In that same month the company recorded its highest ever combined total weekly take of £247k.
>
> Trading at our Baa Wigan venue continues to be challenging with revenues down 40% compared with 2004. However, we remain confident that all our sites are well positioned for future growth.

70. The sum raised by the placing was to be used by BBG to fund the expenses of acquiring BBL, the share placing and admission to trading on CISX. In particular, a fee of £470,000 including VAT which was payable to Zeus.

71. In theory, BBG could have placed any number of shares at any price in the placing as long as the investors who invested in the August Offer were required to pay 25% of the sum initially invested. That was the further sum those investors had committed to invest in the placing. Whatever number of shares were placed at whatever price, the total raised by the placing would have been £480,000, which is 25% of the £1,920,000 raised by the August Offer. However, the more shares issued the more diluted the shareholders holding shares other than through the August Offer would become. Further, clause 12.4 of the Acquisition Agreement required BBG to ensure that the Consideration Shares represented at least 29.9% and no more than 29.99% of the shares. In the event, the Consideration Shares represented 29.91% of the shares in issue after the placing.

72. Mr Currie gave evidence as to how he arrived at the placing price of 108p which also became the quoted price on CISX. Mr Currie acknowledged that this evidence was

given by way of recollection of the valuation exercise he performed without access to Zeus' files.

73. As I understood his evidence, the valuation exercise Mr Currie carried out had also been used to give him the price of the August Offer which equated to 26.76p per share. In other words, Zeus calculated a value for the business equating to 108p and then divided by 4 to give early investors a price of 26p. In valuing the business of BBG he said that he essentially looked at what he viewed as two comparable businesses. Inventive Leisure plc mentioned above and Tasty plc which floated on AIM in June 2006.

74. Mr Currie's evidence was that someone at Zeus would have looked at the results for Inventive Leisure in the year ended 30 June 2005 and for Tasty in the year ended 31 December 2005. He calculated that Inventive had an enterprise value of £51m equating to a multiple based on earnings before interest and tax ("EBIT") of 11.6. Unlike Baa Bar, he considered that Inventive was "ex growth" and therefore applying a multiple of 15 to BBL's operating profits based on the 9-month period ending 31 August 2006 gave an enterprise value of £30.3m and a share price of 108p. In contrast, he calculated that Tasty had an operating multiple of 100.

75. Neither party relied upon Mr Currie's method of valuing the business for the purposes of the share valuation exercise I must perform. In the circumstances I need say no more about the valuation exercise performed by Mr Currie and I place no reliance on Mr Currie's valuation of 108p per share.

76. BBG shares were admitted to trading on CISX on 21 November 2006. At that stage its share capital was held as follows:

Subscription Shares	7,173,626
Placing Shares	444,444
Consideration Shares	5,185,000
Zeus & associates	4,533,339
Total	17,336,409

(5) BBG following flotation

77. Ms Clarke continued to run the business on a day to day basis together with Mr Siney as finance director. Board meetings were held once a month, which Mr O'Sullivan would attend. Ms Clarke would also meet Mr O'Sullivan quite regularly outside of board meetings to discuss the business.

78. Mr O'Sullivan was paid £15,000 per annum to be the non-executive chairman of BBG. BBG also issued shares to Mr O'Sullivan amounting to some 1.34% of the issued share capital as at the date of the placing. Mr Henderson suggested that this was a modest amount which would have reflected a limited role in the company and its growth strategy. Mr Currie's evidence was that BBG was also a vehicle for Mr O'Sullivan to introduce other transactions and he could make whatever he wanted of the role, with

reward possibly coming via an employee benefit trust or similar. I am satisfied that Mr O'Sullivan's remuneration was modest, but that his shareholding did give him some incentive to help grow the business.

79. The smoking ban came into effect in 2007 and had a negative effect on the business especially from 2008 onwards.

80. Sometime in 2007 BBG sold the non-trading Wigan premises for £410,000. The proceeds were used to partly settle the Bridging Loan of £1m. The balance of the Bridging Loan was repaid on the due date of 17 November 2007.

81. The Deferred Consideration payable to the former shareholders in BBL also fell due for payment on 17 November 2007. However, this obligation was restructured by agreement and interest at the rate of 10% was payable on the amount outstanding.

82. BBG continued to trade from its 7 bars, including Wigan. It opened the following new bars following the acquisition:

Location	Date
Manchester, Fallowfield	Sept 2008
Liverpool, Myrtle St	Sept 2009
Nottingham	2010
Leeds	2011

83. Opening a new bar takes about 12 months from finding a site, purchasing and refitting the premises to the commencement of trading. The roll out programme fell behind the assumptions which had been made in the Working Capital Review.

84. The Wigan bar was closed at some stage, although it still appears to have been trading in 2010, after the last valuation date.

85. There was only one trade in BBG shares on CISX in the years that followed. This was a trade of 10,000 shares on 3 April 2007. The circumstances of that transaction are not clear and neither party relied upon it as providing any assistance in determining the market value of the shares in BBG in this appeal. Mr Currie said that the fact there was only one transaction was disappointing "as CISX had promised liquidity". He said that buyers and sellers were not familiar with the market and some institutions would not invest in AIM listed shares or overseas shares. He said that this had damaged BBG because the business' strategy involved raising funds. I infer that Mr Currie attributed the lack of transactions at least in part to a lack of liquidity in its shares on CISX.

86. In 2006 and 2007, Baa Bar Fleet Street was the subject of allegations of violent conduct in and around the premises. New measures were introduced following discussions with police culminating in a licensing review by the local council in May 2007 at which conditions were attached to the licence.

87. The Annual Report and Financial Statements of BBG for the year ended 30 April 2007 ("the 2007 Accounts") were published on 27 September 2007. A preliminary public announcement was made on 30 August 2007 and the Chairman's Statement records as follows:

> The trading environment has been very difficult in the period since acquisition. Higher interest rates reduced consumer confidence and increased competition had a negative impact on trade.
>
> In addition, certain operational controls were enhanced ahead of a licence review hearing for Baa Fleet (Liverpool) which was a major factor in the reduced sales performance overall. This included the implementation of voluntary trading restrictions, installation of proof-of-age ID technology, increases in security personnel and the introduction of polycarbonate glasses.
>
> Also, Bumper (Liverpool) was heavily affected by new competition and suffered a substantial fall in sales.
>
> Against this backdrop, revenues have been disappointing with like for like sales decreasing by 9.3 per cent in the period 21 November 2006 to 30 April 2007.
>
> Overall gross margins remained strong across the estate but pressure on overheads impacted on profitability, especially with increases in wages and utility costs.

88. Audited accounts of BBL for the 17m ended 30 April 2007 were lodged with Companies House on 31 October 2007. The Directors' report contained a similar description of the company's trading. The trading outlook was described as follows:

> The current environment remains challenging and the inclement summer weather has had an adverse impact on trade Prior year comparatives also benefit from the strong performance experienced during the 2006 World Cup.
>
> Sales for the first 15 weeks of the current financial year were down 6 I per cent on a like for like basis but the trend is one of continuing improvement.
>
> Following a successful review hearing before Liverpool City Council Licensing Unit, we are confident that the performance at Baa Fleet will improve significantly and the recovery at Bumper is already well underway
>
> We are pleased to report that our Manchester and Wigan venues continue to deliver strong positive sales growth
>
> We are prepared for a challenging year …

89. The results for the 17m period may be summarised as follows:

	17m/e 30/04/07 £'000
Turnover	11,079

Cost of Sales	(2,726)
Gross Profit	8,353
Profit after Tax	1,686

90. BBG published an interim results announcement on 31 January 2008 presenting interim results for 6m ended 31 October 2007. These were unaudited results, and the announcement contained the following narrative:

> Group turnover for the period was £3,960,662.
>
> Earnings before interest, tax, depreciation and amortisation (EBITDA) was £982,007 with operating profit (before goodwill amortisation of £188,612) of £654,296.
>
> Overall, the operating profit for the period was £465,684 and the loss on ordinary activities after taxation was £10,236.
>
> Net debt at 31 October was £10,324,012.
>
> We reported previously that revenues, measured on a like for like basis declined by 6.1 per cent in the early part of the first half-year due, in part, to the unseasonably wet summer weather and onset of reduced consumer confidence.
>
> However, this position has improved, with a like for like sales decrease of 2.9 per cent in the full six-month period to 31 October 2007.
>
> Baa Fleet (Liverpool) remained a major factor in the reduced sales performance overall due to the voluntary trading restrictions implemented earlier in the period. Also, Bumper (Liverpool) continued to be affected by new competition resulting in a fall in sales. However, the trend at both venues continued to improve significantly throughout the period.
>
> Our three Manchester venues again achieved excellent like for like revenue growth of 4.3 per cent combined in the half-year to 31 October 2007.
>
> The current trading environment remains difficult.
>
> This is reflective of overall growing consumer caution and sustained competition. The effects of the smoking ban have impacted in recent months with the onset of cold and continuing wet weather.
>
> A bridging loan of £1,000,000 (advanced by Yorkshire Bank in anticipation of the sale of both the trading and non-trading Wigan properties) was partly settled with the disposal proceeds from the sale of the non-trading site for £410,000. The balance became payable and was duly paid on 17 November 2007.

91. The financial crash started to be felt by the business in 2008. It caused the valuation of BBG's licensed premises to fall which in turn caused certain difficulties for BBG with its bank.

(6) Dr McArthur's acquisition and gifting of shares

92. I have set out above the circumstances in which Dr McArthur came to acquire his shares in BBG.

93. Dr McArthur is a successful businessman with an engineering background. He has started several businesses during his career. One such business was Opal Telecommunications Limited which merged with Carphone Warehouse and later became Talk Talk Communications Limited. Talk Talk demerged from Carphone Warehouse in 2010.

94. Dr McArthur has implemented a balanced portfolio strategy and uses reputable professional advisers. His portfolio includes certain higher risk investments, such as investments in smaller companies and in what he called "pre-IPO" private companies. Dr McArthur used this description to include what Mr Currie described as cash shells, namely investing in private companies prior to an anticipated flotation, although there was no initial public offering as such. The shares issued on being admitted to the relevant stock exchange were issued to existing shareholders by way of a placing.

95. Dr McArthur has invested in a number of cash shells with the involvement of Zeus and Mr Currie. He described them as high-risk investments where he would expect a high number of failures but also several major successes, which has been the case. He has never invested solely to generate tax relief. Dr McArthur's evidence did trespass to some extent on matters that are properly the subject of expert opinion. To that extent I have disregarded it, and I focus on his evidence of fact.

96. Dr McArthur's investment in BBG was part of this investment strategy. The decision to subscribe in the August Offer may have been made by his advisers, who operated a discretionary portfolio for him which did not require them to consult with him prior to making an investment. In relation to the Placing Shares, he was obliged to purchase them under the terms of the August Offer and at the time he did not have any great knowledge about the business of BBL.

97. In 2004, Dr McArthur established a charitable trust called the Hamilton Davies Trust. Since then he has made gifts of shares which have been valued in excess of £10m to the trust, including shares in Talk Talk, Carphone Warehouse and other companies both large and small. Those gifts include the shares in BBG which are the subject of this appeal.

98. I should say that there is no question of any wrongdoing or impropriety on the part of Dr McArthur in relation to his gifts of shares, or the claims to relief which he has made in self-assessment returns. It is clear that Dr McArthur takes a dim view of HMRC's approach to their enquiry and to other enquiries concerning the valuation of shares acquired and gifted in similar cash shells. He has made complaints about HMRC's conduct. However, those matters are not relevant for present purposes. The issue I must determine relates solely to the value of the shares at the various valuation dates.

(7) Mr Bloxham's acquisition and gifting of shares

99. I have set out above the circumstances in which Mr Bloxham came to acquire the Consideration Shares.

100. Mr Bloxham has a number of charitable interests and has established a charitable trust. He has been advised as part of his general tax planning to consider gifting shares to the trust. Over the years he has gifted a large number of shares to the trust, and also to other charities. He has selected which shares to give to charity largely based on the inherent capital gain. Gifts of shares to charity are relieved from capital gains tax as well as receiving income tax relief on the market value of the shares.

101. Mr Bloxham did not recall any discussions with Zeus in connection with the flotation of BBG about gifting his shares to charity. His stockbroker would provide figures for the market value of all shares gifted in this way. Those figures were incorporated in Mr Bloxham's self-assessment returns. I should also say that there is no question of any wrongdoing or impropriety on the part of Mr Bloxham in relation to his gifts of shares, or the claims to relief made by Mr Bloxham in his self-assessment returns.

A charity shell scheme?

102. Mr Henderson invited me to find that the flotation of BBG was an example of what is known as a "charity shell scheme". Essentially this is an arrangement having the common features which Mr Currie accepted were present in relation to BBG. Arrangements such as this have been the subject of litigation in this Tribunal and in the courts. In *Netley v HM Revenue & Customs* [2017] UKFTT 442 (TC), a case before me involving similar issues to the present appeals, I was not satisfied that the flotation as a whole was structured in order to obtain the tax advantages of gift relief. The availability of gift relief was simply an incident of a successful flotation. I was also referred to the case of *Halsall v Champion Consulting Limited* [2017] EWHC 1079 (QB), a decision of HHJ Moulder sitting as a judge of the High Court. That case involved a claim for professional negligence by several claimants who had invested in a charity shell scheme based on assurances that the scheme would work and reduce their tax liability.

103. The underlying scheme in *Halsall* also bears some similarities to the present facts, indeed Zeus and Mr Currie acted in relation to the flotation of the various companies involved and Mr Currie gave evidence. However, I must be careful to make findings of fact based on the evidence before me, and not by reference to the evidence and findings made in *Netley* or *Halsall*.

104. It is not clear to me why HMRC seek to establish that the flotation of BBG was part of a charity shell scheme. Mr Henderson described it as "part of the background" to the flotation. However, HMRC do not say that Dr McArthur or Mr Bloxham were motivated by the availability of charity gift relief. Whatever the tax background against which BBG came to be floated on CISX, that background does not affect the market value of BBG's shares at the various valuation dates. Neither party seeks to rely on the valuation exercise carried out by Mr Currie in determining the placing price of 108p and the subscription price of 26.76p in the August Offer. The appellants contend that the market value on 19 February 2007 was 108p but that is derived from a specific

valuation method and places no reliance on the placing price or the quoted price on CISX.

105. Mr Firth on behalf of the appellants did submit that the subscription price of 26.76p was discounted to reflect the risk to investors that the cash shell may not make an acquisition and be listed on a stock exchange. Early stage investors such as Dr McArthur hoped and believed that the shares would increase in value following an acquisition and listing. Otherwise they would simply wait until the listing and purchase at that stage.

106. In response, Mr Henderson submitted that there was another explanation for investing in the August Offer at 26.76p, namely the availability of gift relief. Some investors, if not Dr McArthur, would invest in the belief that a four-fold increase in the share price on listing would give the opportunity to obtain gift relief. Indeed, on that basis the amount of gift relief would exceed the amount invested, which was the position in Netley.

107. Based on Mr Currie's evidence, I am satisfied that for some investors in the August Offer the possibility of tax relief on gifting shares to charity based on a 3 or 4-fold increase in the share price on flotation would have been a key motive for investing. However, others such as Dr McArthur were simply motivated by the possibility of investment gains and not by the availability of tax relief on gifts to charity. The flotation cannot therefore be described simply as a charity shell scheme.

108. In my view, even if this was a charity shell scheme, that fact is of no relevance to the valuation exercise that I must perform. If reliance was being placed on the 26.76p subscription price in the August Offer, on the placing price at the time of listing or on the CISX quoted price, then the existence of a charity shell scheme may have been relevant to my findings as to the market value of the shares.

109. The shares in SC Plc at the time of the August Offer bear no relation as far as valuation is concerned to the shares in BBG at the time of the placing or at any time thereafter. It was not publicly known at the time of the August Offer that BBL was the target. Once it was known that BBL was the target, the shares would be valued by reference to what was known at the time of valuation in relation to the underlying business.

THE EXPERT EVIDENCE

110. In this section I shall summarise the approach and conclusions of the two expert witnesses, Mr Bowes on behalf of the appellants and Mr Mitchell on behalf of the respondents. I also make some initial observations on their evidence before considering the issues more fully in my later discussion.

111. It is worth pointing out that the appellants originally relied on a different expert, Mr David Houghton who was unable to give evidence due to ill health. Mr Mitchell produced a supplemental report in response to Mr Houghton's report. Thereafter, Mr Bowes produced his report, there was a meeting between Mr Bowes and Mr Mitchell

and they produced a joint statement setting out matters which were agreed and matters which were not agreed. The sequence in which the expert reports were served is as follows:

2 November 2017	-	Mr Houghton's first report
3 November 2017	-	Mr Mitchell's first report
27 February 2018	-	Mr Mitchell's supplemental report
30 June 2020	-	Mr Bowes' first report
13 October 2020	-	Joint statement of Mr Bowes and Mr Mitchell

112. Both experts gave evidence of their opinion as to the value of relatively small minority interests in shares of BBG at the various valuation dates and gave reasons for their opinions. The respective valuations were as follows:

Valuation Date	Mr Bowes	Mr Mitchell
19 Feb 2007	108 p	8 p
13 Aug 2008	68 p	16 p
16 Oct 2009	49 p	16½ p

113. It is immediately notable that there is a significant divergence on valuation. Further, Mr Bowes shows the shares diminishing in value over the period and Mr Mitchell shows the shares increasing in value. The principal reasons for these differences are the different views of the experts as to the information available to the hypothetical purchaser, different weight given to the various methodologies considered and different assumptions used in applying those methodologies.

Mr Bowes' evidence

114. Mr Bowes set out a detailed description of the history of the business, both generally and from a financial perspective. He described some background to the pub, bar and tavern market sector and its outlook. He also considered CISX and the role of market makers on CISX, although he accepted that he had no expertise in that area. He described the history of the business and his view of the future prospects for BBG. The sources for some of the factual matters stated in Mr Bowes' report were not identified and it appears that some information may have been provided at a meeting he had with a Mr Cocker, and some more general information came from Mr Bowes' family members who had local knowledge. It is unsatisfactory that Mr Bowes did not always set out his sources and did not even have a clear idea of how Mr Cocker might have been involved with BBG. It appears that Mr Cocker was simply a business associate of Dr McArthur acting as an intermediary. Some of the information as to the future prospects of BBG was derived from the Working Capital Report. In the event, the appellants did not seek to say that the Working Capital Report would have been available to the hypothetical purchaser. None of this information really formed any part of Mr Bowes' valuation exercise, apart from a discounted cashflow exercise which is no longer relied upon. I proceed on the basis that the content of the Working Capital Report would not have been available to the hypothetical purchaser, although the

purchaser would have inferred that a working capital report had been prepared covering at least 12m from the date of the listing.

115. Mr Bowes went on to consider and explain various share valuation methodologies. In forming his opinion as to the value of BBG's shares Mr Bowes considered the following methods:

(1) The use of discounted cash flows ("DCF") to identify the present value of forecast future free cash flows. The cash flows are discounted back to the valuation date using a weighted average cost of capital. Mr Bowes used the DCF method with and without adjustment for a size premium. A size premium reflects the views of some valuers that increased risks attach to the shares of smaller businesses compared to the shares of larger businesses.

(2) The use of price earnings ratios ("p/e ratios") to capitalise the values of maintainable earnings in the form of profit on ordinary activities after taxation. P/e ratios are derived from broadly comparable listed company shares, subject to appropriate adjustments. Adjustments may be necessary to reflect differences between the unlisted company being valued and a listed company comparable. For example, a discount for lack of marketability which I consider in more detail below.

(3) Similar to the use of p/e ratios, another method uses multiples of earnings based on comparable transactions, where comparable businesses have been purchased or floated on a stock exchange.

(4) Using multiples of maintainable earnings before interest, tax, depreciation and amortisation ("EBITDA") to give what is known as the "enterprise value" of the underlying business. "Maintainable earnings" are an estimate of the annual earnings of a business likely to be achievable on an ongoing basis. Certain adjustments to the enterprise value are then made, for example for company debt and non-trading assets such as surplus cash. Multiples will generally be obtained from comparable listed companies or comparable transactions.

(5) The net asset value, which involves a revaluation of all the company's assets. This is not generally a method of valuation used for trading companies, but Mr Bowes used it as a "base figure".

(6) Transaction prices, which is the value attributed to the shares by reference to specific transactions in the shares. Mr Bowes took into account the price of 108p per share paid for the placing shares.

116. Mr Bowes used these six methodologies to estimate the value of the shares at each valuation date as follows:

Methodology	**19 Feb 2007**	**13 Aug 2008**	**16 Oct 2009**
DCF with size premium	139 p	88 p	68 p
DCF without size premium	168 p	108 p	82 p
P/e ratio – listed comparables	107 p	25 p	n/a
P/e ratio – transaction comparables	145 – 170 p	60 – 80 p	n/a
EBITDA multiple	95 p	42 p	12½ p

Net asset value	34 p	59 p	17½ p
Transaction prices	108 p	n/a	n/a
Conclusion	**108 p**	**68 p**	**49 p**

117. In expressing his conclusion as to the value of the shares Mr Bowes looked at certain averages of all the prices derived from each method. At the first valuation date this was 133p and led him to conclude that the placing price of 108p was "entirely reasonable" and he took that as the value of the shares. At the second valuation date, the mid-point between the median and the mean was 68p which he took as his valuation. At the third valuation date, the mid-point between the median and the mean was 49p which he took as his valuation. Mr Bowes therefore gave weight to all the various methodologies in reaching his opinion on valuations.

118. It is worth noting in relation to this table that the p/e ratio methods do not provide a value on 16 October 2009 because BBG sustained trading losses in 2008 at the post tax level. Further there were no recent transactions in the shares of BBG to give a value on the two later valuation dates.

119. Mr Bowes did not place reliance on the transaction whereby BBG acquired BBL. Indeed, he did not refer to it as potential evidence of value. He said in oral evidence that this was because he considered that following the acquisition of BBL the shares in BBG were listed shares, it had strengthened its management and BBG had finance in place to grow the business. He viewed it as a substantially different business.

120. Mr Bowes did not regard the price of 26.04p attributed to the Consideration Shares as being relevant to the valuation because it was completely at odds with the price subscribed for the August Offer which he viewed as 91p, and the 108p which was the placing price and the quoted price on CISX. As to the 91p, I note here for convenience that Mr Bowes did not appreciate that there had been a share reorganisation which meant that the equivalent price paid for shares in the August Offer was 26.76p

121. It is also convenient at this stage to make certain observations on the various methodologies adopted by Mr Bowes.

122. First, in relation to Mr Bowes' DCF calculations. Mr Bowes used various assumptions in his DCF calculations which in my view were unduly optimistic. For example, he assumed that the business would open 5 new bars a year from 2011 onwards. The Working Capital Report assumed 2 or 3 new bars per year up to 2009. I also consider based on the evidence that Mr Bowes was unduly optimistic in terms of the income per bar and unduly conservative in his estimates of capital expenditure.

123. I also consider that Mr Bowes was wrong to consider using the DCF method at the second valuation date, by which stage it was clear that the company had not opened any new bars. The DCF calculations were performed on the basis that the new bars expected to have been opened by that time had been opened. Mr Bowes said that he simply assumed that the company would "catch up" with the previous forecasts.

124. Secondly, in relation to p/e ratios. Mr Bowes explained why he didn't make any adjustment to reflect the fact that his comparables for p/e ratios were much larger companies listed on the London Stock Exchange. He took the view that there was a trade-off. As a smaller company, BBG had substantial growth potential although larger companies would be less risky because for example they were more diverse.

125. Mr Bowes' evidence as to the share price based on p/e ratios drawn from comparable transactions was not reliable. The source data he used at least appeared to have been drawn from Mr Houghton's report. In some respects, Mr Houghton's analysis of the data contained errors which found their way into Mr Bowes' report. Mr Bowes was unable to give a satisfactory explanation either for the source of his figures or for the apparent errors in his figures. In the end, rather than further research the position and delay the hearing, he decided that he would not rely on this methodology.

126. Thirdly, in relation to the use of EBITDA. In calculating maintainable earnings Mr Bowes used the 9m accounts to 31 August 2006, which he extrapolated to give a 12-month figure of £2,383,500. In fact, Mr Firth pointed out and I accept that this should have been £2,372,000. He used a multiple of 11.73 which was derived from EBITDA multiples of 7 comparable companies, including well-known names such as Greene King and Marston. I shall consider the calculation of EBITDA and the multiple in more detail below. Mr Bowes' calculation gave a share price of 95p, however that also appears to include a transposition error in that he used an incorrect multiple of 11.37. Using a multiple of 11.73 would have given a share price of 100p.

127. On the second valuation date, the interim results for the 6m ending 31 October 2007 showed net debt as £10,324,012. In his calculation of the equity value, Mr Bowes deducted net debt of £9,818,785. Mr Bowes could not say where he obtained his figure for net debt.

128. Fourthly, in relation to net asset values. Because this was a trading company, Mr Bowes expressed the view that it was not appropriate to use a net asset valuation, however he did consider that such a valuation at least gave a base value. He did not explain in his report how he came to a net asset value of 34p. In cross examination he accepted that the calculation used net assets for BBL as at 31 August 2006 of £5,966,000 derived from the Listing Document. He divided this by the number of shares in issue to give a net asset valuation of 34.4p. However, he accepted that he ought to have used the net assets of BBG at 31 August 2006 which was £3,754,000 and would give a net asset value per share of 21.6p.

129. Mr Bowes' evidence was that there is an uplift in the value of unlisted shares if those shares are listed. The uplift derives from greater marketability or liquidity and upon listing any discount for lack of marketability ("DLOM") would fall away. He stated that in his experience the uplift was at least 30%.

Mr Mitchell's evidence

130. Mr Mitchell gave a rather more succinct description of BBL's business and said very little about the market sector and its outlook or about CISX. He discussed the

various valuation methodologies that I have described above in the context of Mr Bowes' report.

131. Mr Mitchell's view was that a DCF approach could not be used at any of the valuation dates because the forecasts necessary to adopt such an approach were not in the information available to the hypothetical purchaser.

132. Based on the information which Mr Mitchell considered would be available to the hypothetical purchaser, his opinion was that in valuing the shares on 19 February 2007, a transaction based approach using the purchase of BBL by BBG on 17 November 2006 was the most appropriate methodology, including a discount for lack of control ("DLOC"). He also considered it appropriate to test the reasonableness of the resulting valuation by comparing it to valuations using EBITDA and EBITDA multiples based on listed company comparables and transaction comparables.

133. The listed company comparables used publicly available EBITDA multiples, adjusted for an equity bid premium and private company discount. An equity bid premium reflects the fact that a premium will be paid in order to gain control of a target company compared to the price of a minority interest. There was an issue as to the purpose of a private company discount. I discuss these factors further below. Mr Mitchell then reduced the multiple derived from his analysis by a DLOC and DLOM.

134. The transaction comparables were sourced by Mr Mitchell from a database called Capital IQ, which I understand is a market intelligence database available by subscription. The database provided information in relation to company acquisitions from which EBITDA multiples were available or could be calculated.

135. Based on the information which Mr Mitchell considered would be available to the hypothetical purchaser, his opinion was that in valuing the shares on 13 August 2008 an EBITDA multiple approach using multiples based on listed company comparables was appropriate. Similar adjustments to those described above were used. No alternative methodology was used because the only comparable transaction was prior to the 2008 recession and there were no recent transactions in relation to the business or its shares.

136. Mr Mitchell used the same approach for valuation on 16 October 2009, namely an EBITDA multiple approach. He was able to identify a comparable transaction but because there was only one transaction, he did not consider it appropriate to use that methodology.

137. Using these methodologies, Mr Mitchell derived the following values per share at each of the valuation dates:

Methodology	**19 Feb 2007**	**13 Aug 2008**	**16 Oct 2009**
Transaction price	8 p	n/a	n/a
EBITDA using:			
Listed company comparables	33 – 36 p	16p	16½p
Transaction comparables	5 – 16 p	n/a	n/a

Conclusion	**8 p**	**16 p**	**16½ p**

138. Mr Mitchell noted that his view led to an increase in value between 19 February 2007 and 13 August 2008 despite the market generally deteriorating between those dates. That was because the information available to the hypothetical purchaser indicated an increase in maintainable EBITDA of BBG at the later dates.

139. I deal with Mr Mitchell's evidence in more detail in the discussion below.

Joint statement of experts

140. A joint statement was prepared after service of the expert reports referred to above. The joint statement followed a meeting of the experts and subsequent email correspondence between the experts. By way of summary, Mr Bowes and Mr Mitchell disagreed on the following matters:

(1) The information available to the hypothetical purchaser at the various valuation dates.

(2) The basis on which maintainable earnings of BBG at the various valuation dates should be identified.

(3) The basis on which EBITDA multiples at the various valuation dates should be identified.

(4) Whether BBG was in a position to fund the intended roll out programme.

(5) Various assumptions made in Mr Bowes' DCF calculations.

(6) The need for DLOC and DLOM adjustments.

(7) Whether the mere fact of listing gives an uplift in value.

(8) The effect of listing on CISX on the liquidity of the shares.

(9) Whether it was necessary to analyse BBG's market in detail.

(10) The relevance and significance of the transaction whereby BBG purchased the shares of BBL in November 2006

(11) Whether Mr Mitchell was right to apply a bid premium and then a private company discount.

(12) Whether the EBITDA multiples should recognise that the growth in BBG was organic whereas growth in the listed company comparables was by way of acquisitions.

141. I shall deal with the relevant areas of disagreement in so far as necessary in my discussion in the following sections of this decision. For reasons which appear below, it will not be necessary to consider all the areas of disagreement.

The parties' submissions on the expert evidence

142. It is appropriate at this stage to consider the way in which the parties invited me to address the expert evidence in the course of their closing submissions.

143. Both parties were agreed that I should focus not on the experts' opinions as to the market value of the shares, but on the reasoning supporting those opinions (see *Kennedy v Cordia (Services) LLP* [2016] UKSC 6).

144. Mr Firth, on behalf of the appellants did not in the event expressly rely on Mr Bowes' expert evidence to any great extent. Instead, he invited me to value the shares on the basis of a multiple of EBITDA, deducting BBG's net debt from the resulting enterprise value to give the "equity value", which is the value attributable to the shares. Mr Firth made submissions based on the underlying evidence as to BBG's maintainable EBITDA and the appropriate multiple at the various valuation dates. He did rely on some of Mr Bowes' reasoning in identifying the EBITDA and the appropriate multiple. He did not seek to rely on Mr Bowes' use of DCFs, p/e ratios, net asset values or transaction prices.

145. Mr Firth's submissions as to the market value of the shares at the valuation dates using this methodology may be summarised as follows:

	19 Feb 2007	**13 Aug 2008**	**16 Oct 2009**
EBITDA	£2,372,000	£2,092,433	£1,936,558
Multiple	12.8	8.37	10.3
Enterprise value	£30,361,600	£17,513,664	£19,946,547
Net Debt	(£11,700,000)	(£10,324,012)	(£10,169,206)
Equity value	£18,661,600	£7,189,652	£9,777,341
Price per share	**108p**	**41p**	**56p**

146. It can be seen that the market value Mr Firth invites me to find is the same as Mr Bowes for 19 February 2007, lower than Mr Bowes for 13 August 2008 and higher than Mr Bowes for 16 October 2009. It is a matter of coincidence that Mr Firth and Mr Bowes both reach a figure of 108p for 19 February 2007, given that they have used a different approach to derive that figure.

147. In contrast, the respondents simply invited me to prefer the evidence and approach to valuation of Mr Mitchell.

148. There was no dispute between the parties as to the net debt of BBG at each valuation date. The following table compares Mr Firth's submissions as to the EBITDA and multiples to be used in an earnings method to the figures used by Mr Mitchell which are relied on by the respondents:

	19 Feb 2007	**13 Aug 2008**	**16 Oct 2009**
Appellants' EBITDA	£2,372,000	£2,092,433	£1,936,558
Respondents' EBITDA	£1,793,805	£1,810,000	£1,936,558
Appellants' Multiple	12.8	8.37	10.3
Respondents' Multiple	11/11.5	8.25	8/8.5

149. Mr Firth invites me to use an EBITDA calculation at the first valuation date, whereas Mr Mitchell uses a transaction price based on the transaction whereby BBG purchased the business of BBL on 17 November 2006. That is a difference of approach which I shall consider in my discussion below.

150. In relation to transaction prices, Mr Firth submitted that the transaction in which BBG purchased the shares in BBL should not be taken into account because some reasonably prudent purchasers would use an earnings based valuation method which even on Mr Mitchell's evidence would result in a higher market value. The highest bidder would therefore arrive at a price based on earnings. In relation to the two later valuation dates, both parties invite me to use an EBITDA calculation.

151. The issues between the parties in carrying out the EBITDA calculations concern the following matters:

(1) The level of maintainable EBITDA.

(2) The estimate of an appropriate multiple.

(3) Whether any DLOC or DLOM should be applied and if so how those discounts should be calculated.

152. In light of Mr Firth's approach to the evidence of Mr Bowes, Mr Henderson submitted that an expert's opinion should normally be accepted unless it is disputed by other expert evidence or is inconsistent with the Tribunal's findings of fact. The Tribunal should not develop its own alternative theory, even if that alternative theory is put forward by counsel. In support of that submission, I was referred to a decision of the Upper Tribunal in *Ball UK Holdings v HM Revenue & Customs* [2018] UKUT 407 in which I sat with Falk J and where we stated as follows:

> 41. What is a matter for a court or tribunal, however, is the proper assessment of expert evidence. Clearly a judge may prefer the evidence of one expert to that of another, but this should be fully reasoned and the judge should not simply "develop his own theory" (see for example *Devoran Joinery Co Lt v Perkins (No. 2)* [2003] EWCA Civ 1241 at [24]).
>
> 86. In making findings of fact, the FTT took the proper course of considering the conflicting expert evidence and explaining in detail why it preferred the evidence of Mr Chopping to Mr Chandler … But whilst clearly not required to follow the views of either expert slavishly, it is important that the FTT avoids any impression of forming its own views on factual matters that are not clearly supported by evidence.

153. Mr Henderson criticised Mr Firth's submissions on the basis that he was putting forward his own alternative theory as to valuation of the shares. I do not consider that Mr Firth is putting forward an alternative theory. He is adopting a method of valuation which was considered by both experts and which both experts applied, albeit with different inputs giving rise to different outputs. It is necessary in applying that method to make certain value judgments as to the appropriate inputs.

154. Mr Henderson also relied upon passages from a recent decision of Mr Justice Martin Spencer in *Griffiths v TUI UK Limited* [2020] EWHC 2268 (QB). That case concerned a claim by a holidaymaker against a tour operator for damages for breach of contract having contracted a gastric illness whilst on holiday. The County Court Judge dismissed the claim and the case was said to raise a fundamental question as to the approach to expert evidence which was "uncontroverted". In particular, whether it was open to the court in those circumstances to reject the reasoning and conclusion of the expert on the issue of causation. The only expert evidence before the court on the question of causation was the claimant's expert report and that expert's written answers to questions put to him. The expert did not give oral evidence and was not cross-examined. In that sense his evidence was "uncontroverted".

155. The expert's opinion was that the claimant had suffered gastric illness caused by consumption of contaminated food at the hotel where the claimant was staying. However, the judge accepted various criticisms about the expert report made by counsel for the defendant, including criticisms that the report contained a number of assertions which were "bare ipse dixit", in other words assertions without any proof or reasoning.

156. In the present case there is evidence from two expert witnesses, and both have been cross examined at length. Their reasoning has been tested in cross examination and cannot be said to amount to bare assertion, save possibly in relation to one matter. That matter concerns what is called "put option theory" which I consider in more detail below.

157. In my discussion below I shall consider the different inputs and reach my conclusion based on all the evidence before me. In light of all the evidence, including the expert evidence, I consider that Mr Firth is entitled to put forward a case in closing submissions which draws from different aspects of the evidence and invites different value judgments. It seems to me that is what he has done.

DISCUSSION

158. The issues which arise for determination in identifying the market value of the shares in BBG at the various valuation dates concern the following matters:

(1) The information available to the hypothetical purchaser.

(2) The appropriate valuation methods.

(3) The correct measure of EDITDA.

(4) The correct EBITDA multiple.

(5) Whether there should be a DLOC and/or a DLOM

159. Before considering the issues in more detail it is convenient to deal with a number of preliminary matters. Firstly, a submission by Mr Firth as to the correct approach to be taken in identifying market value and secondly the burden of proof. I then go on to consider the issues in the context of each valuation date.

Identifying the market value

160. Mr Firth submitted that it would be an error to try and identify the characteristics of a typical market participant and ask what that person would have paid. I agree. The exercise is concerned with the price payable by a reasonably prudent purchaser, who is informed from the information available as to all relevant facts concerning the business, its present position and its future prospects. A prudent purchaser will not be unduly cautious or unduly optimistic.

161. Mr Firth criticised Mr Mitchell's evidence on the basis that Mr Mitchell was not looking to identify the highest price that a reasonably prudent purchaser would pay for the shares. He submitted that once it is acknowledged that there are different methodologies which may be used to value shares, the question is which of those methodologies produces the highest value. Mr Firth submitted that the proper approach should be to exclude any unreasonable methodologies and look to see what values the remaining methodologies produce. The highest of those figures will be the market value.

162. It was said that a clear example of Mr Mitchell's error was his approach to the roll out which in his view would be impossible to achieve because BBG had insufficient funds. If a hypothetical purchaser took a different view, then that purchaser would value BBG more highly than someone who took Mr Mitchell's view.

163. In support of his submission, Mr Firth relied on the following dicta from the cases cited above:

> "We must decide what the highest bidder would have offered in the hypothetical sale in the open market, which the Act requires us to imagine took place at the time of Mrs. Lynall's death." (*re Lynall* at 694B per Lord Reid)

> "The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable." (*IRC v. Gray* at 372 per Hoffmann LJ)

164. Mr Henderson submitted that this was wrong as a matter of authority. He relied on dicta of Lord Morris in *Duke of Buccleuch v IRC* [1967] 2 WLR 207 and of Ungoed-Thomas J in *re Hayes Will Trusts* [1971] 1 WLR 758. In the latter case it was stated:

> It has been established time and again in these courts, as it was in our case, that there is a range of price, in some circumstances wide, which competent valuers would recognise as the price which 'property would fetch if sold on the open market'. Neither the section [7(5) Finance Act 1894] nor Sankey J. [in Earl of Ellesmere v Inland Revenue Commissioners [1918] 2 KB 735] requires that the top price of that range should be the price fixed for estate duty. That price together with the lowest price in the range, may be expected to be the least likely price within the range, to be obtained from the open market. The most likely price, in the absence of consultation between the valuer representing conflicting interests, would presumably be the mean price.

165. In my view the correct approach is straightforward. It is a case of identifying the highest price a reasonably prudent purchaser would pay. Not the highest price a range

of reasonably prudent purchasers might pay. Expert evidence is a proxy for the reasonably prudent purchaser and different valuers might come up with different estimates. In that case, it is necessary to consider on the balance of probabilities and based on the reasoning of the experts who is right or where in the range the highest price lies.

166. Mr Henderson made a fair point that the test can be looked at both ways. The valuer is looking for the highest price the hypothetical purchaser would pay and the lowest price the hypothetical vendor would accept. Where they meet, is the market value of the shares. It is also the case that section 272 envisages a single price which is the market value.

167. I do not accept Mr Firth's broader submission that different reasonably prudent purchasers might use different valuation methods. In my view, valuation is not simply a question of choosing one methodology and excluding consideration of other methods. In any particular case it is likely to involve looking at various methods, giving different weight to each method and arriving at a best estimate of the highest price the hypothetical purchaser would pay. Mr Firth accepted that proposition in his oral closing submissions. On that basis, the prudent purchaser would not simply look at one method of valuing a company's shares to the exclusion of all other methods. Indeed, Mr Bowes looked at certain averages of all the methods he considered in order to reach his conclusions. Mr Mitchell's approach was in fact closer to Mr Firth's submission, but even he used other methods by way of a reasonableness check. Having said that, I consider Mr Mitchell made an error in not taking into account his EBITDA approach at the first valuation date. I consider that the approach I am adopting is consistent with the authorities cited to me.

168. Mr Firth also submitted that in applying a methodology, if some reasonably prudent purchasers would take an optimistic view, for example as to maintainable earnings, then those views should be taken into account in applying the methodology. I do not accept the basis of that submission. It is not that different reasonably prudent purchasers might take different views as to maintainable earnings. I am concerned with the view of a reasonably prudent purchaser. If a reasonably prudent purchaser considered that there were a range of possible views as to the level of maintainable earnings, it is necessary to identify within that range what would be the highest price the reasonably prudent purchaser would pay, without being unduly optimistic or unduly pessimistic.

169. For example, Mr Mitchell accepted that there may be a range of views as to value in the market. This was in the context of comparing his valuation of 8p to the value attributed to the Consideration Shares of 26.04p. He accepted that others may reasonably take a view on a higher value. That must be right, and the question then becomes what weight to place on the different methods, which might depend in turn on the level of confidence the purchaser has in relation to the assumptions made in applying the method. The reasonably prudent purchaser would consider both values and may decide to discount one and use the other, or adopt one method but to adjust the price to reflect the result of the other method. That was effectively Mr Bowes' approach and I consider he was correct as a matter of principle.

Burden of proof

170. An issue arose in closing submissions as to the burden of proof. The closure notices which are under appeal amended the appellants' claims to relief to reflect HMRC's view that the market value of the shares at each valuation date was 31.5p. Mr Firth submitted that the burden of establishing that the value of the shares was higher than 31.5p lay on the appellants, whilst the burden of establishing that the value was lower than 31.5p lay on the respondents.

171. On the present facts, the question of where the burden of proof lies is academic. For the reasons which follow I can be satisfied from my findings of fact on the balance of probabilities as to what the market value of the shares was at all material times.

Information available to the hypothetical purchaser

172. The starting point in determining the market value of the shares in BBG is to identify what information would have been available to the hypothetical purchaser.

173. There was a dispute the between the parties as to whether the hypothetical purchaser would have access to the following information:

(1) Documents referred to in the Listing Document which were available for inspection for 14 days following the date of that document, in other words until 1 December 2006.

(2) Information from BBG that would indicate a bonus paid to directors in the year ended 30 November 2005 was exceptional and was unlikely to have been paid in the year to 30 November 2006.

174. Mr Bowes had also maintained that the Working Capital Report would have been available to prospective purchasers. That was in connection with his DCF calculation. In the event, the appellants did not rely on any DCF calculations.

175. Section 272 does not say anything about what information is to be treated as available to the hypothetical purchaser in valuing the asset. Section 273 makes provision for certain information to be assumed as being available where the asset being valued is shares which are not quoted on a recognised stock exchange. It was introduced after the decision of the House of Lords in *re Lynall*, mentioned earlier. The section itself has no application in the present appeal because the shares in BBG were quoted on a recognised stock exchange.

176. The arguments before me did not explore in any detail the relationship between the principles applicable to identifying information available to a purchaser of shares which are quoted on a recognised stock exchange, the exchange's regulations in terms of disclosure of information and the law relating to insider dealing.

177. Subject to that, the reasoning in *re Lynall* is applicable to the present appeal, although it concerned a private company not listed on a recognised stock exchange. The confidential information in that case included the fact that a flotation of part of the company's capital was being considered.

178. The Court of Appeal in *re Lynall* had held that it should be assumed that the prudent purchaser would make all reasonable enquiries and that he would receive true and factual answers to reasonable enquiries. Hence, information as to the flotation would have been available. The test was by reference to what a reasonable board of directors would disclose, and not what the particular board of directors would have disclosed.

179. The House of Lords held that a sale in the open market would not involve release of any confidential information to prospective purchasers. Such information was not to be taken into account in ascertaining the market value of the shares. A sale in the open market was contrasted with a sale by private treaty, where such confidential information might be available.

180. Lord Reid stated at p696A that there was no general rule that directors must be supposed to disclose information which they were not obliged to disclose. He continued:

> The farthest we could possibly go would be to hold that directors must be deemed to have done what all reasonable directors would do. Then it might be reasonable to say that they would disclose information provided that its disclosure could not possibly prejudice the interests of the company. But that would not be sufficient to enable the respondents to succeed.

181. Having said that, Viscount Dilhorne at least did not treat as confidential information accounts of the company already prepared and awaiting presentation to the shareholders.

182. Section 273(3) now provides that the prudent purchaser is to be assumed as having available all information which he might reasonably require from the vendor if the sale were a sale by private treaty.

183. The respondents' case was that the documents identified in the Listing Document and available for inspection for 14 days would not be available to the hypothetical purchaser at the valuation dates. In fact, this issue only seemed to affect the availability of the terms of BBG's borrowings from Yorkshire Bank which in turn was relevant to whether BBG had sufficient finance to implement the proposed roll out of bars.

184. If the respondents are right, this could cause a "cliff edge" on valuation. In other words, there might one value on day 14 when the documents could be inspected and a different value on day 15 when the documents had ceased to be available for inspection.

185. It seems to me that is an unlikely and artificial outcome. Once documents are in the public domain there are good reasons in the context of share valuations to treat the information contained in those documents as continuing to be available to the hypothetical purchaser. There is no reason why a reasonable board of directors would refuse to provide information to a prospective purchaser where that information had previously been made public during the process of listing the company's shares. However, the issue is of relatively minor significance in these appeals. In any event I am satisfied for reasons stated elsewhere that the prudent purchaser would have been

satisfied that funding was in place for the roll out, even without sight of the terms of BBG's borrowing arrangements with Yorkshire Bank.

186. The second issue concerns a bonus paid to directors in 2005, and whether it was exceptional. A Due diligence report in relation to taxation produced in connection with the flotation was not publicly available. It included consideration of BBL's corporation tax return for the year to 30 November 2005 and said as follows:

> In this year, bonuses have been paid to the directors in order to reduce the profits chargeable to corporation tax and to ensure that quarterly payments of corporation tax were not required.

187. The report indicates that the bonuses were paid principally for corporation tax purposes and as a tax efficient way of extracting value from the business by its owners, who were all directors. It was not simply part of a remuneration package for working directors.

188. I do not consider that such a report would have been made available to a prospective purchaser at the valuation dates.

189. Mr Firth also referred in closing for the first time to what appears to be a sales memorandum produced by Jenics at the time it was marketing BBL for sale. The memorandum included a summary of the profit and loss account for 2004 and 2005 with what appears to be a forecast for 2006. The 2005 figures are adjusted to add back the director's bonuses, presumably to make the figures comparable. The document had not been put to any witnesses and on the material available to me I do not consider that it would have been available to the hypothetical purchaser at the valuation dates.

190. Mr Firth argued that even if these documents were not available to a prospective purchaser, information that the 2005 bonus was exceptional would have been made available by a reasonable board of directors to a prospective purchaser of a relatively small minority interest in the shares of BBG. Both experts expressed views on this, but I do not consider it is a matter for expert evidence. It is a value judgment for the Tribunal as to whether a reasonable body of directors would disclose to a prospective purchaser of the shares in February 2007 that the bonuses paid in the year ended 30 November 2005 had been exceptional and had not been paid in the year ended 30 November 2006.

191. In my view, a reasonable board of directors of a listed company would not volunteer such information to a prospective purchaser of a relatively small minority interest in BBG's shares in February 2007. There would be no reason for the board to do so, even if the information was not price sensitive. Again, in any event this conclusion is not determinative of the issue. For reasons given elsewhere, I consider that there was enough information otherwise available to the hypothetical purchaser from which to conclude that the bonus paid in 2005 was likely to have been exceptional.

(1) Valuation on 19 February 2007

192. This valuation date is only 3 months after BBG purchased BBL and was floated on CISX. It is common ground that the following information would have been available to the hypothetical purchaser:

(1) The audited accounts of BBL for the year ended 30 November 2005.

(2) The Listing Document dated 21 November 2006 which included accounts of BBL for the 9m ending 31 August 2006.

(3) Audited accounts of BBL for each of the 3 years up to an including the year ended 30 November 2005

193. It would also have been known that a working capital report had been prepared in relation to the listing of shares on CISX, although I have found that the contents of that report would not be available.

194. Mr Mitchell considered that the most appropriate valuation method on this date should be based on the transaction whereby BBG acquired the entire share capital of BBL. Information about that transaction was contained in the Listing Document. The hypothetical purchaser would know that BBG had made an initial payment of £13,363,224 together with a deferred payment amounting to £250,000. £1,350,000 of the initial payment was treated as being satisfied by the issue of the Consideration Shares. The total consideration was therefore £13,613,224 which Mr Mitchell has taken as the enterprise value of BBG's business in February 2007.

195. I have already noted that Mr Bowes considered that the business operated by BBG was substantially different from the business operated by BBL because BBG was a listed company and in a position to grow the business. In fact, BBG had much more debt than BBL because it had borrowed some £11m to fund the purchase. Fundamentally, it was the same bars and the same CEO.

196. This was an arm's length transaction between the previous shareholders and directors of BBL and BBG. It also included a transaction whereby part of the consideration was satisfied by the issuing of Consideration Shares. I am not bound by the value attributed by the parties to the Consideration Shares, but it is in my view evidence that I can take into account in identifying the value of the BBG shares in February 2007.

197. Details of the Yorkshire Bank facilities would also have been known from the Listing Document. In particular, that there was a term loan facility of £10.7m, a revolving credit facility of £1.4m and a bridging loan facility of £1m. Mr Mitchell made an assumption that the revolving credit facility was for working capital purposes and that the balance of £11.7m was being used to fund the purchase of BBL. On this basis he calculated an equity value of £1,913,224 which equates to a share price of 11p per share as follows:

	£
Enterprise value	13,613,224
Loans	(11,700,000)
Equity value	1,913,224
Share price	11p

198. Whilst the appellants contended that this was not a valid approach because it was valuing a different business, there was no dispute that as a matter of calculation the approach indicated a share price of 11p. Mr Mitchell then discounted that price by 29.5% to 8p to reflect a DLOC and DLOM. I deal with the need for a DLOC and a DLOM later in this discussion.

199. Mr Mitchell went on to compare this valuation method with an EBITDA approach using comparable listed companies and comparable transactions to identify an appropriate multiple. He estimated maintainable EBITDA for BBG to be £1,793,805 which was the EBITDA of BBL for the year ended 30 November 2005.

200. In calculating an appropriate multiple, Mr Mitchell adjusted the data for the comparables to reflect an equity bid premium and a private company discount. The equity bid premium was applied to the market capitalisation of each listed comparable company. The equity bid premium applied by Mr Mitchell was 26% and reflects the premium which would be paid to gain control of the company.

201. The adjustment for a private company discount was 24% and in his report Mr Mitchell stated that this reflected the fact that BBG shares were illiquid and that BBG was smaller in size and less diversified than the listed comparables. In his oral evidence he stated that it also adjusted for various other features of private companies compared to listed companies, such as less access to capital and finance.

202. Mr Mitchell therefore increased the market capitalisation of the listed comparables by 26%, and decreased the resulting figure by 24%. Net debt was then added back to give the enterprise value of each comparable and the enterprise value was divided by the latest available EBITDA to give the relevant multiple.

203. In calculating an appropriate multiple for BBG, Mr Mitchell considered revenue growth, EBITDA growth and EBITDA margin of the comparables and of BBL for calendar years 2003, 2004 and 2005. Based on that comparison he considered that generally BBL fell into the lower quartile of the results and the he should therefore use a multiple in the lower quartile which was in the range 11 to 11.5. A combined DLOC and DLOM of 29.5% was then applied to give a valuation for BBG shares of 33 – 36p.

204. A similar exercise using comparable transactions gave a valuation of 5 – 16p. Mr Mitchell identified 10 comparable transactions involving acquisitions of pub companies ranging in value from £56m to £571m. Data from Capital IQ enabled him to calculate the multiple applied to EBITDA for each of the transactions. He decided to apply a multiple from the first quartile of those multiples, giving a range of 7.25 – 8.75. This was on the basis that smaller transactions appeared to warrant lower multiples. He did not consider that any adjustment was necessary for a bid premium because the transactions already included a bid premium. Further, there was no private company discount because the calculations used the actual price paid for the target company.

205. Mr Mitchell considered that overall, the price of 8p per share based on the transaction value in November 2006 was supported by the comparable transaction method.

206. It is important to note that Mr Mitchell decided not to rely on the value attributed to the Consideration Shares in the acquisition of BBL which was 26.04p. he said this was because it was unclear to him how that value had been arrived at. He also decided not to rely on the subscription price of 26.76p in the August Offer or the price indicated by his EBITDA exercise, although his reasons for not relying on the EBITDA method are not clear to me.

207. Mr Mitchell preferred the transaction based approach and wanted to see whether there was anything that "jumped out" to suggest that the transaction was not between unconnected parties or to suggest that it would not be reasonable to use it or that it was not a good benchmark. He considered that the EBITDA valuation was not "profoundly different" from the transaction price. Clearly Mr Mitchell held a firm view that the best valuation method was the transaction-based approach.

208. Mr Firth criticised Mr Mitchell's approach because he failed to rely on the EBITDA approach using listed company comparables from which Mr Mitchell calculated a significantly higher price of 33 – 36p. In my view this is a fair criticism.

Outlook for the business

209. Mr Mitchell did not give any consideration to Baa Bar's target market of students and the prospects for that market in terms of growth. Having said that, Mr Bowes' analysis was entirely qualitative and did not really feed into any quantitative analysis as to the effect such growth prospects might have on the value of BBG shares.

210. I am satisfied from the Listing Document that BBG had a strategy for growth and that growing student numbers supported that strategy. The directors were optimistic about the prospects of successfully rolling out the business and were of the opinion that the business' working capital was sufficient for at least 12 months. Mr O'Sullivan had been appointed as non-executive chairman which potential investors would view positively. General market sentiment in February 2007 was high. The share prices of listed companies in the same sector had broadly been rising since early 2006.

211. Mr Mitchell concluded his report as to the valuation at this date by saying that BBG did not appear to have cash available to fund the planned roll out programme, which aimed to open 2 or 3 bars per year. Further it did not appear to be in a position to fund the programme by additional borrowings.

212. In reaching his conclusion that BBG did not have funding in place to achieve the planned roll out, Mr Mitchell did not take into account the terms of the loan facility agreement between BBG and Yorkshire Bank, save to the extent that it was summarised in the Listing Document.

213. The appellants relied on the terms of the facility agreement which was one of the documents available for inspection for 14 days until 1 December 2006. It provided as follows:

> 3 PURPOSE
>
> 3.1 The Borrower must apply the proceeds of:

> (a) the Term Loan, the Bridging Loan and the Initial Revolving Loan in or towards payment of the purchase price under the Acquisition Agreement, payment of the Acquisition Costs and the refinancing of certain liabilities of Target;
>
> (b) any subsequent Revolving Loan for the acquisition, development and/or refurbishment of properties.
>
> 4.2 Revolving Loans
>
> (a) The obligations of the Lender to make any Revolving Loan (except for any Rollover Loan) available shall be subject to the following further conditions precedent:
>
> > (i) satisfaction of the Lender that the purpose of the relevant Revolving Loan is to fund the acquisition and/or fit out of a Property (whether freehold or leasehold) other than the Existing Properties.

214. It is not really clear from the loan agreement how the revolving loan facility worked, but Mr Mitchell's evidence was that even if the revolving loan facility was available to fund the roll out, the £1.4m would not be sufficient. The business was highly geared and would also have to fund interest on the loans.

215. Mr Firth submitted that Mr Mitchell was wrong to assume that the roll out was impossible. The fact the bank had made funds available for the roll out was a strong indication to the market that the roll out could be achieved.

216. I accept that Mr Mitchell was wrong in his assessment that the hypothetical purchaser would consider that BBG's roll out plans were impossible. In my view the hypothetical purchaser would consider that BBG's plans for expansion were likely to be realistic and supported by a working capital report prepared for the benefit of BBG, and by Yorkshire Bank's agreed lending. Having said that, the hypothetical purchaser would still recognise and take into account uncertainty as to whether the business could successfully expand.

217. Clearly a purchaser who believed that the roll out of bars and growth of the business could be achieved would value the business more highly than a purchaser who did not believe that it could be achieved. I can see how the feasibility of a roll out would directly affect a valuation using a DCF model. It is less easy to quantify how it might affect valuations using other models, save that it might encourage a more optimistic view of the company's prospects and go to balance any caution about the way in which, for example maintainable earnings and the EBITDA multiple are to be estimated. I bear this in mind when I come to consider those matters.

218. Mr Firth criticised Mr Mitchell's approach to valuation based on the acquisition of BBL by BBG. He submitted that Mr Mitchell had failed to consider whether 8p represented the highest bid reasonably obtainable. Some purchasers would rely on the price paid in the August Offer and/or the value attributable to the Consideration Shares. I have already rejected Mr Firth's submission as to how as a matter of principle I should approach the valuation exercise.

219. I agree with Mr Mitchell that a reasonably prudent purchaser would not place any weight on the price paid in the August Offer. At the time of the August Offer the identity of the business was not known. In my view, whatever was paid for the shares in the August Offer gives no indication as to the value of the shares after the business has been acquired. Mr Firth submitted it was an indication that investors believed that once a target was acquired and the shares were listed they would be worth considerably more. Otherwise there would be no reason to take the risk. I do not accept that submission. By February 2007 BBG was effectively a trading company, owning the business of BBL. The hopes and expectations of the subscribers to the August Offer were water under the bridge. As Dr McArthur said, cash shell investments were high risk where a high number of failures could be expected, as well as some successes. By February 2007, what mattered in terms of valuation were the fundamentals of the business being operated.

220. Mr Mitchell acknowledged in cross-examination that the process of obtaining a listing would add credibility to the company, for example in terms of corporate governance. This can help in terms of the ability to raise equity finance and possibly bank finance. Indeed, the Yorkshire Bank facility was conditional on BBG being listed on CISX. I accept this evidence and that of Mr Bowes to the effect that a listing can add value to a share price, although it seems to me that the added value arising other than as a result of increased liquidity is difficult to quantify.

The Consideration Shares

221. In relation to the Consideration Shares, Mr Firth argued that the price attributed to the Consideration Shares in the Acquisition Agreement is not indicative of market value because they were locked-in and it appeared that the vendors were simply given the same price as the early subscribers via the August Offer. He submitted that some market participants would have used an earnings-based approach to value the shares.

222. In relation to the lock-in, Mr Mitchell agreed that shares subject to a lock-in would be worth less that shares not subject to a lock-in. That would suggest that if the agreement for the Consideration Shares was otherwise an indication of market value, then the market value of the shares without a lock-in would be higher than the 26.04p attributed to the shares in the Acquisition Agreement.

223. As to the suggestion that Mr Bloxham and the other vendors were simply given the same price as the subscribers to the August Offer, there is no evidence to that effect. The witnesses were unable to recall how the parties arrived at a price of 26.04p for the Consideration Shares. Indeed, Mr Mitchell said that it was unclear to him how the 26.04p had been arrived at and that was why he did not take the transaction into account in reaching his conclusion as to the value of the shares in February 2007.

224. What is known is that Mr Bloxham and the other shareholders who received the Consideration Shares were very close to the business and the deal. There is no reason to think that they misunderstood the value of the business, or the value of the business in the hands of BBG. There is also no reason to think that the value attributed to the Consideration Shares in the Acquisition Agreement was anything other than an estimate of a value negotiated at arm’s length. In my view the hypothetical purchaser would put

weight on the price attributed to the Consideration Shares. Mr Mitchell acknowledged in cross-examination that the price did give him pause for thought.

Measure of EBITDA

225. The issues between the parties in estimating EBITDA may be summarised as follows:

(1) Whether it should be calculated by grossing up the most recent accounts of BBL for the 9m ended 31 August 2006 or by using the results for the year ended 30 November 2005.

(2) Whether there should be any adjustments in relation to the directors' bonus included in the accounts for year ended 30 November 2005 or for the remuneration of the non-executive directors who took office at the time of flotation.

226. Mr Bowes grossed up the 9m accounts and made no adjustment for directors' remuneration because he considered that the bonus paid in 2005 was exceptional. Mr Mitchell did not use BBL's results for the 9m ended 31 August 2006, which were available in the Listing Document. He did not explain in his report why he did not use those results. In his supplemental report, provided in response to a report by Mr Houghton, Mr Mitchell gave two reasons why it was not appropriate to simply gross up the 9m figures:

(1) because no bonus payment was included in the 9m accounts, which he assumed was because the financial year had yet to be completed, and

(2) because two non-executive directors had entered into service agreements and their salaries would need to be taken into account.

227. Mr Mitchell did not at this stage consider seasonality as a reason not to use the 9m accounts. Having heard the evidence about seasonality and that summer 2006 was very good for trade, he considered that was another reason not to use the grossed up 9m accounts. In his opinion it was better to use the 2005 accounts because they did not require "subjective adjustments".

228. I accept that grossing up the 9m accounts might give undue weight to a very good summer period. However, it would not give any weight to trade in September and October which was also generally good because the bars are mainly student bars.

229. I can see that the hypothetical purchaser would prefer to use figures which do not require any adjustment, especially where the need for an adjustment is uncertain or the extent of an adjustment is difficult to quantify. However, in my view the hypothetical purchaser would also prefer to use more up to date figures. There is effectively a trade-off.

230. On balance, I consider that the hypothetical purchaser would gross up the EBITDA for the 9m ended 31 August 2006 and take an average of that figure and the EBITDA for the year ended 30 November 2005. Indeed, Mr Mitchell adopted a similar approach when estimating EBITDA at the second valuation date.

231. The question which then arises is whether the hypothetical purchaser would make any adjustment for directors' remuneration.

232. Mr Mitchell accepted that if the reason the bonus was paid was to reduce profits chargeable to corporation tax then it was exceptional. However, the reason the bonus was paid is only apparent from the tax due diligence report which was not information available to the hypothetical purchaser. The Listing Document identifies that the two executive directors had been given new service contracts on 17 November 2006 which included a discretionary bonus scheme. However, there was no information as to what bonuses might be paid under the discretionary bonus scheme. I do not consider that a reasonable board of directors would provide information as to whether bonuses would be paid and if so in what sum to the prospective purchasers of a relatively small minority interest. Mr Firth submitted that the board of BBG would inform a purchaser that the 2005 bonus was exceptional to prevent a misconception in the market which would depress the share price. I do not accept that submission.

233. However, in my view even without such information the hypothetical purchaser would consider that the bonus paid in the year ended 30 November 2005 was likely to have been exceptional.

234. The Listing Document shows that no bonuses were paid in 2003 or 2004. It also shows that in 2005 the total emoluments of the directors excluding the bonus increased from £79,000 in 2004 to £135,000 in 2005. Mr Siney had been appointed as finance director in January 2005 and it seems likely that his appointment explained the bulk of the increase. The emoluments of the highest paid director including bonus, which is likely to have been Ms Clarke, increased from £79,000 in 2004 to £134,000 in 2005, which included her share of the total bonus of £310,000. It is likely therefore that Ms Clarke's bonus amounted to only £55,000 of that sum which is some 18% of the total bonus, which appears consistent with her shareholding in BBL. It is clear from the 2005 accounts that there are only two full time directors, Ms Clarke and Mr Siney.

235. The hypothetical purchaser would appreciate that in the year ended 30 November 2005, BBL was an owner managed business and that bonuses would be one method of extracting value from the company. In future, BBL would not be an owner managed business and bonuses would be discretionary. They would be expected to reflect performance of individual directors and would be subject to scrutiny by shareholders.

236. In my view it is likely that the hypothetical purchaser would consider that the bonus was not simply additional remuneration for the executive directors, but was connected with a one-off extraction of value by shareholders who were also directors. After November 2006 the business would not be what was effectively an owner-managed business.

237. On that basis, no adjustment should be made in the 9m accounts for directors' bonuses. Similarly, the cost of the directors' bonuses in the November 2005 accounts should be added back as an exceptional item. The total to be added back including employers' national insurance contributions would be approximately £340,000.

238. It is also clear that on flotation the salaries of the executive directors were increased. Ms Clarke was to be paid £120,000 pa and Mr Siney was to be paid £75,000, in each case with discretionary bonuses. In addition, there were salaries of the non-executive directors. Mr O'Sullivan was to be paid £15,000 pa and Mr Charnock £10,000 pa. The total basic salaries of directors was therefore £220,000 pa compared to £135,000 pa in the year ended 30 November 2005. In my view the hypothetical purchaser would factor the additional directors' emoluments of some £95,000pa including employers' national insurance. I do not consider that the hypothetical purchaser would take a view that given the intended roll out, in the medium term the additional cost of this remuneration would be covered by increased profits. The cost was known, but the increased profits were not certain. The adjustment to be made to maintainable earnings based on the 2005 accounts is therefore a net increase of £245,000.

239. EBITDA for the year ended 30 November 2005 was £1,793,805. The adjusted EBITDA would therefore be £2,038,805.

240. The 9m accounts to 30 August 2006 show EBITDA of £1,779,000. The directors' remuneration included in that figure was £118,000. Going forward, that remuneration would be at the level of £220,000 pa, requiring a deduction from EBITDA of approximately £52,000 including employers' national insurance. This gives EBITDA for the 9m of £1,727,000. Grossed up for a 12m period gives EBITDA of £2,302,667.

241. Taking an average of the two adjusted figures gives EBITDA of £2,170,736.

Correct Multiple

242. Mr Firth made various criticisms of Mr Mitchell's approach in identifying the relevant multiple as being in the range 11 – 11.5. He submitted that BBG should have been treated as average within the group of comparables rather than in the lower quartile. Such an approach, he said would also be consistent with the information available as to BBG's growth prospects.

243. Mr Mitchell's calculation of the multiple range involved adjusting the comparables for a bid premium and a private company discount. He did not provide the unadjusted figures, but went on to make further adjustments for DLOC and DLOM. Mr Firth carried out a calculation which he said reversed the adjustments for a bid premium and private company discount to give an unadjusted average multiple for the comparables of 12.8. I would stress that this was a calculation carried out by Mr Firth and not Mr Bowes. The reason Mr Firth did this was to then consider the effect of all the adjustments put forward by Mr Mitchell. On that basis it was not necessary to consider the adjustments for a bid premium and a DLOC because it is accepted that in Mr Mitchell's approach they matched each other. Mr Firth then focussed on adjustments for a private company discount and the DLOM.

244. When I consider the expert evidence of Mr Bowes and Mr Mitchell as to the appropriate multiple, there is actually very little between them. Mr Bowes' evidence was that the multiple should be 11.73 and Mr Mitchell's evidence was that it was in the

range of 11 – 11.5. The real dispute between the experts was the need for a subsequent adjustment for a DLOC and a DLOM.

245. In comparing BBG to the listed company comparables, Mr Mitchell looked at revenue growth, EBITDA growth and EBITDA margin for the comparables and for BBG in the three calendar years to 31 December 2005. He concluded that comparatively, BBG's financial performance deteriorated over that period and therefore he used multiples at the lower end of the peer group range which was 11.5 – 13.3. It is not clear why Mr Mitchell went on to identify a range for BBG of 11 – 11.5 when 11 was lower than any of the comparables.

246. I am satisfied from the evidence before me that the hypothetical purchaser would identify a range for possible multiples of 11.5 – 11.73 and would take an average of 11.6.

247. I must then consider whether there should be a DLOC and/or a DLOM applied to the share price indicated by that multiple.

Discount for lack of control

248. Mr Bowes considered that there was no need to use a DLOC when using comparable listed companies because the share price was for a minority holding and therefore the market capitalisation took into account the lack of control. The shareholder has all the control he needs over his own shareholding. Mr Mitchell disagreed. He considered that the market capitalisation included a control premium and therefore there should be a DLOC. I prefer Mr Mitchell's evidence in this regard. As I understand it, Mr Firth accepted that if the calculation of the multiple included a bid premium then there should be a DLOC.

249. Mr Mitchell described the DLOC as the inverse of the equity bid premium. The equity bid premium is effectively reversed out by applying a DLOC and Mr Firth did not take issue with that approach or with the amount of DLOC applied by Mr Mitchell which was 20.6%.

Discount for lack of marketability

250. Mr Mitchell arrived at a DLOM using what is known as "protective put option theory". This is effectively a way of identifying the cost of purchasing liquidity by reference to the value of an at-the-money put option with a life equal to the period of the restriction on liquidity. The purchaser of such an option guarantees a price at least equal to the current share price for the period of the restriction, thus manufacturing liquidity. The theory incorporates estimates of the volatility of the share price, which Mr Mitchell estimated by reference to the volatility of listed comparable companies. Using this theory and a restriction period of 5 years, Mr Mitchell calculated a DLOM of 11.1%.

251. Mr Bowes' view, which also formed part of Mr Firth's submissions was that there is no need for a DLOM because the shares were listed on CISX and the role of market maker ensured liquidity. Liquidity is essentially a measure of how readily an asset may be realised and converted into cash at its market value. It was common ground that

liquidity is a continuum. At one end is cash, which is fully liquid and does not need to be realised. Land may fall at the other end of the spectrum, depending on the circumstances. Unquoted shares might generally be described as illiquid. Quoted shares might generally be described as liquid. However, much depends on the precise nature of the asset and the market for the asset.

252. Mr Bowes considered that the existence of a market maker on CISX meant that it was not appropriate to use a DLOM when valuing the shares of BBG. He did however accept that he had no expertise in relation to market makers, and his knowledge was derived from google searches he had carried out. He also accepted that there may not be a liquid market in every share on CISX and hence a DLOM may be necessary. It would depend on the circumstances. However, he said that for the 2007 valuation date, not much would be known about the liquidity of the market. Equally, by the 2009 valuation date he took into account that there had been no market transactions. However, he did accept that on the 2007 valuation date there would be concerns about marketability given that there had been no trades in the 3 months since the shares had been listed. Further, that might lead one to apply a DLOM if unable to identify the reason there had been no trades.

253. In the present case, Mr Firth relied on the fact that the shares in BBG were quoted on CISX and the existence of a market maker in those shares meant that the shares should be treated as liquid assets with no need for a DLOM.

254. Mr Mitchell's view was that the shares of BBG were not liquid. As at the first valuation date there had been no trades in the shares. Hence, he did not use the quoted price in valuing the shares. Mr Mitchell did not take into account the existence and role of the market maker.

255. There was very little evidence before me as to the role of market makers on CISX generally, and no evidence as to the specific market maker for shares in BBG. Mr Firth relied upon some documentation including a publicly available letter dated 6 September 2002 from CISX to the United States Securities and Exchange Commission in Washington, which described market makers on CISX as follows:

> Market Maker obligations are set out in Chapter V of the Membership Rules of the Exchange (headed "Trading") and include the requirements to enter and maintain at all times two-sided quotations on the trading system; and actively offer to buy from and sell to an enquiring Trading Member at the price and in a size up to that displayed by it.

256. It can be seen from this passage that market makers on CISX operate a price spread and that their offers to buy and sell at those prices are up to a size displayed by the market maker. There was no evidence before me as to what the spread was on 19 February 2007 or what size of deal those prices applied to.

257. Mr Firth submitted that it was irrelevant that the obligation of market makers to purchase shares was limited to a particular size of deal. In making that submission he relied upon s.272(2) TCGA 1992. For convenience I shall set it out again:

> (2) In estimating the market value of any assets no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole of the assets is to be placed on the market at one and the same time.

258. Mr Firth submitted that this provision prohibited any reduction in the estimate of market value of a share on the basis that all of the shares are being sold at the same time. It is the quoted price that matters, and it is not necessary to establish that the number of shares to be valued falls within the limit of the market maker. It is part of the same principle that no account should be taken of the fact that flooding the market on the valuation date would depress the price. If there was full liquidity in relation to one share, then the fact that what is being sold is a large parcel of shares does not lead to a discount.

259. Mr Henderson submitted that section 272(2) was not intended to have the effect of treating an illiquid asset as a liquid asset. It is about "flooding the market" causing discounts in the price that might be paid for an asset due to a sudden increase in supply. Just because you can sell one share it does not require an assumption that you can sell 100,000 shares.

260. I agree with Mr Henderson. I do not consider that section 272(2) is intended to treat an illiquid asset as a liquid asset. The estimate in the value of the appellants' shares in BBG is not being reduced on account of an assumption that all the shares held are being placed on the market at the same time. The estimate is simply being made on the basis that the shares are illiquid and there is no ready market for the shares.

261. Mr Firth also submitted that the sale could be broken into parcels of shares within the market maker's limit, over the course of a number of days if necessary. I do not accept that submission. I have no evidence before me as to the practice of market makers in this regard, nor could I form any view as to what period of time would be necessary to effect such transactions.

262. Generally, I do not have enough evidence about the obligations and practice of market makers to say that shares in BBG should be treated as a liquid asset. Even if Mr Firth were right to say that theoretically the shares could be broken into smaller parcels within the size of deals offered by the market maker, there is no evidence to support that as a practical option. The shares must also be treated as being sold on the date of valuation, not over a period of days, weeks or months. It is generally accepted that the hypothetical sale postulated by section 272(1) is on the basis that the asset is parcelled into natural units in such a way as to maximise the proceeds of sale. As Lord Reid stated in *Duke of Buccleuch v IRC* at 219F and 220D:

> … there is no justification for requiring elaborate sub-division of natural units on the ground that if that had been done before the hypothetical sale the total price for the natural unit would have been increased…
>
> I have said that this Act applies rough and ready methods. It is vain to apply theoretical logic. The question of what units to value is a practical question to be solved by common sense."

263. In my view the hypothetical purchaser would see that there had been no market transactions in BBG shares, but would take into account that a significant proportion of shares were locked-in. Overall, I consider that the purchaser would form a view that the shares in BBG appeared to be illiquid and would apply a DLOM. This is consistent with Mr Currie's evidence as to what he perceived as a lack of liquidity in the market.

264. Mr Firth put to Mr Mitchell that there should be no DLOM because he had already adjusted the multiple to reflect the fact that BBG was a private company. However, I am satisfied that Mr Mitchell's approach was to find the value of 100% of a private company and then to apply a DLOM because a minority share in a private company is less liquid than a 100% share in a private company.

265. Mr Firth put to Mr Mitchell that a share listed on CISX is more attractive than a similar unlisted private company so it would not have the same DLOM. That may be true, although Mr Mitchell did not accept the proposition. However, the point goes to the extent of the DLOM rather than whether there should be any DLOM at all.

266. Based on all the evidence before me, I am satisfied that the market for shares in BBG was illiquid and that there should be a DLOM. The question then is how to quantify the DLOM.

267. The method used by Mr Mitchell to estimate a DLOM was the protective put option theory described above. Mr Bowes criticised this approach on the following basis:

(1) In estimating market volatility in 2008 and 2009, substantial market turmoil in the wake of the financial crash led to exceptional volatility at the two later valuation dates.

(2) Using a 5-year time period led to an implicit assumption that this exceptional volatility would persist throughout that period of time.

268. I am satisfied from the evidence of Mr Mitchell and Mr Bowes that protective put option theory is a recognised method to estimate the DLOM of illiquid assets. Mr Mitchell said that it was a common method used by valuers. Mr Bowes referred to it in the Joint Report as follows:

> [Mr Mitchell] appears to have used protective put option theory to calculate his DLOMs, and has applied the Black Scholes Option Pricing Method (BSOPM). It is unclear to [Mr Bowes] whether the BSOPM and its inputs are fully understood or whether it was decided to apply them in an aggressive manner. Whatever the cause, the assumptions adopted have resulted in DLOMs that are materially higher than they should otherwise be.

269. Mr Mitchell accepted in the Joint Report that higher volatility resulted in a higher DLOM, but considered that it was appropriate to take this into account because during the financial crisis more value would be placed on the ability to liquidate the asset. In cross-examination Mr Mitchell said that he did not just take volatility at the valuation dates, but over the previous 5 years and that there is no better way to calculate forward volatility.

270. It was put to Mr Mitchell that his use of a 5-year period was arbitrary. Mr Mitchell said that he used 5 years for the option period on the basis that it could take up to 5 years to find a buyer. He accepted that different valuers might take a different view on that period. He considered that the resulting discount of 11.1% was not large. It would be standard practice to use 3, 5 and sometimes 10 years. Mr Mitchell chose the period of 5 years on the basis that it was standard practice. Also, because the volatility of the pubs, bars and taverns sector was quite low, the cost of liquidity was quite low on the first valuation date, although it was higher on the later valuation dates.

271. Mr Bowes did not offer any alternative as to how the DLOM should be calculated. In all the circumstances I accept Mr Mitchell's evidence and conclude that he made a reasonable estimate of market volatility.

272. Mr Firth put to Mr Mitchell that the cost of the option not only bought liquidity, but also guaranteed the current price of the share. He submitted that Mr Mitchell had been unable to explain why the cost of liquidity was not being overestimated in this way and that if I was unable to understand why liquidity was not being overstated then I should not simply accept Mr Mitchell's assertion that was the case. This was one matter where Mr Firth submitted that Mr Mitchell's evidence amounted to a "bare ipse dixit".

273. Mr Firth's criticisms in this regard go beyond the criticisms levelled by Mr Bowes and take no support from Mr Bowes' evidence. Mr Bowes did not criticise use of the theory, but the way in which volatility was taken into account. In those circumstances I accept Mr Mitchell's evidence as to the level of the DLOM calculated using the protective put option theory.

274. In a separate argument, Mr Firth submitted that if there was an adjustment for DLOM, there was no need to apply a separate private company discount. Otherwise there would be double counting. In his report and the Joint Report, Mr Mitchell stated that a private company discount was required because the shares were not liquid. In cross-examination and re-examination he stated that the private company discount reflected other factors associated with private companies for example the size of the company, its diversification and geographic spread, access to capital and less rigorous corporate governance. He did not accept that because BBG was a listed company there should be no private company discount, or that as a smaller company it had more scope for growth which offset economies of scale associated with larger companies.

275. Mr Mitchell maintained that there was no double counting by having a private company discount and a DLOM. The private company discount was a discount to reflect that 100% of a private company was less liquid than 100% of a listed company. The DLOM was a further adjustment to reflect that a minority shareholding in a private company was less liquid than a controlling interest in a private company and was separate to the DLOC.

276. The private company discount has already been reflected in my findings as to the appropriate multiple. I am satisfied from Mr Mitchell's evidence that a DLOM should also be applied to the share price based on that multiple to reflect the fact that a minority

shareholding in a private company is less liquid than a controlling interest in a private company and that is in addition to the DLOC itself.

277. Based on all the evidence I find that it is appropriate to apply a combined DLOC/DLOM of 29.5%.

278. Mr Firth also criticised Mr Mitchell's EBITDA calculations based on comparable transactions. However, neither party suggested in closing submissions that I should take this method into account in valuing the shares of BBG. I do not therefore need to consider Mr Mitchell's method or the criticisms of it any further.

Conclusion on EBITDA valuation

279. In my view, the hypothetical purchaser would use an EBITDA calculation for the value of shares in BBG as follows:

Maintainable EBITDA	£2,170,736
Multiple	11.6
Enterprise Value	£25,180,537
Net Debt	£11,700,000
Equity Value	£13,480,537
Number of Shares	17,336,409
Equity value per share	78p
DLOC/DLOM	29.5%
Value per share	55p

Net asset values

280. Neither party sought to rely on net asset values in their closing submissions and I shall not consider it further.

Value as at 19 February 2007 - Conclusion

281. Taking into account all the matters above, the evidence as a whole and the parties' submissions I consider that the hypothetical purchaser would give weight to the following methods in making an offer to purchase the shares in BBG on 19 February 2007:

(1) The transaction in which BBG purchased the whole share capital of BBL. That was an arm's length transaction which effectively involved a sale and purchase of the business of BBL in its then state. The transaction indicated that a relatively small minority interest in the shares of BBG at the date of the transaction was 11p per share. A combined DLOC/DLOM of 29.5% should be applied to this figure to indicate a value of 8p per share.

(2) The Acquisition Agreement in which a value of 26.04p per share was attributed to the Consideration Shares in BBG in the arm's length deal between the shareholders of BBL and BBG. Those shares were locked in and so this transaction would indicate a value for the shares in BBG without any lock-in higher than 26.04p.

(3) A valuation of the shares using EBITDA and an appropriate multiple, with adjustments for DLOC and DLOM. For the reasons given above, this method of valuation would indicate a valuation of the shares in BBG of 55p

282. The hypothetical purchaser would take into account in particular that there had been no real change in the business between November 2006 and February 2007, although there was now a plan in place to roll out the business, funding was in place for at least the initial stages of the roll out and the company was now listed on CISX with a strengthened board of directors in place. There were still considerable uncertainties as to prospects for the business and whilst an EBITDA approach indicated a price of 55p per share, the previous directors and shareholders had accepted a value of 26.04p attributed to the Consideration Shares. That was an arm's length deal involving the previous management of the business who would be expected to be in a good position to make a judgment as to its future prospects and value.

283. On balance I consider it likely that the hypothetical purchaser would take an average of the 8p and 55p which gives a value of 31.5p per share. The hypothetical purchaser would take some comfort in making such a bid because it was consistent with the value attributed to the Consideration Shares which could be taken as also reflecting the fact that the Consideration Shares were lock-in.

284. I have no knowledge as to the basis on which the respondents issued closure notices to the appellants on the basis that the market value of the shares at all material times was 31.5p. The fact I have found the market value on this valuation date to be 31.5p is undoubtedly a matter of coincidence.

285. In all the circumstances I consider that the market value of the shares in BBG gifted on 19 February 2007 was 31.5p per share.

(2) Valuation on 13 August 2008

286. Both parties agreed in closing that the most appropriate methodology to value the shares at this date is on the basis of a multiple of EBITDA.

287. Mr Mitchell considered that in addition to the information available at the previous valuation date, the following further information would also be available:

(1) Audited accounts of BBG for the year ended 30 April 2007.

(2) Audited accounts of BBL for the 17 months ended 30 April 2007.

(3) Interim unaudited results for the six months ended 31 October 2007.

288. In order to identify maintainable EBITDA for a 12-month period, Mr Mitchell took an average of the pro-rated earnings from the 17 months audited accounts of BBL. The EBITDA for the 17m period was £2,964,280 giving an annual equivalent of £2,092,433. The EBITDA for the 5 months of trading in the audited accounts of BBG ending 30 April 2007 was £637,000 which grossed up to an annual equivalent of £1,528,800. The average of these figures gave maintainable EBITDA of £1,810,000.

289. In contrast, Mr Bowes and Mr Firth invited me to simply pro-rate EBITDA from the accounts for the 17m period ending 30 April 2007, which gave a figure of £2,092,433

290. Mr Firth criticised Mr Mitchell's approach as effectively including 3 winter periods and only 1 summer period in the resulting average which he said was skewed. Annualising the 17m period included only 2 winter periods and 1 summer.

291. I can see arguments for both approaches. However, I consider that the hypothetical purchaser would have regard to comments made by the Chairman of BBG in the interim unaudited results of BBG for the period. It was noted that like for like sales had decreased and that the current trading environment remained difficult. This reflected growing consumer caution, sustained competition and the effects of the smoking ban. The board was cautious regarding the outlook for the financial year.

292. In my view and in light of all the evidence the hypothetical purchaser would adopt an approach which gave a more conservative outcome than that proposed by Mr Firth. That is the approach adopted by Mr Mitchell.

293. Mr Mitchell again used comparable listed companies to obtain a multiple, adjusted for an equity bid premium and a private company discount. He did not carry out a comparable transaction analysis because the most recent transaction he could identify was 13 November 2007 which was prior to the 2008 recession and therefore not comparable. The comparable listed company analysis gave a multiple of 8.25.

294. There was very little difference between the multiple of 8.25 adopted by Mr Mitchell, the multiple of 8.2 adopted by Mr Bowes and indeed the multiple of 8.37 adopted by Mr Firth. Based on all the evidence I consider it appropriate to use a multiple of 8.25.

295. Mr Mitchell applied a combined DLOC and DLOM of 38.4% to give a valuation of 16p. For reasons previously given, I consider it appropriate to apply a DLOC and DLOM. I am satisfied that the hypothetical purchaser would use a combined DLOC and DLOM of 38.4%.

296. In my view, the hypothetical purchaser would use an EBITDA calculation for the value of shares in BBG as follows:

Maintainable EBITDA	£1,810,000
Multiple	8.25
Enterprise Value	£14,932,500
Net Debt	£10,324,012
Equity Value	£4,608,488
Number of Shares	17,336,409
Equity value per share	27p
DLOC/DLOM	38.4%
Value per share	16.5p

Value as at 13 August 2008 - Conclusion

297. For the reasons given above, I accept Mr Mitchell's approach to valuation using EBITDA. In all the circumstances I consider that the market value of the shares in BBG gifted on 13 August 2008 was 16.5p. Mr Mitchell's calculation of the combined DLOC/DLOM gave a discounted share price of 16p, but it appears to me he has made a slight mathematical error.

(3) Valuation on 16 October 2009

298. Both parties agree that the most appropriate methodology to value the shares at this date is on the basis of a multiple of EBITDA.

299. Further, it was common ground that the level of maintainable EBITDA should be taken from the audited accounts for the year ended 30 April 2009, even though they were not signed off until 20 October 2009. There as some discussion as to how Mr Mitchell reached the conclusion that these accounts were available to the hypothetical purchaser, but given this was an area of agreement I need not explore those reasons.

300. Mr Mitchell again used comparable listed companies to obtain a multiple, adjusted for an equity bid premium and a private company discount. He did not carry out a comparable transaction analysis because he was only able to identify one comparable transaction which he considered insufficient. His comparable listed company analysis gave a multiple in the range 8 to 8.5.

301. Applying a multiple of 8 – 8.5 and a combined DLOC and DLOM of 50.8% indicated a valuation of 15 – 18p. Mr Mitchell settled on the mid-point of 16.5p.

302. Mr Bowes calculated a multiple of 8.37 but Mr Firth submitted the multiple should be 10.3. He submitted that Mr Mitchell's multiple was too low because:

(1) BBG's revenue growth and EBITDA growth for calendar year 2008 were in excess of the figures for all competitors. The decrease in EBITDA margin it suffered was the second smallest of all the comparables.

(2) The hypothetical purchaser would consider that BBG was outperforming the competition which would justify using the highest multiple for a comparable of 10.3 rather than the range of 8-8.5 used by Mr Mitchell.

303. Mr Bowes, at least initially, adopted a combined DLOC/DLOM of 50% on the basis that purchasers would know that BBG was about to become unlisted. This was approximately the same as the discount used by Mr Mitchell.

304. These are value judgments based on the evidence. In circumstances where the experts have adopted very similar multiples and very similar discounts, I consider it appropriate to reach my conclusion based on the expert evidence. In my view it is appropriate to use a multiple of 8.5 and a combined DLOC/DLOM of 50%.

305. In my view the hypothetical purchaser would use an EBITDA calculation for the value of shares in BBG as follows:

Maintainable EBITDA	£1,936,558
Multiple	8.5
Enterprise Value	£16,460,743
Net Debt	£10,169,206
Equity Value	£6,291,537
Number of Shares	17,336,409
Equity value per share	36p
DLOM/DLOC	50%
Value per share	18p

Value as at 16 October 2009 - Conclusion

306. For the reasons given above I consider that the market value of the shares in BBG gifted on 16 October 2009 was 18p.

CONCLUSION

307. For all the reasons given above I am satisfied that the market value of the appellants' shares in BBG at the three valuation dates are as follows:

19 February 2007	31.5p
13 August 2008	16.5p
16 October 2009	18p

308. I therefore determine the preliminary issues accordingly. Any issues as to valuations at any other gifting dates and the disposal of the appeals generally shall be determined at a subsequent hearing unless agreed by the parties. The parties shall seek to agree directions for that hearing and inform the tribunal as to their position within 60 days from the date of release of this decision.

309. This document contains full findings of fact and reasons for the preliminary decisions. Any party dissatisfied with the preliminary decisions 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 28 June 2021