Neutral Citation Number: [2018] EWHC 876 (Comm)

Case No: LM-2017-000145

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2018

Before :

PETER MACDONALD EGGERS QC (Sitting as a Deputy High Court Judge)

- -

Between :

LINDSEY JOSEPH	**Claimant/ Respondent**
- and -	
LEBC GROUP LIMITED	**Defendant/ Applicant**

- -
- -

Edward Brown (instructed by **Rahman Ravelli Solicitors**) for the **Claimant**
Alec McCluskey (instructed by **Michelmores LLP**) for the **Defendant**

Hearing dates: 23rd March 2018

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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.

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MR PETER MACDONALD EGGERS QC

Mr Peter MacDonald Eggers QC:

Introduction

1. The Claimant, Ms Lindsey Joseph, brings this action against the Defendant seeking relief for breach of an agreement with the Defendant ("the Bonus Agreement"). The Defendant ("LEBC") is a company providing advisory services in the financial sector. Ms Joseph had founded a healthcare insurance intermediary business. In 2004, LEBC acquired that business and operated it as a division of its activities ("the CHS Business"). LEBC employed Ms Joseph to continue to run that business.

2. Under the Bonus Agreement, Ms Joseph became entitled to the payment of a bonus by LEBC upon the service of a written notice by Ms Joseph in September 2014. The amount of the bonus was dependent on the turnover and the "*Fair Value*" of the CHS Business. In order to calculate that "*Fair Value*", the parties appointed Moore Stephens LLP ("Moore Stephens") as the Valuer. In December 2015, Moore Stephens produced a "*non-speaking*" valuation, which stated the "*Fair Value*" of the CHS Business in unadorned terms, without any explanation of the reasoning underlying the valuation.

3. However, Ms Joseph objected that the valuation was produced by Moore Stephens without the benefit of the information which allegedly should have been produced by LEBC to produce an accurate valuation. In September 2017, Ms Joseph commenced these proceedings claiming relief for breach of the Bonus Agreement on the grounds that LEBC was obliged, but failed, to produce the information required. LEBC denies the claim.

4. Prior to serving a Defence, LEBC applied for an order striking out Ms Joseph's claim, alternatively summary judgment dismissing the claim. These are the applications which fall for determination by the Court.

The Bonus Agreement

5. In 2009, Ms Joseph and LEBC entered into the Bonus Agreement. Ms Joseph signed the Bonus Agreement on 24th April 2009 and LEBC signed the Bonus Agreement on 13th August 2009. The Bonus Agreement provided that LEBC would pay Ms Joseph a bonus upon the occurrence of a "*Trigger Event*", which was defined to mean the first occurrence of the sale of the CHS Business, the sale of LEBC, Ms Joseph giving notice of termination of her employment or ceasing to hold employment within the LEBC Group, or the receipt by LEBC of notice by Ms Joseph if no sale of the CHS Business or of LEBC had taken place before Ms Joseph's 55th birthday.

6. On 29th September 2014, Ms Joseph gave written notice to LEBC pursuant to clause 5 of the Bonus Agreement requiring LEBC to pay to Ms Joseph a bonus, on the basis that no sale of the CHS Business or LEBC had then taken place before Ms Joseph's 55th birthday. By clause 5.2, the amount to be paid by way of bonus ("*the Due Amount*") was to be calculated in accordance with clause 3 of the Bonus Agreement. By clause 3, when read with clause 5.2, the Due Amount depended on the size of the "*Relevant CHS Business Turnover*". If the Relevant CHS Business Turnover was less than or equal to £500,000, the Due Amount would be 30% of the Fair Value of the CHS Business, if the CHS Business Turnover exceeded £1,000,000, the Due Amount

would be 40% of the Fair Value of the CHS Business. If the CHS Business Turnover was between £500,000 and £1,000,000, the Due Amount escalated from 32% to 38% of the Fair Value of the CHS Business depending on the precise level of the CHS Business Turnover. By clause 5.2, the Due Amount could not be less than £25,000.

7. The Fair Value of the CHS Business was defined by the Bonus Agreement to mean "*the fair market value … on a going concern basis in accordance with the normally accepted principles of commercial business valuation*", either as agreed between the parties or, in the absence of agreement within one month of Ms Joseph's written notice, as determined by a Valuer, meaning an independent firm of recognised commercial business valuers.

8. Clause 4 made provision for the valuation exercise by the Valuer. The Valuer was to be appointed by the Directors of LEBC and by Ms Joseph. By clause 4, the Valuer was to act as an expert, not as an arbitrator.

9. Clause 4 of the Bonus Agreement further provided that:

> "4.4 … the Directors shall make available to the Valuer all such information about the CHS Business as would reasonably be expected to be made available to a prospective third party purchaser of the CHS Business.
>
> 4.5 The Company shall use its reasonable endeavours to procure that such determination by the Valuer is made and notified to Ms Joseph as soon as practicable …
>
> 4.7 Upon receipt of the determination by the Valuer of the Fair Value of the CHS Business at the Relevant Date the Company shall immediately notify Ms Joseph of that determination.
>
> 4.8 In the absence of manifest error in the opinion of the Valuer, Ms Joseph, shall, unless the Company otherwise agrees, accept and be bound by the Valuer's determination …"

The valuation under the Bonus Agreement

10. The parties appointed Moore Stephens as the Valuer. Moore Stephens accepted this responsibility pursuant to a Letter of Engagement dated 9th April 2015. The Letter of Engagement was signed by Ms Joseph and by Mr Jack McVitie, the Chief Executive Officer of LEBC, confirming that "*the contents of this letter and the attached terms and conditions are in accordance with our understanding of your terms of employment*". The Letter of Engagement set out the terms of Moore Stephens' appointment, including the following:

> "1.5 We are to rely solely on the information provided by the addressees of this letter. As a result, there may be other information, which could affect the value of the CHS Business, of which we have not been made aware.

> 1.6 We are to issue a formal valuation letter. In so doing we will not enter into any discussion or provide any explanation for our opinion either verbally or in writing …
>
> 1.8 We point out that there are risks involved in any investment as values and income can go down as well as up. We further point out that the valuation of unquoted companies, or parts thereof, is not an exact science and, whilst our valuation will be one which we consider to be both reasonable and defensible, others may place a different value on the Shares …"

11. By reason of clause 1.6, the valuation or determination provided by Moore Stephens was agreed to be a "*non-speaking*" valuation. Indeed, Appendix 2 to the Letter of Engagement set out an example of the final valuation determination letter, which was in substantially the same terms as the valuation which was in fact issued by Moore Stephens.

12. The Letter of Engagement set out a procedure for the provision of information to Moore Stephens and described that information in clause 1.9 and Appendix 3 to the Letter of Engagement. I understand that the "*Relevant Date*" for the valuation was 30th September 2014.

13. The parties made a number of submissions and provided information to Moore Stephens between May and November 2015 in reply to requests made by Moore Stephens. The relevant issue which gives rise to Ms Joseph's claim concerns the proper characterisation and valuation of the business associated with the renewal of the relevant insurance policies placed through the CHS Business.

14. In an email dated 15th May 2015, Michelmores LLP, LEBC's solicitors, provided information to Moore Stephens, setting out the "*revenue structure of CHS*" comprising "*mainly commission income which is initial income upfront, where there is a risk of clawback should a plan/policy be cancelled before the anniversary or renewal … The basis of charging is usually the commission received on the scheme at renewal*". Michelmores LLP also provided Management Accounts for the previous three years. In the Profit and Loss statement for the CHS Business, the budgeted income for renewal commission for the year ending September 2015 was stated to be zero. In this email, reference was made to "*Advisor Office*", which is a "*financial services specific software … used for recording income and client relationship by LEBC Group, and which CHS also uses to record income and manage client data*".

15. In a letter dated 28th May 2015, Ms Joseph's solicitors, Laytons, informed Moore Stephens that the income of the CHS Business is "*mainly renewal income, which is recurring, year on year, and deemed low risk in the insurance sector*", that "*Cancellations of the whole policy are rare*", and that "*the industry standard for valuing health insurance intermediaries is as a multiple of revenue … the values associated with a health insurance intermediary have always been more buoyant than of an IFA mainly due to the stability of the portfolio*".

16. In a letter dated 6th July 2015, in response to Laytons' letter dated 28th May 2015, LEBC informed Moore Stephens that:

> "*CHS's business model revolves around annual revenue that has to be "re-broked" every year. The business is classified as "initial" by Tenet and by the regulator and is different to the simpler renewing nature of "recurring revenue" of IFA businesses … The CHS reporting system is not able to provide detail on the underlying contract details for the recurring commission income streams. As a result of this, LEBC is not able to provide a reliable estimate of the current or forecast recurring revenue.*"

17. In a letter dated 30th July 2015, Laytons informed Moore Stephens that:

> "*The portfolio is proven to be stable and made up of recurring, renewal income. It is not, as Mr McVitie claims, "initial" revenue, nor is it high risk. I am informed by Ms Joseph that any industry specialist will confirm its business represents a stable source of revenue (which is supported by the year on year growth) … the classification of work as "renewal" may be an important one for the purposes of any valuation, since the revenue is widely accepted as "recurring" and will have an intrinsic value (not least to interested parties … engaged in the acquisition of health insurance intermediaries). In addition, Ms Joseph will confirm the income in CHS was always accepted as renewal and recurring and this was the very basis of the annual revenue forecast meeting (please see attached email from finance which includes a draft budget detailing the inherent business as renewal, which was the case from 2004 to 2011 inclusive), as discussed each year with the Finance Directors when setting the following year's forecast/budgets. According to Ms Joseph, the budget for CHS was based on the renewal portfolio being recurring, albeit an allowance was made for a small element for losses (generally 5%) plus inflationary increments plus an element for new business which, combined, operated to counteract any losses of business and added to the growth to the book of business. Ms Joseph estimates that approximately 90% of the business's revenue will relate to renewal (and level) commission*".

18. According to Ms Joseph, this submission was provided without the supporting information which was, according to Ms Joseph, in LEBC's possession.

19. In an email dated 20th August 2015, Laytons informed Moore Stephens that "*With regard to renewal income, (and based on industry practice) LEBC and CHS each year would set CHS's budget on the assumption the previous year's income would renew (barring a small percentage of losses plus a new business target)*".

20. In an email dated 2nd October 2015, Laytons informed Moore Stephens that "*Whilst accepted that the contract terms will generally be for 1 year, Ms Joseph points to the fact that clients will stay with brokers for many years - provided they are happy with the level of service etc, hence the reason why the income was (and has for many years) regarded as being "renewal", and not "initial". This will be reflected not just in the company's P&L, but when budgeting each year with Ms Joseph*".

21. On 21st December 2015, Moore Stephens issued its determination, stating that "*we have considered the Fair Value of the CHS Business … as at 30 September 2014 … We hereby certify that the Fair Value of the CHS Business as at the Valuation Date is £293,538 …*".

22. As a result of that valuation, LEBC paid Ms Joseph 38% of the Fair Value in the sum of £111,544.44, less deductions for income tax and National Insurance, so that Ms Joseph received the net amount of £64,681.62.

Ms Joseph's claim

23. Ms Joseph alleges that the Moore Stephens valuation is an under-valuation, because Moore Stephens lacked important information which should have been provided by LEBC.

24. In support of her case that the Moore Stephens valuation is an under-valuation, Ms Joseph obtained a further valuation from Grant Thornton LLP ("Grant Thornton") who valued the CHS Business in the amount of £1,088,000.

25. Ms Joseph therefore claims that she should have received under the Bonus Agreement the gross sum of £435,200, being 40% of the Grant Thornton valuation.

26. Ms Joseph claims the difference between the sum she received from LEBC and the sum which should have been received had Moore Stephens valued the CHS Business on the basis of accurate and complete information. Ms Joseph makes this claim on the grounds of breaches of clause 4.4 and of implied terms in the Bonus Agreement that LEBC was under a duty not to provide false, misleading or incomplete information to the Valuer for the purposes of the Valuation and a duty to act with reasonable diligence in identifying and obtaining relevant information as requested by the Valuer for the purposes of the Valuation (paragraph 6 of the Particulars of Claim).

27. It is a critical part of Ms Joseph's case that LEBC provided "*false, misleading or incomplete information*" to Moore Stephens or failed to act with reasonable diligence in identifying and obtaining relevant information as requested by Moore Stephens. According to paragraph 21 of the skeleton argument served by Mr Edward Brown, on behalf of Ms Joseph, it is alleged that LEBC's statements that the CHS Business system or LEBC were not able to provide underlying contract details on recurring commission revenue streams were untrue.

28. According to Ms Joseph's first witness statement dated 24th November 2017, at paragraph 18, the most significant aspect of the source of revenue for the CHS Business was its "*renewal revenue*", meaning recurring income the business would receive every year insofar as the relevant client remained with the CHS Business, as such renewal revenue is more valuable and less risky than non-recurring income. In support of the importance of this characterisation of such income, Ms Joseph relies on a report prepared by Mazars dated 8th June 2014, commissioned by LEBC, a share valuation issued by Pett, Franklin & Co LLP in May 2015, again commissioned by LEBC, and a report prepared by Grant Thornton.

29. Ms Joseph alleges that, contrary to what is said in LEBC's letter dated 6th July 2015, LEBC was able to capture the relevant data on recurring income (through "Advisor Office" software) and that the CHS Business itself kept a spreadsheet recording recurring income, which could (and should) therefore have been provided by LEBC to Moore Stephens. Ms Joseph also alleges that LEBC provided copies of Management Accounts which wrongly treated renewal commission as being nil for each of the 2012, 2013, 2014 and 2015 years (paragraph 13 of the Particulars of Claim), but in

her first witness statement, Ms Joseph states that the renewal commission stated in the Management Accounts was nil in 2015, but were "*significantly less than the correct figure*" for the 2012-2014 years (paragraph 21).

30. According to the first witness statement of Ms Vic Ravenchester, who had been employed as an Administration Head at LEBC from 2001 to 2014, the CHS Business kept this spreadsheet internally and separate from the Adviser Office reports. Ms Ravenchester also stated that "*it was renowned that all clients would renew … the retention rates tended to be very high …*" (paragraphs 9-10).

31. LEBC denies Ms Joseph's allegations. In his first witness statement dated 19th October 2017, Mr McVitie explained LEBC's position, maintaining that in 2012, LEBC's then compliance director, Mr Peter Shelton, reviewed the classification of the CHS Business's income following a change in LEBC's regulatory principal (from Sesame to TenetConnect Ltd), and that this resulted in much of the income of the CHS Business being re-classified as initial, rather than renewal, income, because corporate private medical insurance policies were re-broked every 12 months and there was no guarantee that such policies would renew (paragraph 16(f)). In his second witness statement dated 19th January 2018, Mr McVitie stated that "*Whilst there is a high probability that a number of CHS policies will be successfully re-brokered, which is reflected in the group's steady income stream from year to year and our budgeting, it is impossible to predict which policies will be re-brokered and which will not*" so that LEBC did not classify revenue relating to the CHS Business as "*recurring*" because of the risk that it would not recur (paragraph 7). Mr McVitie added that setting a financial budget and monitoring progress or anticipated cashflow are an entirely separate exercise to the classification of income received, and that the Advisor Office software could not interrogate or report on the likelihood of any particular policy being successfully "*re-brokered*" and therefore that the income would "*recur*" (paragraphs 10-11).

32. Ms Joseph has also relied on the evidence of Mr Peter Shelton, to whom Mr McVitie referred in his evidence. In his first witness statement dated 6th February 2018, Mr Shelton stated that the classification of the annual renewal of CHS healthcare schemes as renewal income was to imply that no advice was given by an authorised person at renewal, whereas in fact advice was given. Therefore, Mr Shelton stated, the purpose of the re-classification was to ensure that the advice given at renewal was properly monitored for regulatory purposes. Mr Shelton did not recall any discussion with TenetConnect Ltd as to the accounting treatment of income from the CHS Business renewals. Mr Shelton also stated that the change of classification of the renewal income was from "*non-advised renewal income*" to "*advised recurring income*" (paragraph 11).

33. In his third witness statement dated 23rd February 2018, Mr McVitie took issue with Mr Shelton's evidence by referring to a board meeting on 12th June 2012, at which Mr Shelton was present, the minute of which recorded that "*Renewal income in April is behind largely due to the reclassification of CHS income by Tenet, who requires it to be classed as initial business rather than renewal*". Mr McVitie also referred to the LEBC internal financial reports which showed the change in reporting of the CHS Business income from "*renewal*" to "*initial*" income (paragraph 5).

LEBC's applications

34. LEBC applies for an order striking out Ms Joseph's claim against LEBC pursuant to CPR rule 3.4(2), alternatively summary judgment dismissing Ms Joseph's claim pursuant to CPR rule 24.2. These applications were issued prior to LEBC serving their Defence to Ms Joseph's Particulars of Claim.

35. As far as the strike out application is concerned, LEBC maintains that Ms Joseph's statement of case does not reveal a valid claim as a matter of law or is an abuse of the court's process. In support of this application, LEBC argues that Ms Joseph's claim seeks to litigate an issue which was exclusively a matter for Moore Stephens as the Valuer and further that the claim "*is incurably incapable of proof*" and should be struck out on that ground. In *McDonald's Corporation v Steel* [1995] 3 All ER 615, a pre-CPR case, the Court of Appeal was prepared to recognise this as a ground for striking out a claim because it would constitute an abuse of the Court's process. Neill, LJ said (at page 623):

> "*It follows therefore that there can be no objection in principle to an application being made to the court on the basis that a statement of claim or a defence should be struck out as an abuse of process because, as disclosed in the affidavits filed in support of the application, the claim or defence is incapable of proof … I am satisfied that the correct approach is to consider whether or not the defendants' case in relation to a particular passage is incurably bad. The power to strike out is a draconian remedy which is only to be employed in clear and obvious cases. I have already set out the wide variety of the evidence which a defendant may be able to rely upon at the trial. I anticipate therefore that it will only be in a few cases where it will be possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of being proved*"

36. Alternatively, LEBC applies for summary judgment dismissing Ms Joseph's claim on the ground that she has no real prospect of succeeding on the claim (CPR rule 24.2(a)(i)). The general principles underlying the determination of a summary judgment application are well established and are explained by Lewison, J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at para. 15, including that a claim with a real prospect of success is one which carries conviction, as opposed to being merely arguable, that the evidence presented to the Court should not be taken at face value if there is clear, contrary evidence, and that the Court should have in mind both the evidence presented in support of or in response to the summary judgment application but also the evidence which could reasonably be expected to be produced at a trial. In other words, the question is whether the Court is in a position, based on the evidence before it and reasonably anticipated evidence, fairly to determine the legal and factual issues critical to the success or failure of a claim. Mr Brown also relied on Floyd, LJ's comment in *TFL Management Services Ltd v Lloyds TSB Bank plc* [2013] EWCA Civ 1415; [2014] 1 WLR 2006, at para. 27, after referring to Lewison, J's summary, that the Court should consider carefully before determining single issues on a summary judgment application. Indeed, Lewison, J said that "*the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case*".

37. The central basis of LEBC's applications is that Ms Joseph's claim seeks to circumvent the binding valuation delivered by Moore Stephens and is incapable of proof at trial. In support of this submission, Mr Alec McCluskey on behalf of LEBC relies on the decision of the Court of Appeal in *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826; [2012] Bus LR 542. At paragraphs 33-34, Thomas, LJ quoted from Hoffmann, LJ's judgment in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48 and said that "*in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision*", and then concluded that "*The court will not generally intervene in a matter which is within the jurisdiction of the expert save in the narrow circumstances circumscribed as a matter of contractual interpretation of such clauses*". Mr McCluskey also relied on the decision of Harman, J and the Court of Appeal in *Dean v Prince* [1953] 1 Ch 590, 600-601; [1954] 1 Ch 409, 417-418, 426-427. In this case, the Court held that a valuer's determination could be set aside on grounds of fraud or mistake as to principle, jurisdiction or law. Harman, J held that the valuation was not unchallengeable before the Court, but the Court would not itself undertake the valuation, which is a matter for the expert valuer. On appeal, Harman, J's decision setting aside the valuation was overruled, because either there was no relevant mistake or that if there were such a mistake, it had no material impact on the valuation.

38. In addition, Mr McCluskey said that where the valuation is a non-speaking valuation, as in this case, such that the Valuer does not explain the basis of or reasons for its decision, the Court should not conjecture as to the rationale adopted by the Valuer. In this respect, Mr McCluskey relied on Potter, J's decision in *Healds Foods Ltd v Hyde Dairies Ltd*, unreported, 1st December 1994, where it was held that the expert could not be called or required to give evidence of the reasons for his or her determination, because the determination was final and binding and the expert was under no obligation to give a reasoned decision (affirmed by the Court of Appeal in an unreported judgment dated 6th December 1996). Mr McCluskey also relied on Robert Walker, LJ's decision in *Morgan Sindall Plc v Sawston Farms (Cambs) Ltd* [1999] 1 EGLR 90. In that case, Robert Walker, LJ said at page 92:

> "*The whole point of instructing a valuer to act as an expert (and not as an arbitrator) is to achieve certainty by a quick and reasonably inexpensive process. Such a valuation is almost invariably a non-speaking valuation, with the expert's reasoning and calculations concealed behind the curtain. The court should give no encouragement to any attempt to infer, from ambiguous shadows and murmurs, what is happening behind the curtain.*"

39. Mr McCluskey, for LEBC, argues in support of LEBC's applications as follows:

    (1) According to the Particulars of Claim, Ms Joseph's claim is a claim for money in a precise amount, being the difference between the sum received by Ms Joseph from LEBC on the basis of the Moore Stephens valuation and the sum she should have received based on the Grant Thornton valuation. Mr McCluskey says that this is a claim in debt and, as such, it must fail, because there is nothing in the Bonus Agreement that requires LEBC to pay any sum based on a valuation procured unilaterally by Ms Joseph from Grant Thornton.

Moreover, argues Mr McCluskey, the Grant Thornton valuation proceeds on the assumption that Ms Joseph is correct in her assertions as to the correct treatment of renewal and non-renewal commission and there was nothing in the Bonus Agreement which required Moore Stephens to value the CHS Business on this basis.

(2) Ms Joseph claims that LEBC was obliged to make a minimum payment of £375,000 under the Bonus Agreement under clause 8.2. Mr McCluskey argues that this is hopeless, because clause 8.2 does not impose an obligation to make any payment, but merely provides for the payment of larger bonuses in tranches.

(3) There is only a claim in debt. There is no properly pleaded claim by Ms Joseph for damages for breach of contract.

(4) It is not possible for Ms Joseph to succeed in any claim for damages which would require proving that the determination of the Fair Value of the CHS Business would have been in a higher sum had LEBC provided the information which it is alleged it should have provided, but did not provide, to Moore Stephens because (a) the valuation was on a "*non-speaking*" basis so that it is not permissible for the Court to consider the basis of the Moore Stephens valuation, (b) Moore Stephens, in its Letter of Engagement, provided the valuation on the basis that it would not provide any explanation for the valuation; (c) Moore Stephens could not be permitted or required to give evidence at trial as to the basis of the valuation, because the parties agreed that the valuation would be binding (relying on *Healds Foods Ltd v Hyde Dairies Ltd*); and (d) Ms Joseph made submissions to Moore Stephens as to the treatment of the relevant CHS Business as "*renewal*" business; therefore, Moore Stephens were in a position to consider such submissions, but it is not possible to know whether Moore Stephens considered the treatment of income streams as relevant to the valuation exercise or whether Moore Stephens treated such income as recurring income or as renewal business.

40. At paragraph 16 of Mr McVitie's first witness statement in support of LEBC's applications, it was suggested that the implied terms of the Bonus Agreement on which Ms Joseph's claim depends could not be established. However, in response to this assertion, Mr Brown relies on Jacob, J's decision in *Parry v Edwards Geldard (No. 2)* [2001] PNLR 44, at para. 17-18:

> "*Mr Rodger submits that the contract between Rhys and Alan was such that Alan was entitled to buy at the price settled by the valuer, however mistaken the valuer might be about the value. Once the valuer had settled a value, that valuation cannot be set aside because the parties had agreed that the price was to be whatever was settled … the parties are bound by the result found by the valuer, but only upon the assumption that he is given proper instructions as to what to value. It is absurd to think that if he is given wrong instructions by the common mistake of both parties that both parties are bound by the common mistake. Mr Rodger conceded (rightly) that if the valuer valued the wrong piece of land because he was given wrong instructions as to what land he was to value, the valuation could be set aside. This is because, as Lord Denning said "it is simply the law of contract". If there were a valuation of the wrong piece*

> *of land the valuation could be set aside as a valuation not of the land contracted to be valued. Similarly in this case it was clearly implicit that neither party would give the valuer false information about the attributes of the land to be valued. They accepted the risk that he might make an error but not that he would be directed into error by one side or the other. Thus, if he made his own mistake, they would be bound by that (assuming it was a non speaking award). It is absurd to say that the parties contracted to be bound where either of them (still less both) gave the valuer false information. Thus when Alan, in particular, directed the valuer to proceed on the basis that no quota was involved he was in breach of contract, whether innocently or not does not matter. He cannot rely upon his own breach to say that the valuation should stand. Unlike the Campbell case [Campbell v Edwards [1976] 1 WLR 303] there is no question of the valuer making his own mistake, this is a case where the valuer made no mistake in doing that which he was asked to do. The parties were bound by the valuation so far as it went, namely of the land without quota but no more*."

41. During the hearing of LEBC's applications, Mr McCluskey did not press the argument that the existence of the implied terms relied on by Ms Joseph could not be established. In any event, I would not have accepted any such argument given the authority of Jacob, J's decision and given the fact that Ms Joseph has a real prospect of succeeding in her case as to the existence of the alleged implied terms. Further, there remains Ms Joseph's claim based on a breach of an express term of the Bonus Agreement, namely clause 4.4.

42. Dealing with the extant arguments presented by LEBC, the second argument is no longer relevant, because Ms Joseph has stated that she does not intend to proceed with the "*minimum payment*" argument based on clause 8.2 and that she will amend the Particulars of Claim accordingly.

43. The first and third arguments raise questions as to the nature of the claim presented by Ms Joseph. Mr Brown maintains that Ms Joseph brings a claim in debt and for damages. As to the claim in debt, I have some sympathy for Mr McCluskey's argument, but Mr Brown says that the Moore Stephens' valuation is a nullity. This is an issue which must be considered in tandem with the factual basis of Ms Joseph's claim and, if the valuation were a nullity, a claim in debt based on a substituted valuation remains a possibility. It is right to note that, as Mr McCluskey observes, that the fact that the valuation is a nullity is not expressly pleaded. However, I do not regard that as a matter which must necessarily be pleaded for the purposes of the claim. In any event, if the claim for damages were one which has been made and which is not summarily determinable, I do not consider that the claim in debt should be determined on a summary basis.

44. As to the nature of Ms Joseph's pleaded case, and in particular whether Ms Joseph has pleaded a claim for damages for breach of contract, it is pertinent to note that (1) the claim form issued by Ms Joseph states that her claim is a "*claim for damages for breach of the express and implied terms of a Bonus Agreement*"; (2) having pleaded a claim based on breaches of the Bonus Agreement, Ms Joseph's begins the next section of the Particulars of Claim with the heading "*Loss and Damage*"; (3) under that heading, at paragraphs 14-16, there is a plea that Ms Joseph claims the sum of

£323,655.56 (being the difference between the sum which Ms Joseph claims should have been payable based on a correct valuation and the sum received by Ms Joseph), but there is no express reference to "*damages*" within the body of this section; and (4) the prayer for relief sets out Ms Joseph's claim for "*Damages as aforesaid and/or to be assessed*".

45. In those circumstances, although paragraphs 14-16 could have been more elegantly expressed, I have no doubt that there is a pleaded claim for damages.

46. That leaves the important issue whether Ms Joseph's claim is incapable of proof at trial (Mr McCluskey's fourth argument). There are two elements to LEBC's submission.

47. The first element is that, according to LEBC, it is legally impermissible to inquire into the basis of the Moore Stephens valuation, given that it was given on a "*non-speaking*" basis and given that it was agreed to be binding on Ms Joseph by clause 4.8 of the Bonus Agreement, unless LEBC agreed otherwise or unless there was a "*manifest error*". There is no such contrary agreement by LEBC and the parties are agreed that there has been no "*manifest error*". It is true to say that the valuation, insofar as it is valid, is by reason of clause 4.8 of the Bonus Agreement binding on Ms Joseph, but the issue which arises for determination in connection with Ms Joseph's claim is not whether the Valuer made an error in the valuation based on the information provided, but whether any error in the valuation resulted from LEBC's breach of clause 4.4 and/or breach of the implied terms of the Bonus Agreement. As Mr Brown, for Ms Joseph, put it, the central evidential dispute is whether LEBC could have produced the information which it said it could not produce, and that this dispute cannot be determined summarily.

48. The second element is that in order to calculate the alleged loss caused by the breaches of the Bonus Agreement, it is necessary to determine whether, had accurate and complete information been provided to Moore Stephens for the purpose of the valuation exercise, Moore Stephens would have determined a different "*Fair Value*". LEBC maintains that is not possible to inquire into the existence or the extent of the influence of such information on Moore Stephens' valuation. This is so even though Ms Joseph made submissions as to the correct treatment of the CHS Business's renewal income. Accordingly, it is argued, Ms Joseph's claim is incapable of proof at trial.

49. Ms Joseph has deployed evidence to the effect that LEBC failed to provide to Moore Stephens information which it possessed and which was required for the valuation exercise. LEBC denies this. This is plainly a triable issue. In circumstances where there may have been a breach of the Bonus Agreement on the part of LEBC, the remedy available to Ms Joseph is damages.

50. The real question is whether it is possible for the Court to assess at trial those damages flowing from the particular breaches of contract, as alleged by Ms Joseph. It may be that LEBC is right to contend that it is not possible. However, I do not consider that the Court is in a position at an interlocutory hearing to determine the validity of that contention. LEBC may be right but it may be wrong.

51. I have come to the conclusion that LEBC must fail in its application for the following reasons. First, I can foresee the real possibility that Ms Joseph can adduce factual and expert evidence to demonstrate that Moore Stephens, or possibly a valuer in the position of Moore Stephens, would have valued the CHS Business in a higher amount had the information provided by LEBC been accurate and complete. That is not to say that Ms Joseph will necessarily succeed, but equally I do not think it can be said that Ms Joseph will necessarily fail in any such task.

52. Second, I do not consider that Ms Joseph's claim, based on a breach of contract by reason of the alleged failure of LEBC to produce accurate and complete information to Moore Stephens for the purpose of the valuation exercise, necessarily means that it is circumventing the valuation produced by Moore Stephens, because it is not seeking to impugn the judgment of Moore Stephens; the claim lays responsibility for the allegedly inaccurate valuation not on Moore Stephens but on LEBC. That is not to say that LEBC could not successfully argue at trial that the contractual machinery relating to the valuation should not be circumvented by such considerations, but it is not an assertion which must or can necessarily be upheld at this stage.

53. Third, although I accept that Ms Joseph made submissions to Moore Stephens as to the treatment of the relevant CHS Business as "*renewal*" business, this is not the issue raised by Ms Joseph's claim. The claim focuses on the information which LEBC is alleged to have failed to provide and which explains or substantiates such submissions which were made by Ms Joseph.

54. Fourth, Ms Joseph contends that the Moore Stephens valuation is a nullity. This is a question of law which requires full argument. If it is a nullity, which is by no means clear, this may answer LEBC's objections to the claim in debt and that it is not possible to produce an alternative valuation as a comparator to the Moore Stephens valuation.

55. Fifth, LEBC's argument that Ms Joseph's claims are incapable of proof is presented as a logical necessity; it is not presented to the Court based on any expert evidence. If it is, it is not one which the Court is able to determine in the absence of the consideration of factual and expert evidence at trial. This is plainly a case where the Court would benefit from a fuller investigation into the facts having regard to such additional evidence.

56. In those circumstances, I do not consider that the Court can safely hold, at this hearing, that Ms Joseph's claim is incapable of proof in the absence of a trial and the testimony of the factual and expert witnesses on the issues of causation and the quantum of any loss allegedly caused by the alleged breaches of the Bonus Agreement. It is not one of those "*clear and obvious cases*" contemplated by Neill, LJ in *McDonald's Corporation v Steel* [1995] 3 All ER 615. In my judgment, Ms Joseph's claim has a real prospect of success at trial.

57. Accordingly, I dismiss LEBC's applications for an order striking out Ms Joseph's claim and/or for summary judgment. I also reject the suggestion that the claim involves an abuse of process on the part of Ms Joseph.

58. I await counsel's submissions in connection with the form of order and future directions to be made.