Neutral Citation Number: [2023] EWCA Civ 702

Case Nos: CA-2022-001712, 001718

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, BUSINESS LIST (ChD)
Insolvency and Companies Court Judge Jones sitting as a Judge of the High Court
[2022] EWHC (Ch) 1373

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2023

Before :

LORD JUSTICE SINGH
LORD JUSTICE ARNOLD
and
SIR LAUNCELOT HENDERSON

- -

Between :

OLUREMI AKIM AGBAJE	**Claimant/ Respondent**
- and -	
THE ROBERT FREW MEDICAL COMPANY LIMITED	**Defendant/ Appellant**

- -
- -

Jason Coppel KC and Oluwaseyi Ojo (instructed by **Taylor Wood Solicitors**) for the **Appellant**
Amardeep Dhillon (instructed by **Ardens**) for the **Respondent**

Hearing date : 14 June 2023

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Approved Judgment

Lord Justice Arnold:

Introduction

1. The Claimant ("Dr Agbaje") is a GP who was formerly a partner in the Robert Frew Medical Practice ("the Partnership"). The First Defendant ("RFMCL"), which is now the sole remaining defendant, is a company which owns the property used by the Partnership. The partners in the Partnership own shares in RFMCL pursuant to the terms of a shareholders' agreement dated 2006 ("the Agreement"). On 18 April 2009 Dr Agbaje was expelled from the Partnership. The validity of that expulsion was upheld by HHJ Dight sitting in the Central London County Court on 16 April 2010. At the time of his expulsion Dr Agbaje owned 1600 shares in RFMCL. As explained in more detail below, the Agreement contained pre-emption provisions for the transfer of a leaving member's shares to other members at a price to be determined by a mechanism specified in the Agreement. On 4 November 2011 Dr Agbaje's shares were transferred to other partners. A dispute arose as to whether RFMCL had complied with the relevant provisions in the Agreement. Although in form this was a dispute as to whether the contractual machinery had been correctly operated by RFMCL, in substance it was a dispute as to the true value of the shares. Eventually ICC Judge Jones sitting as a Judge of the High Court determined following a trial on 4 May 2022 that the value of the shares was £21,188 as at 18 April 2009 for the reasons the judge gave in a reserved judgment dated 17 June 2022 [2022] EWHC 1373 (Ch) ("the Valuation Judgment").

2. RFMCL appeals with permission granted by Newey LJ from two consequential orders made by the judge on 17 June 2022 and 12 August 2022. By the first order the judge ordered RFMCL to pay Dr Agbaje interest at 4% per annum upon the sum of £21,188 from 4 November 2011 to 17 June 2022 for the reasons the judge gave in an extempore judgment on 17 June 2022 [2022] EWHC 2273 (Ch) ("the Interest Judgment"). By the second order the judge ordered RFMCL to pay most of Dr Agbaje's costs of these proceedings for the reasons the judge gave in an extempore judgment on 12 August 2022 (no neutral citation number) ("the Costs Judgment"). An application by Dr Agbaje for permission to cross-appeal against the judge's decision on the valuation issue was refused by Newey LJ.

The relevant provisions of the Agreement

3. Clause 10 of the Agreement provides, so far as material:

> "10.1 The following events shall be deemed to constitute the service of a Transfer Notice in respect of all the shares held by the shareholder suffering or instigating the event in question:
>
> 10.1.1 a Shareholder ceasing to be a partner in the general medical practice carried on by the Shareholders and whose principal place of business is at the Company registered office.
>
> …"

4. Although the use of the capitalised expression "Transfer Notice" suggests that it is a defined expression, it is not in fact one of the expressions whose meaning is defined in clause 1.1. The "Company" is defined as meaning RFMCL. Dr Agbaje was one of the "Shareholders" who were parties to the Agreement.

5. Clause 11 of the Agreement provides, so far as material:

> "11.1 A Transfer Notice shall:
>
> 11.1.l offer all the shares registered in the name of the Shareholder who wishes to transfer such Shares ('the Vendor') for transfer; and
>
> 11.1.2 constitute the Company the agent of the Vendor for the sale of the shares specified therein (the 'Sale Shares') at the Transfer Date.
>
> 11.2 Where any Transfer Notice is deemed to have been given in accordance with this Agreement, the deemed Transfer Notice shall be treated as having contained each of the matters required under clause 11.1
>
> …
>
> 11.4 The following procedure shall apply on the receipt or deemed receipt by the Company of a Transfer Notice:
>
> 11.4.1 The Company shall within 28 days of the receipt of a Transfer Notice determine the Transfer Price and give notice in writing to the persons in the order referred to in clause 11.4.2 informing them that the Sale Shares are available and of the Transfer Price and shall invite such persons to state in writing within twenty eight days from the date of the said Transfer Notice (which date shall be specified therein) whether he is willing to purchase any and, if so, how many of the Sale Shares.
>
> 11.4.2 The Sale Shares shall be offered in the following order and pro rata to their existing shareholdings (where applicable)
>
> 11.4.2.1 As [sic] the other of the Shareholders direct either to themselves or to a third party; and then to
>
> 11.4.2.2 the Company; and then to [sic]
>
> 11.4.3 After the expiry of the offers to be made pursuant to clause 11.4.2 above or sooner if all the Sale Shares offered shall have been accepted, the Board shall within seven days thereafter allocate the Sale Shares in accordance with the applications and the Company

shall forthwith give notice of each such allocation (an 'Allocation Notice') to the Vendor and each of the persons to whom Sale Shares have been allocated (a 'Member Applicant') and shall specify in the Allocation Notice the place and time (being not later than fourteen days after the date of the Allocation Notice) at which the sale of the Sale Shares shall be completed.

11.4.4 Upon such allocations being made as aforesaid, the Vendor shall be bound, on payment of the Transfer Price, to transfer the Sale Shares comprised in the Allocation Notice to the Member Applicants named therein at the time and place therein specified. If he makes default in so doing the chairman for the time being of the Company or failing him one of the Directors or some other person duly nominated by a resolution of the Board for that purpose, shall forthwith be deemed to be the duly appointed attorney of the Vendor with full power to execute complete and deliver in the name and on behalf of the Vendor a transfer of the relevant Sale Shares to the Member Applicant and the Chairman or the relevant Director may receive and give a good discharge for the purchase money on behalf of the Vendor and subject to the transfer being duly stamped and where applicable enter the name of the Member Applicant in the register of members as the holder or holders by transfer of the shares so purchased by him or them. The Board shall forthwith pay the purchase money into a separate bank account in the Company's name and shall hold such money on trust (but without interest) for the Vendor until he shall deliver up his certificate or certificates for the relevant shares to the Company when he shall thereupon be paid the purchase money.

…"

6. The Transfer Price is defined in clause 1.1 as follows:

> "such price as shall be agreed between the Vendor (as defined in Clause 11) and the other of the Shareholders; or in the event that no agreement can be reached then such price as shall be determined by the Auditors of the Company from time to time who shall act as experts and not as arbitrators and which the Auditors shall certify to be in their opinion the fair market value of such Shares as between a willing buyer and a willing seller taking into account any restrictions on such sale or the size of the holding being sold and contracting on arm's length terms having regard to the fair value of the Business as a going

> concern as at the date of the Transfer Notice referred to in clause 11 but subject to a 10% discount".

7. Clause 4 of the Agreement provides, so far as material:

> "Unless otherwise agreed unanimously between the Shareholders in writing:
>
> …
>
> 4.3 The Auditors of the Company shall be Kingston Smith or such other firm of chartered accountants as the Shareholders shall determine from time to time
>
> …"

Section 35A(1) of the Senior Courts Act 1981

8. Section 35A(1) of the Senior Courts Act 1981 provides:

> "Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and -
>
> (a) in the case of any sum paid before judgment, the date of the payment; and
>
> (b) in the case of the sum for which judgment is given, the date of the judgment."

The valuation dispute

9. When Dr Agbaje was expelled from the Partnership, clause 10.1 of the Agreement applied and so there was a deemed service of a Transfer Notice. By virtue of clauses 11.1.1 and 11.2 Dr Agbaje was deemed to be the Vendor of his shares. By virtue of clauses 11.1.2 and 11.2 RFMCL was Dr Agbaje's agent for the sale of the shares. Accordingly, RFMCL was required to follow the procedure specified in clause 11.4.

10. On 1 July 2010 RFMCL sent Dr Agbaje a letter informing him that Hubbard Lloyd had been instructed to value his shares. Hubbard Lloyd had replaced Kingston Smith as RFMCL's accountants. Neither Kingston Smith nor Hubbard Lloyd were appointed as auditors, since RFMCL was exempt as a small company from the requirement to file audited accounts. Dr Agbaje was invited to agree that Hubbard Lloyd should carry out the valuation, and warned that if he did not raise any objection he would be taken to agree to their instruction.

11. On 7 July 2010 Dr Agbaje replied objecting strongly to the sale of his shares.

12. On 12 August 2010 RFMCL wrote to Dr Agbaje enclosing a resolution of its board of directors dated 6 August 2010 resolving to invoke clause 11 of the Agreement and to determine the price of the shares within 28 days.

13. On 24 September 2010 RFMCL's solicitors wrote to Dr Agbaje about a number of matters. The letter included the following passage:

> "We are also instructed to inform you that our client will also now proceed to dispose of your shares in [RFMCL] pursuant to clause 11 of [the Agreement].
>
> The Directors of the Company have determined the value of each share is £20. We understand that you have 1600 shares. The proceeds of the sale which we estimate will amount to £32,000 shall be kept in a dedicated bank account until such time as you can produce your share certificate."

14. Dr Agbaje did not reply to this letter.

15. On 13 October 2010 Bruce Sutherland & Co, a firm of accountants specialising in share valuation, produced an "Informal Note" at RFMCL's request setting out the approach which Bruce Sutherland & Co considered to be appropriate for the valuation of minority shareholdings in RFMCL. This suggested that the value of Dr Agbaje's shareholding was £15 per share, and made it clear that this value ignored the application of a 10% discount.

16. By a letter dated 10 December 2010 RFMCL instructed Hubbard Lloyd to value the shares and determine the Transfer Price. On 30 March 2011 Hubbard Lloyd produced a report valuing the shares at £15 per share relying in part on the methodology proposed by Bruce Sutherland & Co.

17. On 28 June 2011 RFMCL's solicitors wrote to Dr Agbaje enclosing a copy of Bruce Sutherland & Co's valuation, which they said had previously been sent to Dr Agbaje's solicitors. The letter also enclosed a copy of Dr Agbaje's loan account with the Partnership showing a balance of £16,705.25 due to the Partnership and said that the Partnership had assigned this debt to RFMCL. The letter enclosed a cheque for £7,294.75, representing the balance due to Dr Agbaje from the sale of his shares at a price of £15 per share (a total of £24,000) after setting off the partnership debt. The cheque was not cashed by Dr Agbaje.

18. On 4 November 2011 Dr Agbaje's shares were transferred to other members of the Partnership. The purchasers paid £15 per share. We were informed by counsel for RFMCL that £24,000 was held from then on by RFMCL in a bank account ready for payment to Dr Agbaje (and was ultimately used to pay the sum determined by the judge). We were informed by counsel for Dr Agbaje that Dr Agbaje did not accept this, on the basis that RFMCL had not disclosed bank statements evidencing the retention of the sum in question. We are not in a position to resolve this dispute, but it is not necessary to do so.

19. On 30 May 2013 David Hubbard of Hubbard Lloyd spoke to Dr Agbaje. Dr Agbaje informed Mr Hubbard that, so far as he was concerned, he had not sold his shares and he was looking at a figure of over £200,000.

20. On 18 May 2016 Andrew Burwood of Larking Gowen, a firm which by then incorporated Hubbard Lloyd, acting on behalf of RFMCL, sent Dr Agbaje an email saying that Larking Gowen had recently finalised RFMCL's accounts for the year ended 30 June 2015 and that these included a provision of £24,000 payable to Dr Agbaje for 1600 shares at £15 per share. The email went on:

> "The current directors of the company are happy to pay this amount to you if you accept the share valuation to be valid. Please let me know if you would like them to proceed."

21. Dr Agbaje did not reply to this email.

22. On 4 January 2017 RFMCL wrote to Dr Agbaje's solicitor replying to a pre-action letter dated 30 December 2016. RFMCL's letter enclosed a copy of the Hubbard Lloyd valuation report and stated:

> "We have said all along that the proceeds of the sale of the shares of your client amounting to £24,000 will be paid to him on production of his share certificate, and the return of the cheque sent to him in 2011. We refer to the email to your client by Andrew Burwood …"

23. On 2 March 2017 Dr Agbaje's solicitor replied to this letter saying that he had not seen the Hubbard Lloyd report before, but only Bruce Sutherland & Co's "Informal Note". He went on:

> "You say that you have said all along that £24,000 would be paid to Dr Agbaje. The point is, that so-called 'valuation' by Bruce Sutherland is no such thing, as we have been saying all along. It is an Informal Note, which actually contains two possible approaches to a share valuation, neither of which is accepted by Dr Agbaje. That is why we are where we are."

24. On 28 August 2019 RFMCL wrote to Dr Agbaje saying that it understood from its solicitors that he had been in touch. The letter referred to the fact that the cheque which Dr Agbaje had been sent in 2011 had not been cashed. It referred to the email from Mr Burwood to Dr Agbaje, and said that "the sum of £24,000 which represents the total sum due from the sale of the shares remains with the company". The letter went on to say that, given the transfer of Dr Agbaje's shareholding had been an issue for 10 years, RFMCL was keen to have the matter finally resolved. RFMCL recognised that there were differing positions on the issue. The purpose of the letter was to set out RFMCL's position, and to invite Dr Agbaje to set out his position to facilitate a resolution of the matter. The letter proceeded to rely upon the valuations of Dr Agbaje's shares at £15 per share by Bruce Sutherland & Co and Hubbard Lloyd, and invited Dr Agbaje to set out details of any independent valuation of the shares he had received.

25. On 30 October 2019 Dr Agbaje commenced wide-ranging proceedings against RFMCL and five of its shareholders. Dr Agbaje complained that his shares had been improperly transferred on 4 November 2011 and converted, and he claimed damages for conversion. He alleged that RFMCL had not followed the procedure in clauses 10 and 11 of the Agreement as the price of the shares had not been agreed with him or determined by RFMCL's auditors in accordance with the Agreement. He averred that Hubbard Lloyd were not RFMCL's auditors and that they had adopted "the defective approach" of Bruce Sutherland & Co. He also made financial claims in respect of alleged wrongful deductions from his partnership drawings, non-payment of partnership profits and for an account, and repayment, of partnership capital. Amongst the relief sought, against all the defendants, was a declaration that Dr Agbaje was entitled to 1600 shares in RFMCL and "an Order that the 1600 Shares be valued pursuant to the Shareholders Agreement 2006, sold and the monies paid to the Claimant together with interest accrued". Contrary to the requirements of CPR rule 16.4(2), no basis for the claim to interest was pleaded.

26. On 20 December 2019 the Defendants applied to strike out, or for summary judgment dismissing, the claim. By an order of Deputy Master Hansen dated 2 June 2020 much, but not all, of the original claim was struck out and/or summarily dismissed. The Deputy Master also decided to strike out the claim for conversion as being time-barred, but by an oversight this was not recorded in his order.

27. On 3 July 2020 RFMCL's solicitors sent Dr Agbaje's solicitors an open letter saying:

> "We are once again instructed to send you a cheque for £24,000 being the payment for your client's shares transferred. The cheque is enclosed with this letter. We request that you ask your client to cash the cheque immediately and this is not dependent on whether or not he accepts the transfer value of the shares.
>
> … if the court determines that the shares are worth more than £15, he will be entitled to recover the difference."

28. This cheque was not cashed by Dr Agbaje.

29. On 15 July 2020 RFMCL's solicitors sent Dr Agbaje's solicitors an open letter making the following offer:

> "Your client … to accept the value of the share at £15/ per share … and in response, our clients … will not seek to enforce the 10% discount as provided for in the definition of transfer price in the Shareholders' Agreement.
>
> This offer is open for acceptance within 21 days of receipt of this letter and for the avoidance of doubt, if the offer is accepted within this period, the Claimant will be liable for the Defendants' costs of the proceedings to date which will be capped at 50%."

30. This offer was not accepted by Dr Agbaje. On 28 July 2020 Dr Agbaje's solicitors wrote to RFMCL's solicitors making an open counter-offer to settle his claims for £100,000 plus costs.

31. By an order dated 5 March 2021 Deputy Master Rhys gave Dr Agbaje permission to amend his Claim Form and Particulars of Claim so as to join two additional Defendants.

32. On 7 March 2021 Dr Agbaje served his Amended Claim Form and Amended Particulars of Claim. The Amended Particulars of Claim deleted the claims which had been struck out or summarily dismissed by Deputy Master Hansen, including the claim for conversion. Although Dr Agbaje continued to allege that RFMCL had failed to follow the procedure specified in clause 11 of the Agreement and was thereby in breach of the Agreement, he did not claim any damages for that breach. The Amended Particulars of Claim retained claims for a declaration that Dr Agbaje was entitled to 1600 shares in RFMCL and for "an Order that the 1600 Shares be valued pursuant to the Shareholders Agreement 2006, ~~sold~~ and the monies <u>being their ascertained value</u> paid to the Claimant together with interest accrued".

33. On 22 March 2021 the Defendants served a Defence in which they admitted that Dr Agbaje's 1600 shares in RFMCL had been transferred at a price of £15 per share, and averred that this had been done in accordance with clauses 10 and 11 of the Agreement. In support of this reliance was placed upon the letters dated 1 July 2010, 7 July 2010, 12 August 2010 (and enclosed resolution), 10 December 2010, 28 June 2011 and 3 July 2020 as well as the Hubbard Lloyd report. The Defendants denied that the transfer price had not been determined by RFMCL's auditors, relying upon the fact that Hubbard Lloyd had replaced Kingston Smith pursuant to a unanimous resolution of the shareholders dated 7 May 2008. The Defendants disputed that the approach adopted by Hubbard Lloyd was defective. The Defendants denied that Dr Agbaje was entitled to any of the relief he sought, or any other relief.

34. On 25 August 2021 Dr Agbaje discontinued his claim against the Second to Eighth Defendants.

35. By an order dated 15 October 2021 Deputy Master Linwood gave directions for the determination of Dr Agbaje's claim against RFMCL. The order included provisions, made by consent, appointing Kate Hart as a single joint expert to opine in a written report on the value of Dr Agbaje's shares in RFMCL as at 18 April 2009 and as at 4 November 2011 on the basis of the definition of "Transfer Price" in the Agreement.

36. On 29 October 2021 RFMCL's solicitors sent Dr Agbaje's solicitors a Without Prejudice Save as to Costs letter making the following offer:

> "The First Defendant will pay your client £30,000 in full and final settlement of his claim for the proceeds of his 1600 shares in the first Defendant. This offer is made on condition that it is open for acceptance within 14 days of the date of this letter and in any event by 4pm on 12 November 2021.
>
> If accepted by this date, the First Defendant will not seek its costs of and occasioned by the share claim from your client. In

> effect, both parties will bear their costs of the share claim. After this date, the offer will no longer be open for acceptance and is automatically withdrawn.
>
> We would add that the global offer of £30,000 represents a share value of £18.75 per share which we are confident that your client will not achieve at any valuation or at trial. Furthermore, it should be evident to your client now that he would not be able to recover any interest in the shares having failed to cash all the cheques sent to him to date."

37. Dr Agbaje did not accept this offer.

38. In her report dated 5 January 2022 Ms Hart valued Dr Agbaje's shares at £21,188 (£13.24 per share) as at 18 April 2009 and £21,326 (£13.33 per share) as at 4 November 2011. Dr Agbaje posed certain questions to Ms Hart, but she maintained her opinion in a letter dated 14 February 2022.

39. It is common ground that Dr Agbaje has never surrendered his share certificate to RFMCL.

The trial

40. As the judge explained in the Valuation Judgment, he spent the first half day of the trial identifying the issues which he needed to determine. After discussion with the parties, it became clear that the real issues in dispute on the existing pleadings were (i) the date on which Dr Agbaje's shares should be valued and (ii) the value of those shares as at that date. Accordingly, there was no need for any evidence from the witnesses of fact whose statements had been served by the parties. Although Dr Agbaje applied for permission to re-amend his Particulars of Claim to advance three new allegations, one of which was that the shares should be valued at the date of the hearing, the judge refused permission on the grounds that the application to amend was made very late and would necessitate an adjournment and that the costs incurred were already disproportionate to what was at stake. Accordingly, the remainder of the trial was devoted to legal submissions on the two issues identified above.

The Valuation Judgment

41. The judge's reasoning in the Valuation Judgment may be summarised as follows.

42. The judge held at [15] that the issue as to whether clause 11 of the Agreement had been complied with was "academic" because "[t]he relief sought by Dr Agbaje, namely that the shares be '*valued pursuant to the Shareholders Agreement 2006, sold and the price to be paid*' is not opposed". It is convenient to note before going on that the words in italics are an inaccurate quotation from sub-paragraph (3) of the prayer to Dr Agbaje's original Particulars of Claim and do not reflect the amendments to that sub-paragraph in the Amended Particulars of Claim (see paragraph 32 above).

43. The judge noted at [18] that the parties had agreed to the appointment of a single joint expert to value the shares, and went on:

> "In effect, therefore, the parties agreed a variation of the 2006 Shareholders' Agreement for the purposes of this valuation and sale. It is to be implied that the parties wish the Court to determine the value based upon the expert opinion directed rather than for this expert to provide a certificate of value. That is agreed."

44. The judge considered and rejected at [36]-[45] Dr Agbaje's criticisms of Ms Hart's valuation of the shares, which were that she had wrongly discounted their value on account of Dr Agbaje's shareholding being a minority shareholding and had wrongly applied the aspect of the definition of "Transfer Price" which required a "10% discount".

45. The judge held at [46]-[48] that the date of the valuation should be the date of the deemed Transfer Notice (18 April 2009), rejecting Dr Agbaje's arguments that the valuation date should be the date of the trial, alternatively the date on which his name was removed from the members' register (4 November 2011).

46. The judge expressed his conclusion at [51] as follows:

> "I accept the expert evidence of Ms Hart and her valuation of the Shares at £21,188 as at 18 April 2009."

47. The substantive orders which the judge made in accordance with this conclusion were (1) a declaration that the value of Dr Agbaje's shares on 18 April 2009 was £13.24 per share, (2) a declaration that the total value of the shares on that date was £21,188 and (3) an order that Dr Agbaje be paid £21,188 for the shares.

The Interest Judgment

48. On the date that the Valuation Judgment was handed down, the judge heard argument as to whether Dr Agbaje was entitled to interest on the sum of £21,188, and if so at what rate and from what date. Counsel for Dr Agbaje clarified that Dr Agbaje's claim to interest was made under section 35A(1) of the 1981 Act and sought an award at the rate of 8% from 18 April 2009. RFMCL's advocate submitted that Dr Agbaje was not entitled to interest. The judge ordered RFMCL to pay interest at the rate of 4% from 4 November 2011 (an amount subsequently calculated as £9,006.93).

49. The judge's reasoning in the Interest Judgment may be summarised as follows.

50. The judge began at [2]:

> "As explained in the judgment handed down, this case proceeded before me on the basis, as accepted by the Defendant, that the Claimant was entitled to be paid for the shares which he was required to sell under the terms of a shareholders' agreement made in 2006. It is accepted that the terms of the shareholders' agreement were not complied with: not only was the Claimant not paid for the shares but they were converted by the Defendant by the removal of his name from the share register and by their transfer to others. As a result the

> circumstances of the breach of the agreement concerning the requisite valuation and payment and of the conversion were not the subject of investigation at trial."

51. Having referred at [3] to "the admitted non-payment of the purchase price and conversion of the shares", the judge said at [5]:

> "The claim was issued on 30 October 2019 with accompanying Particulars of Claim pleading (amongst other claims) conversion of the shares. It was subsequently amended but no-one has suggested anything turns upon that. There was no or no sufficient argument before me analysing whether this is a claim in debt or damages for the purposes of section 35A of the Senior Courts Act 1981. That was because from the parties' perspective there did not need to be. This is not a case where payment is dependent upon a transfer of the shares still retained by the vendor. This is a case where the Defendant has accepted that the price has to be paid without the need for share transfers because of the conversion of the shares by the Defendant treating the Claimant's obligation of transfer under the shareholders' agreement as fulfilled."

52. The judge went on in [6]:

> "… As already stated, this is not a case of the purchase price being delayed because the Claimant has not signed a share certificate. It is clear the Court has a discretion to award interest under section 35A of the Senior Courts Act 1981 in those circumstances of non-payment of a contractual liability and of conversion of the shares and when the claim proceeded at trial in the manner of accepted fact as previously summarised."

53. The judge then turned at [7] to consider the date from which interest should run "had the terms of the shareholders' agreement been complied with" and again referred to "conversion" of the shares. He recorded RFMCL's advocate's position as being as follows:

> "8. … Mr Ojo's … submission [is] that there was a valuation. He accepts it was not a valuation in compliance with the terms of the shareholders' agreement because it was by the company's accountant rather than by an auditor. However, he submits that because there was no auditor, the accountant's valuation should be treated as a valuation in accordance with the shareholders' agreement. The valuation can be identified, he submits, within a letter of 24 September 2010, which refers to a sum of £32,000. Mr Ojo also refers to the fact that it was notified to the Claimant within the letter that this sum was available for the payment and would be paid into a bank account to be held there until he accepted it.

> 9. Mr Ojo relies upon this letter to support the submission that there should not be interest in circumstances where the shareholders' agreement expressly provides that the sum due for the shares to be transferred, equal to the valuation conducted in accordance with the shareholders' agreement, should be paid into a bank account and held without interest."

54. The judge rejected this argument for the following reasons. First, he said in [10] that "[t]he trial did not proceed on the basis that a valuation had been made but on the basis that a valuation was required and that payment would be made upon the Court's determination addressing the opinion of the Court appointed valuer". Secondly, he said in [11] that it was a matter of dispute as to whether the valuation relied upon by RFMCL was in accordance with the Agreement and he had not been asked to resolve that dispute.

55. Accordingly, the judge held at [12] that the 24 September 2010 letter "should not be taken into account". The decision on interest "must proceed from the basis that the valuation required under the terms of the shareholders' agreement never took place".

56. The judge went on to hold in the perfected version of the Interest Judgment at [15]-[16] that interest should run from 18 April 2009 (the dated of the deemed Transfer Notice), apparently having forgotten since the hearing that he had in fact ordered interest to run from 4 November 2011 (the date on which the shares were transferred).

57. The judge considered the appropriate rate at [17], holding that it was 4%. In this context he again referred to "the conversion of the shares".

The Costs Judgment

58. The judge heard argument on costs on 12 August 2022. RFMCL submitted that Dr Agbaje should pay its costs of the proceedings since it had succeeded on the only issues which made it to trial, on the valuation of the shares, and subject only to a small reduction to reflect the Claimant's success on the interest issue. The judge ordered that:

    i) RFMCL should pay Dr Agbaje's costs up to 1 March 2022, and Dr Agbaje should pay RFMCL's costs thereafter.

    ii) RFMCL should pay Dr Agbaje's costs of one half-day of the trial and 50% of Dr Agbaje's costs of the hearing on 12 August 2022.

59. The Judge's reasoning for making this order may be summarised as follows.

60. The judge considered at [3] that the starting point was that:

> "The Claimant was the successful party to the extent that he obtained an order for payment of sums due for the transfer of his shares resulting from his deemed transfer notice of 18th April 2009. Although the dispute in statements of case and evidence addressed matters of compliance with the requirements of the shareholders' agreement, the fundamental factual position was that the Defendant unilaterally transferred

> the Claimant's shares and removed him as a member without his consent. Having done that, the obvious question, and indeed that is how the matter came to trial, was, 'How much should we pay for those shares?'."

61. Against that, the judge recognised at [4] that "all of the matters which were in issue and argued before the court [at trial] were lost by the Claimant". He went on at [5] to say that Dr Agbaje should have accepted the valuation of Ms Hart, in which case there would have been no need for the trial. That led the judge to conclude at [6]-[7] that, subject to issues of conduct and offers, Dr Agbaje should have his costs, but only down to the expiry of a reasonable time for consideration of Ms Hart's report. That was 14 days after her letter dated 14 February 2022.

62. At [8]-[9] the judge said that Dr Agbaje's success with regard to interest should be reflected by requiring RFMCL to pay one half-day of the trial costs.

63. At [10]-[11] the judge rejected certain submissions made by Dr Agbaje as to RFMCL's conduct partly on the ground that the facts were unclear and partly on the ground that the judge's provisional views on costs "recognise that the Claimant was entitled and needed to come to court to get a judgment and also provides a fair outcome for the Defendants in the context of the Claimant's decision to pursue this matter to trial based upon too high a valuation".

64. At [12] the judge dismissed the relevance of the offer made by RFMCL in its letter dated 24 September 2010 partly on the basis that "this was not a litigation offer", but "most importantly, at that stage, the contractual obligations to obtain a share valuation had not been fulfilled". Dr Agbaje was entitled to insist on performance, and he was in no position to value the shares himself.

65. The judge added at [13]:

> "… a critical matter which I also consider to be relevant in the exercise of my discretion and which must be borne in mind, namely that there was a unilateral conversion of the shares. This was certainly unacceptable conduct. I have taken this into consideration in the decisions already made but it is also a matter to be weighed in the balance (as a further and alternative ground) when deciding that this letter should not affect the orders for costs."

66. The judge next considered the offer made on 29 October 2021. Although he found that the sum of £30,000 offered by RFMCL exceeded the sum of £29,642 including interest as at that date that Dr Agbaje had obtained, he held that this did not affect the position for the following reasons.

> "14. … that offer was made on the bases that there would be no order as to costs and that the offer had to be accepted within the next 14 days. At that stage, there was no cause for reaching any other conclusion than that the Claimant should be entitled to their costs. The stage of the expert report being produced and its consequences being considered had not been reached.

> 15. In those circumstances, I consider those terms of the offer to be important features in the exercise of my discretion when deciding that the refusal of that offer was a reasonable one. Further or alternatively the problems of unilateral conversion of the shares and/or of the Claimant not being in a position to value the shares himself would also shift the balance in favour of the Claimant and lead to the same conclusion in respect of that letter."

67. Finally, the judge held at [18]-[19] that, although neither party could be said to have succeeded on costs, RFMCL should pay 50% of Dr Agbaje's costs of the costs hearing because costs inevitably flowed from the proceedings, a costs hearing would have been required in any event and "taking into account all of the matters previously addressed".

The interest appeal

68. RFMCL appeals against the order that it should pay interest to Dr Agbaje on three grounds.

69. Ground 1 is that the judge's reasoning in the Interest Judgment was both wrong and involved a serious procedural irregularity because it was based on incorrect and unfair premises. First, the judge proceeded on the basis that RFMCL accepted that it had not complied with the terms of the Agreement because the valuation required by the Agreement had never taken place. That was wrong: as explained above, RFMCL had denied that allegation in its Defence; and it had made no such concession either at trial or in argument on 17 June 2022. Moreover, the judge had decided during the trial that it was unnecessary to determine this issue, and he had not determined it in the Valuation Judgment. Secondly, the judge proceeded on the basis that RFMCL accepted that it was in breach of the Agreement because it had not paid Dr Agbaje for his shares. That was wrong: as explained above, RFMCL had denied that Dr Agbaje was entitled to any relief. RFMCL had always accepted the principle that Dr Agbaje should be paid for his shares, and had repeatedly offered to pay Dr Agbaje, but those offers had not been accepted by Dr Agbaje. Nevertheless, as I shall explain in more detail in the context of Ground 2, RFMCL disputed that any legal obligation to pay Dr Agbaje under the Agreement had yet arisen. Thirdly, and perhaps most seriously, the judge proceeded on the basis that RFMCL accepted that it had converted Dr Agbaje's shares. That was wrong: as explained above, Dr Agbaje's claim for conversion had been struck out by Deputy Master Hansen and deleted in his Amended Particulars of Claim. Had it been maintained by Dr Agbaje, it would have been hotly disputed by RFMCL for the reasons already explained.

70. Counsel for Dr Agbaje had no answer to this ground of appeal. His position was in essence that, despite these errors, the judge had made the right decision. In my judgment the errors mean that the judge's decision cannot stand, and this Court must reconsider the issue.

71. Ground 2 is that the court has no jurisdiction to award interest under section 35A of the 1981 Act. It is common ground that Dr Agbaje's claim concerning his shares was not a claim for damages. Dr Agbaje contends that it was a claim for "recovery of a debt" because the result of the claim was that RFMCL was ordered to pay him

£21,188. RFMCL disputes this. The resolution of this issue depends partly on the meaning of the word "debt" in this context, and partly on the correct analysis of the nature of Dr Agbaje's claim having regard to the terms of Agreement.

72. In *The Aldora* [1978] QB 748 at 751 Brandon J said this about section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934, the predecessor to section 35A(1):

> "… it is to be observed that the words used are 'any debt,' indicating that the net is being spread as widely as possible. Those words are, as it seems to me, apt to cover sums, whether liquidated or unliquidated, which a person is obliged to pay either under a contract, express or implied, or under a statute."

73. In *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 2 AC 352 at 373 Lord Brandon of Oakbrook, as he had by then become, said that he adhered to the view he had expressed in *The Aldora*, but nevertheless stated the position slightly differently:

> "In my opinion the words 'any debt or damages,' in the context in which they occur, are very wide, so that they cover any sum of money which is recoverable by one party from another, either at common law or in equity or under a statute of the kind here concerned."

The other members of the House of Lords agreed with Lord Brandon.

74. Although the word "any" in section 3(1) of the 1934 Act has been replaced by the word "a" in section 35A(1) of the 1981 Act, this does not undermine Lord Brandon's view. Thus Lord Nicholls of Birkenhead said in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 at [109]:

> "The court has jurisdiction to award simple interest under section 35A of the Supreme Court Act 1981, because 'debt or damages' in section 35A includes any sum of money recoverable by one party from another: see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352."

75. Although the power to award interest under section 35A(1) of the 1981 Act is broad, it is not unlimited. In *Odyssey Aviation Ltd v GFG 737 Ltd* [2019] EWHC 1980 (Comm) Peter MacDonald Eggers QC sitting as a Deputy High Court Judge held that the claimant's successful claim for a declaration that it was entitled to a deposit which the defendant had lodged with an escrow agent pursuant to an aircraft purchase agreement between the claimant and the defendant that had been terminated was not a claim to recover a debt within section 35A(1) of the 1981 Act, and therefore the court had no power to award interest. His reasoning was as follows:

> "16. Odyssey's claim for a declaration that it is entitled to be paid the Deposit held by the Escrow Agent is not a claim in respect of which the Court has the statutory power to award interest. This is because Odyssey's claim is not a claim for the recovery of debt or damages from GFG. I reach this decision, even though the direct effect of the making of the declaration claimed by Odyssey is its recovery of a money sum from the Escrow Agent and even though GFG could have

> facilitated the release of the Deposit before the determination of this dispute.
>
> 17. Section 35A of the 1981 Act empowers the Court to award simple interest '*in proceedings …for the recovery of a debt or damages*', such interest to be included '*in any sum for which judgment is given … on all or any part of the debt or damages in respect of which judgment is given*'. This provision contemplates that the relief which the claimant seeks is the recovery of a debt or damages from the defendant. It is possible that section 35A could be read as encompassing any claim whose ultimate purpose is the recovery of money from a third party, but in that event it is difficult to understand why section 35A would be expressed to be applicable to proceedings for the recovery of '*debt or damages*', which contemplates that the defendant is liable to the claimant in debt or for damages and that such liability is to be the subject matter of a claim in the relevant proceedings. This interpretation is reinforced by sub-sections (3) and (7) of section 35A, which refer to the defendant's liability to the claimant in respect of debt or damages."

76. Turning to the present case, in my judgment Dr Agbaje's claim was not a claim for "recovery of a debt" for the following reasons. As I have explained, the dispute between Dr Agbaje and RFMCL was not as to whether Dr Agbaje should be paid for his shares. The dispute was as to the correct value of the shares at the relevant date. That was the dispute which the judge resolved in the Valuation Judgment. Although the judge decided that the value of the shares was £21,188, it does not necessarily follow that RFMCL was under any legal obligation to pay Dr Agbaje that sum. Whether RFMCL was under such an obligation depends on the proper interpretation of clause 11 of the Agreement.

77. In summary, clause 11 of the Agreement provides for the following steps to be taken upon receipt by RFMCL of a deemed Transfer Notice. First, RFMCL must determine the Transfer Price for the Vendor's shares. Secondly, RFMCL must offer the shares to the other Shareholders for purchase at the Transfer Price. Thirdly, the other Shareholders must respond to those offers. Fourthly, RFMCL must allocate the shares between the Shareholders who wish to purchase them. Fifthly, the sale of the shares must be completed. Sixthly, on payment of the Transfer Price, the Vendor must transfer the shares to the purchasers. If the Vendor does not do so, RFMCL is empowered to do it on their behalf. RFMCL must pay the purchase money into a bank account and hold it upon trust for the Vendor, but without interest, until they deliver up their certificate(s) whereupon they shall be paid the purchase money.

78. As can be seen, the valuation of the shares is supposed to take place at the start of this process, and before any question of payment arises. At what point in the process does RFMCL become legally obliged to pay the Vendor the purchase money? Counsel for Dr Agbaje submitted that the answer to this question is provided by the first sentence of clause 11.4.4, and in particular the words "on payment of the Transfer Price": RFMCL is obliged to pay the Vendor the Transfer Price at the time of completion of the sale to the purchasers. Counsel for RFMCL submitted that the words "on payment of the Transfer Price" in the first sentence refer to payment of the Transfer Price *by the purchasers to RFMCL*, and that RFMCL only becomes legally obliged to pay *the*

Vendor the purchase money upon delivery of the certificate(s) in accordance with the last sentence of clause 11.4.4.

79. In my judgment the correct answer to this question depends on whether the Vendor is a willing participant in the process or not. If the Vendor is a willing participant, then the first sentence of clause 11.4.4 applies. This envisages that, on completion of the sale of the shares, the Vendor will voluntarily transfer their shares to the purchasers and receive payment of the Transfer Price in return. If the Vendor is not a willing participant, then the remainder of clause 11.4.4 applies. In those circumstances RFMCL acting as the Vendor's attorney is empowered to transfer the shares on their behalf, to give good discharge for the purchase money and to enter the purchasers' names in the register of members. RFMCL must then hold the purchase money on trust for the Vendor, but the Vendor is only entitled to be paid the money if and when they deliver up their certificate(s).

80. In the present case Dr Agbaje was not a willing participant in the process. On the contrary, he was deeply unwilling. Thus his shares were transferred to the purchasers by RFMCL in exercise of the power conferred by the second sentence of clause 11.4.4. RFMCL received the purchase money from the purchasers. It was required to hold that money in a separate account on trust for Dr Agbaje (and, according to RFMCL, it did so). Dr Agbaje was only entitled to receive the purchase money when he delivered up his certificate; but he never did so. It follows that RFMCL never became legally obliged to pay Dr Agbaje the purchase money. Furthermore, the Agreement expressly excludes any entitlement of Dr Agbaje to interest on the purchase money while it sat in the bank account.

81. The reason why Dr Agbaje was an unwilling participant in the process was that he did not accept the Transfer Price determined by RFMCL of £24,000. RFMCL offered to pay Dr Agbaje this sum less what it said he owed the Partnership on 28 June 2011 and to pay the full sum on 18 May 2016, but he held out for a higher sum. Dr Agbaje was not even prepared to accept RFMCL's proposal of 1 July 2020 that he cash the cheque for £24,000 and pursue a claim for the difference. In the end the logjam was broken by the judge's decision, which resulted in a lower valuation of £21,188. Although paragraph 3 of the judge's order of 17 June 2022 ordered RFMCL to pay Dr Agbaje the sum of £21,188, strictly speaking that was not an order which the judge had power to make, as opposed to an order that RFMCL should pay Dr Agbaje the sum of £21,188 upon delivery up by Dr Agbaje of his certificate. RFMCL did not oppose the making of the order which the judge made because it had never disputed that Dr Agbaje should be paid the correct sum.

82. The proper analysis of Dr Agbaje's claim is therefore that it was not a claim for recovery of a debt, because no debt was ever owed to Dr Agbaje by RFMCL. As framed in the Amended Particulars of Claim, Dr Agbaje's claim was a claim for specific performance of the Agreement. Furthermore, as presented at trial, the claim was purely for the determination by the court of the correct value for his shares in circumstances where Dr Agbaje's unwillingness to accept either the Transfer Price determined by RFMCL or the payments offered and tendered by RFMCL were the only obstacles to his receiving the money. It follows that the court has no jurisdiction to award interest under section 35A(1) of the 1981 Act.

83. Ground 3 is that, even if the court has jurisdiction to award interest under section 35A(1) of the 1981, the judge should not have exercised his discretion to do so. If necessary, I would reject Dr Agbaje's claim for interest on this ground as well. As is well established, the purpose of awarding interest under section 35A(1) is to compensate the claimant for having been kept out of money to which he is entitled. Even if Dr Agbaje did have a legal entitlement to be paid the purchase money from 4 November 2011, when it appears that the purchasers paid the purchase money to RFMCL, as I have explained, the reason why Dr Agbaje did not receive the money until May 2022 was because he was unwilling to accept either RFMCL's determination of the Transfer Price or its offers and tenders of payment. Moreover, Dr Agbaje ultimately received a lower amount than RFMCL had offered to pay him. Thus Dr Agbaje was not kept out of the money by RFMCL, but by his own actions. In those circumstances there is no justification for RFMCL being ordered to pay Dr Agbaje interest.

The costs appeal

84. Having regard to my conclusion on the interest appeal, I shall deal with the costs appeal briefly because the correct order for costs must in any event be reconsidered in the light of RFMCL's success on the interest appeal. Appeals on costs face a high hurdle to overcome. It is unnecessary for present purposes to recite the well-known authorities which establish this. RFMCL appeals on six grounds, one of which was not pursued, but in essence its case is that the judge's decision was plainly wrong. Dr Agbaje defends the judge's decision.

85. In my view the judge's decision was plainly wrong for the following reasons. First, his starting point was that Dr Agbaje was the successful party because he had succeeded in obtaining an order for payment of the price for his shares. This was wrong for the reasons given above. The correct starting point was that RFMCL was the successful party, because the real issue between the parties was as to the correct value of the shares and the judge had determined that issue in favour of RFMCL. Secondly, the judge proceeded on the basis that Dr Agbaje was entitled to pursue the claim until the service of Ms Hart's report. That ignores the fact that the only reason the report was required was because Dr Agbaje had refused to accept the Transfer Price determined by RFMCL, and the result of the exercise was that Dr Agbaje got less than he had been offered, not more. Thirdly, the judge gave wholly inadequate reasons for discounting the various offers which RFMCL had made. Fourthly, and troublingly, the judge criticised RFMCL for "unacceptable conduct" in converting the shares when, as explained above, Dr Agbaje's claim for conversion had been struck out.

86. In my judgment the correct order for costs is that Dr Agbaje should pay RFMCL's costs of the proceedings, save to the extent that the costs have already been dealt with by orders which remain undisturbed.

Sir Launcelot Henderson:

87. I agree.

Lord Justice Singh:

88. I also agree.