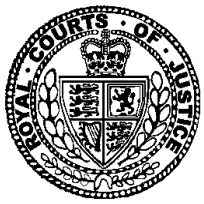

Neutral Citation Number: [2022] EWHC 1373 (Ch)
Case No: BL-2019-001995

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2022

Before :

I.C.C. JUDGE JONES SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

DR OLUREMI AKIM AGBAJE	**Claimant**
- and -	
THE ROBERT FREW MEDICAL COMPANY LIMITED	**Defendant**

- -
- -

Mr Amardeep Dhillon (instructed by **Ardens Solicitors**) for the **Claimant**
Mr Oluwaseyi D. Ojo (instructed by **Taylor Wood Solicitors**) for the **Defendant**

Hearing date: 4 May 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....CHJ 17/6/22.....

I.C.C. JUDGE JONES SITTING AS A JUDGE OF THE HIGH COURT

I.C.C. Judge Jones:

A) Introduction to the Issues

1. There are two issues raised by this claim which now proceeds only against The Robert Frew Medical Company Limited ("the Company"). The first of those issues is not in dispute for the purpose of this hearing. Namely, that Dr Agbaje is to be treated as being entitled to and able to sell under the terms of a 2006 Shareholders' Agreement, 1600 ordinary shares ("the Shares") of the Company. That leaves the issue of the value of those shares for which he seeks an order that they be purchased by the Company.

2. That issue arises under the provisions of the 2006 Shareholders' Agreement as a result of Dr Agbaje's expulsion from (as then named) "Robert Frew Medical Partners" ("the Partnership") by letter dated 18 April 2009. The legitimacy of that expulsion was subsequently upheld in the County Court. The provisions of the 2006 Shareholders' Agreement concerning the sale of a member's shares apply in the event of expulsion from the Partnership. The Company, whilst not partnership property, was in effect its property owning arm used to lease a medical centre to the partners.

3. The morning of this hearing was spent clarifying Dr Agbaje's case and, as a result, determining whether cross-examination, as sought, was appropriate. This resulted in Mr Dhillon, Counsel for Dr Agbaje, very helpfully identifying 12 factual matters which were relied upon for his client's case. Insofar as they referred to matters upon which Dr Agbaje could give evidence, Mr Ojo, Counsel for the Company, accepted those facts without the need to cross-examine subject to the caveat that he could ask for Dr Agbaje to be called should that prove necessary in the light of any cross-examination of his client's witnesses. In fact no cross-examination occurred.

4. That course also identified three matters Mr Dhillon wanted to address with the Company's witnesses in cross-examination but which were not pleaded and required permission to amend if they were to be relied upon. Namely:

    a) To challenge the accuracy of the accounts of the Partnership and of the Company in order to establish whether the Company had received the rent to which it was entitled from the Partnership and, if not, to challenge the valuation of the Shares by the Court appointed expert.

    b) To have a sum of some £40,000 added back into the relevant accounts of the Company as a result of the claim that this sum had been received by the Partnership from NHS England to pay for monies spent by the Company in respect of the upkeep of a car park with the result that the partnership should have paid an equivalent sum to the Company.

    c) To obtain a new date for valuation, namely the date of this hearing on the basis that the Company has now admitted that Dr Agbaje remains a shareholder and Dr Agbaje is entitled to specific performance of the Shareholders' Agreement as of today.

5. Mr Dhillon sought permission to amend with or without the amendments being reduced to writing either on the basis that the case would continue in the afternoon with cross-examination of the relevant witnesses of the Company on those issues or on the basis that there would be an adjournment with further directions for disclosure and supplemental witness statements. This judgment expands upon the reasons given orally before the short adjournment for the decision refusing permission. In reaching that decision I took into consideration the notes to be found in the White Book concerning late amendment and the case law they refer to.

6. The starting point is that the witness statements of the Company's witnesses do not address the three issue in the circumstance of them not having been pleaded. That is the starting point because it would not have been fair or just to require those witnesses to have addressed those issues that afternoon, without any real forewarning and without the opportunity to review the contemporaneous documentation. That applied in particular when the relevant events occurred over 10 years ago, although it would apply in any event. Underlying that starting point was also the fact that the process of disclosure would need to be re-addressed. Those matters led to the conclusion that if amendment was permitted, there would have to be an adjournment of this final hearing and the application to amend had to be considered in that light.

7. In those circumstances, it would be contrary to the overriding objective to grant an adjournment for the purposes of amendment. A basic reason justifying that decision is the absence of any proportionality between the amount in issue and the costs. The difference between the highest and lowest valuations is in the region of £43,000. The costs are already disproportionate and an adjournment would simply exacerbate an unfortunate position which should/would not have been reached in any event had a commercial and practical approach been adopted. The consequence of a late adjournment would also be that the afternoon would be wasted, that court time lost and further court time in the future required. That would not be a just result or in the interests of other court users or be a reasonable use of the Court's resources.

8. In reaching that decision I have borne in mind that the issues were identified by the Company from disclosure which, in accordance with directions, had been required by 12 November 2021. It could be argued, therefore, as it was, that the fact this is relatively recent should be taken into consideration. However, correspondence, in particular a letter to the expert dated 2 December 2021, establishes that the amendments could have been drafted before 10 December 2021. That was the date by which witness statements were directed to be exchanged. In any event, the amended case could have been identified by at latest January 2022. Had the issues been identified before either of those dates, as they should have been, this hearing date could have been adjourned (assuming it would have been right to do so) or further directions could have been sought to enable it to remain effective. No such steps were taken and it would not be just and in accordance with the overriding objective to adjourn now.

9. So far as the proposed amendment relating to the accounts is concerned, I also took into consideration that this concerned the terms of a lease dated 17 June 2011 which provides that rent of some £116,000 odd should be paid to the Company by the Partnership from 1 January 2010. The Company's accounts for the years ending 30 June 2010 and 2011, however, only refer to "sales" of £77,927 and £78,800

respectively. This has potential significance only for the second, valuation date of the 4 November 2011 should that date be used. That being the date when Dr Agbaje's name was removed from the Company's register of members.

10. However even should the second date apply, there would appear to be little, if any, proportionate merit in the amendment in the context of the costs of an adjournment bearing in mind the relatively short period between 1 January 2010 and 4 November 2011. This adds to the factors justifying refusal of an amendment.

11. More importantly, the point will not have significance if the earlier date for valuation, 18 April 2009, the date of expulsion and of the deemed share transfer notice (to be referred to later), is applied. Although this remained an issue for final submissions, the Shareholders' Agreement provides that the required transfer notice for the sale of the Shares was deemed to have been served when Dr Agbaje ceased to be a partner, namely upon expulsion. The fact that he remained a member of the Company or continued to have a beneficial interest in the shares would not alter that date. There appeared to be no realistic prospect of successfully arguing the second date would apply when considering the application to amend. This was a further factor justifying the decision.

12. So far as the amendment concerning the £40,000 was concerned, I also took into consideration that the expert when responding to questions has opined that this would make very little difference in any event to her valuation (see paragraph 11 of her 14 February 2022 letter).

13. As to the new date for valuation, it is apparent from the terms of his Order that the Deputy Master on 15 October 2021 decided that the valuation date could only be one of 18 April 2009 or 4 November 2011. He rejected the date of trial as a further alternative and this has not been appealed. In any event, this hearing has been approached by the parties on the basis that the Court will determine valuation taking into consideration the expert evidence for those dates. If a later valuation date is to be used, new expert evidence will be required based upon new directions. It could not be pursued today, obviously and should have been raised previously (presumably on appeal) but in any event, it would not be right to adjourn both because of the decision of the Deputy Master and because of the consequences. It would be contrary to the overriding objective.

B) Background for the Valuation

14. The Company's accounts for the financial years of 2007 – 2011 reveal a significant reduction in "sales" (i.e. rent) from £118,000 in the first of those years to a sum of between £77,303 and £78,800 in the other years. The Company's net trading position after administration expenses, interest on the mortgage and tax was a profit of £41,588 in 2007 and an overall loss for the other years of (£25,813). Overall, therefore, at that stage in its history at least, this was not a company in which to invest for the purpose of receiving a dividend. The benefits of the investment would be any appreciation in capital value of the property subject to the ability to be able to sell the shareholding.

15. The relevant provisions within the Shareholders' Agreement for share transfer and valuation are clauses 9 – 11. In outline, shares can be transferred subject to pre-emption rights. Those rights entitle the current members to a first option to purchase at "the Transfer Price". In this case, as stated, there was a deemed service of a transfer notice because of Dr Agbaje's expulsion from the partnership. There is an issue whether the pre-emption right provisions were complied with but that is academic because Dr Agbaje's is still seeking an order that the shares be sold/purchased in accordance with his deemed transfer notice under the terms of the Shareholders' Agreement. The relief sought by Dr Agbaje, namely that the shares should be *"valued pursuant to the Shareholders Agreement 2006, sold and the price to be paid"*, is not opposed.

16. As to valuation, clause 11.4.1 of the Shareholders' Agreement requires the Company to determine the Transfer Price. It must obtain a certified opinion of the share value from its Auditors acting as experts when applying the definition of *"the transfer price"*. Namely:

> *"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 of 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."*

17. The objective meaning of that definition is quite straight forward, even though its application may not be:

    a) In the absence of agreement between the vendor and the other shareholders, the price shall be determined by the Company's Auditors as experts. That description is important because the circumstances when a determination by an expert can be challenged are "tightly circumscribed" (per Potter J in ***Healds Foods Ltd v Hide Dairies Ltd*** (1/12/94) and the Court of Appeal's decision on 6/12/96 and see ***Cadogan Petroleum Plc & ors v Tolley & ors*** [2009] EWHC 3291 Ch at paragraph [31].

    b) They are to certify as at the date of the transfer notice their opinion of the fair market value of the shares based upon the facts of a willing buyer and a willing seller at arm's length and its business being a going concern.

    c) In doing so they must take into consideration the effect (if any) of any restrictions upon the sale and/or of the size of the holding.

    d) That resulting value is to be subject to a 10% discount for the purpose of certification.

18. One would have thought, therefore, that agreement to a valuation between the parties would have ended the Court's role because the matter would return to the auditors or perhaps to an agreed valuer to apply those contractual provisions. However, the parties agreed that a single joint expert should be appointed to provide evidence to the

court *"regarding the share value claim"*. I refer to paragraph 8 of the Order made on 19 August 2021. At the CCMC on 15 October 2021, Deputy Master Linwood approved draft directions prepared by the parties, and ordered the appointment of Ms Kate Hart, as an expert to conduct the valuation of the Shares and to prepare a report in respect of the valuation. 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.

C) Expert Opinion

19. Ms Hart opined upon the fair market value, assuming a willing buyer and seller within an arms' length transaction, taking into account any restrictions on such sale and the size of the holding and having regard to the value of the Business (i.e. of the Company as described in clause 2 of the Shareholders' Agreement) as a going concern at the date of the transfer notice but subject to a 10% discount. She used a cost (asset based) approach which she considered to be appropriate for a property investment company. Her conclusion is that the full market value of the Company at 18 April 2009 was £294,000 and 4 November 2011 £296,000. She valued the Shares at £21,188 at 18 April 2009 and £21,326 at 4 November 2011. This represents a price per share of £13.24 and £13.33 respectively. In reaching that opinion she applied a minority discount for the block of shares being sold.

20. Ms Hart did not consider it appropriate to apply a premium to the value of Dr Agbaje's shares on the basis that the quality of the tenant meant this was a risk free investment. It was the value of the demised property which underpinned the value of the Shares. The Property was valued by an independent firm of surveyors and they would have taken into consideration the relative security of the income stream. It was in any event not a risk free investment.

D) Submissions

21. For convenience, I will only refer to Counsels' submissions insofar as it is necessary to do so. I will summarise them and not refer to those I do not consider need to be specifically addressed.

22. Mr Dhillon submitted on behalf of Dr Agbaje that applying the correct construction of the 2006 Shareholders Agreement, the only discount to be applied should have been the specified 10%. There should be no other minority discount, contrary to the expert's approach, because the Shareholders' Agreement required a single share valuation multiplied by the total shares to be sold/purchased and not for the shares to be valued as one block with a minority discount. This construction applied the facts known to the parties when the Shareholders' Agreement was executed, which facts informed an objective construction and were consistent with the approach to construction identified by the Court of Appeal in ***Cosmetic Warriors Limited and***

another v Andrew Gerrie and another [2017] EWCA Civ 324. Most importantly the construction should have taken into consideration that the Company was a quasi-partnership. The Company should have been valued first and a pro rata valuation applied to each share.

23. In support of his submission Mr Dhillon also relied in particular upon the decisions of the House of Lords in ***Ebrahimi v Westbourne Galleries Ltd*** [1973] A.C. 360, ***Arnold v Britton*** [2015] UKSC 36, [2015] A.C. 1619, ***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50, [2011] 1 WLR 2900.

24. Applying in particular the Court of Appeal's ***Cosmetic Warriors*** decision (above), he submitted that clauses 11.4 and 11.5 of the 2006 Shareholders' Agreement when read within the factual context mentioned would lead a reasonable objective reader to the conclusion that its proper construction required a net asset valuation subject only to the 10% deduction. It was not intended there should be a minority discount because everyone was a minority shareholder at the date of the Shareholders' Agreement, this was a quasi-partnership and it was reasonable objectively to conclude that the members intended that any future sale would recognise those facts and that leavers would be protected by this parity except for the 10% deduction. That construction would reflect the price a member would pay to maintain their respective percentage share of the issued share capital. This was consistent with the previous sale of shares by Dr Tayo at £10.00 a share in 2005.

25. Mr Dhillon also submitted that the expert was in error when at paragraphs 3.2 and 3.3 of the report she treated the Company solely as a property investment company. The business of the partnership should not be deemed "irrelevant". It was not. For example, whilst clause 2.1 of the 2006 Shareholders' Agreement defined the business as one of holding property, clause 5.3 required the business to be maintained, extended and improved and this had to be for the benefit of and/or to support the Partnership. The two entities were inextricably linked, as evidenced by the fact that a share transfer notice would be deemed served upon expulsion. The evidence also established that in practice the two entities were managed together by the same people for the same purposes. It was also reflected by the fact that the payment of any finance required by the medical centre by the Partnership would be reimbursed by the NHS under the Costs-Rent Scheme. That would not have occurred had any other business been undertaken from this Property and it increased the value of the Company.

26. It was submitted that the value of the shares on the two dates should be: in 2009, £26.49 per share and in 2011, £26.66 per share. However, as previously mentioned, it was in addition submitted that the valuation date should be the date of trial.

27. Mr Ojo submitted on behalf of the Company that the position is straightforward. The definition of the Transfer Price makes plain on its own and when read in the context of the relevant provisions that the valuer must consider the effect (if any) of any restrictions upon the sale of and the size of the holding. The 10% deduction would be applied at the end having taken into account all such required considerations. That is what Ms Hart did, her valuation complies with the requirements of the 2006 Shareholders' Agreement and, whilst the Court is not bound to accept her evidence,

there is no alternative expert opinion evidence and it should do so. He relied upon the decision of ***Re Euro Accessories Ltd*** [2021] EWHC 47 (Ch).

28. As to the Company's acceptance that Dr Agbaje is the owner of the Shares, that should not lead to a new valuation date. It recognises the fact that he should receive value for his shares and is an admission made for these proceedings to avoid unnecessary litigation. In fact the Company's position is that there was a valuation by its accountants, in the absence of auditors, that the offer was rejected and, as a result, the Shares transferred by the Company with Dr Agbaje' account being credited with that sum.

E) The Law

29. The principal issue is one of construction and a key case is the decision of the Court of Appeal in ***Cosmetic Warriors Limited and another v Andrew Gerrie and another*** (above). It was concerned with articles of association which permitted the sale of shares at the request of a member by the company as their agent. A member's transfer notice (and in certain circumstances its existence would be deemed) could require all or none of the shares to be sold rather than for part of the allocation to remain unsold. The company had the discretion to decide whether the sale would be in one or more lots. Whichever applied, the price would be at the *"prescribed price"*. This was to be *"such sum per share"* (my underlining for emphasis) as the member selling and the company may agree or (in summary) experts would opine as *"the fair value thereof as between a willing buyer and a willing seller ... on a going concern [basis] ..."*. Once the price was agreed or determined, members could apply by application for such maximum number of shares as they wished. A pro rata allocation would apply if there was competition based upon the intending purchasers' respective registered shareholdings subject to their respective maximums.

30. The Court of Appeal applied the principles of construction for written contracts found in the decision of ***Arnold v Britton*** (above), which was noted not to have departed from the guidance contained in ***Rainy Sky SA v Kookmin Bank*** (above). It is not for me to seek to paraphrase or summarise those principles and guidance. I refer to paragraphs [20-23] of the judgment of Lord Justice Henderson, the judgment of the Court of Appeal. In this case I need not address the distinctions between the construction of articles of association and private contracts (i.e. shareholder agreements as in this case) subsequently identified by Mr Justice Snowden, as he then was, in ***Re Euro Accessories Ltd*** (above). The distinctions would not alter the application of the Court of Appeal's approach to the 2006 Shareholders' Agreement in any event.

31. In reaching their decision the Court of Appeal did not accept the submissions of Mr Hollington Q.C. who referred to particular wording within the relevant article to support the argument that its language was consistent with valuation of the shares as a block and not pro rata. He also submitted (see paragraph [38]) that there was a presumption that a fair valuation should produce a real not an artificial valuation and, as a result, the fair market price at which a willing vendor will sell and a willing purchaser will buy should be applied. That price in a private company, as explained by Vinelott J. in ***Howie v Crawford*** [1990] BCC 330, would:

> *"normally, if not invariably, depend upon the proportion of the shares of the company comprised in the holding and on any special rights or restrictions contained in the articles … as well as on the value of the net assets … and [the] profit and dividend record … 'fair' … remind[s] the valuer that the market value must be ascertained on the assumption there is a willing vendor and a willing purchaser, that there is a fair market and that no one would be excluded from bidding in it".*

32. The Court of Appeal was persuaded otherwise by the language used taking into consideration in particular that: (i) the prescribed price was to be "per share"; (ii) the valuation was on a going concern basis, meaning a valuation of the company as a whole, which then had to result in the price per share being valued on a pro rata basis and not as a block; and (iii) it may be wholly uncertain who the ultimate purchaser or purchasers of the shares would be, or to what extent they might be prepared to pay a special price for the shares, which indicated a pro rata construction because the experts would not or not necessarily know how many shares would be transferred or to which member.

33. In reaching that decision the Court of Appeal emphasised that the answer depended upon the language used in the particular case not upon the application of presumptions. That was because, particularly in private companies, there could be a myriad of different circumstances applying at the time when the intention of the parties was expressed in writing in the contract for the purposes of objective construction. I refer to paragraph [43] of the judgment:

> *"In the first place, I do not think it is right to start with any presumption one way or the other. Particularly in the case of a private company with few members, where the relationship between the key shareholders may well be one of quasi-partnership, it is far from obvious that valuation of the shares to be transferred as a block, rather than on a pro rata basis, would accord with business common sense. The parties may well have intended that the valuation should reflect the value of the selling member's proportional stake in the business as a whole, regardless of the size of his shareholding. The circumstances in which a member may wish, or be compelled, to transfer some or all of his shares are likely to vary enormously, and whatever basis of valuation is prescribed the result may (depending on the precise circumstances in which the question arises) appear to prejudice one side or the other. In the end, there is in my judgment no substitute for looking at the language which the parties have actually used, in accordance with the principles of construction which are common ground, in order to ascertain what they objectively intended. As the cases show, the issue is one which frequently arises and is often difficult to answer, but the guidance which the authorities can give is limited because ultimately everything turns on the wording of the articles in question."*

34. It is also to be noted from ***Re Euro Accessories Ltd*** (above), albeit a case concerning construction of articles of association, that Mr Justice Snowden emphasised that the phrase "fair value" addresses the value of the shares to be transferred and, therefore, their number. To (perhaps but necessarily) state the obvious, it is the shareholding being sold that is being valued. If that shareholding does not offer control because it is a minority shareholding, there will normally be a discount because the minority shareholder should only be entitled to be paid the value of the shares they are selling (see paragraphs [39-44]). Mr Justice Snowden (to whom the ***Cosmetic Warriors Limited*** decision had been cited) concluded:

> *" … what is relevant, and in my judgment significant, is the clear statement of general principle that unless there are indications to the contrary in the relevant instrument establishing the right of compulsory acquisition, the general principle of share valuation is that what must be given a "fair value" is what is being compulsorily transferred. This has the result that unless there is a contrary indication, the transferor cannot insist on being paid by*

> *the transferee for something to which his shares do not entitle him and that he does not own. He therefore cannot insist on payment for a proportionate part of the controlling stake which the acquirer thereby builds up, or a pro rata part of the value of the company's net assets or business undertaking."*

35. The learned Judge was specifically concerned with a provision applying compulsory acquisition. That gave rise, as occurs in unfair prejudice petitions, to the question whether compulsory acquisition took the case outside the general principle. In unfair prejudice petitions it will normally do so if the compulsion resulted from wrongdoing by the majority. They should not benefit from their wrong by obtaining at a discount the shares forced by their action to be sold to them. In the case before Mr Justice Snowden, he concluded that expropriation resulting from compulsion under the terms of the articles of association did not mean a pro rata value had to be applied to achieve a fair value. The general principle of share valuation, namely that what must be given a "fair value" is what is being transferred, should still be applied.

F) Decision

36. The answer to the question whether the shares should be valued individually and, therefore, without a minority discount or have a discount applied because a purchaser would pay less for a minority interest block turns on the true construction of the 2006 Shareholders' Agreement.

37. The fact that the Company was a quasi-partnership, as I accept it was (and it was not argued otherwise), is potentially relevant to construction as a background fact known at the time the Shareholders' Agreement was made. The Company was formed in the context of the Partnership, there was an association or relationship of mutual confidence, an agreement or understanding that all or some would participate in its management and there were restrictions upon share transfers.

38. Its relevance does not go further than that, however. For the avoidance of doubt, and Mr Dhillon does not suggest otherwise, it is not being contended that a minority discount is inappropriate in the context of Dr Agbaje's expulsion for reasons analogous to those frequently relied upon in an unfair prejudice petition. There the Court will decide there should be no minority discount because the sale is in effect "forced" as it results from the wrongful acts of the majority. It would be inequitable in that circumstance for the majority to achieve a purchase at a minority discounted price as a result of their own wrongdoing. The 2006 Shareholders' Agreement does not confer any power or obligation upon the expert valuer to investigate such matters and make the necessary findings of fact.

39. Instead the 2006 Shareholders' Agreement expressly requires the expert when reaching a fair market value to take into consideration (amongst other matters) the size of the holding being sold. This is not a case, as in ***Cosmetic Warriors Limited and another v Andrew Gerrie and another*** (above) where the contract requires agreement or determination of the price of *"such sum per share"*. That is a fundamental distinction in the wording and, on the face of it, the fact that a minority holding is to be valued will be relevant. Although the extent of its relevance will be a

matter for the valuer exercising their expertise, that brings into play the general principle that a "fair value" must be given to what is being transferred.

40. To be "fair" in this case, the value must not be based upon the price of shares which offer control but on the price a willing vendor and purchaser would agree for a minority shareholding which does not. Whilst still a matter for the expert based upon the particular facts, there will normally be a discount because the minority shareholder should only be entitled to be paid the value of the shares they are selling.

41. In reaching an opinion upon that matter the expert should take into consideration the fact that under clauses 11.4.2 and 11.5 the shares to be sold: (i) will first be offered to the members in the numbers required for each to maintain their proportion of the issued share capital where applicable; (ii) then to the Company; and (iii) if not purchased, are then able to be transferred in a good faith sale to any person or persons at any price not less than the Transfer Price and on terms not more favourable than those offered to the members or the Company.

42. I do not accept the submission that those provisions have the result that a pro rata valuation applies. The 2006 Shareholders' Agreement simply does not say that. It does not provide that the meaning of "Transfer Price" is a price based on a pro rata transfer. Instead it expressly provides for the number of shares being sold to be taken into consideration. Insofar as the submission is based upon the contention that a single share valuation is required because there will be a pro rata transfer of the shares to the other members, that is not necessarily the case. For example, there will not be a pro rata transfer if only one of the existing members exercises their pre-emption rights and the Company purchases the remainder. Nor would there be one if a third party purchase occurred when the price must be not less than the Transfer Price.

43. Further, even if the sale would be pro rata to the members, that would not justify the conclusion that the member selling a minority shareholding should receive more than that shareholding was worth when it did not offer control. Such a conclusion would result in the other members having to pay more than the "fair" value to maintain their existing proportions of the issued share capital.

44. Whilst the Court of Appeal came to a different conclusion in the ***Cosmetic Warriors Limited*** decision (above), each case turns upon its own contract. As emphasised, this is not a contract requiring valuation *"per share"*. Whilst regard is also to be had to the fair value as a going concern, that does not mean as a matter of objective construction that a minority discount should not be applied. It is quite normal as a fair value of a going concern (for example when determining value by reference to net assets, EBITDA or other income) to apply a discount to take account of the shareholding being sold being a minority interest. In this case, as explained above, the uncertainty of the identity of the ultimate purchaser(s) in fact sustains the objective construction that effect should be given to the express requirement to take into consideration the number of shares and the resulting application of a minority discount.

45. I am satisfied that the expert valuer has applied the terms of the 2006 Shareholders' Agreement as an objective construction requires. I also conclude, subject to addressing two further submissions and one additional matter, that this is not a case in which I can reject the expert opinion before me. There may have been cause to question the size of the discount in the context of the Company and its Business but

that does not mean the opinion was in error. It does not present any cause for me to impose a different opinion to the one reached by an expert. It is also to be noted (i.e. as a footnote) that this opinion is consistent with the discount approach of the other experts who have been retained from time to time.

46. The first submission is that the date of valuation should be the date of trial. That is because Dr Agbaje should have remained a member of the Company (i.e. his name should not have been removed from the register of members, as it was), the deemed transfer notice was not given effect under the terms of the 2006 Shareholders' Agreement and he is now entitled to request or for his shares to be the subject of a deemed transfer notice now.

47. However, Dr Agbaje comes to this hearing seeking to enforce the failure (which for this purpose I will accept as correct) of the Company to follow the procedure for the purchase of the Shares in accordance with the 2009 deemed transfer notice. His claim at this hearing has not been based upon the assertion that there is no obligation to sell his shares because of non-compliance with the notice and, therefore, that a new transfer notice may be deemed or served. Mr Dhillon mentioned that this had been part of Dr Agbaje's case but had been struck out summarily. Assuming that is correct, it does not assist. The dismissal is binding (there having been no appeal) and Dr Agbaje has proceeded by seeking performance of the Shareholders' Agreement based upon the deemed transfer notice. In addition, this trial has proceeded in accordance with directions requiring a valuation for two dates. The request for the date to be the date of trial was refused and that decision has not been appealed. Dr Agbaje cannot change course at this final hearing.

48. In those circumstances the date of the valuation must be the date of the deemed transfer notice. The definition of "Transfer Price" within the Shareholders' Agreement expressly provides that such a valuation shall be as at the date of the notice. It is not to be the alternative date of the day Dr Agbaje's name was removed from the members' register. It cannot be the date of the hearing.

49. The second submission is that insufficient consideration has been given to the value of the business of the Partnership, especially when payments were reimbursed by the NHS under the Costs-Rent Scheme. If that was to be pursued, I would need expert opinion evidence addressing the point whether by cross-examination of Ms Hart or by its introduction through another expert with permission. Absent that, I have no cause other than to accept the opinion of Ms Hart bearing in mind her evidence summarised above.

50. The additional point is whether the construction permitting a minority discount can have been intended when a 10% deduction is required in any event. The answer to this is that the additional deduction does not alter the construction requiring a valuation taking into consideration the size of the shareholding to be sold. I have not understood it to be argued otherwise.

G) Conclusion

51. For the reasons set out above I accept the expert evidence of Ms Hart and her valuation of the Shares at £21,188 as at 18 April 2009.

Order Accordingly