



Neutral Citation: [2023] UKFTT 989 (TC)

Case Number: TC09000

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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Piccadilly Exchange
Manchester
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Appeal reference: TC/2018/08117
TC/2018/05826
TC/2019/01181

INCOME TAX – relief on gifts of shares to charity – shares admitted to dealing on AIM – market value of shares — application to allow appeals on grounds of abuse of process refused – substantive appeals dismissed – certain assessments increased pursuant to section 50(7) TMA 1970

Heard on: 17 and 18 July 2023
Judgment date: 20 November 2023

Before

**TRIBUNAL JUDGE CANNAN
Ms SUSAN STOTT FCA**

Between

**(1) NICHOLAS BELL
(2) MUKHTAR HUSSAIN
(3) STEPHEN FOX**

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellants: Alistair Webster KC instructed by way of direct access

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

DECISION

INTRODUCTION

1. These appeals concern the market value of shares in two companies: Cityblock Plc (“Cityblock”) and Strategic Retail Plc (“Strategic Retail”). Each of the appellants gifted shares to charity in 2003 in one or both of those companies and claimed relief for those gifts in their tax returns for 2003-04. The shares in each company had been the subject of separate placings and admission to dealing on the Alternative Investment Market (“AIM”) on 29 July 2003 and 19 December 2003 respectively. The gifts were all made on those dates and for the purpose of claiming relief the appellants valued the shares at 51.25p and 93.875p respectively.

2. The respondents (“HMRC”) opened enquiries into the appellants’ tax returns for 2003-04 in June 2005 and January 2006. Closure notices were not issued until May and August 2018. The closure notices amended the relevant self-assessments to show relief based on a market value of the shares at the date of gifting of 12p in the case of Cityblock and 26.68p in the case of Strategic Retail. The effect of the closure notices was that the relief available to the appellants was considerably reduced. In fact, HMRC now contend that the market value of the shares was 7.91p and 14.25p respectively and seek to further restrict the relief claimed.

3. HMRC’s enquiries into the appellants’ returns took many years. It was some 12 or 13 years between the enquiries being opened and the closure notices being issued. The appellants have applied to debar HMRC from defending their appeals and for the Tribunal to summarily allow the appeals on the basis of an abuse of process. We heard those applications at the same time as the substantive appeals. We have decided that the applications must be dismissed. It is convenient to set out our reasons once we have set out the relevant evidence and our findings of fact on the substantive appeals. The sole issue on the substantive appeals is the value of the shares in each company at the date of gifting.

4. We had evidence from Mr Bell and Mr Fox in the form of witness statements. There was no challenge to the facts stated in those witness statements. Mr Hussain did not provide a witness statement or give evidence. The appellants did not rely on any expert evidence as to the market value of the shares. HMRC relied on expert evidence from Mr Andrew Strickland, a chartered accountant and business valuer, as to the value of Cityblock shares and Strategic Retail shares at the gifting dates.

5. The various values said to be attributable to the shares may be summarised as follows:

	Cityblock (p)	Strategic Retail (p)
Claims for relief	51.25	93.875
Closure notice	12.0	26.7
HMRC expert	7.9	14.3

6. Mr Webster KC on behalf of the appellants invites us to allow the appeals on the basis that the value of the shares was as stated in the appellants’ self-assessment returns for 2003-04. Ms Murray for HMRC invites us to increase the assessments on all the appellants on the basis that the value of the shares was less than the value used in the closure notices. We are grateful for the assistance of both counsel, in particular Mr Webster who has appeared pro bono.

7. The burden is on the appellants to establish that the value of the shares was correctly stated in their claims for relief, or is higher than the value attributed to the shares in the closure notices. There is also a burden on HMRC to establish that the value of the shares is actually less than that attributed to them in the closure notices. We make our findings of fact on the basis of all the evidence before use and on the balance of probabilities.

LEGAL FRAMEWORK

8. There is no issue between the parties as to the legal framework relevant for the purposes of the substantive appeals.

9. In 2003-04 certain shares which were qualifying investments were eligible for income tax relief when gifted to charity pursuant to section 587B Income and Corporation Taxes Act 1988 (“ICTA”). Relief was given by reference to the market value of the qualifying investment as follows:

587B(1) Subsections (2) and (3) below apply where, otherwise than by way of a bargain made at arm's length, an individual ... disposes of the whole of the beneficial interest in a qualifying investment to a charity.

(2) On a claim made in that behalf to an officer of the Board —

(a) the relevant amount shall be allowed —

(i) in the case of a disposal by an individual, as a deduction in calculating his total income for the purposes of income tax for the year of assessment in which the disposal is made;

...

(4) Subject to subsections (5) to (7) below, the relevant amount is an amount equal to —

(a) where the disposal is a gift, the value of the net benefit to the charity at, or immediately after, the time when the disposal is made (whichever time gives the lower value);

...

(8A) The value of the net benefit to the charity is —

(a) the market value of the qualifying investment,

...

(9) In this section—

‘qualifying investment’ means any of the following —

(a) shares or securities which are listed or dealt in on a recognised stock exchange;

...

(10) Subject to subsection (11) below, the market value of any qualifying investment shall be determined for the purposes of this section as for the purposes of the 1992 Act.

10. It was common ground that the shares in Cityblock and Strategic Retail were dealt in on a recognised stock exchange and were therefore qualifying investments. Section 587B(10) provides that the market value of any qualifying investment is to be determined as it would be

under the Taxation of Chargeable Gains Act 1992 (“TCGA 1992”). The relevant provisions for present purposes are contained in sections 272 and 273 TCGA 1992 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.

(3) Subject to subsection (4) below, the market value of shares or securities quoted in The Stock Exchange Daily Official List shall, except where in consequence of special circumstances prices quoted in that List are by themselves not a proper measure of market value, be as follows —

(a) the lower of the 2 prices shown in the quotations for the shares or securities in The Stock Exchange Daily Official List on the relevant date plus one-quarter of the difference between the 2 figures, or

(b) halfway between the highest and lowest prices at which bargains, other than bargains done at special prices, were recorded in the shares or securities for the relevant date,

choosing the amount under paragraph (a), if less than that under paragraph (b), or if no such bargains were recorded for the relevant date, and choosing the amount under paragraph (b) if less than that under paragraph (a).

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.

11. It was common ground that shares dealt in on AIM were not quoted in the Stock Exchange Daily Official List. As such, section 272(3) does not apply in valuing the shares and the price at which the shares were dealt in on AIM is not conclusive as to their market value. Further, shares dealt in on AIM are not “quoted” on a recognised stock exchange for the purposes of section 273(2) (see the discussion in *Netley v HM Revenue & Customs* [2017] UKFTT 442 (TC) at [185] – [195]). As such, section 273(3) applies to the valuation of the shares. All the information which a prudent prospective purchaser might reasonably require when proposing to purchase shares from a willing vendor by private treaty and at arm’s length is treated as being available to the prospective purchaser.

12. The parties were agreed as to the principles of valuation that we should apply in valuing the shares pursuant to these provisions. The relevant principles were recently set out in *Close, Nuttall and Chisnall v HM Revenue & Customs* [2022] UKFTT 193 (TC) at [13] and [14] as follows:

(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).

...

(8) It would be an error to try and identify the characteristics of a typical market participant and ask what that person would have paid. 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.

(9) It is necessary to identify 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 those circumstances, 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.

(10) 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.

(11) 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.

(12) It is not the case that if some purchasers might take an optimistic view, for example as to maintainable earnings, then those views should be taken into account in applying the methodologies. It is not that different reasonably prudent purchasers might take different views as to maintainable earnings. What is relevant is the view of the 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.

(13) It is then necessary to consider 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 different methods. The reasonably prudent purchaser would consider all resulting values and may decide to discount some and use one particular method, or to adopt one method but to adjust the price to reflect the results of other methods.

13. It is necessary to identify the information available to the prudent prospective purchaser. We adopt the approach of Dr Brice, the Special Commissioner in *Caton's Administrators v Couch* [1995] STC (SCD) 34 which was summarised in *Netley v HM Revenue & Customs* [2017] UKFTT 442 (TC) as follows:

204. The effect of section 273(3) and the context in which it came to be enacted were considered by Dr Brice, Special Commissioner in *Caton's Administrators v Couch* [1995] STC (SCD) 34. She concluded as follows:

“...in my view, s 152(3) [now section 273(3)] is effective to provide that any information, including unpublished confidential information, and even information which might prejudice the interests of the company, is assumed to be available in the hypothetical sale if it would be reasonably required by a prudent prospective purchaser of the asset in question. It is therefore necessary to consider, in each case, what information a prudent prospective purchaser of the asset in question would reasonably require. In the context of s 152(3) I understand the word 'require' to mean 'demand as a condition of buying'; information is 'required' if the purchase would not proceed without it.”

205. The question of what a prudent purchaser would reasonably require is essentially a value judgment, informed by the expert evidence. In *Caton's Administrators*, Dr Brice also had regard to an observation in *Dymond's Capital Taxes*. At page 51a Dr Brice stated as follows:

“*Dymond*, para 23.328 also says that where the holding is less than 25% it may be that the buyer will expect less information but this is a matter for expert evidence. The size of the company is important and a buyer investing £200,000 would obviously be entitled to know more than one investing £2,000. Where the holding was small, say less than £50,000 and less than 5% of the capital, the buyer would not normally be expected to have more than the information which was published or which he could find out without questioning the directors.”

14. Finally, in the context of the Tribunal's powers on this appeal, section 50(7) Taxes Management Act 1970 enables us to increase the amount of tax charged by the closure notices if it appears that the appellants have been undercharged:

(7) If, on an appeal notified to the tribunal, the tribunal decides –

...

(c) that the appellant is undercharged by an assessment other than a self-assessment, the assessment or amounts shall be increased accordingly.

FINDINGS OF FACT

15. We shall first make findings of fact in relation to the claims for relief made by the appellants on gifting shares in Cityblock and Strategic Retail. We shall then consider the circumstances of each company, including the nature of their businesses and the circumstances in which they came to be floated on AIM. We shall then make findings of fact directly relevant to the valuation of the shares in each company at the material dates in 2003.

The appellants' claims for relief

16. In each case, the appellants acquired their shares in offers for subscription and in subsequent placings of shares when the companies were floated on AIM.

17. The basic facts in relation to each appellant are summarised in the following table. We understand that the shares gifted by each appellant were the shares they acquired in the offers for subscription and that they retained their placing shares, but nothing really turns on that.

The table shows the shares gifted, the date of gift, the amount subscribed for the shares, the amount of relief claimed by each appellant in their respective tax returns, the adjusted relief following HMRC's closure notices and what we have termed the re-adjusted relief which HMRC now say the appellants are limited to:

	Mr Bell	Mr Hussain	Mr Fox
Cityblock:			
Shares gifted	123,000		164,000
Date of gift	29 July 2003		29 July 2003
Amount subscribed	£15,000		£20,000
Relief claimed	£63,037		£84,050
Strategic Retail:			
Shares gifted		183,000	73,200
Date of gift		19 Dec 2003	19 Dec 2003
Amount subscribed		£42,000	£16,800
Relief claimed		£171,791	£68,716
Total relief claimed	£63,037	£171,791	£152,766
Total Adjusted relief	£14,760	£48,824	£39,210
Total re-adjusted relief	£9,729	£26,077	£23,403

18. The appellants all gifted the shares identified above to charity. Mr Bell to The Kings School Chester and Deeside House Educational Trust, Mr Fox to Manchester Jewish Community Care and Mr Hussain to Muslim Hands.

Previous valuations

19. Prior to issuing the closure notices, HMRC obtained valuation reports from Kate Green in relation to Cityblock and from Lee Mann in relation to Strategic Retail. Ms Green and Mr Mann were both employed by HMRC in their shares and asset valuation division and were Associate Members of the Business Valuation Faculty of the Royal Institution of Chartered Surveyors. Ms Green concluded that the value of Cityblock shares at all dates between 29 July 2003 and 26 July 2004 was not more than 12p per share. Mr Mann concluded that that the value of Strategic Retail shares at all dates between 19 December 2003 and 20 April 2004 was not more than 26.68p per share.

20. HMRC relied upon these valuations when they issued closure notices to each appellant. We were not taken to these valuation reports in any detail and neither party relied on them.

Cityblock

21. Cityblock was incorporated as a private limited company on 5 March 2003, under the name Easyroad Limited. On 4 April 2003, it was re-registered as a public company. At this stage it had a small number of shareholders ("the initial subscribers") who had paid nominal amounts for their shares, including Zeus Partners ("Zeus"), a corporate finance house.

22. Cityblock, then called Easyroad, published an "Offer for Subscription" on or about 8 April 2003. The offer document stated as follows:

[The Company]... is seeking to raise up to £700,000 by way of an offer for subscription... Following completion of the Subscription, the Company (assuming full take-up of the Subscription) will have cash assets of approximately £700,000 before expenses. The funds

raised will be used to acquire a company or business which requires additional funding and is seeking admission to trading on the Alternative Investment Market of the London Stock Exchange plc...

23. The directors of Cityblock at this time were Mr Richard Hughes and Mr Norman Molyneux, both corporate finance specialists. Mr Hughes was a partner in Zeus.

24. The offer went on to set out detailed information about Cityblock and its plans. At the beginning of Part I it stated:

The Directors believe that there are companies and businesses which are seeking admission to trading on AIM but which are being discouraged from proceeding due to the difficulties in raising finance in the current market conditions.

The Company was formed to be a cash shell to attract such companies and businesses. The Directors believe that they now require additional funds in order to initiate and conclude negotiations with a suitable target. In the light of current market conditions, in particular the difficulties involved in raising new equity for small companies, the Directors will seek to value the Company at a significant premium to its cash balance in any transaction.

The main criteria that the Directors have applied in identifying potential targets is to focus on small businesses which have the capability to grow rapidly and which now require funds to achieve that growth. The Directors' preferred structure for any target would involve the acquisition by the Company of the entire share capital of a company or business in exchange for the issue of Ordinary Shares and the simultaneous admission of the Company to trading on AIM, with completion being conditional on such admission. Once the Subscription is completed, the Directors intend to source, initiate and complete negotiations with a suitable target. A number of potential targets have been identified.

25. The offer also stated:

It is ... a term of the Offer for Subscription that Investors participate in any further fundraising undertaken by the Company at the time of Admission.

26. The obligation was for shareholders subscribing to the offer to invest a further amount on admission to AIM equal to 15% of their initial investment. It was not known at this point how many new shares this would equate to, or what price would be paid for those shares.

27. The offer also set out the terms of a "lock-in" which would apply in relation to shares acquired pursuant to the offer. In summary, it provided that subscribers for shares in the company would not be permitted to transfer their shares until the second anniversary of the share issue. The lock-in was subject to certain exceptions, one of which was that the company would consent to the transfer of restricted shares to a registered UK charity, provided that the charity itself agreed to be bound by the lock-in.

28. The offer was fully subscribed and on 20 May 2003 shares were allotted to 25 subscribers, including Mr Bell and Mr Fox.

29. Cityblock published a prospectus on 2 July 2003 as part of a placing of new shares and the admission of its shares to trading on AIM. The prospectus identified that Cityblock intended to apply for admission of its shares to trading on AIM, with trading to commence on 29 July 2003. The nominated adviser, or "Nomad" for the purpose of admission to AIM was WH Ireland Limited, stockbrokers.

30. In his evidence, Mr Strickland accepted that the role of a Nomad was as described by the Tribunal in *Netley* at [91]:

91. It is a requirement of the AIM rules that any company admitted to AIM must have a Nomad. Nomads are approved by the LSE to manage admission of companies to AIM. Typically Nomads are corporate finance houses and brokers with experience of equity capital market transactions. The Nomad will advise and guide a company in relation to the admission process. It was common ground that the role of a Nomad in 2004 was as follows:

- (1) To undertake due diligence to ensure a company is suitable for AIM;
- (2) To provide guidance to companies through the flotation process;
- (3) To prepare the company for being on a public market;
- (4) To assist in preparation of the AIM admission document;
- (5) To confirm to AIM that the company is appropriate to be admitted to AIM;
- (6) To act as a regulator whilst the company is on AIM.

31. The prospectus in its introduction stated as follows:

[The company] has conditionally agreed to acquire the entire issued share capital of Cityblock, a developer of student accommodation property, for a total consideration of £1,365,394 to be satisfied by the issue of the Consideration Shares. To fund the costs of the Acquisition, [the Company is seeking to raise £105,000 before expenses by way of a placing of the Placing Shares [defined as “up to 218,750 new Ordinary Shares”].

32. The prospectus went on to outline the business and history of Cityblock Ltd. It had been set up by Mr Martin Higginson and Mr Trevor Bargh with the objective of creating purpose-built accommodation for students. It was considered that there was a strong demand for modern student accommodation and that there would be increased demand given the Government’s drive to increase the number of 18-30 year olds in university education. The strategy was to focus on developing properties to address the needs of the target market, which was undergraduates in the second or third year of study, postgraduate students and older students. The emphasis would be on lifestyle rather than cost. Cityblock Ltd intended to locate units in city centre sites where there was a university population with a high percentage of postgraduate and overseas students.

33. Cityblock Ltd had commenced construction at a site in Lancaster which was expected to be completed by October 2003. Marketing for that site, which comprised 30 units, had commenced and deposits had been received for 16 rooms. The annual rental income was expected to be £94,500. The ground floor was to be let as commercial premises generating an annual rental income of £20,000. It was intended to complete a second development by October 2004 and a third development by October 2005 with one site per year thereafter.

34. Mr Higginson and Mr Bargh would be executive chairman and managing director respectively of Cityblock. Mr Higginson had founded a number of companies, including a premium rate telephone competition service which had been sold to Scottish Power for £10m. He worked at Scottish Power where he oversaw the integration of five telephony businesses which were floated as Thus Plc. He had since been involved in businesses including the delivery of mobile phone content to younger people, a building company and a venture capital company. In 2002 he was voted North West Entrepreneur of the Year. It was anticipated that he would devote two days per month to the company and his salary was to be £5,000 pa.

35. Mr Bargh had managed a number of companies in the Courtaulds group. He later joined a major international management consultancy and established a property development and investment partnership called Bargh Estates, involved in large commercial city centre

developments. It was anticipated that he would devote one day per week to the company and his salary was to be £20,000 pa.

36. Senior management were identified as Andrew Stanyon, the operations manager and Alison Bargh, the facilities manager. The fees of two non-executive directors were identified as totalling £15,000 pa, whilst W H Ireland was to receive £22,500 pa for acting as Nomad and broker to Cityblock.

37. Mr Higginson and Mr Bargh received the consideration shares on completion of the agreement and admission to AIM. This gave them each some 26% of the issued share capital of Cityblock. The consideration for the sale of their shares in Cityblock Ltd was expressed to be £1,365,294, to be satisfied by the issue of the consideration shares. They agreed not to dispose of the consideration shares for a period of two years following admission to AIM.

38. PKF were the reporting accountants in relation to the financial information in the prospectus. The financial information showed that Cityblock Ltd and its two subsidiaries had no turnover in the period ended 31 March 2003. It had incurred an operating loss of £12,142 attributable to administration expenses.

39. The consolidated balance sheet of Cityblock Ltd showed fixed assets of £238,508 which was the costs to date incurred on purchasing and developing the Lancaster site and the costs incurred on a second site in Lancaster. There were net current liabilities of £250,648, comprising mainly trade creditors of £85,999 and directors' loans of £169,998. The director's loans had been converted to equity after 31 March 2003. On 7 April 2003, Cityblock Ltd had completed the purchase of the second site for £343,250. It was noted that the second site had initial planning permission but that changes to the plans could lead to delays. It was also a site of archaeological significance and it was noted that this might delay or prohibit the development.

40. Cityblock Ltd had a loan facility with Yorkshire Bank of £1,045,000. Of this, £245,000 had been used to complete the purchase of the second site.

41. PKF produced a pro forma statement of combined net assets covering Cityblock Limited and its group companies together with the cash shell which was still called Easyroad Plc as follows:

Cityblock	£
Fixed assets:	
Intangible	1,107,000
Tangible	582,000
Current Assets	579,000
Current Liabilities	(247,000)
Total Assets	2,021,000

42. The intangible fixed assets appear to comprise the goodwill on the acquisition of Cityblock Ltd by Cityblock.

43. The financial information did not include any cashflow forecasts or profit forecasts, but the directors expressed their opinion that Cityblock would have sufficient working capital for at least 12 months from the date of admission to AIM.

44. The prospectus noted that Cityblock had also issued 184,500 shares to Wacks Caller, who were the company's solicitors. This was in consideration for their professional fees of £22,500 (excluding VAT) in relation to their work on the offer for subscription, the placing and admission to AIM.

45. Cityblock shares were admitted to dealing on AIM on 29 July 2003. At the same time, Cityblock issued a further 218,750 shares (the "placing shares"), which were allotted at 48p each to the 25 subscribers pursuant to the terms of the offer, including Mr Bell and Mr Fox. Cityblock raised £105,000 from the placing. The placing shares were not subject to the lock-in.

46. None of the subscribers chose to invest in the placing shares at 48p per share. They were required to do so pursuant to the terms of the offer. The price and the number of shares issued as placing shares was identified to reflect the obligation on subscribers to invest a further 15% of the amount paid for their shares pursuant to the offer. The more shares issued as placing shares the lower the price those shares would have been. Similarly, the more shares issued, the more diluted the holdings of the initial subscribers would become.

47. Cityblock issued 11,377,447 consideration shares to Mr Higginson and Mr Bargh in consideration for the entire share capital of Cityblock Limited. As a result, Mr Higginson and Mr Bargh held 52.1% of the shares of Cityblock post flotation.

48. On the day of flotation, the shareholders in Cityblock and the cash amounts paid to Cityblock, or in the case of Mr Higginson, Mr Bargh and Wacks Caller, the value attributed their shares, for the allotment of shares were as follows:

	Shares	Proportion %	Cash Paid/ Value Attributed £	Price per share
Initial Subscribers	4,321,400	19.8	527	0.01p
Subscribers	5,958,750	27.3	805,000	13.51p
Higginson/Bargh	11,377,447	52.1	1,365,294	12.00p
Wacks Caller	184,500	0.8	22,500	12.20p

49. The initial subscribers and the 25 subscribers had together paid an average price of 7.836p per share.

50. It appears from the prospectus that all the shares were subject to the lock-in save the placing shares.

Strategic Retail

51. Strategic Retail was incorporated as a private limited company on 1 April 2003, under the name WC CO(11) Limited. On 26 September 2003, it was re-registered as a public company. At this stage it had a small number of shareholders ("the initial subscribers") who had paid nominal amounts for their shares, including associates of Zeus.

52. Strategic Retail published an "Offer for Subscription" on 30 September 2003. The offer document stated as follows:

[Strategic Retail]... is seeking to raise up to £1,515,000 by way of an offer for subscription... Following completion of the Subscription, the Company (assuming full take-up of the Subscription) will have cash assets of approximately £1,528,000 before expenses. The funds raised will be used to acquire a company or business in the retail sector. Following the

acquisition it is intended that the Company would seek admission to trading on the Alternative Investment Market of the London Stock Exchange plc...

53. The directors of Strategic Retail at this time were Mr Ian Currie and Mr Roy Gabbie. Mr Currie was one of the partners of Zeus and Mr Gabbie had considerable experience in developing and selling retail chains.

54. The offer went on to set out detailed information about Strategic Retail and its plans. In Part I it stated:

The Directors believe that an opportunity exists to acquire a company or business in the retail sector. They have identified Fads (Trading) Limited as a company that may meet their criteria and they are currently investigating that opportunity. Fads (Trading) Limited operates around 50 retail outlets in the home decor and household goods market. One of the joint administrators of Fads (Purchasing) Limited, Fads (Employees) Limited and Fads (Holdings) Limited, David Mond together with the senior management of Fads Group Limited including Hugh Robertson, Chief Executive and Mark Hopton, Finance Director are shareholders of the Company ...

The Company was formed to be a cash shell to acquire Fads (Trading) Limited or failing that another company or business in the retail sector. The Directors believe that the Company now requires additional funds in order to progress discussions and carry out financial due diligence and provide working capital should an acquisition be concluded with a suitable target. In the light of current market conditions in particular the difficulties involved in raising new equity for small companies, the Directors will seek to value the Company at a significant premium to its cash balance in any transaction...

55. The offer also provided:

It is ... a term of the Offer for Subscription that Investors participate in any further fundraising undertaken by the Company at the time of Admission.

56. The obligation was for shareholders subscribing to the offer to invest a further amount on admission to AIM equal to 23% of their initial investment. It was not known at this point how many new shares this would equate to, or what price would be paid for those shares.

57. The offer also set out the terms of a "lock-in" which would apply in relation to shares acquired pursuant to the offer. In summary, the offer provided that subscribers for shares in the company would not be permitted to transfer their shares until the second anniversary of the share issue. The lock-in was subject to certain exceptions, one of which was that the company would consent to the transfer of restricted shares to a registered UK charity, provided that the charity itself agreed to be bound by the lock-in.

58. The offer was fully subscribed and on 24 November 2003 shares were allotted to 78 subscribers, including Mr Hussain and Mr Fox. Those subscribers paid 22.95p per share.

59. Strategic Retail published a prospectus on 28 November 2003 as part of a placing of new shares and the admission of its shares to trading on AIM. The prospectus identified that Strategic Retail intended to apply for admission of its shares to trading on AIM, with trading to commence on 19 December 2003. The Nomad for the purpose of admission to AIM was WH Ireland Limited, stockbrokers.

60. By this stage, Mr David Mond who was one of the joint administrators of Fads, had been appointed a non-executive director of Strategic Retail. Mr Mond was a chartered accountant who specialised in insolvency and business turnarounds. He had served on the

council of the Association of Business Recovery Professionals. He was also at that time a director of Downtex Plc, an AIM-listed company.

61. The prospectus stated as follows in the introduction:

On 28 November 2003 the entire issued share capital of Fads was acquired from Fads (Holdings) for a nominal amount after certain assets and liabilities had been transferred from Fads (Holdings), Fads (Group) and Fads (Employees) into Fads. To fund the expenses of the Acquisition and Proposals the Company is seeking to raise £348,450 before expenses by way of a placing of up to 382,912 Placing Shares and will seek admission of the entire issued ordinary share capital over the Company to trading on AIM.

62. Strategic Retail paid 99p to acquire Fads. The prospectus outlined the business and history of Fads. It had been set up in the 1950's and operated 53 retail outlets in the home decor and furnishings market. They were mainly high street locations rather than out of town "DIY sheds". The business was subject to a number of changes in ownership over the years most recently a management buyout in March 2000. A number of store closures followed, and some of the group companies entered into administration in 2002 and 2003.

63. The directors of Fads were Mr Mond, non-executive chairman, Mr Gabbie, non-executive director, Mr Robertson, chief executive and Mr Hopton, finance director. The directors stated in the prospectus that Fads was trading in line with expectations and that they viewed the remainder of the year with confidence. Most of the stores operated by Fads were occupied under licences and it was intended that the basis of its occupation of those stores be formalised. The strategy for the company was described in the prospectus as follows:

Fads intends to undertake a programme of improvements to the profile and variety of products stocked in its stores, which will be reviewed on a rolling basis. In addition, the Directors intend to identify appropriate sites in market towns and central London for new stores to be established as well as identifying other suitable businesses to acquire. No such acquisitions of sites or businesses are currently under negotiation.

64. The prospectus included a pro forma consolidated balance sheet for Strategic Retail and Fads as at 27 September 2003. This showed net assets of £1,375,000. The net assets of Fads itself were stated at £1,000:

Strategic Retail	£
Fixed assets:	
Intangible	(1,000)
Tangible	493,000
Current Assets	5,945,000
Current Liabilities	(5,062,000)
Total Assets	1,375,000

65. Strategic Retail shares were admitted to dealing on AIM on 19 December 2003. At the same time, Strategic Retail issued a further 382,912 shares (the "placing shares"), which were allotted at 91p each to the subscribers pursuant to the terms of the offer. Strategic Retail raised £348,350 from the placing. The total cost of raising funds in the offer and the placing amounted to £489,000.

66. Again, none of the 78 subscribers chose to invest in the placing shares at 91p per share. They did so pursuant to the offer. The price and the number of shares issued as placing shares was identified to reflect the obligation on subscribers to invest a further 23% of the amount paid for their shares pursuant to the offer.

67. On the day of flotation, the shareholders in Strategic Retail and the cash amounts paid to Strategic Retail for the allotment of shares were as follows:

	Shares	Proportion %	Cash Paid/ Value Attributed £	Price per share
Initial subscribers	6,100,488	46.6	500	0.01p
Subscribers	6,983,984	53.4	1,863,450	26.68p
Total:	13,084,472	100	1,863,950	14.25p

68. It appears from the prospectus that all the shares were subject to the lock-in save the placing shares.

The appellants' investment decisions

69. Mr Bell is a chartered accountant. Much of his evidence was directed towards the delay of HMRC in conducting their enquiries. In relation to his investment in Cityblock, he described as a “fundamental factor” in his decision to invest that the government had announced in 2001 its goal that 50% of young adults should progress to higher education. Mr Bell considered that there would be a large gap in terms of supply and demand for student accommodation and that Cityblock would be in a prime position to exploit that demand. He considered that the team behind Cityblock would add value to its prospects. His evidence also included expressions of opinion intended to support the price at which he claimed relief on his gift of shares. Mr Webster rightly did not seek to rely upon those expressions of opinion. Whilst Mr Bell is a chartered accountant, his evidence as to the AIM market and the correct approach to valuation of Cityblock shares was in the nature of expert evidence and we discount it.

70. Mr Fox is a solicitor. Again, much of his evidence was directed towards the delay of HMRC in conducting their enquiries. His investment decisions in relation to Cityblock and Strategic Retail were all about the future prospects of the companies. He considered that they were shares to hold for the medium to long term. In relation to Cityblock, he could see that a city such as Manchester had a thriving student population which made Cityblock an attractive investment. In relation to Strategic Retail, he considered that the Fads business would not be saddled with the same volume of debt and liabilities and as such had a much better chance of prospering.

71. Mr Hussain is a Kings Counsel. He did not give evidence, but there are no factual issues arising on his appeal other than the value of the shares.

72. The rationale of Mr Bell and Mr Fox in investing in the shares is relevant, if at all, only by way of background. It is not relevant to the valuation issues that we must determine. We cannot treat either Mr Bell or Mr Fox as a proxy for the prudent prospective purchaser. At one stage, HMRC were alleging that the investments were made as part of an arrangement which involved the share price being deliberately inflated to maximise tax relief. The

rationale for investing in the shares would then have been directly relevant. However, Ms Murray made clear that this was no longer any part of HMRC's case.

THE EXPERT EVIDENCE - GENERALLY

73. The appellants do not rely on any expert evidence on valuation. They do however challenge the evidence of Mr Strickland and did so by way of cross-examination. In this section we summarise Mr Strickland's evidence.

74. Mr Strickland is a chartered accountant and business valuer. He is a consultant to a firm called Scrutton Bland and a member of the valuation committee of the Institute of Chartered Accountants of England and Wales. He is a member of the board of the International Institute of Business Valuers and chair of its education and training committee.

75. Mr Strickland identified three recognised approaches to the valuation of businesses and business interests, including company shares. He described these as the cost approach, the income approach and the market approach.

76. The cost approach values a company by reference to the aggregate net value of all the assets. The principle behind the cost approach is stated in *International Valuation Standards 2020* as follows:

The cost approach provides an indication of value using the economic principle that a buyer will pay no more for an asset than the cost to obtain an asset of equal utility.

77. Mr Strickland described the cost approach as follows:

The cost approach values the entire share capital of a company on the basis of a summation of the values of the assets less liabilities that are owned by the company.

78. The income approach uses discounted cashflow techniques, applied to evidence as to future cashflows or earnings. Mr Strickland described it as follows:

The income approach provides an indication of value by converting future cash flow to a single current value. It is therefore an approach that requires reliable cash flow or profits data. It also requires a realistic cost of equity capital or weighted average cost of capital.

79. The market approach uses valuation metrics of comparable listed companies or corporate transactions. Those metrics might include, for example, multiples of earnings or price earnings ratios of comparable assets. For property companies, the metric might be the relevant discount or premium to net asset value of a comparable company.

80. Mr Strickland considered that the best approach to value shares in Cityblock and Strategic Retail at the valuation dates was the cost approach. He discounted the income approach and the market approach for reasons which we summarise below in relation to each company.

81. In considering the value of the shares, Mr Strickland took into account the financial information publicly available in the offers for subscription and the prospectuses. We consider below in the context of abuse of process whether there might have been any other information available to the prudent prospective purchaser which might have affected Mr Strickland's conclusions on valuation.

EXPERT EVIDENCE - CITYBLOCK

Cost approach

82. Mr Strickland considered that the cost approach gave a value of 7.91p per share. This took into account the 7.836p average price per share paid by the initial subscribers and the 25 subscribers. Taking into account the value attributed to the shares issued to Wacks Caller, the average price per share increased to 7.91p per share. Mr Strickland did not apply any discount for the costs associated with the offer for subscription, the purchase of Cityblock Limited and the flotation on AIM. Rather, he treated those costs as an asset of the company.

83. The figure of 7.91p per share equates to what Mr Strickland described as the adjusted net assets of Cityblock, which he calculated to be £1,728,000. In cross-examination, Mr Strickland maintained that this did not amount to a net asset valuation, but it seems to us that is effectively what it is. In his report, Mr Strickland calculated the “adjusted net assets” starting with the total assets appearing in PKF’s statement of combined net assets as follows:

Cityblock	£
Total Assets	2,021,000
Costs of raising funds	172,000
Adjustment to consideration for Cityblock Ltd shares	(465,000)
Adjusted net assets	1,728,000

84. The adjusted net assets equates to 7.91p per share. That is because of the two adjustments. First, using a share value of 7.91p per share means that the consideration received by Mr Higginson and Mr Bargh reduces from £1,365,294 to £900,253. Second, it adds back the costs of the flotation, amounting to £172,000, which PKF had taken into account in identifying total assets.

85. It appears to us that the calculation of adjusted net assets performed by Mr Strickland simply uses the 7.91p per share calculated above to value the shares allotted to Mr Higginson and Mr Bargh. It then capitalises the costs, meaning that there is no deduction from the funds introduced by the subscribers. It does not support the share price of 7.91p as such.

86. Mr Strickland went on to consider whether various other factors would suggest a different value for the shares. The factors which he considered and the reasons he discounted them are as follows:

- (1) He did not consider that it was appropriate to apply any discount for a lack of control or for a lack of liquidity or marketability at the date of flotation. He relied on research evidence that market participants do not generally apply such a discount in the period of 6 months or a year after flotation.
- (2) He did not take into account any commercial value introduced by the initial subscribers because there was no evidence as to how any commercial value might be ascertained.
- (3) The governance costs associated with admission to AIM were material when compared to future revenue streams of the company. In the circumstances, he did not consider that admission to AIM resulted in any increase in total corporate value.

(4) The fact that Mr Higginson and Mr Bargh could together exercise control over the company and its dividend policy would have a “generally depressive” impact on value, although he did not seek to quantify that effect.

(5) The consideration attributable to the shares of Mr Higginson and Mr Bargh gave rise to goodwill identified in the Prospectus as £1,107,000. Mr Strickland’s value of 7.91p per share based on the cost approach indicated a value for the goodwill of £642,000. He did not know what that goodwill represented.

(6) There was no information as to whether Cityblock had any relationship with Lancaster University in relation to students occupying the first two sites to be developed. He considered that this would be an unresolved point in the mind of the prospective purchaser.

Income approach

87. In order to value the shares using an income approach, Mr Strickland considered that the prudent prospective purchaser would make various assumptions as to the costs of developing further properties, the rental income from those properties and the ongoing costs of running the business. He considered that the assumptions he used were “generally optimistic”. The two main sensitivities were the estimated rental yield and the interest expense. He assumed that bank funding would be available, but even then he considered that the high level of gearing would mean that further equity investment would be required. Otherwise, by 2008 bank borrowings would have risen to £4.7m. The profit after tax on the basis of Mr Strickland’s assumptions would steadily rise from a loss of £28,287 in 2004 to a profit of £86,015 in 2008.

88. Mr Strickland discounted the resulting cashflows and derived a net present value of £925,000 for the business, which was significantly less than the value of £1,728,000 using the cost approach.

Market approach

89. Cityblock had no historic earnings to which a price earnings ratio or an earnings multiple could be applied. The indicative future earnings which Mr Strickland had calculated for the purposes of the income approach might have been used. However, Mr Strickland noted that shares of FTSE-listed property investment companies all traded at a significant discount to their net asset value. Those companies included Unite Group, which specialised in providing student accommodation.

90. Mr Strickland acknowledged that property businesses would often have a higher price earnings ratio than other trading businesses because there is less risk, in the sense that they have asset backing and predictable cashflows. Overall, he considered that this material would suggest that the cost approach did not understate the value of shares in Cityblock.

91. There were also transactions in the shares of Cityblock following its flotation on AIM. The evidence was that 3,637 shares were traded in 6 transactions on 29 July 2003. The total value of these transactions was £1,959 with an average price of 53.86p per share. This would suggest a value for the company of £11.8m. On the basis of Mr Strickland’s indicative income projections, Mr Strickland calculated that this would equate to a price earnings ratio of 128. Mr Strickland could not understand on what basis buyers of shares in Cityblock could see value so far in excess of the net asset value identified in the prospectus.

92. Mr Strickland noted the restrictions on trading shares in Cityblock as a result of the lock-in provisions. On the basis that only the placing shares could be traded, the “free float”, which is the percentage of shares in issue which can be freely traded, was only 1% of the total share capital. He regarded Cityblock as an unproven company with significant risks arising from the level of gearing that it would require to develop one site a year.

Mr Strickland’s overall conclusion

93. Overall, Mr Strickland considered that the value of the shares disposed of by Mr Bell and Mr Fox on 29 July 2003 was no more than 7.91p per share, based on the cost approach.

EXPERT EVIDENCE – STRATEGIC RETAIL

Cost approach

94. Mr Strickland considered that the cost approach gave a value of 14.25p per share. This was based on the average amounts paid for the shares by the initial subscribers and by the 78 subscribers pursuant to the offer and in the subsequent placing. He did not apply any discount for the costs associated with the flotation on AIM. Again, he treated those costs as an asset of the company.

95. As stated above, the pro forma consolidated balance sheet for Strategic Retail and Fads as at 27 September 2003 showed net assets of £1,375,000. The net assets of Fads itself were stated at £1,000. Mr Strickland added the costs of raising funds and acquiring Fads which was £489,000. The total value given by the cost approach was therefore £1,864,000 which equates to 14.25p per share. This is essentially the same calculation based on the amounts paid by the initial subscribers and the subscribers. The assets of Strategic Retail comprised the funds raised together with the net assets of Fads which amounted to only £1,000.

Income approach

96. Mr Strickland noted that there was only limited information available regarding future cashflows of strategic Retail. There was audited financial information showing turnover and gross profit before central overheads for the 257 days ended 23 February 2002 and the 53 weeks ended 1 March 2003. There were also unaudited draft figures for the 30 weeks ended 27 September 2003. However, the position was confused by intra-group sales and there was no information about central overheads.

97. In the circumstances, Mr Strickland’s view was that he could not identify evidence of cashflows or even prepare indicative projections of possible future earnings. His opinion was that a prudent prospective purchaser could not derive a value based on the income approach.

Market approach

98. Fads had no positive earnings to which a comparable earnings multiple could be applied. Unlike Cityblock, there was no information which he could project forward on the basis of assumptions about future performance. The aggregated figures for the relevant group companies only went down to store contribution. The central overhead costs were not included. Mr Strickland considered that information relating to central overhead costs would not be available to the prudent prospective purchaser.

99. There were deals on AIM in the shares of Strategic Retail following its flotation. The evidence in relation to those transactions shows that on 19 and 22 December 2003 there were

13 transactions on AIM in which 131,700 shares were traded for a total consideration of £123,947. Three of those trades were marked as cancelled. That left 10 trades over two days covering 101,700 shares for a total consideration of £95,447. The price at which those shares were traded was between 92.75p and 97p, with an average price of 94.11p. This would imply a market value of approximately £10m for the Fads business which had been purchased from the joint administrators for a nominal sum three weeks earlier.

100. In the absence of any explanation to justify such a value, Mr Strickland's view was that he could not take these transactions into account in assessing the market value of the shares. He noted that the lock-in provisions restricted the shares available to trade. Only the 382,912 placing shares could be traded. Whilst some 27% of the placing shares were traded, the free float was only 2.9% of the total share capital. He did not consider this to be a functioning market, or what he also described as a liquid market. He considered that a liquid market requires a free float of 15-20% of the issued share capital and that transactions in an illiquid market are not good evidence of value.

101. Mr Strickland went on to consider the effect of various other factors. His opinion in relation to those factors, which he also considered in relation to Cityblock, was as follows:

- (1) On the date of flotation it was not appropriate to apply any discount for a lack of control or to reflect the fact that there was a lack of liquidity or marketability.
- (2) It was not appropriate to take into account any commercial value introduced by the initial subscribers who paid only nominal sums for their shares.
- (3) He did not consider that admission to AIM resulted in any increase in total corporate value.

Mr Strickland's overall conclusion

102. Overall, Mr Strickland considered that the value of the shares disposed of by Mr Hussain and Mr Fox on 19 December 2003 was 14.25p per share, based on the cost approach.

CONSIDERATION OF THE ISSUES

103. Mr Webster on behalf of the appellants took issue with Mr Strickland's evidence and his conclusions for various reasons. We consider his submissions as follows:

- (1) Submissions in relation to Mr Strickland's approach generally;
- (2) Submissions specific to the valuation of Cityblock shares;
- (3) Submissions specific to the valuation of Strategic Retail shares.

(1) GENERALLY

104. We shall deal with the issues in so far as they apply to both valuations in this section. Where specific issues arise in relation to either Cityblock or Strategic Retail we shall deal with them in the separate sections which follow.

105. The appellants accept that Mr Strickland is an expert valuer and did not challenge his status as such. However, it was suggested that he was not well placed to give evidence as to the value of shares listed on AIM because he had little if any experience in valuing such shares. We do not accept that criticism.

106. Expert valuers will not generally be called upon to value listed company shares. However, when using listed companies as comparables, expert valuers such as Mr Strickland do need to understand the pricing of those shares in the market by reference to generally accepted valuation methods. We are satisfied that Mr Strickland brought his experience to

bear in this regard. We are satisfied that he is well qualified to give expert evidence as to the value of shares in Cityblock and Strategic Retail.

107. There was a broad submission that the valuation carried out by Mr Strickland was far removed from the real world assessment of value that would be made by a prudent prospective purchaser. In circumstances where there is no allegation that the price of deals on AIM were artificially inflated, those prices provide reliable evidence as to the value of the shares.

108. We do not accept those submissions. Mr Strickland has applied well established valuation methods in reaching his conclusions on the value of the shares. Those are the methods a prudent prospective purchaser would seek to apply in valuing the shares. There is no disconnect with the real world valuation of shares. Mr Strickland's evidence as a professional valuer was that in an illiquid market the transaction prices did not provide reliable evidence of value. We accept that evidence.

109. Closely associated with those submissions, was a submission that Mr Strickland failed to take into account the nature of AIM as a market. In particular, the opportunity it gives to buy and sell shares in small companies which is not open to shareholders in small private companies. The appellants relied on evidence that in March 2005, AIM had a total market capitalisation of £39.8 billion with companies having an average market capitalisation of £36.1m. There were 1,103 companies listed on AIM at that time, of which only 27% had reported positive earnings per share. The average price earnings ratio was 53.1, whereas on the same date the average price earnings ratio of companies in the FTSE 250 was 17. Even companies with negative earnings had substantial market capitalisations.

110. Mr Strickland accepted that there were a number of companies on AIM which were growing very rapidly leading to high price earnings ratios and market capitalisations. Such companies often had small current profits or indeed negative earnings but with the expectation of high profits in the future. He considered that the market was pricing those shares by reference to their future profits. Mr Strickland noted that AIM included a number of start-up businesses developing new products and new services including technology businesses with an expectation of future revenues justifying their share price. This contrasts with Cityblock and Strategic Retail for which there was no evidence by way of forecasts of future revenues.

111. Mr Strickland accepted that the market will price such companies taking into account the trade sector, competition, quality of management, access to capital and the prospects for future growth. He acknowledged that for the purposes of his cost approach, an asset of equal utility would be a company on AIM operating in the same sector with the same quality management, access to capital and the same business plan. However, he maintained that shares are still priced by reference to the cost approach or by reference to future cashflows or earnings, having regard to the risks associated with those future cashflows. He did not otherwise factor these points into his valuation, for example in relation to possible value added by the companies' initial subscribers or the management teams. We accept that there was no way to quantify these matters without cashflow projections or profit forecasts.

112. Mr Bell adduced evidence identifying a random sample of 6 companies floated on AIM in 2002 and 2003. In each company, the share price on flotation was well in excess of the company's net asset value. Essentially, the appellants say that these are relevant, comparable businesses being floated on AIM and illustrate that Mr Strickland, who has valued Cityblock and Strategic Retail by reference to net assets, has failed to take into account how the market works.

113. The evidence available to us in relation to these companies was incomplete. We are not satisfied that they are comparable companies in the sense that they operated in very different markets to Cityblock and Strategic Retail. We are satisfied from Mr Strickland's evidence that the financial information he had been able to obtain in relation to these companies supported share prices in excess of net asset value. We do not consider that this sample of companies supports a conclusion that Mr Strickland has somehow misunderstood the pricing of shares on AIM.

114. Overall, we do not consider that Mr Strickland failed to take into account the nature of AIM as a market. We are satisfied that Mr Strickland was entitled to value the shares by reference to the financial information that was available to the prudent prospective purchaser.

115. It was submitted that Mr Strickland had failed to take into account various other factors in his valuations. In particular:

- (1) The reputation of Zeus in successfully bringing companies to market.
- (2) The market in which the companies were trading or intending to trade, and the prospects of that market.
- (3) The experience of the new directors put in by Zeus, together with the market experience of the existing directors.
- (4) Investor sentiment generally.

116. We do not accept that Mr Strickland was wrong in not taking these matters into account. There was no basis on which he could quantify the effect they might have on the value of the shares.

117. Mr Strickland did not consider the fact that the value of the placing shares in each company was supported by WH Ireland, the Nomad. He did not have a detailed knowledge as to the role of the Nomad in a flotation on AIM. In *Netley*, there was evidence before the Tribunal and a finding of fact at [123] that whilst a Nomad would not undertake a robust valuation exercise, they must still be satisfied that the valuation of the placing shares was justified. We are not in a position to make any finding to that effect on the evidence in this appeal. In any event, we do not consider that much weight would attach to the placing price itself in the absence of publicly available financial information to support that price.

118. Mr Webster submitted that Mr Strickland had failed to have regard to the position of the hypothetical vendor. For example, where there were dealings on AIM, the hypothetical vendor would not sell significantly below the value of those dealings.

119. We do not consider that is the case. Mr Strickland was valuing the shares by reference to the financial information available to him. We have accepted his reasons for not taking into account the transactions which took place on AIM. The market value of the shares will be the highest price a prudent prospective purchaser would pay and the lowest price the hypothetical vendor would accept. There is no reason to think that Mr Strickland's methodology fails to identify the latter price. The same financial information is available to both the hypothetical purchaser and the hypothetical vendor and it matters not from which perspective it is analysed.

120. It was submitted that Mr Strickland failed to have regard to the upward effect on valuation of the shares being publicly listed on AIM. However, he did address this point in his evidence. He noted that there were governance costs associated with a listing on AIM. He concluded that admission to AIM would not result in any increase in total corporate value. We accept his evidence in that regard.

121. In both valuations, Mr Strickland placed no reliance on the price at which shares were dealt on AIM on or about the date of valuation. This was because the existence of the lock-in provisions meant that there was a very small free float. Mr Webster argued that the lock-in provisions and the small free float meant that scarcity of shares would tend to drive the price higher. Mr Strickland accepted that if supply is less than demand, then the price of an asset will be driven up. However, we are not satisfied that this makes the transaction prices any more reliable than Mr Strickland indicated. The prices do not provide reliable evidence of value because the market in the shares was illiquid.

(2) CITYBLOCK

122. The appellants make various specific challenges to the evidence of Mr Strickland in relation to the value of Cityblock shares. It is said that Mr Strickland's valuation is flawed, and the best evidence of value is the prices paid for the shares in the transactions on AIM on 29 July 2003.

123. It was submitted that in his market approach, Mr Strickland was wrong to use the price earnings ratios of companies with a full listing on the London Stock Exchange. Such companies are more mature without the expectation of a premium for early investors. He ought to have used price earnings ratios of AIM-listed companies.

124. We do not accept that Mr Strickland erred in his approach. He used the only comparables available. The appellants did not identify any AIM-listed companies which might be viewed as comparable. Mr Strickland had been unable to find any AIM-listed comparables. Property investment companies on AIM were also involved in property development and trading, using trading profits to fund property ownership. As such they were not comparable to Cityblock.

125. Mr Webster also relied on the upward trend in property prices at the time of the flotation. Nationwide data showed average house prices steadily increasing from £179,457 in 2001 to £271,619 in 2004. He submitted that Mr Strickland had failed to take into account that this would reflect in property rentals and Cityblock's earnings. We accept Mr Strickland's evidence that this did not affect his valuation. Indeed, it must be reflected in the valuations of the comparables used by Mr Strickland in his market approach. Even then, Unite Group was valued at a discount of 38% to its net asset value.

126. Mr Webster submitted that Mr Strickland's reasons for not taking into account the 12p per share put on the value of Cityblock Ltd and the 12.2p per share attributed to Wacks Caller's services were unconvincing. Mr Strickland appeared to say that because the net asset value was 7.91p per share, this evidence must be disregarded.

127. In our view there is some merit in this challenge. The prospectus stated that the total consideration for which Cityblock acquired the shares in Cityblock Ltd was £1,365,294, and that this was satisfied by the issue of the consideration shares. This equated to 12p per share. Mr Strickland discounted this figure because he could not see how it had been worked out and he therefore had no explanation for the difference between that figure and the average of 7.91p per share paid by the initial subscribers, the subscribers and Wacks Caller.

128. In our view the prudent prospective purchaser would give particular weight to the consideration identified in the prospectus. It was agreed between Mr Higginson, Mr Bargh and the promoters. WHI and Zeus had put their name to the document. It would be known that all those parties would have access to full information about the company and its prospects. They would not be restricted to publicly available information. Further, Wacks

Caller would be in the same position, and they had agreed to convert their fees to equity on the basis of 12.2p per share.

129. In all the circumstances, we consider that the prudent prospective purchaser would regard these transactions as strong evidence as to the value of the shares in Cityblock.

CONCLUSION ON VALUATION – CITYBLOCK

130. For the reasons given above, we broadly accept Mr Strickland's expert evidence. However, we consider that the prudent prospective purchaser would place significant weight on the value attributed to the consideration shares and the value attributed to the Wacks Caller shares.

131. In our judgment, taking into account all the facts and matters referred to above, the value of Cityblock shares on 29 July 2003 was 12p per share. This is the same value that HMRC placed on the shares in their closure notices. We must therefore dismiss the appeal of Mr Bell, and also the appeal of Mr Fox in so far as it relates to his claim for relief on his gift of Cityblock shares. It also means that we should not exercise our power to increase the assessments in the closure notices.

(3) STRATEGIC RETAIL

132. Most of the appellants' challenges to the evidence of Mr Strickland in relation to the value of Strategic Retail shares were the general challenges we have considered above. It is said that Mr Strickland's valuation is flawed, and the best evidence of value is the prices paid for the shares in the transactions on AIM on 19 and 22 December 2003.

133. The appellants say that there was no explanation for Mr Strickland's failure to look at comparables when applying his market approach. However, the reason Mr Strickland did not seek to identify comparables was that he had no figures for earnings to which he could apply the resulting metrics. In our view, Mr Strickland was right to take that approach.

134. It was also pointed out that there was evidence that on 21 March 2005 the price at which shares were dealt in on AIM was 48.5p, suggesting a market capitalisation of £7.73m. Mr Webster invited us to use that evidence as a sense check. However, it is some 15 months after the valuation date, and in any event it suffers from the same issues of reliability as the transactions on 19 and 22 December 2003.

135. We have found that the 78 subscribers paid a total of 26.68p per share. They committed to that investment at the date of the offer knowing that Strategic Retail was proposing to buy the Fads business. That price per share indicates a market value of Strategic Retail of £3,490,937, against assets in the form of cash amounting to £1,864,000. Mr Strickland's evidence was that he could not justify such an uplift in value. Assuming that the joint administrators achieved a fair value for the Fads business, the uplift would represent value being brought to the business by the initial subscribers. He considered that the prudent prospective purchaser would not be prepared to recognise such added value.

136. It is tempting to think that some value must be attributed to the involvement of the initial subscribers, including the non-executive directors. Mr Gabbie had considerable experience in managing retail chains and Mr Mond specialised in business turnarounds. Further, working capital raised from the 78 subscribers was being introduced into the business. The question is how to value those matters in the absence of any working capital report or forecasts of future earnings?

137. However, we accept Mr Strickland's evidence that the prudent prospective purchaser has no way of quantifying that value in the absence of any working capital report or forecasts of future earnings. There are no reliable, comparable transactions which would indicate a value higher than the value of 14.25p per share based on the cost approach applied by Mr Strickland. We cannot rely on the price of 26.68p per share paid by the 78 subscribers because they had exactly the same financial information used by Mr Strickland.

CONCLUSION ON VALUATION – STRATEGIC RETAIL

138. For the reasons given above we accept Mr Strickland's expert evidence. In our judgment, taking into account all the facts and matters referred to above, the value of Strategic Retail shares on 19 December 2003 was 14.25p per share. This is less than the value placed on the shares by HMRC in their closure notices. We must therefore dismiss the appeals of Mr Hussain, and also the appeal of Mr Fox in so far as it relates to his claim for relief on his gift of Strategic Retail shares. It also means that we should exercise our power to increase the assessments in the closure notices relating to the Strategic Retail shares of Mr Hussain and Mr Fox.

ABUSE OF PROCESS

139. The appellants have applied to debar HMRC from defending the appeals or for the appeals to be summarily allowed on the basis that a fair hearing is not possible because of delay in their enquiries. HMRC do not accept that this Tribunal has jurisdiction to exercise such powers based on conduct prior to the commencement of the appeals. In *Nuttall v HM Revenue & Customs* [2022] UKFTT 192 (TC) and most recently in *Chisnall & Others v HM Revenue & Customs* [2023] UKFTT 857 (TC) it has been held that in principle there is such a jurisdiction. In both of those cases, HMRC did not seek to argue that their delay in closing enquiries was anything other than inordinate and inexcusable. They argued that on the facts the delay did not prejudice a fair hearing.

140. All parties in the present appeals were content to proceed on the basis that in principle we do have such jurisdiction. HMRC reserved their position in relation to other appeals, or if the present appeals proceed further, to argue that as a matter of law there is no such jurisdiction.

141. Again, HMRC do not seek to argue that the delay in issuing the closure notices was not inordinate and inexcusable. The enquiries were opened in June 2005 and January 2006. Closure notices were not issued until May and August 2018. The issue we must decide is whether, by virtue of that delay, relevant evidence which might otherwise have been available to the Tribunal is no longer available.

142. It is important to note at the outset that the prudent prospective purchaser has all the information which might reasonably be required to purchase the shares. In the case of small minority holdings, that is the publicly available information. It was not suggested that the prudent prospective purchaser would have anything in addition to what was publicly available at the valuation dates.

143. What is publicly available information is a matter of fact to be determined by the Tribunal on the balance of probabilities. It is for the appellants to satisfy us that it is likely that there was publicly available information which might have affected the valuation of the shares but which, because of the delay, is no longer available. The appellants point to various categories of information which they say would have existed but is no longer available. Some of that information would not have been publicly available, but they say that it would, or at

least might have assisted Mr Strickland. Other information they say would have been publicly available.

144. First it is said that evidence would have been available from Zeus, WH Ireland and the appellants' investment advisers which might have explained the divergence between the placing price of the shares and Mr Strickland's valuations based on a cost approach. That evidence is no longer available and HMRC failed to secure that evidence.

145. We are satisfied that such evidence would have existed, but because of the delay is no longer available. However, that information would not have been publicly available and would not have been available to the prudent prospective purchaser.

146. The appellants accept that it would not have been available to the prudent prospective purchaser, but say that it could still be relevant evidence. It might have enabled Mr Strickland to gain a better understanding of why his cost approach diverged from the placing price and the transactions which took place on AIM. We do not accept that argument. If the evidence would not be available to prudent prospective purchaser, it is not relevant evidence. An expert cannot be in any better position to assess the value of the shares than the prudent prospective purchaser.

147. Mr Webster observed that such material was the subject of evidence and findings by the Tribunal in *Netley* and was treated as relevant to the valuation process. However, in *Netley* HMRC alleged that the arrangements surrounding the admission of shares to AIM were designed to allow subscribers to claim gift relief greater than their cash investments. That is why evidence as to the price setting process was relevant. The valuation aspect of the decision was based only on publicly available information. No such allegation has been made by HMRC in the present appeals, and a similar allegation that the share prices of the placing shares were deliberately inflated has not been pursued.

148. Secondly, it is said that Mr Fox had notes and documentation relating to his subscription for shares in Cityblock and Strategic Retail which are no longer available. We are not satisfied that Mr Fox would have had anything relevant to the valuation of the shares which was not relied on by Mr Strickland.

149. Thirdly, it is said that Mr Strickland himself acknowledged that he would have sought further evidence to explain the disparity between his valuation on a cost approach and the deals taking place on AIM, but that such information was no longer available. However, he was not suggesting that information which was publicly available was no longer available. Mr Strickland stated that he would expect all publicly available information relevant to valuation to be included in the offer documents and the prospectuses which he has considered. He said that was how markets had to work, otherwise there would be scope for market abuse or insider dealing. The submissions before us did not address the ingredients of the offence of insider dealing under the Criminal Justice Act 1993 or market abuse generally. However, we find that all publicly available information relevant to the valuation process would be included in the formal documents. There might be other information not included in the formal documents, such as details about the market sector, competition in the market and so-called investor sentiment. However, for the reasons given by Mr Strickland, that evidence would not affect the valuation of the shares in these appeals.

150. In all the circumstances, we are satisfied that no material evidence other than that contained in the formal documents would have been available to the prudent prospective purchaser. We are not satisfied that delay on the part of HMRC has prejudiced a fair hearing of the appeals. We therefore dismiss the appellants' applications based on abuse of process.

DISPOSAL OF THE APPEALS

151. For the reasons given above, we dismiss the appeals in relation to Cityblock. We are satisfied that the value of the Cityblock shares on 29 July 2003 was 12p per share.

152. We dismiss the appeals in relation to Strategic Retail. We are satisfied that the value of the Strategic Retail shares on 19 December 2003 was 14.25p per share and that Mr Hussain and Mr Fox were undercharged by the assessments in the closure notices. We must therefore direct pursuant to section 50(7) Taxes Management Act 1970 that those assessments should be increased accordingly.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

**JONATHAN CANNAN
TRIBUNAL JUDGE**

Release date: 20th NOVEMBER 2023