



Neutral Citation Number: [2023] EWHC 1452 (Ch)

Case No: BL-2021-MAN-000039

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: Monday 19 June 2023

Before :

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

Between :

Aymes International limited

Claimant

- and -

(1) Nutrition 4U B.V.
(2) NutriMedical B.V.
(3) Sander Ketelaar

Defendants

Mr Andrew Latimer (instructed by **Hemingways Solicitors Limited**, Sheffield) for the **Claimant**

Mr Francis Bacon (instructed by **Freeths LLP**, Nottingham) for the **Defendants**

Hearing dates: 28-30 March, 3 April 2023

Draft Judgment circulated: 14 June 2023

Judgment handed down remotely: 19 June 2023

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.

.....
HIS HONOUR JUDGE HODGE KC

Remote hand-down: This judgment was handed down at a remote hearing at 10.00 am on Monday 19 June 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

Contract – Whether time of the essence of completion of an option contract to purchase shares at a price to be determined by reference to a formula which falls to be applied at a set date – Whether consideration paid for the grant of the option falls to be included in the formula for calculating the purchase price for the shares – Whether purchaser entitled to specific performance of the option contract – Terms of any order for specific performance

The following cases are referred to in the judgment:

British and Commonwealth Holdings plc v Quadrex Holdings Inc [1989] 1 QB 842
British Overseas Bank Nominees Ltd v Analytical Properties Ltd [2015] EWCA Civ 43
Clements v Frisby [2023] EWHC 320 (Ch)
Davis v Spalding (1974) 231 E.G. 373
Grant v Cigman [1996] 2 B.C.L.C. 25
Hare v Nicoll [1966] 2 QB 130
Homepace Ltd v Sita South East Ltd [2008] EWCA Civ 1, [2008] 1 P. & C.R. 24
Lamesa Investments Ltd v Cynergy Bank Limited [2020] EWCA Civ 821, [2021] 2 All E.R. (Comm) 573
Michaels v Harley House (Marylebone) Ltd [2000] Ch 104
Mills v Sportsdirect.com Retail Ltd [2010] EWHC 1072 (Ch), [2010] 2 B.C.L.C. 143
MSAS Global Logistics Ltd v Power Packaging Inc [2003] EWHC 1393 (Ch)
Pena v Dale [2003] EWHC 1065 (Ch), [2004] 2 B.C.L.C. 508
Re Schwabacher (1908) 98 L.T. 127
Revenue and Customs v Secret Hotels2 Ltd [2014] UKSC 16, [2014] 2 All E.R. 685
Simmers v Innes [2008] UKHL 24, 2008 S.C. (HL) 137
Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444
Taylor v Crotty [2006] EWCA Civ 1364

His Honour Judge Hodge KC:

I: Introduction

1. This is my considered judgment following the trial in Manchester, over four days between 28 March and 3 April 2023, of a Part 7 claim issued on 8 April 2021. The claimant is represented by Mr Andrew Latimer (of counsel) and the defendants by Mr Francis Bacon (also of counsel).
2. For structural reasons only, this judgment is divided into the following parts (although these are not self-contained and the contents of any one part have informed other parts):
 - I: Introduction
 - II: Background
 - III: Witness evidence
 - IV: Findings of fact
 - V: Completion
 - VI: Company Value
 - VII: The CEO contract
 - VIII: Breach
 - IX: Specific performance
 - X: Conclusion
3. This claim concerns the admitted exercise by the claimant, Aymes International Limited, of a call option agreement (**the call option agreement**) for the purchase from the first defendant, Nutrition4U B.V. (**Nutrition4U**) of the entire issued share capital of the second defendant, NutriMedical B.V. (**NutriMedical**), a Dutch company specialising in the development and marketing of nutritional products. The principal issues which fall to be considered are whether: (1) following the exercise of the option, time was of the essence of completion of the resulting contract to purchase the shares (**the option contract**) at a price to be determined by reference to a formula which falls to be applied at a set date; (2) the consideration paid for the grant of the option falls to be included in the formula for calculating the purchase price for the option shares; and (3) the claimant is entitled to specific performance of the option contract and, if so, the terms of any order for specific performance.
4. By a call option agreement dated 31 August 2016 the claimant, a company incorporated in England and Wales, was given the option to purchase from Nutrition4U the entire share capital of NutriMedical. The claimant's founder is Mr Roger Wertheim-Aymes (**Mr Aymes**) and he is its sole director and shareholder. The claimant was incorporated on 27 May 2008 but it did not begin to trade until October 2013, once the restrictions associated with the termination of Mr Aymes's former

employment with a competitor had expired. The claimant supplies nutritional products in the UK and Ireland but it has no other market share within Europe. It does not manufacture its own products but, by concentrating on the distribution and sale of a single product, it was able to place large orders with the manufacturer and thereby purchase at a discounted price.

5. Nutrition4U, also a Dutch Company, is the legal and beneficial owner of all the shares in NutriMedical. The third defendant, Mr Alexander (known as Sander) Ketelaar (**Mr Ketelaar**), who is a Dutch national resident in the Netherlands, is currently the Chief Executive Officer (**CEO**) of NutriMedical, and he serves as its only employee under the terms of a service contract. Mr Ketelaar is also the director and sole shareholder of Nutrition4U. NutriMedical has no appreciable fixed assets, and its value derives from its intellectual property and the goodwill in its nutritional products. NutriMedical originally developed and traded its own products in the Netherlands and Belgium but by the time of the call option agreement it had far more extensive contractual agreements worldwide. NutriMedical possessed a wider range of products than the claimant and this meant that the orders it placed for particular products were smaller and so its manufacturing costs were correspondingly higher.
6. The parties to the call option agreement include the claimant, Nutrition 4U and Mr Ketelaar (who was joined as a party to the agreement since it provides for him to continue to serve as NutriMedical's CEO after the sale of its shares to the claimant). NutriMedical is not a party to the call option agreement but it has been joined to these proceedings so that it might be present before the court when submissions were made and would be bound by any declaration relating to the terms on which it is to retain Mr Ketelaar as CEO after completion of the sale of the option shares.
7. The claimant served a notice exercising the call option on 1 April 2020 stating (in accordance with clause 5.1 (c) of the call option agreement) that completion was to take place on 29 May 2020. Completion has still not yet taken place. The claimant contends that Nutrition4U is in breach of the option contract in failing to complete; and it claims: (1) declarations in respect of all three defendants (and, if necessary, an order pursuant to the jurisdiction in *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 to fix the terms of Mr Ketelaar's employment contract as the CEO of NutriMedical); (2) as against Nutrition4U, a decree of specific performance (or damages in lieu), damages for the delay in completion and interest; (3) such further or other relief as the court thinks fit; and (4) costs.
8. The defendants accept that the claimant validly exercised the call option pursuant to the exercise notice served on 1 April 2020; but they invite the court to find: (1) that the parties are no longer bound by the terms of the option contract on the basis that time was of the essence of that contract, which has now lapsed; (2) insofar as relevant, that the annual instalments of the '*Option Consideration*' paid by the claimant to NutriMedical fall, as a matter of construction, to be included in the '*Relevant Margin*' or '*Turnover*' in Schedule 1 to the call option agreement when calculating its '*Company Value*' for the purpose of determining the price to be paid for the option shares; and (3) that it was not reasonable for the claimant to offer to enter into an employment contract with Mr Ketelaar on the terms it has proposed. It should be noted that there is no counterclaim for damages, or any other relief, by any of the defendants.

9. To ensure that this judgment remains within reasonable, and comprehensible, bounds, I do not propose to address all of the evidence and submissions that have been presented to the court but merely those that are relevant to my decision and its underlying reasoning; but that does not mean that other matters have been overlooked. The reality is that much of the factual (and expert accountancy) evidence that was presented to me, over two court days, was of little real assistance in determining the issues of construction which fall to be decided. Whilst I will make appropriate findings of fact where these are material and necessary to my decision on matters covered by the agreed list of issues, I do not propose to make findings of fact on the many extraneous matters that were ventilated during the course of closing speeches. The submissions of counsel are fully recorded in their helpful and detailed skeleton arguments, and in the closing speaking notes which they kindly provided to me at the conclusion of the trial, so I do not propose to reproduce these verbatim.

II: Background

10. I can take much of the background to this case from the skeleton arguments of both counsel and from the documents.
11. Mr Latimer began by addressing the principles of contractual interpretation. He acknowledged that the core issue in the case is one of the true construction of the call option agreement. He recognised that the terms of that agreement, what was known to the parties at the time it was entered into, and its context, are all relevant but only insofar as they assist in the construction exercise. Mr Latimer made the point that the principles of contractual construction are well known; and he referred me to the adoption by Sir Geoffrey Vos C, delivering the leading judgment in the Court of Appeal, in *Lamesa Investments Ltd v Cynergy Bank Limited* [2020] EWCA Civ 821, [2021] 2 All E.R. (Comm) 573 at [18], of the statement by HHJ Pelling QC in the lower court of the applicable principles of contractual (described, I think in error, as statutory) interpretation. In addition, Mr Latimer emphasises that it is well-settled that: (1) Where plain words do not resolve the case, or the court wants to test a proposed construction, commercial common sense is a legitimate tool to use. However, (2) drafts of the call option agreement are not admissible as an aid to construction. Mr Latimer says that this is hardly surprising: The drafts were the versions of the contract which the parties chose not to execute. The subjective intentions of the parties are inadmissible anyway and so knowing why they rejected a particular term is also irrelevant. Volume D4 of the trial bundle contains 33 earlier drafts which run to 889 pages. They are inadmissible in law (a point accepted by Mr Bacon). Likewise, (3) post-contractual expressions of intentions are inadmissible to construe the contract: A contract has a fixed meaning and it cannot mean one thing at the date of the contract and something else a month or a year later by reason of subsequently expressed intentions. In closing, Mr Latimer referred me to observations of Lord Neuberger PSC (with whom Lord Sumption, Lord Reed, Lord Hughes and Lord Hodge JJSC all agreed) in *Revenue and Customs v Secret Hotels2 Ltd* [2014] UKSC 16, [2014] 2 All E.R. 685 at [33] that “*In English law it is not permissible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement*”.
12. For his part, Mr Bacon emphasised that the meaning of the words in a contract have to be seen in their “*documentary, factual and commercial context*”, including “*commercial common sense*”. The purpose of interpretation is to identify what the

parties have agreed, not what the court thinks that they should have agreed; and Mr Bacon acknowledges that subjective evidence of the parties' intentions has to be disregarded.

13. I do not discern any differences between counsel on the proper approach to the interpretation of the option agreement.
14. It is common ground that the claimant wished to extend its nutritional product range from powder into liquid products and also to expand its export business. NutriMedical already owned the recipe for a liquid product, and discussions about a potential merger between the two companies began as early as 2013. Both companies perceived there to be a synergy between them. They had the same competitors but different geographical markets, and it made sense for the two companies to work together rather than in competition; by co-ordinating the placing of their orders, they could secure larger discounts from the manufacturers who supplied their products by optimising production runs. Mr Ketelaar believed that the "*two companies fit together very nicely and create a lot of value for investors*". NutriMedical's liquid product was initially manufactured by Even Sante, a French company, which required all orders for NutriMedical's products to be placed through it. According to Mr Ketelaar, it had taken an investment of about €1 million for the defendants to develop and establish NutriMedical's products and its export networks; and it would have taken any new company trying to develop similar products at least two to three years to bring them to market.
15. The negotiations were conducted between Mr Ketelaar (for NutriMedical) and Mr Patrick Eraut, who was the claimant's then chairman. On 27 June 2014 the claimant entered into a distribution agreement with NutriMedical which appointed the claimant as the exclusive distributor of certain NutriMedical products within the UK. The pricing was based on a fixed margin for NutriMedical's products of 10%. It is Mr Aymes's evidence that the margin for one particular product (which the claimant sold under the name '*Aymes Complete*') was later capped at a maximum sum of €150,000 per year. Mr Aymes refers, by way of support, to an unsigned copy of an addendum to the distribution agreement (at Bundle D1, page 316); and he says that although he has been unable to locate a signed copy, the parties gave effect to its terms. This was challenged by Mr Ketelaar and was not addressed in the evidence of Mr Eraut (who, according to Mr Aymes, was best placed to address this conflict of evidence) so I am unable to make any positive finding that the parties did in fact apply a fixed maximum margin of €150,000 per year for Aymes Complete. However, this was clearly the subject of some discussion between the claimant and the defendants, and the proposal to adopt a fixed maximum margin of €150,000 per year may well have been the origin of the figure later adopted in the call option agreement as the annual payment of the Option Consideration.
16. On 31 August 2016, the claimant, Nutrition4U, and Mr Ketelaar entered into the call option agreement. This is governed by English law and is subject to the exclusive jurisdiction of the English courts. Clause 2.2 and clause 24 require the parties to act in good faith towards each other and so as to give effect to the spirit and intention of the agreement.
17. Recital (C) provides that:

The Buyer wishes to have an exclusive right to exercise the Option, not exercisable before 1st April 2020, and in consideration of the Option agrees to pay the Company consideration of the equivalent of 150,000 Euros in GBP per annum in the 3 years and 7 months between 1st September 2016 and 31st March 2020 less the Company margin on any order placed by the Buyer before the date of this agreement but due to be delivered after the date of this agreement (the '*Option Consideration*').

After I had circulated my judgment in draft, my attention was also drawn to recital (D) which (so far as material provides):

The Buyer upon choosing to exercise the Option will issue shares in the Buyer to the Seller, such shares to have the similar rights to those held by the Buyer, based on the Company Value calculation and conditions set out in Schedule 1 at the time of the proposed transaction ...

18. Clause 3 is headed '*Grant of the Option*'. So far as material it provides:

3.1 Subject to the conditions in clause 2 and in consideration of the payment of the Option Consideration from 1st September 2016 of 150,000 Euros per annum by the Buyer to the Company payable in equal monthly instalments of 12,500 Euros until 31st March 2020, total €537,500, the Seller grants to the Buyer an Option to purchase all of the Option Shares on the terms set out in this agreement. The Company's margin on any order placed by the Buyer before 16 September 2016 but not received by that date is to be refunded and offset against the first payments.

...

3.3 Upon exercise of the Option the Buyer shall immediately provide the Seller with the Transaction Documentation. The Buyer undertakes to use its reasonable endeavours to ensure that the Proposed Transaction is effected. In the event of a dispute clause 12 shall apply in its entirety.

19. Clause 4 is headed '*Option Period*'. Clause 4.1 provides:

The Option may only be exercised:

- (a) After 31st March 2020; or
- (b) before 1st July 2020, and if the Option is not exercised on or before such date, it shall lapse.

20. Clause 5 is headed '*Exercise*'. So far as material, it provides:

5.1 The Option shall be exercised only by the Buyer giving the Seller an Exercise Notice in accordance with clause 19 which shall include:

- (a) the date on which the Exercise Notice is given;
- (b) a statement to the effect that the Buyer is exercising the Option;

(c) a date, which is no less than twenty one (21) and no more than fifty (50) Business Days after the date of the Exercise Notice, on which Completion is to take place; and

(d) a signature by or on behalf of the Buyer.

...

5.3 Once given, an Exercise Notice may not be revoked without the written consent of the Seller.

5.4 All dividends and other distributions resolved or declared to be paid or made by the Company in respect of the Option Shares by reference to a record date which falls on or before Completion shall belong to and be payable to the Seller.

21. Clause 6 is headed '*Consideration*' and provides:

6.1 Subject to the completion of satisfactory due diligence including all financial due diligence in accordance with clauses 2.3, 2.4 and 2.5 above, the Consideration payable for the Option Shares shall be satisfied by:

(a) the issue and allotment to the Seller of such number of shares in the Buyer as is determined pursuant to Schedule 1 (by way of fulfilment of the Proposed Transaction), or alternatively

(b) the fee of 1 Euro if the Company Value as at the date of exercising the Option is 0 Euros or less. In such circumstances the parties agree that there shall be no UK Issue and therefore no obligation for the Buyer to issue shares in the Buyer to the Seller.

22. Clause 7 is headed '*Trade between the Buyer and the Company during the Option Period*'. Clause 7.1 provides:

Sales of products and services between the Buyer and the Seller are to be at cost with no additional margin applied by either party. There is no obligation on either party to provide the other with credit terms. Any Company margin paid on orders placed before 1st September 2016 for delivery after 1st September 2016 to be refunded.

23. Clause 8 is headed '*Completion*'. So far as material, it provides:

8.1 Subject to the completion of satisfactory due diligence, Completion shall take place at International House, 124 Cromwell Road, London. SW7 4ST or such location as the parties may agree and on the date specified in the Exercise Notice or such later date as the parties may agree.

...

8.4 Effective as of Completion the CEO will be retained by the Buyer to continue in his role as CEO of the Company following exercise of the Option and the CEO shall deliver to the Buyer a Service Contract in a form

to be agreed, including such terms or clauses as are set out in Schedule 3, and executed as a deed;

...

8.7 Subject to the exercise of the Option and subject to the calculation of the Company Value in Years 3 and 4 and subject to the Seller's satisfactory due diligence, the parties agree to sign and exchange the Transaction Documentation in a form to be agreed between the parties, incorporating all the terms of the Proposed Transaction, including (without limitation) the matters set out in 8.7 (a), (b) (c) and (d) below ...

24. Clause 12 is headed '*Determination by an Expert*'. It provides (so far as material):

12.1 Any dispute as to the Consideration, Company Value valuation, the effect of a Reorganisation or any valuation of shares shall be referred to an independent accountant to be nominated by the president for the time being an independent accountant of the Institute of Chartered Accountants in England and Wales.

12.2 The Independent Accountant shall use all reasonable endeavours to reach its conclusions under clause 12.1 within 1 month.

...

12.4 The Independent Accountant shall be deemed to be acting as an expert and not as arbitrator and its determination as to the amount of the Consideration and/or the effect of a Reorganisation shall be final and binding on the parties.

25. Clause 16 is a '*whole agreement*' clause. Clause 17 requires any variation or waiver to be in signed writing; and by clause 17.3:

Except as expressly stated, no failure to exercise or delay in exercising any right or remedy provided under this agreement or by law constitutes a waiver of such right or remedy or shall prevent any future exercise in whole or in part thereof.

26. Schedule 1 to the call option agreement is headed '*Calculation of Company Value*'. So far as material, it provides:

1. The Relevant Margin shall be a sum equal to the Turnover of the Company (excluding any sales to the Buyer) minus the direct cost of goods (excluding those goods sold to the buyer) and any logistics costs; sales and marketing costs (excluding those related to New Products) and €150,000 for CEO salary for the penultimate financial year preceding the exercise of the Option, namely Year 3. The Relevant Margin shall be based on the figures in Year 3 which must be repeated or bettered in Year 4 by the same customers. If the Year 4 figure is lower for a customer then that figure will be used in determining the Relevant Margin. For the sake of completeness the NHS shall count as one customer for the purpose of this calculation. The

equivalent calculation - mutatis mutandis - shall be used to determine the Relevant Margin of the Buyer. So:

Relevant Margin (RM) = Turnover in Year 3, repeated or bettered in Year 4

- Sales to AI
- Cost of Goods excluding sales to AIL
- logistics cost excluding AIL sales
- Sales and Marketing Costs not relating to new products
- €150,000

2. The Relevant Margin x 6 plus (or minus if negative) Net Assets will be used to calculate the Company Value of the Buyer and Seller. So:

Company Value = RM x6 + Net Assets

3. The parties shall use their respective reasonable endeavours to procure that the Relevant Margin and Company Value shall be finally determined as quickly as possible and, in any event, no later than the date for Completion specified by the Buyer in the Exercise Notice failing which, the matter shall be referred to an expert for determination in accordance with clause 12.

4. The Company Value in the case of each of the Buyer and the Company:

- (a) Include such provisions as the Seller and Buyer may both agree to be appropriate;
- (b) Exclude exceptional profits or losses whose effect is stated in the accounts;
- (c) Exclude profits or losses of a capital nature (whether or not realised);
- (d) Be net of sales, marketing costs and logistics, excluding those costs allocated to new product introductions. The higher percentage figure for sales and marketing costs will be taken from either year 3 or year 4 in making the Gross Margin calculation

...

Years 3 and 4 were 1 April 2018 to 31 March 2019 and 1 April 2019 to 31 March 2020 respectively.

27. There is no issue over the execution or the validity of the call option agreement. It is common ground that the option consideration of €537,500 payable under clause 3.1 of the agreement was duly paid to the company whose shares were to be purchased (NutriMedical). It is also common ground on the pleadings (and was identified as an agreed fact by Mr Latimer at paragraph 15 (4) of his skeleton argument) that the claimant was already trading with NutriMedical and that *“the €537,500 was paid as a*

guaranteed income to NutriMedical in lieu of any profit margin” on the sale of its products to the claimant. At paragraph 49 of his witness statement, Mr Aymes explains that:

Prior to entering into the Option Agreement, [the claimant] had paid to NutriMedical margin on its products, subject to a cap of €150,000 per annum. After the Option Agreement was entered into, NutriMedical did not receive any profit margin, but it did receive €150,000 per annum instead and Nutrition4U agreed to accept those payments as Option Consideration.

28. This is confirmed in the evidence of Patrick Eraut, in his answers to questions 12, 13 and 15 (addressing the purpose of the call option agreement, the option period, and the Option Consideration of €537,500):

The agreement was designed to compensate NutriMedical for the loss of margin on the AYMES product made to a NutriMedical recipe ... It was intended to compensate NutriMedical for the loss of margin from selling to AYMES for a long period (4 years) in exchange for their co-operation in supplying the recipe which enabled us to develop an alternative with a more reasonably priced and amenable supplier ... This related to the loss of margin when AYMES stopped buying NutriMedical products manufactured by Even Sante. The negotiation of the option agreement became protracted which is what led to this not being for an ‘even’ period of 4 years.

It is also confirmed by Mr Ketelaar at paragraph 42 of his witness statement:

The Option Consideration was paid by the claimant to [NutriMedical] in lieu of a profit margin on sales made by [NutriMedical] to the claimant.

This is consistent with what Mr Ketelaar had written to Mr Aymes in an email sent on 11 June 2019 (at Bundle D2, pages 418-9):

You earmarked the 600k in option payments as goodwill. This is fundamentally not correct. Prior to the option agreement you bought the products from me and had to pay a margin to NutriMedical on these products. In the option agreement, we agreed that, during the term of the option agreement, no margin applied. The margin you would have had to pay to NutriMedical during the term of the option agreement would have actually exceeded the option payments you made. Also, I have given you all the support I could with the change to Unidiet leading to even larger cost savings for [the claimant], where there was no obligation for me to do so. So from this angle, [the claimant] has benefited hugely from the collaboration with NutriMedical.

29. In light of the provisions of recital (C) and clause 7, governing trade between the two companies during the option period, I accept that this evidence forms part of the factual background to the option agreement which is admissible as an aid to its true construction. I also accept Mr Aymes’s evidence at paragraph 50 that:

The plan of both sides was that the Option Consideration would secure an agreement with Nutrition4U for [the claimant] to purchase NutriMedical at

some future stage based on a fair valuation, under the terms laid out in the Option Agreement.

However, Mr Aymes's later evidence (at paragraph 51) is clearly inadmissible as evidence of one party's subjective intent:

It was not the intention for the Option Consideration to inflate the value of NutriMedical for the purposes of determining the '*Company Value*' for the purposes of the Option Agreement. It would not have made (and does not make) any commercial sense for [the claimant] to make payments to NutriMedical, which would have had the effect of increasing the price payable by [the claimant] to Nutrition4U to acquire NutriMedical.

30. Mr Latimer points out that it is common ground on the pleadings that the option consideration of €537,500 was (as the name suggests) the consideration for the call option. The consideration payable for the share capital of NutriMedical was separate and was to be calculated in accordance with clause 6.1 of, and Schedule 1 to, the call option agreement. The effect of these provisions is that if the '*Company Value*' at the date of exercise of the option is zero, or a negative figure, then the consideration payable for the option shares is a token €1. If the company value is a positive figure, then the claimant would issue shares in itself to the seller, Nutrition4U, to satisfy the amount due.
31. It is, I think, common ground (and, if not, I so find) that all parties considered the call option agreement to be to their mutual benefit, and they confidently expected that it would be exercised by the claimant. Mr Latimer points out that some options are speculative, for example where £1 is paid for the option and the seller will only receive a substantial payment if the option is exercised. He asserts that the present case was different: the claimant was paying €537,500 in option consideration up-front because both the claimant and Nutrition4U fully expected the option to be exercised. There is nothing speculative, so Mr Latimer says, about half a million euros.
32. Once the call option agreement was entered into NutriMedical and the claimant began trading at cost price. Mr Latimer draws attention to the fact that each month NutriMedical issued a document to the claimant headed '*Sales – Invoice*' in the VAT-free sum of €12,500, representing each monthly instalment of the option consideration. (One example is to be found at Bundle D1, page 830). However, I attribute no significance to the use of the term '*Sales - Invoice*': the invoices were in a printed standard form and the description in the body of the invoice was '*Option agreement*' followed by the relevant month and year. I find that no-one considered that these monthly payments represented '*sales*' to the claimant or treated them as such.
33. Mr Bacon emphasises that NutriMedical's liquid product (sold as '*Aymes Complete*') has been a very profitable source of revenue for the claimant, yielding gross profits in the order of some £5.66 million in the five years ended 31 March 2021. For his part, Mr Latimer points to increasing turnover, and corresponding increases in profits for the claimant, over the four years to 31 March 2019 whereas NutriMedical's sales over the period 3 December 2014 to 31 March 2019 fell from more than €1 million to only some €287,000, yet profits remained fairly constant at around some €61,000 p.a. Mr Latimer points out that NutriMedical only managed to maintain broadly the same

level of profit, despite its turnover decreasing by three-quarters, because of the €150,000 p.a. which it received from the claimant under the call option agreement between 1 September 2016 and 31 March 2020. The explanation for the fall in sales by NutriMedical is that when the distribution agreement was first made, NutriMedical had purchased products from Even Sante and sold them on to the claimant. In August 2017, the claimant began to purchase directly from Even Sante, rather than through NutriMedical; and in September 2017, the claimant started to purchase directly from a new supplier called Unidiet and not through NutriMedical.

34. Mr Latimer maintains that the key point is that, from the claimant's perspective, the value of NutriMedical lay in its potential for future collaboration. That is why '*Company Value*', as measured by the formula in Schedule 1 to the call option agreement, might be negative (as he submits it is) yet there is still a commercial value to the claimant in acquiring NutriMedical. In light of this commercial background, Mr Latimer invites the court to ask: Would the claimant really have agreed to the '*Company Value*' being boosted by including the claimant's own €150,000 p.a. payments, especially if these payments made the difference between NutriMedical making a profit or a loss. In effect, the claimant would be paying twice over. That, according to Mr Latimer, would make no sense at all.
35. Around the middle of 2017, and against the background of the call option agreement, the manufacture of NutriMedical's liquid product was switched to the new manufacturer, Unidiet, which utilised NutriMedical's recipe. This switch had been in contemplation even before the conclusion of the call option agreement, as evidenced both by a binding letter of intent signed by Unidiet and NutriMedical in June 2016 (which provided for Unidiet to produce NutriMedical's proprietary recipe in its own production facility) and by a reference to Unidiet as a potentially relevant entity in clause 14.3 of the call option agreement. Thereafter, the claimant was able to order directly from Unidiet. This change in the manufacturer enabled the claimant to continue to supply NutriMedical's liquid product in the UK and Ireland without having to obtain any new approval from the regulatory body responsible for licensing the sale and supply of nutritional products in those markets.
36. By the beginning of 2019 the relationship between the parties still appeared to be good, with NutriMedical's products making a very substantial contribution to the claimant's profits. In his email dated 18 January 2019 Mr Ketelaar said: "*I want to join Aymes for years to come and build a thriving export business.*". He made a presentation to the board of the claimant on 7 February 2019 which was apparently well received. By this time, Mr Ketelaar had already sent Mr Eraut a copy of his proposed CEO contract in the expectation that its terms would be resolved long before the call option was exercised.
37. Early in 2019, however, there was a breakdown in the relationship between Mr Aymes and Mr Eraut, who until then had been the claimant's principal point of contact with Mr Ketelaar. Mr Eraut explains in his answers to questions that there had already been "*a significant conflict*" with Mr Aymes, and that he opted for an early buy-out of his shares rather than accept the more "*humiliating*" alternative of "*being busted down to the ranks*". One consequence of Mr Eraut's departure from the claimant was that Mr Ketelaar received no feed-back on the draft contract he had proposed for his role as CEO of NutriMedical in the event the call option was exercised. Another was the breakdown in the relationship between the claimant and

the defendants, resulting from what Mr Eraut refers to as Mr Aymes's increasing scepticism about the value of NutriMedical and the perception of Mr Mike Kirby, who effectively succeeded Mr Eraut, as expressed in his email to Mr Aymes of 7 May 2019 (at Bundle D2, page 374), that the "*best option*" was "*to buy him out for cash*" (referring to Mr Ketelaar).

38. One of the issues the parties invite the court to resolve is a dispute as to what, if anything material, was discussed about the way forward at a breakfast meeting that took place between Mr Aymes and Mr Ketelaar in Amsterdam in May 2019. The respective versions of events are given at paragraphs 55 to 58 of Mr Aymes's witness statement and by Mr Ketelaar at paragraphs 31 to 33 of his statement. Before this meeting, Mr Bruno Pereira of the claimant had already - Mr Bacon would say erroneously - expressed his view, in an email to Mr Aymes dated 15 April 2019 (at Bundle D2, page 340), that NutriMedical was "*worth less than zero*"; and he suggested that "*the apparent dependence of the business on the person of Sander is not at all healthy*".
39. Mr Aymes's evidence is that at the Amsterdam meeting, he discussed the call option agreement with Mr Ketelaar, who told him that he intended to liquidate NutriMedical if the claimant did not exercise the option. The claimant had invested substantially in NutriMedical, and the acquisition was a key aspect of its growth into the European market. Mr Aymes states that he therefore agreed with Mr Ketelaar to set about negotiating to acquire all of the shares in NutriMedical on the basis that the claimant would pay Nutrition4U the balance of the option consideration (as there were still several months left before the option could be exercised). The claimant sent a '*Letter of Intent*' to Nutrition4U on this basis but the claimant says that Mr Ketelaar proceeded to "*renege*" on these discussions, so the claimant reverted to the mechanism laid down in the call option agreement.
40. Mr Ketelaar's evidence is that, overall, the 2018/2019 financial year had been disappointing for NutriMedical, with '*follow-ups*' to many business opportunities leading to nothing. Consequently, Mr Ketelaar says that his "*motivation had reduced*". He brought this up openly with Mr Aymes in order to begin to explore new ways of growing the business and the impact this might have on the call option agreement. Mr Ketelaar says that he was open and honest that, following another disappointing year, the claimant might not wish to exercise the call option with Mr Ketelaar as a less motivated CEO. He says that he left the meeting after inviting the claimant to give the matter some thought and to follow this up with more discussions. There was still sufficient time before the start of the option period; and Mr Ketelaar says that he believed that, in the spirit of their long-term relationship, bringing this topic up early on was the right, and the honest, thing to do. Mr Ketelaar says that subsequent discussions with Mr Aymes led him to understand that he had interpreted the meeting in a different way to Mr Ketelaar: Instead of continued discussions on the way forward, Mr Aymes sent a letter of intent regarding the immediate purchase of all of the shares in NutriMedical; and Mr Aymes appointed Mr Mike Kirby, in place of Mr Eraut, to handle the matter from that point onwards.
41. Mr Ketelaar says that he was caught by surprise by Mr Aymes's actions, which were not what he had been expecting following their meeting. Mr Ketelaar says that he made several attempts to call Mr Aymes to discuss the situation, but these calls remained unanswered. Instead, Mr Ketelaar says that he received aggressive, quickly

followed by threatening, emails concerning alleged breaches of the call option agreement. As a result, Mr Ketelaar says that he was immediately shut off from the claimant's organisation: he was blocked from its Facebook network, his permissions for the Dropbox shared drives were removed, and he no longer received invitations to attend meetings of the executive board and the management team. Also, collaboration between the two companies on supply chain issues, and almost all communications from the claimant, ceased. Mr Ketelaar categorically denies any suggestion that he ever discussed the possibility of winding-up NutriMedical with the claimant. It puzzles Mr Ketelaar that this breakfast meeting, at which there were apparently different interpretations of what was said, should have destroyed all the trust that they had built up over six years. He maintains that despite the defendants' efforts to discuss the situation and find solutions, the claimant chose a formal, legal route instead. He asserts that the defendants subsequently offered several solutions to normalise the relationship, and seek to rebuild trust, but the claimant rejected all such efforts. Since the claimant made it clear in communications that NutriMedical was 'dilutive' to the claimant's business and had no value, it remained unclear to Mr Ketelaar what course of action the claimant was going to take until the option period approached. The claimant's actions led Mr Ketelaar to think that it was not really serious about acquiring, and expanding, NutriMedical's business.

42. Strictly, it is not necessary for me, in order to determine this case, to make any finding as to precisely what transpired at the breakfast meeting in Amsterdam in May 2019. As Mr Bacon pointed out in closing, whatever was discussed is of very little relevance because the parties did not proceed with any variation to the call option agreement. On the balance of probabilities, I find that there was a genuine misunderstanding between the two men, and that Mr Aymes construed Mr Ketelaar's communication that his motivation was reduced differently from the way that Mr Ketelaar had intended it to come over to Mr Aymes. It is clear, from Mr Kirby's email to Mr Aymes of 7 May 2019 (at Bundle D2, page 374), that even before this meeting, the claimant already entertained a degree of distrust towards the defendants, and considered that "*the best option*" was to buy Mr Ketelaar "*out for cash*". Mr Ketelaar did not attend the board meeting of the claimant that took place on 5 June 2019, but I find that this was not because the claimant deliberately excluded him from it: An email from Mr Ketelaar dated 27 May 2019 explains that the following day he would be travelling to Brazil and Argentina for a week and would not be returning in time for the management meeting. Given the jet lag, he considered that he might not be of much use for the board meeting either so he said that he would "*take a rain check on these this time*". In other respects, however, I do accept Mr Ketelaar's evidence that he was "*shut off*" from the claimant's organisation.
43. The differences between Mr Aymes and Mr Ketelaar appear clearly from their exchange of emails on 7 June 2019 (at Bundle D2, pages 405-6). In cross-examination, Mr Kirby accepted that by this time he no longer trusted Mr Ketelaar. An email from Mr Aymes to Mr Kirby dated 12 June 2019 (at Bundle D2, page 416), copied to the claimant's Dutch and English lawyers (respectively Ms Stina Lindmark and Hemingway Law), refers to both Mr Ketelaar and his business model in patronising and derogatory terms, describing the latter as "*rubbish*", and advocates that the claimant should "*capitalise on the situation where he is on the back foot and we should not let him feel any degree of comfort.*" Mr Bacon relies on this as the start of a course of conduct which is contrary to the good faith provision of clause 24.2 of

the call option agreement. A further email from Mr Aymes to Mr Kirby dated 23 July 2019 (at Bundle D2, pages 454-5) referred to a strategy “*to starve [Mr Ketelaar] out*”; and it noted that the removal of his access to Dropbox “*will cause him some anxiety*”. I agree with Mr Bacon’s assessment that Mr Aymes plainly entertained no goodwill whatsoever towards Mr Ketelaar long before the claimant served its notice exercising the call option on 1 April 2020.

44. It is common ground that the claimant served a valid exercise notice under the call option agreement on 1 April 2020, setting the date for completion as 29 May 2020. Despite clause 3.3 of the option agreement requiring the claimant to provide Nutrition4U with the ‘*Transaction Documentation*’ (as defined) “*immediately*” upon the exercise of the option, the claimant did not do so until 16 April 2020; and, even then, the defendants complain that this did not comply with the requirements of the call option agreement. Mr Bacon invites the court to note the following key dates in the timeline leading up to, and beyond, the nominated date for completion of 29 May 2020:

(1) On 21 February 2020 Mr Ketelaar had sent Mr Kirby heads of terms for his service agreement in purported compliance with clause 8.4 of the call option agreement. These provided for a contract of employment rather than a service contract due to the tax issues which might arise under Dutch law. Mr Bacon says that this point was not conceded by the claimant until an email of 12 April 2022, when its Dutch attorney submitted a second version of a draft employment agreement for review by the defendants’ Dutch lawyer. This is the version that was referred to the single joint expert in Dutch employment law and practice. I note, however, that the claimant’s Dutch lawyer first submitted a draft employment agreement as long ago as 8 September 2020, under cover of an email which stated: “*My client has decided to accept your clients’ view that an employment agreement should be drafted (and not a service agreement as first discussed) between NutriMedical and Mr Ketelaar. The CEO agreement that your client provided my client with earlier this year, however, was based on a UK format whereas my client prefers a Dutch law format.*” By way of response, Mr Bacon points out that the claimant did not formally abandon its pleaded case in relation to a service contract until its re-amended particulars of claim in January 2023.

(2) Mr Ketelaar wrote to Mr Kirby on 2 April 2020 asking for the transaction documentation to be provided “*immediately*” in accordance with clause 3.3 of the call option agreement.

(3) On the same day, Mr Kirby asked the defendants to lodge the commercial contracts, details of the intellectual property and updated financials, whereupon the claimant would commit to getting drafts of the transaction documentation to the defendants within one week. Mr Kirby did not revert on the employment contract.

(4) On 7 April 2020 Mr Ketelaar wrote to Mr Kirby asking him to provide the transaction documentation in accordance with the requirement for the parties to conduct themselves in good faith. He wrote: “*As you know, we are working towards a date for Completion of 29 May 2020. The Transaction Documentation should be in circulation now so that the appropriate amount of time can be given to considering those documents.*”

(5) In the meantime, Ms Stina Lindmark (the claimant's Dutch attorney) had invited Mr Ketelaar to agree to a tax ruling on his employment status. Mr Ketelaar responded on 9 April explaining why, because of the tax Dutch regime, he had been advised that he should have an employment contract, and reminding her that the claimant had set the date for completion at 29 May 2020, which was likely to be before any tax ruling could be received. Mr Ketelaar indicated that if Ms Lindmark was adamant upon obtaining a tax ruling, he would be willing to co-operate subject to six stated pre-conditions, including that he and his advisors should be allowed to fine-tune the form and content of the request for a ruling and should cover all the defendants' costs in advance since he had already obtained tax advice. Mr Latimer submits that Mr Ketelaar signed off the email with what Mr Latimer terms the "*cheery*" expression: "*I hope you can live with this*" well knowing that the claimant could not do so. I reject Mr Latimer's submission that Mr Ketelaar appreciated that these conditions would prove unacceptable to the claimant, and that he refused his consent to any reference to the Dutch tax authorities in all but name. I am satisfied that Mr Ketelaar regarded these pre-conditions as reasonable ones to require.

(6) Mr Kirby acknowledged on 9 April 2020 that his focus was on completion of the transaction.

(7) On 16 April 2020 Ms Lindmark sent an email to Mr Ketelaar (copied to Mr Kirby) attaching the first drafts of the Transaction Documents for discussion purposes. This included a calculation of NutriMedical's Company Value which deducted €150,000 from Turnover by excluding the Option Consideration as "*Sales to the Buyer*" and stated the Company Value in a negative amount. Mr Bacon submits that the transaction documents were not submitted "*immediately*" (as required by clause 3.3 of the call option agreement) and gave rise to a dispute to which clause 12 applied. On the same day, Ms Lindmark made it clear that the claimant was no longer seeking a tax ruling.

(8) On 24 April 2020 Mr Maarten van Dooren, a Dutch attorney instructed by the defendants, wrote to Ms Lindmark disputing the terms of the Transaction Documents, making various suggestions. He specifically commented on the claimant's calculation of Company Value, writing: "*The Option Consideration should not be deducted from the Company's Turnover as part of the calculation of the Relevant Margin. Paragraph 1 of Schedule 1 provides that 'Sales to AIL' be deducted from the Company's Turnover. The Option Consideration does not form part of the Sales to AIL. It is evident from Schedule 1 Paragraph 1 that the intention is that Sales to AIL comprises trading sales, as it goes on to refer to the 'direct cost of goods' sold to AYMES.*" He asked for the Company Value for the claimant so that he might calculate the number of shares to be issued to his client. He also proposed that the parties should follow the mechanism in clause 12.1 of the call option agreement and appoint an independent accountant to resolve the dispute.

(9) On 28 April 2020 Baker Tilly (NutriMedical's accountants) provided a calculation which attributed a positive value to NutriMedical of €388,992 as set out at Bundle D1, page 46. The figure provided for NutriMedical's '*Net Assets*' was €343,920. Mr Latimer points out that the claimant's own calculation of '*Company Value*' accepted, as the value of NutriMedical's '*Net Assets*', Baker Tilly's figure of €343,920, which was to be adopted by BDO, on behalf of the claimant, in their 7 July 2020 valuation letter. It is now common ground between the accountancy experts that

this figure is, in fact, incorrect because it was based on a set of accounts which addressed the value of NutriMedical's net assets as at 31 March 2019, rather than a year later (as required by the formula in the call option agreement); and that the true figure should be €481,858.

(10) Mr Bacon submits that by 28 April the defendants had done all they could have been expected to do before the date fixed for completion and so cannot be found to have acted in breach of contract, with the result that the claim in that regard should be dismissed. It was plain and obvious from this point on, if not before, that there was a dispute as to Company Value which fell to be resolved in accordance with the dispute resolution mechanism in clause 12.1 of the call option agreement yet the claimant deliberately chose not to follow the agreed machinery in that clause. Mr Bacon submits that this refusal to engage with clause 12.1, or to ask for an extension of time for completion, represented a lack of good faith and/or a failure to use reasonable endeavours and/or constitutes a compelling reason for the court, in the exercise of its discretion, to refuse specific performance of the option contract. In the alternative, by reason of the claimant's delay and/or failure to come to court with clean hands, the court should decline to make a decree of specific performance.

(11) On 4 May 2020 Ms Lindmark wrote to Mr van Dooren (at Bundle D1, page 168). She wrote: *"The arguments why the Option Consideration should be excluded from the valuation in order not to be double counted are overwhelming and we see no need to pay an expert money to confirm this."* Mr Bacon reiterates that clause 12.1 of the call option agreement expressly provides that any dispute as to the Company Valuation **shall** be referred to an independent accountant in accordance with clause 12, and that the defendants were at all material times willing to be bound by the accountant's findings (as confirmed by Mr Ketelaar in cross-examination). Mr Bacon also points out that despite asserting that there was *"no need to pay an expert money"* to confirm the Company Valuation, the claimant did go ahead (without telling the defendants) and instruct BDO, on 5 June 2020, to do precisely that by preparing a company valuation, but only after the date fixed by the claimant for completion had already passed.

(12) On 13 May 2020 Freeths LLP, the defendants' solicitors, wrote to Ms Lindmark referring to clause 12.1 and saying that any dispute as to the Company Valuation should be referred to an independent accountant. *"Once that issue is resolved, the parties will then be able to progress to the next stages of the share transaction."*

(13) On Wednesday 27 May 2020 Mr van Dooren wrote to Ms Lindmark suggesting that they arrange a meeting through Microsoft Teams at 11.00 am CET (10.00 am GMT) the following day. He concluded: *"I trust you noted that a completion Friday, May 29 – the date your client fixed in its exercise notice – it is not feasible. In the call I would like to discuss what the consequences are, if any, after the period for completion has lapsed."*

(14) Ms Lindmark responded that evening: *"As the matter is an English Law issue by now, my client's UK Counsel have in the meantime informed your clients UK counsel that they are taking instructions. They will respond to the letter directed to me on 15 May 2020. I will await the outcome of the English law dispute and do not see the need to have a meeting on Dutch matters at this moment. If this changes, I will let you know."*

(15) At 08.55 on Friday 29 May 2020 Mr van Dooren responded by email: *“I feel it's unfortunate that you prefer to await the outcome of the English law dispute before discussing the matter. The call was suggested as a means of unlocking the deadlock in terms of the company valuation. Our goal is to facilitate the parties working together towards the mutually agreed objective set out in the option agreement and, to do that, we need their cooperation. Please let me know when your of [sic] your client's view regarding the sense of the suggested call changes.”*

(16) The date fixed for completion of Friday 29 May 2020 passed without completion having taken place.

(17) Despite what Mr Bacon cites as *“the clear and unambiguous wording”* of clause 12.1 of the call option agreement (and clause 3.3 and paragraph 3 of Schedule 1) the claimant neglected to seek the appointment of an independent accountant. The claimant also failed to invoke clause 8.1 of the call option agreement to seek to agree any extension of time for completion before 29 May 2020 or at all. Instead it instructed Hemingways, who wrote to Freeths on 7 July 2020 enclosing a report of BDO LLP valuing NutriMedical at €1. Mr Bacon points out that BDO was not an independent accountant appointed in accordance with, and for the purposes of, clause 12 of the call option agreement.

45. It is the defendants' case that the contractually agreed date for completion of 29 May 2020 was of the essence of the call option agreement, that the claimant did not act in good faith towards the defendants, and that it failed to use reasonable endeavours to ensure that the terms of the call option agreement were observed before the appointed date for completion passed. The defendants contend that the claimant was not acting in good faith in refusing to agree to appoint an independent valuer of NutriMedical (pursuant to paragraph 3 of Schedule 1) and in failing to ask for an extension of time before the date fixed for completion had passed.
46. It is convenient at this point to refer to a few of the many letters that have passed between the English solicitors representing the claimant (Hemingways) and the firm of solicitors representing the defendants (Freeths). These begin with a letter from Hemingways dated 7 July 2020, inviting Freeths to correspond with them rather than the claimant's Dutch attorneys, Lindmark Legal. It was this letter that first enclosed a copy of the negative valuation of NutriMedical in the sum of €511,008 carried out by Mr Ian Pickles, a director in the forensic services department of BDO LLP. The letter concluded:

Way forward

Going down the route of an expert determination in respect of the valuation of the Company pursuant to clause 12 of the Agreement will be an expensive and time consuming exercise.

Both parties now have the benefit of the report of Mr Pickles. Bearing in mind the contents of his report, it is inconceivable that a further chartered accountant appointed pursuant to clause 12 of the Agreement will come to a different conclusion to that of Mr Pickles.

Your client has already received a substantial payment from our client for the shareholding of a company with a negative value.

A pragmatic approach, which would save both of our clients further time, expense, and contention, will be to proceed on the basis that the consideration for the purpose of clause 6 of the Agreement be €1. If this can be agreed, then the parties can proceed with the outstanding issues to prepare for completion.

47. Hemingways' letter of 18 August 2020 acknowledges that it was common ground that there existed a dispute as to the Consideration and the Company Value (as defined by the call option agreement) which the parties had been unable to resolve. The dispute therefore fell to be determined pursuant to clause 12 of that agreement. Hemingways identified three suitable chartered accountants whose practice was in forensic accountancy; and they invited the defendants to select one of them, failing which the claimant would proceed according to clause 12 of the call option agreement.
48. Freeths responded substantively by letter dated 21 August 2020. There were said to be a number of issues to be addressed over and above the valuation issue before the matter could progress, most if not all of which had been overlooked by the claimant. There were two alternative means of progressing the matter. The first was to proceed with the transaction to completion, with the parties working together to agree a timetable by which each of the various steps needed to be taken to ensure that the transaction was managed effectively to an orderly conclusion. *"The alternative proposal is that your client formally requests to revoke the exercise notice. Our client will offer to consent to this on the condition that the parties work together to agree a means of working together in the future for their mutual benefit."* It was clearly undesirable for the matter to drag on indefinitely; and Freeths therefore proposed a timetable to bring the matter to a closure one way or another under which the claimant would provide its response as to whether it wished to proceed with the transaction, or to revoke the exercise notice, within 14 days of the date of the letter. If the claimant opted for the latter, it should, at the same time, outline a clear proposal to deal with the ongoing relationship between the two companies. Freeths' letter concluded: *"Our client is content for your client to make the decision as to which option it would prefer, however, if the transaction is to progress, your client will need to engage with the Option Agreement and provide the information it is obliged to provide."*
49. Mr Latimer points out that even if the defendants were in any position to treat the claimant as in repudiatory breach of the option agreement, by this letter Nutrition4U did not elect to accept such repudiation as terminating the option contract but rather affirmed that contract, pointing out that its consent was required to any request to revoke the exercise notice.
50. Hemingways responded on 27 August 2020, reiterating both the existence of a dispute between the parties as to the Consideration and the Company Value (as defined by the call option agreement) and also the contractual mechanism within that agreement by which that dispute might be determined. There was said to be no contractual term within the call option agreement whereby the parties' ability to complete could 'lapse' once the claimant had already exercised the option pursuant to clause 5 of that agreement. The parties did not complete by 29 May 2020 because of the existence of that dispute, in respect of which the parties had been corresponding with each other

with a view to resolving the dispute. Further, there was no contractual provision that required the parties to agree an extension to the alleged ‘*deadline*’ of 29 May 2020; nor was there any need for the parties to do so. The purpose of Hemingways’ letter was to set out the steps they were taking to move to completion. Hemingways again invited Nutrition4U to consider agreeing to instruct one of the three proposed chartered accountants. Subject to that, in terms of the valuation, “*the parties are in the hands of the President of ICAEW and the accountant whom the President nominates*”. Once the valuation had been determined, Hemingways suggested that the parties should work to finalising the terms of the transaction documentation within two weeks, with completion to follow three weeks thereafter.

51. Freeths’ response, dated 24 September, described Nutrition4U as being “*extremely confused*” by the claimant’s approach to the matter. The letter went on to allege breaches of the claimant’s disclosure, documentary and other requirements of the call option agreement; and asserted: “*In view of your client’s repudiatory breaches of contract, our client hereby puts you on notice that the Option Agreement is terminated. In any event, and in anticipation of your client’s disagreement in respect of this stance, your client allowed the completion date to pass without completing the transaction. The transaction has failed and the option has lapsed notwithstanding whether or not your client agrees.*”
52. On 2 October 2020 Hemingways responded, contesting any breach of the call option agreement, inviting Nutrition4U to substantively re-engage in negotiations towards completion, and threatening an application for specific performance. The letter included the following: “*Our client will proceed to completion with or without your client’s co-operation. If your client does not agree to continue to engage in negotiations leading to completion, our client will issue court proceedings for specific performance of the Option Agreement. Our client would prefer to avoid the necessity of such proceedings but your client will no doubt appreciate that bearing in mind the contents of the Option Agreement and the Option Consideration which our client has already paid, our client will not hesitate to issue court proceedings should this be necessary. Your client will have had sufficient experience of dealing with our client to know that this is no empty threat.*”
53. Freeths’ response of 15 October 2020 acknowledges that there was a binding contract between the parties by way of the call option agreement, and that the option had been exercised; but it asserts that the transaction failed when 29 May passed without completion having taken place; and sets out various reasons why any application for specific performance was doomed to fail. Mr Bacon points out that despite the threat in Hemingways’ letter of 2 October, the claimant delayed for a further six months before issuing proceedings for specific performance.
54. On 3 November 2020 Hemingways wrote to Freeths referring to clause 12 of the call option agreement as “*a mandatory clause requiring the parties to refer certain specific disputes for expert determination*”. They stated that they had previously suggested the instruction of an expert outside the mechanism of clause 12, which Nutrition 4U had declined. Bearing in mind their obligations of good faith, Hemingways invited Nutrition4U to agree to seek a nomination from the President of the ICAEW, and, once this had been obtained, to jointly instruct the nominated accountant. Freeths’ response, on 10 November, was that Nutrition4U did not intend

to proceed with the transaction and would seek to defend whatever action the claimant might bring on the basis of the reasons clearly set out, at length, in correspondence.

III: Witness evidence

55. In closing, Mr Bacon referred me to paragraphs 161 to 168 of the recent judgment of HHJ Mark Cawson KC (sitting as a Judge of the High Court) in *Clements v Frisby* [2023] EWHC 320 (Ch) in which he carefully reviewed the authorities detailing the correct approach to the evaluation of witness evidence. I derive the following propositions from this review:

(1) It is necessary for a fact-finding judge to act with caution before attaching undue weight to the impression that a witness might give in the witness box, or his or her 'demeanour'; and what is said in the witness box requires to be tested against other evidence, in particular the contemporaneous documentary evidence.

(2) When the court is required to decide questions of fact relating to events that took place some years previously, it must bear firmly in mind the unreliability of memory, the limited weight to be placed on witnesses' recollections of what was said in meetings and conversations, and the need to base factual findings on inferences drawn from the documentary evidence and the known or probable facts. It is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection, and is honest, evidence based on that recollection provides any reliable guide to the truth. Allied to this is the concern that when seeking to recall events over a significant period of time, and when reconstructing those events, a witness is liable, in their own mind, to do so in a way that inaccurately recalls those events in their own favour, and to exaggerate perceived advantages to their own case, and do so without deliberately giving false evidence.

(3) It is important to make findings by reference to all the evidence, both documentary and witness evidence, placing such weight as the circumstances require on each.

(4) In addition to the documentary evidence, it is plainly appropriate to test the witness evidence against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions.

56. At [168], HHJ Cawson KC concludes as follows:

I consider that the above considerations lead to the conclusion that in most cases the party required to prove their case will need to do so by using reliable contemporaneous documentary evidence as a platform, to which are added known, established or agreed facts, and probable facts (both inherently probable and by inferences properly drawn from known, established or agreed facts), which the Court will then consider by reference to witness testimony which is consistent or compatible with that underlying body of reliable documentary evidence and is not tainted or flawed by other indicators of unreliability ...

57. With those observations firmly in mind, I turn to the witness evidence.
58. **Mr Aymes** gave evidence over the course of some four hours on the first day of the trial, starting shortly after 12 noon and concluding at about 5.00 pm. In closing, Mr Bacon invited the court to treat Mr Aymes as an unreliable witness, and unhesitatingly to reject his evidence unless it was convincingly founded upon a sound basis in the documents. Mr Bacon submitted that Mr Aymes had been prone to exaggeration, and that at times his evidence in cross-examination was evasive, and deliberately so. Mr Bacon criticised Mr Aymes for obfuscation and for refusing to answer questions that were put directly to him. More importantly, Mr Bacon submitted that the court should have no hesitation in finding that Mr Aymes had deliberately lied on oath about: (a) his knowledge, at the time, that the claimant had been responsible for sending emails and letters in November 2014 and July 2015 to recipients in the UK containing false claims about an Irish company (Nualtra) which was the defendant to a trade mark case that the claimant had initiated in Ireland, and (b) an unfounded claim that an agreement for the manufacture and supply of nutritional products had already been concluded with Unidiet before the call option agreement was entered into on 31 August 2016. According to Mr Bacon, Mr Eraut's reliable evidence contradicts Mr Aymes's evidence that at the time he had not been aware of the correspondence containing false claims about Nualtra, which led it to bring libel proceedings against the claimant; whilst the documentation in Bundle F is said to demonstrate that Mr Aymes was not telling the truth to the court about the relative dates of the call option agreement and the agreement with Unidiet. Mr Aymes is said to have known full well that it was the defendants who had opened the door to the claimant securing any, let alone any better, deal with Unidiet because without NutriMedical's recipe, the claimant would have had to start from scratch in finding an alternative source of supply.
59. I am not prepared to accede to Mr Bacon's invitation to find that Mr Aymes deliberately lied on oath about the true order of the call option agreement and the Unidiet contract. Whilst I find that the agreement with Unidiet post-dated the conclusion of the call option agreement, I am prepared to treat this as an innocent error of recollection on Mr Aymes's part. The actual agreement with Unidiet (signed by Mr Eraut on behalf of the claimant) was only concluded on 26 May 2017; but there had been an earlier document (described as a '*binding letter of intent*') signed in early June 2016; and Mr Aymes may have had this in mind when giving his evidence to the court. Further, Unidiet is expressly mentioned in clause 8.7 (d) of the call option agreement so it was clearly within the contemplation of the parties at the time that agreement was concluded. Subject to this one qualification, however, I accept all of Mr Bacon's other criticisms of Mr Aymes as a witness.
60. I find Mr Aymes to be an unsatisfactory, and an unreliable, witness. In his written evidence, I find that he deliberately overstated both his role within his former group employer, Nutricia (at paragraph 7), and also the extent of the claimant's market share within the UK (at paragraph 18). He came over as a ruthless and manipulative individual who was prepared to colour his evidence to his own advantage. At times, I found Mr Aymes's evidence difficult to follow. He displayed both a reluctance to answer direct questions when they were put to him, and a tendency to deflect awkward questions to Mr Eraut and to Mr Kirby. Mr Aymes also had a tendency to supplement the evidence in his witness statement, as with the date of the agreement

with Unidiet. Wherever there is a direct conflict of evidence between Mr Aymes and Mr Ketelaar, I prefer the evidence of Mr Ketelaar over Mr Aymes.

61. I reject Mr Aymes's evidence that he was not aware at the time that the claimant was disseminating untrue statements about Nualtra in correspondence and that an apology was issued through him simply because he was the owner of the company. As will appear when I come to review the evidence of Mr Eraut, I am satisfied that Mr Aymes knew about the false statements about Nualtra at the time they were made, and that he instigated them and was knowingly complicit in their publication, even if he did not actually disseminate them himself. That conclusion accords both with my understanding of Mr Eraut's evidence and also with the inherent probabilities: it is most unlikely that anyone within the claimant company would have taken it upon themselves to libel Nualtra without the prior knowledge and approval of Mr Aymes, who was the owner and the directing mind of the claimant. Mr Latimer submits that the claimant's treatment of Nualtra has no bearing on the subject-matter of this litigation and "*smacks of desperation by increasingly panicky defendants*". However, I agree with Mr Bacon that this episode demonstrates the ruthless attitude to competitors, going beyond normal legitimate business dealings, entertained by the claimant and Mr Aymes; and the refusal of Mr Aymes to own up to such dealings redounds against the credibility of his evidence.
62. Both parties had approached **Mr Eraut** to give evidence at this trial; and his evidence in chief was set out in Mr Eraut's answers to a series of questions exhibited to his witness statement. He described himself as "*the main point of contact*" with Mr Ketelaar and the "*gatekeeper, engineer of conversations about financial integration, supply issues and NPD [new product development]*". Mr Eraut had been due to start giving evidence when the court sat at 10.00 am on the second day of the trial; but the start of his evidence was delayed by the late disclosure of further documents by the claimant, and an unsuccessful application by Mr Bacon to exclude any reliance by the claimant on such late additional disclosure, at least without an adjournment of the trial. The court did not reach Mr Eraut until about 12.20 pm; and he gave evidence for about 50 minutes before the short adjournment. In closing, Mr Bacon described Mr Eraut as a measured and impressive witness, who had been doing his best to assist the court; and he submitted, again correctly, that considerable weight should be given to Mr Eraut's answers, which were said to support the defendants' case. I accept this assessment of Mr Eraut. I unhesitatingly accept him as a truthful and reliable witness who, without any partiality to either party, was doing his very best to assist the court. Where his evidence is admissible, I accept it. Where Mr Eraut's evidence differs from that of Mr Aymes, I prefer Mr Eraut's evidence.
63. During the course of his reply, Mr Latimer challenged a submission advanced by Mr Bacon, in closing, that Mr Eraut had given evidence that Mr Aymes had known about the false statements concerning Nualtra at the time they were made, rather than discovering about them at a later date. Mr Latimer invited the court to consider the form of the question that Mr Bacon had put to Mr Eraut in cross-examination, which Mr Latimer said had been lacking in precision; and to find that Mr Eraut's answer provided no sound basis for any finding that Mr Aymes had been lying about his knowledge of the false statements concerning Nualtra. In view of their different recollections of the course of Mr Bacon's cross-examination, I was invited by both counsel to listen to the digital recording of Mr Eraut's evidence when I came to

consider my judgment. This I have duly done, listening to the entirety of his evidence a number of times, and taking notes of that evidence. My transcription of the recording reads as follows:

Mr Bacon: Mr Aymes said that he had no knowledge of any poison pen letter. Do you have any comment on that?

Objection by Mr Latimer - Overruled

Mr Bacon: Take up Bundle D3, page 10. Please read to yourself paragraphs 1, 5 and 6 on page 10.

[Pause for reading]

Mr Bacon: Do you recall that an apology was made for sending the poison pen letter and the July [2015] letters making false statements against Nualtra? – Yes

Do you know who made those false statements? – Rachel Butler was the person that made those statements.

“And do you know whether at the time those statements were made **or soon thereafter** Mr Aymes had any knowledge that those false statements had been made? – Yes, I believe he did.”

“And on what basis do you derive that belief? – Discussions we had at the time. I had thought actually that in the process with Nualtra, that Roger had taken ownership of that. In a sense, had he not done so, we would have been under considerable pressure - which we were to some degree anyway - to dismiss Rachel.”

“So if you go back in the bundle to the bottom of page 8 [which reads: *“Nualtra says in court documents for the dispute that Aymes’s principal, Roger Wertheim Aymes, instructed a [sic] senior employees to impersonate an NHS representative to obtain information over the phone from Nualtra. As a result of the information Aymes obtained, a number of NHS employees were sent the forged email letter in November 2014 purporting to be on behalf of the NHS, Nualtra says.”*] Is it right that Mr Aymes had instructed an original phone call in relation to the forged letter? – Yes.”

At the judge’s invitation, Mr Bacon then cross-examined about paragraph 7 of Mr Aymes’s witness statement at Bundle B, page 3:

Is that a fair statement? – I think it is a slightly confusing statement because Nutricia did not own Complian between May 2008 and August 2011. It bought Complian near the end of that period – I think in June 2011 if I recall - so throughout Roger was working for Complian which eventually was bought and owned by Nutricia ... I think it is perhaps a slightly misleading mistake in the way it is presented but not necessarily anything deeply suspicious.

Mr Latimer in re-examination:

Mr Latimer: What was the purpose of that option agreement? - Both to compensate Sander for the use of the recipe but also to pave the way for the two organisations to come together and for Mr Aymes to buy NutriMedical.

It was both recognising that there was a recipe that needed to be paid for and that it might have taken us six or 12 months to switch without Sander and also that our volumes would have been slightly smaller so maybe we would have had to pay more for our product; and it was also paving the way for a merger as well. I have a suspicion that my answer is sitting half way between you both but it's still my truth so I can't really change it.

...

Mr Latimer: Why did you pick an accountant [as the expert]? - I think because we felt that the likely area of flare-up later was around the company valuation and how you'd calculate it because it was quite an involved formula and I guess people tend to disagree about these things when you get to the sharp end of these matters. So that felt like the sort of expertise you'd need in order to resolve that.

I think [other matters] are still potentially resolvable by an accountant. The other area of potential flare-up in my mind was the employment contract for Sander as the CEO. I think an accountant might be able to look at other contracts in the employment market and see what was normal.

...

Was it the intention of both parties that the 150,000 euros a year would actually be counted as part of the relevant margin and effectively counted a second time? - I don't understand the question.

If you paid the 150,000 euros a year between 2016 and 2020, when you were negotiating the call option agreement was it your intention that that would be counted a second time as part of relevant margin? - I think it is set out in the formula what would happen. That is what was agreed but I would need to refer back to the document and the formula to see what it says but I think my intention was that it wasn't included but I would need to check that in the agreement.

Mr Eraut was referred to the agreement: Bundle A, page 29 at page 49

When the parties were negotiating the call option agreement, was it their joint intention that that 150,000 euros per year would actually be counted as part of the turnover of year 3 and effectively boost the Relevant Margin figure? - I think that what is written on the page inside is pretty clear, that the 150,000 is an exclusion. Conceptually I think that was driven by the employment costs of the CEO. NutriMedical makes this margin but in order to run NutriMedical you have to pay the guy who is doing the work, Sander ... not necessarily Sander for ever and all time into the future but, at that point, Sander. That is likely to cost something like 150,000 euros with

various odd costs and so on. Therefore you deduct that from the margin the company makes.

The 150,000 is actually Sander's pay isn't it? - It probably pays for bits and pieces on top but yes that's the idea. So it didn't have anything to do with the margin that NutriMedical had previously been making on the sale of the products. It was to do with the costs of the CEO, that 150,000 exclusion. That's my recollection anyway. Though true, it's just a number on a page so legally I don't see it's linked to anything, but I believe that was the nature of the conversation around it.

64. I acknowledge Mr Latimer's point that Mr Bacon's original question, by including the words "*or soon thereafter*", was lacking in precision; but Mr Eraut's answer to Mr Bacon's later question, asking whether it was right that Mr Aymes had instructed a senior employee to make the original phone call in relation to the forged letter, clearly demonstrates Mr Aymes's knowing involvement in the attempt to discredit Nualtra, and the falsity of Mr Aymes's denial of his role in this during the course of his cross-examination. I have reproduced my transcript of Mr Latimer's re-examination because it demonstrates that much of Mr Eraut's evidence was an inadmissible account of his understanding of the effect of the call option agreement, prefaced by an appropriate acknowledgment by Mr Eraut that what is written there is "*pretty clear*". But there is also a clear statement by Mr Eraut, at the start of the re-examination, that one of the purposes of the option agreement was to compensate Mr Ketelaar for the use of his '*recipe*'.
65. Mr Latimer relies upon the principle (stated at paragraph 12-14 of the 24th edition of *Phillips on Evidence*) that answers to questions as to collateral facts, put in cross-examination, are generally regarded as final, in the sense that the cross-examining party may not then seek to contradict such answers by other evidence. However, the editors venture to suggest that the rule may be applied flexibly under the Civil Procedure Rules, with the judge considering the value that may be gained from allowing a party to adduce evidence in breach of the rule, as well as the amount of time that may be wasted thereby, rather than simply imposing an inflexible rule of law. In my judgment, it is permissible, in accordance with the overriding objective of the CPR, for the court to allow questions as to collateral facts to be put in cross-examination to a witness (in this case, Mr Eraut) who has been called by a party (in this case, the claimant) in order to contradict answers previously given by another witness (in this case, Mr Aymes) called by that party.
66. The next witness was **Mr Michael Kirby**. His involvement with the claimant started in August 2017, and so post-dated the entry into the call option agreement. He gave evidence for about an hour and a quarter on the afternoon of the second day of the trial. Mr Bacon accepts that Mr Kirby was an honest witness; but he criticises him for being Mr Aymes's '*yes man*', for sharing a real dislike of Mr Ketelaar, and for his willingness to go along with Mr Aymes's plans to do all that the claimant could to make life as difficult as possible for the defendants, particularly Mr Ketelaar. This extended to ensuring that the terms on which employment was eventually offered to him would be unreasonable and unacceptable to Mr Ketelaar. In my judgment, there is force in these criticisms. Mr Kirby said that he thought it highly unlikely that other employees of the claimant had penalty clauses in their contracts of employment, although he sought to justify the inclusion of such provisions in the case of Mr

Ketelaar by reference to his high-level position within NutriMedical. Mr Kirby's evidence was that he understood that Mr Ketelaar had made it clear, in no uncertain terms, that he would not be coming over to work for the claimant; and he viewed Mr Ketelaar as the person who had been putting forward obstacles in the way of, and slowing down, completion of the option contract when there was no objective justification for this view.

67. **Mr Ketelaar** gave evidence for about an hour and a quarter on the afternoon of Day 2 of the trial and for about a further two and a quarter hours on the morning of Day 3. I find that he was a reliable and honest witness who was doing his best to assist the court and he was not shaken in cross-examination. When Mr Ketelaar could not remember something which had occurred some time previously, he said so. I accept his evidence, which I find to be consistent with the contemporary documents.
68. The expert accountants, **Mr Ian Pickles** (called by the claimant) and **Mr Phil Southall** (called by the defendants), gave their evidence concurrently, on the third day of the trial, for about two and a half hours, either side of the short adjournment. As well as dealing with the issue of Company Valuation, the written expert evidence had also addressed the claim for damages resulting from the delay in completing the option contract. However, by the time the experts were called to give oral evidence, I had already expressed my concerns about completing their evidence in the time allotted to it in the agreed trial timetable given the slippage on the morning of the second day of the trial. This had resulted in a delay of over two hours in calling Mr Eraut to give his evidence, with the knock-on effect that Mr Ketelaar's cross-examination had extending into the morning of the third day of the trial. It was therefore agreed that the accountants' oral evidence would be confined to issues relevant to Company Valuation, with the claim for damages left over to an inquiry should the claimant succeed in establishing any breach of contract giving rise to any claim for damages for delay in completing the sale of the shares in NutriMedical.
69. The expert accountants were in agreement with regard to the calculation of Company Value with the exception of one key issue: how to treat the Option Consideration. They also agreed that the Option Consideration did not reflect either: (1) exceptional profits/losses or (2) profits/losses of a capital nature; and that it should not be accounted for as a '*derivative*' in NutriMedical's books.
70. According to their joint statement:
- (1) Mr Pickles considered that the Option Consideration should be treated as a capital contribution because it represented the consideration for the grant of the call option, and that €150,000 should be deducted from Turnover. Alternatively, if the Option Consideration should fall to be treated as a trading receipt, it should be deducted as a '*sale*' to the claimant.
- (2) Mr Southall considered that when assessing the Company Value, the Option Consideration should be included within NutriMedical's Turnover. It was not a '*sale*' to the claimant as Mr Southall was of the opinion that parties intended the reference to '*Sales to AIL*' to represent an adjustment required solely in respect of goods sold by NutriMedical to the claimant.

However, both experts were in agreement that the interpretation of the appropriate treatment of the Option Consideration was a matter of legal interpretation, based upon the true facts. That is obviously correct. As a result, the claimant's agenda for the experts' concurrent evidence was focused upon considering whether there were any factors in the financial nature of the transaction which might assist in determining the appropriate treatment of the Option Consideration. However, whilst it may properly be the function of an expert accountant to identify and draw the court's attention to any such factors, in my judgment it is ultimately for the court to assess and determine their relevance, and to evaluate their importance (if any). For this reason, I derive very little, if any assistance, from the expert accountancy evidence. If forced to choose between the opinion evidence of the two accountants, however, I unhesitatingly prefer the evidence of Mr Southall to that of Mr Pickles. My reasons are as follows:

71. I accept that both accountants were appropriately qualified and were seeking to do their best to assist the court. However, Mr Southall was instructed to act as a court expert from the outset whereas Mr Pickles (as he fairly acknowledged in his expert report) had originally been instructed by the claimant to provide a valuation, pursuant to Schedule 1 of the call option agreement, prior to the issue of proceedings (and, according to Mr Latimer, as early as 5 June 2020). This was set out in his advisory letter to Hemingways dated 7 July 2020. Mr Pickles fairly accepted that this letter contained certain errors: the omission of a deduction of €9,959 for sales and marketing costs; the error in the statement of the value of NutriMedical's net assets as at 31 March 2019, rather than a year later (as required by the formula in the call option agreement); and the treatment of the option consideration as a derivative - which he had later corrected. Mr Pickles had agreed in the 7 July letter (at para 5.12) that the option consideration should not form part of '*Sales to AIL*' - a position which Mr Pickles reiterated in cross-examination, stating that he remained of the opinion that this was a capital rather than a trading receipt - yet it nevertheless features as his fall-back position at para 2.3 of the joint statement "*if the Court's interpretation of the Option Agreement is that the Option Consideration should be treated as a trading receipt*". In my judgment, Mr Pickles's adoption of this fall-back position demonstrates that he is firmly wedded to his original conclusion that the €150,000 should be deducted from Turnover, and is prepared to resort to any analysis to defend that conclusion. I accept Mr Bacon's criticism that Mr Pickles's evidence was lacking both in commercial reality and any realistic evidential foundation. I would not go so far as to accept that it was also "*based on continually shifting sands*"; but I do find that Mr Pickles was prepared to revisit his expert opinions in order to justify his original conclusion.
72. Since it is more in accordance with the evidence and the commercial realities, I prefer Mr Southall's consistent, and common sense, analysis, reasoning and conclusion that the instalments of the Option Consideration more closely reflected a trading receipt, in the form of payments in lieu of profit margin (but not '*sales*' to the claimant), rather than wholly as consideration for the grant of the call option. If it were to be excluded from turnover, then NutriMedical would have lost all of the profit margin which historically it had previously charged the claimant on all products sold to it, and for no consideration. Whilst, after the move to Unidiet, the claimant proceeded to purchase directly from that entity, and not from the NutriMedical (as it had done previously), I find it impossible to ignore the previous pattern of trading between NutriMedical and the claimant which, in my judgment, forms an important backdrop

to the call option agreement, and an aid to its true meaning and effect. I note that Mr Pickles accepted, in cross-examination, that in agreeing clause 7.1 of the call option agreement (whereby sales of products and services between the claimant and NutriMedical – the reference to Nutrition4U in the body of the sub-clause is a clear error, as the heading to clause 7 makes clear - were to be at cost, with no additional margin applied by either party), the defendants had been giving up a valuable right. If necessary, I would also accept Mr Bacon's submission, supported by Mr Southall's evidence, but challenged by Mr Pickles, that the effect of Mr Pickles's calculation of Company Value is wrongly to deduct €150,000 twice over, once from Turnover (which is not mandated by the Schedule 1 formula) and once for CEO salary (which is), and thereby to double-count the €150,000.

73. The court also received a written report from a single joint expert in Dutch law, **Mrs Debby Hermans** (of Banning Advocates), which addresses the impact of Dutch employment law and practice on the terms of the employment contract for Mr Ketelaar proffered by the claimant. Mrs Hermans was not required to attend for cross-examination and her evidence is therefore effectively unchallenged.
74. Mr Latimer produced a helpful appendix to his skeleton argument purporting to summarise Mrs Hermans's findings and the claimants' response. In some respects, however, I find Mrs Hermans's unchallenged expert opinion evidence to be equivocal; and, in other respects, I do not agree that the opinions she expresses are properly matters to be determined solely by reference to Dutch employment law and practice. It is convenient for me to address these matters in Part VII when I come to address the terms of the CEO contract.

IV: Findings of fact

75. This part of my judgment should be read in conjunction with Part II (Background). I will make appropriate findings of fact where these are necessary or material to my decision on matters covered by the agreed list of issues but I do not propose to make findings of fact on extraneous matters that were raised during the course of closing speeches. For example, Mr Latimer invited me to make findings that the claimant had been free to purchase substitute nutritional products from Unidiet without any involvement on the part of NutriMedical, on the basis that Unidiet had its own generic recipe which it could have adapted to enable it to supply nutritional products to the claimant. Conversely, Mr Bacon invited me to find that the claimant needed NutriMedical's recipe to enter the market for ready-to-drink liquid nutritional products. I do not consider that it is strictly necessary for me to make such findings in order to determine any of the agreed issues; nor do I consider that, in all cases, I have sufficient evidence to enable me to make a reliable determination about such entirely peripheral matters. What, hypothetically, the claimant might have needed, or have done, in some counter-factual scenario is strictly irrelevant when the parties in fact entered into a distribution agreement in June 2014, and then moved forward to conclude the call option agreement on 31 August 2016. Nor is the court in any position to determine what Unidiet might have done had it not entered into a binding letter of intent with NutriMedical in June 2016, or concluded a manufacture and supply agreement with the claimant in May 2017, against the backdrop of the call option agreement. I acknowledge, and find, that the claimant certainly found it convenient to be able to use NutriMedical's recipes without all the risk and lead-in time of trying to develop and market its own competing products, and that Mr Aymes

confirmed in evidence that the claimant could not afford the outlay to develop its own liquid nutritional product at the time. That explains why the claimant acted as it did; but it does not assist in construing the agreement it entered into as a result.

76. I have already found that: (1) all parties considered the call option agreement to be to their mutual benefit, and confidently expected that the call option would be exercised by the claimant; (2) at the breakfast meeting in Amsterdam in May 2019, there was a genuine misunderstanding between Mr Ketelaar, and Mr Aymes, who misconstrued Mr Ketelaar's observations about his reduced motivation; and (3) from about the beginning of June 2019, the defendants were "*shut off*" from the claimant's organisation. I have also already acceded to Mr Bacon's invitation to find that Mr Aymes was not telling the truth when he said, in cross-examination, that he had not been aware, at the time it was sent, that the claimant was responsible for sending '*poison pen*' correspondence about Nualtra to recipients in the UK.
77. Mr Latimer invited the court to find that the common intention of the parties was that the Option Consideration represented payment for the grant of the call option, and that this was separate from the payment to be made for the shares in NutriMedical if the option were exercised. That is correct. However, and unusually, the call option agreement provided for the Option Consideration to be paid to NutriMedical, the company whose shares were the subject of the call option, rather than to Nutrition4U, as the grantor of the call option. Further, the call option agreement also provided for: (1) the instalments of the Option Consideration to be reduced by the margin on any order placed by the claimant before, but due to be delivered after, the date of that agreement, and (2) sales of products and services between the claimant and NutriMedical to be at cost, with no additional margin applied by either party: see Recital (C) and clause 7.1.
78. Mr Bacon referred in closing to an email from Mr Kirby to Mr Aymes dated 2 December 2019 (at Bundle D2, pages 474-5). This begins:
- I spoke to Sander at length on Friday regarding the Option Agreement. It was an '*off the record*' discussion as I was keen to understand where his thinking is at the moment.
- We have stated our objective to exercise the Option Agreement and although I did not state my position, he agrees with me, that we have no choice, If we exercise the option, we must offer him a contract as the agreement stands.
- He told me that he is not expecting a contract of employment that can be acceptable to him as he views it as our intention to exit him from the business in short order. In this respect he has guessed our next move already. I did not comment either way.
79. Mr Bacon invites the court to find that the claimant never intended to offer terms of employment which would be considered reasonable by Mr Ketelaar, and that subsequent offers were on terms which were plainly unacceptable and have been found by the single joint expert to be unreasonable. Mr Kirby was asked about this email in cross-examination and he denied that he and Mr Aymes had any pre-conceived plan to get rid of Mr Ketelaar, although he also made it clear that his

understanding was that Mr Ketelaar had told the claimant, in no uncertain terms, that he would not be coming over to it. I accept Mr Kirby's evidence, which I find to be consistent with the email, when read as a whole. This concludes:

We should aim to get a return on the money invested in having the Option Agreement

We will need to work out how to manage Sander to get the most out of him.

We have a contractual right to full access to all his documentation inc. the registrations.

We can devise a strategy that develops export business and there is no reason we cannot put in someone to manage parts of it, who will show Sander up for his lack of progress and work rate.

Our mid-term aim must still be to manage him out of the business if he does not perform.

Insofar as we have few options, if you agree, I will ask him to propose a Contract of Employment.

Keen to have your views on this.

80. Whilst I find that the claimant did not wish Mr Ketelaar to remain with NutriMedical for any length of time if and when the claimant should exercise the call option, I decline to find that the claimant had made a deliberate decision to offer an employment contract to Mr Ketelaar which he would reject as unreasonable and unacceptable. In an earlier email to Mr Aymes dated 24 July (at page 454) Mr Kirby had recognised that not providing a CEO contract would be a breach on the claimant's part:

We have made it very clear that he is not wanted on our journey and he does not want to come. So he will need to be compensated to get him out of the way. That is what he is banking on. In the meantime, we need to act in good faith in all things and ensure we hold our part of the deal as unappetizing as that is.

81. Founding himself upon an exchange of emails on 20 January 2020 (at Bundle D2, page 480), Mr Bacon invites the court to find that Mr Aymes was considering deliberately suppressing the turnover for NutriMedical for the current financial year. I do not find that this email exchange supports the inference that Mr Bacon invites the court to draw from it.
82. Mr Bacon invites the court to find that the claimant acted in a dilatory manner between the date on which the call option was exercised and the date fixed for completion, and was at fault for letting the completion date pass without completion having taken place. He says that the claimant was the author of its own misfortune, because it failed either to complete the transaction before the completion date had passed or to seek an extension of time. I find that the claimant was late in providing the defendants with the transaction documentation, which was not produced until 16 April, more than two weeks after the exercise of the call option. I also find that once

the parties' disagreement over the calculation of NutriMedical's company valuation emerged, it should have been apparent to both parties that the dispute over the price payable for the option shares would be incapable of resolution before completion fell due on 29 May. Thereupon, both parties should have agreed a later date for completion, ideally by reference to the resolution of the dispute over the determination of the purchase price for the option shares. They should also have promptly referred that dispute to the determination of an expert accountant using the expert determination procedure prescribed by clause 12 of the call option agreement.

83. However, I also find that even if the parties had promptly invoked the expert determination provisions of clause 12 once the dispute over NutriMedical's Company Value arose, completion could not have taken place before 29 May. There would have been the need for the President of the ICAEW to nominate an independent accountant; and clause 12.2 then provides for the accountant to use all reasonable endeavours to reach their conclusion within one month. There would simply not have been the time for this process to be completed before 29 May. I also agree with Mr Latimer's submission that the dispute fell outside the '*final and binding*' provisions of clause 12.4 so the expert determination clause is effectively a red herring. At its core, the dispute about Company Value essentially raised issues of law and construction which an accountant would lack the necessary skill and expertise to determine. Mr Latimer submits that any accountant who tried their hand at resolving a legal dispute would produce a result that was not binding on the parties. He points to the difference of opinion between Mr Pickles and Mr Southall, both expert accountants, about the true meaning and effect of Schedule 1. He relies on the decision of the Court of Appeal (delivered by Lloyd LJ) in *Homepace Ltd v Sita South East Ltd* [2008] EWCA Civ 1, [2008] 1 P. & C.R. 24 at [28]-[30] and [52].
84. Lloyd LJ first considered, as a matter of the true construction of the relevant lease, what it was that had been referred to the expert, and with what effect, as regards the scope of a Surveyor's Mineral Exhaustion Certificate. The structure of those provisions seemed to be such that, despite the absence of any words such as '*final and binding*', the surveyor had been given exclusive power to determine the questions to which his certificate was directed, whether it be as to the exhaustion of all '*Minerals*', or as to their not being economically recoverable and with no prospect of being so within 10 years. If his certificate did no more (and no less) than determine one or other of those matters, it was not open to either party (it would in practice be the landlord) to contend that that was not the correct view of the facts. There would be no point to the certificate if the questions to which it related were to remain in contention between the parties after a valid certificate had been issued. However, concealed within those questions there was a point of construction, as to which it seemed to Lloyd LJ that the lease did not delegate the decision to the surveyor. That point was: what are '*the Minerals*'? If the surveyor had proceeded on a wrong understanding of that expression, his certificate would not be binding upon the parties, because it would relate to the wrong question.
85. At [52], Lloyd LJ said this:
- If the lease had left it to the surveyor to decide what he was to take into account and what to leave out of account in making his calculation, then the fact that a judge might disagree with him as to the proper reading of the lease would make no difference. In such a case I would regard the

certificate (as the judge would have done) as binding between the parties and effective under the lease. However, it seems to me plain that this case is analogous to the *National Grid* case, mentioned above at paragraph [22], rather than to the *Norwich Union* case, also cited above, at paragraph [21]. It is for the surveyor to come to his own view as to whether the Minerals are exhausted or, as the case may be, no longer economically recoverable. In so doing it is up to him to form a view as to what is the extent of the Minerals, and of what quality they are. But it is not for him to decide what is meant by '*the Minerals*' and his certificate is only effective under the lease if it considers the question of (in this case) economic recoverability by reference to the Minerals as correctly understood.

86. In *Homepace*, the gist of Lloyd LJ's decision is that the lease did not delegate to the decision of the surveyor the point of construction as to what the term '*the Minerals*' meant. At its core, the present dispute is about whether the Year 3 annual instalment of the Option Consideration falls to be treated as '*Turnover*' for the purposes of Schedule 1 to the call option agreement. That is an issue of law and construction. I note that in the instant case, '*Turnover*' is not one of the many defined terms within the call option agreement and so the independent accountant is afforded no guidance in that regard. I do not consider that clause 12 delegates to the accountant the determination of the question whether the Year 3 annual instalment of the Option Consideration should fall to be treated as '*Turnover*' for the purposes of Schedule 1 to the call option agreement or that the true intent of clause 12.4 is that his decision on that issue should be treated as final and binding on the parties as an expert determination '*as to the amount of the Consideration*'. I agree with Mr Latimer that the accountant should not be the final arbiter of points of law and construction.
87. In any event, as Mr Latimer points out, the defendants have never applied to stay these proceedings but have allowed the case to come to trial. It is too late now for them to object that this issue should have gone to expert determination. I agree with Mr Latimer that at the end of preparing my judgment on this four day case, my conclusion is that the construction issue was not something which any accountant could, or was ever intended to, determine. As Mr Latimer graphically described the position in closing: "*The dispute was beyond the reach of an accountant*", as the differing approaches of Mr Pickles and Mr Southall demonstrate.
88. On 2 October 2020 Mr Ketelaar sent an email to Mr Kirby inquiring about the claimant's interest in two new powder products he was working on. Professing that he was baffled, Mr Kirby forwarded this to Mr Aymes, asking what he made of it. Mr Aymes responded:

Perhaps he is on medication. This is our IP soon enough. He has a non-compete also so can't break away and start afresh in any capacity. He really should focus on the current business. We are happy to consider all development and support financially or otherwise once matters have been resolved. There is little point in developing a cooperative discussion when shortly decisions will be taken in-house.

Mr Bacon cites this email exchange as demonstrating the contempt that Mr Aymes had for Mr Ketelaar by this time. He submits that it also demonstrates: (1) the claimant's knowledge that, as Mr Ketelaar said in evidence, he was imprisoned by the

failure to complete; and (2) a continued refusal to act in good faith and/or to use reasonable endeavours despite the terms of clause 24 of the call option agreement. In closing, Mr Latimer submitted that it shows that the claimant could not believe that Mr Ketelaar was “*stalling on the sale*” yet still wished to interest the claimant in new business opportunities. I consider that there is force in both these analyses. Mr Bacon also drew my attention to the first sentence of an email sent by Mr Kirby to Mr Aymes on 29 October 2020. The full paragraph reads as follows:

Morning, thinking about our discussion on making life hard for Sander, our position is that the OA is still binding. Therefore we should not disregard it where it suits us to do so. His position is that the OA is no longer binding, the transaction having failed, so he is free to compete. I warned him that if it goes to court and he loses then we would seek damages for any infringement of what we regard as a binding agreement.

This seems to me neatly to encapsulate the parties’ respective positions at that time. I note that at paragraph 45 of his witness statement Mr Ketelaar states that it was his “*firm view that the parties were no longer bound by the option agreement*”. Pending resolution of the dispute over the continuing existence of the option contract, I find that the parties were in a state of limbo.

89. At the end of his oral closing, I asked Mr Bacon what prejudice the defendants had suffered as a result of the delay in completing the sale of the option shares. Mr Bacon responded that there was no pleaded claim for financial losses but that the defendant relied on the matters set out at paragraphs 41 to 58 of Mr Ketelaar’s witness statement. If the claimant is found to be entitled to compel Nutrition4U to sell the option shares to itself, then the matters about which Mr Ketelaar complains would seem to me to be the consequence of the defendants’ opposition to the order for specific performance the claimant seeks, and the dispute over the price payable for the shares in NutriMedical, rather than any breach of the call option agreement on the part of the claimant.

V: Completion

90. It is now common ground between the parties that the option has not lapsed. As Mr Latimer points out, at its simplest, an option operates like an offer which remains open for a period of time. When the option is exercised by delivering the acceptance, a further contract is formed. Just as an offer does not ‘*survive*’ as an offer after it has been accepted and has formed a contract, neither does an option survive once it has been exercised. This is consistent with clause 4.1 (b) of the call option agreement, which identifies the one situation in which the option will lapse: if it is not exercised on or before 1 July 2020. That is reinforced by the defined term ‘*Lapse*’ and the reference to the option lapsing if it is not exercised in clause 7.2 of the call option agreement.
91. Here, the option was validly exercised on 1 April 2020 and, once exercised, the option was effectively spent and was replaced by the ensuing contract for the sale and purchase of the shares in NutriMedical, with completion scheduled to take place on Friday 29 May (being the date specified for completion in the exercise notice). The question is whether time was of the essence of completion of the option contract on the date (29 May 2020) specified in the exercise notice; and, if it was, what

consequences, if any, flow from the fact that completion did not take place on that date.

92. Whilst acknowledging that time was of the essence of the exercise of the option, Mr Latimer submits that both under the general law, and by reason of the express terms of the call option agreement (clause 4.1 (b) and the definition of ‘*Lapse*’), time was not of the essence of completion of the option contract. Mr Latimer relies upon the distinction drawn by Lord Neuberger (speaking for the House of Lords) in the Scottish case of *Simmers v Innes* [2008] UKHL 24, 2008 SC (HL) 137 at [18] between: (1) the service of a notice exercising an option, where time is clearly of the essence since it involves the exercise of a unilateral right, for which time-limits are (at least normally) strict, and (2) completion of the contract which arises on the exercise of the option, where, at least normally, time is not of the essence. At [23] Lord Neuberger observed that the law of Scotland and the law of England and Wales march together here (although on somewhat different jurisprudential bases) so that time will only be of the essence where the contract so provides, or where the nature of the subject-matter of the contract, or the surrounding circumstances, show that time should be considered of the essence.
93. Mr Latimer submits that neither the terms of the call option agreement (which govern any ensuing option contract), nor the nature of its subject-matter, nor the surrounding circumstances, should lead the court to conclude that time was of the essence of the option contract. He points out that by clause 8.1 of the option agreement, completion on the date specified in the exercise notice is expressly “*subject to the completion of satisfactory due diligence*”. Praying in aid observations of Patten LJ (with whom Longmore and Vos LJJ both agreed) in *British Overseas Bank Nominees Ltd v Analytical Properties Ltd* [2015] EWCA Civ 43 at [15], Mr Latimer submits that the present case affords a good example of a completion date which is to be construed in such a way that it is capable of being postponed.
94. In summary, Mr Latimer relies upon the following:
- (1) By clause 8.1 of the call option agreement, completion on the date specified in the exercise notice, or such later date as the parties may agree, is expressly subject to the completion of satisfactory due diligence.
 - (2) The need to agree both the terms of the Transaction Documentation and Mr Ketelaar’s Service Contract as CEO might push actual completion back and afford good reason for time not being of the essence of completion. The usual process of serving a notice to complete making time of the essence ensures that there is a remedy for unreasonable delay, and a way of bringing matters to a head.
 - (3) If time were of the essence of completion, the call option agreement might reasonably be expected to state this expressly, and also to set out the consequences of missing such a vital date. In contrast to clause 4.1 (b) (which sets out the consequences of not exercising the option by 1 July 2020, i.e. that the unexercised option will lapse), the call option agreement does not set out any consequence for non-completion by the date specified in the exercise notice (unlike clause 7.2, which expressly reiterates that the option lapses if it is not exercised, even if trade between the parties continues).

(4) There is no rule of equity whereby time is always viewed as being of the essence of an agreement for the sale of shares. Reported cases where time was held to be of the essence turned on the fact specific nature of the company's business, which meant that the price of its shares were volatile and time-sensitive, changing from day to day. In the instant case, the consideration to be paid for the option shares does not fluctuate according to the date of the actual completion of their purchase because the Consideration payable for the option shares is fixed by reference to a specific date (31 March 2020), and any delay in completion will make no difference to the price payable for the shares. Likewise, given the longstanding trading relationship between the claimant and NutriMedical, and their respective suppliers, and the fact that the employment position and role as CEO of NutriMedical's sole employee was secured by the terms of the call option agreement, any delay in completion could have no material adverse effect upon the company or the business that was the subject-matter of the sale and purchase.

(5) In any event, any supposed rule of equity would have been expressly displaced by the entire agreement provision in clause 16, and also the provisions of clause 17.3, whereby no delay in exercising any right or remedy provided under the call option agreement or by law should prevent any future exercise.

95. Mr Latimer also invites the court to take a step back and look at what he terms the *'too-good-to-be-true'* element of Nutrition4U's case: If time is of the essence of completion of the option contract, NutriMedical keeps the €537,500, Nutrition 4U keeps the option shares, and the claimant receives nothing in return for its investment. However, I note that by clause 7.1 of the call option agreement, the claimant will have enjoyed the benefit of purchasing products at cost during the option period, with no additional margin applied.
96. Mr Bacon acknowledges that that time is not normally of the essence of a contract. However, even though time may not have been expressly made of the essence of the contract, its subject-matter may give rise to the inference that this was the true intention of the contracting parties. Mr Bacon relies on cases where time was held to be of the essence of contracts for the sale of shares or of a business sold as a going concern. He invites the court to find that *'time was of the essence'* of the date for completion of the option contract. In the present case, the subject-matter of the contract was the purchase of NutriMedical as a going concern by way of the purchase of the entire share capital of the company. The parties had deliberately intended a short time scale for completion. By the time the option became exercisable, they each knew the other's business well, and they had already had over three years to prepare for completion.
97. Mr Bacon refers to the importance of the completion date, and the profound impact of the delay on NutriMedical's business, as explained by Mr Ketelaar at paragraphs 41 to 58 of his witness statement. Mr Eraut, who was the claimant's key negotiator of the call option agreement, recognised that it was implicit in that agreement that completion should take place by the completion date, and that time was of the essence. He confirms (in answer to question 19, inquiring about the narrow timescale for the exercise of the option) that: *"It was intended to be a quick decision and process so as not to leave the parties in limbo and uncertainty."* He fairly observes (in response to question 20 inquiring why the parties provided for the option to lapse if not so exercised) that: *"Without this NutriMedical would be unable to properly*

*develop its business under permanent threat of acquisition.” In response to these points, Mr Latimer contends that in these answers Mr Eraut is addressing the need to **exercise** the call option within a narrowly defined period. However, Mr Eraut explains, in his replies to questions 21 and 23, that they had been trying “to preclude unreasonable delay or obstructive behaviour by NutriMedical to avoid or delay the sale” and that his “business experience is that [a] protracted period during which a company is potentially about to be bought are [sic] very damaging”.*

98. Mr Bacon invites the court to note that there has not been a quick decision and process. To the contrary, the claimant allowed the completion date to pass without completion having taken place, and without seeking any extension of time, and then deliberately delayed in seeking specific performance, knowing that this would continue to stifle the defendants’ ability to trade and find new business. In all the circumstances, Mr Bacon invites the court to find that time was of the essence of completion of the option contract, which is no longer enforceable.
99. On this issue, I have no hesitation in preferring the submissions of Mr Latimer to those of Mr Bacon. First, I am entirely satisfied that the terms of the call option agreement do not make time of the essence of completion of the option contract. On the contrary, they point precisely in the opposite direction. In addition to the points so validly made by Mr Latimer, it seems to me that the terms of the option agreement clearly recognise that time is not of the essence of completion of the option contract, and clearly point against any conclusion that it is. Paragraph 3 of Schedule 1 provides for the parties to use their respective reasonable endeavours to procure that the Relevant Margin and Company Value shall be finally determined as quickly as possible and, in any event, **no later than the date for Completion specified by the Buyer in the Exercise Notice failing which, the matter shall be referred to an expert for determination in accordance with clause 12.** Clause 12.1 provides for the President of the ICAEW to nominate an independent accountant who, by clause 12.2, is to use all reasonable endeavours to reach their conclusions **within 1 month.** Since, by clause 5.1 (c), the completion date specified in the exercise notice may be as little as 21, and no more than 50, business days after the date of the exercise notice, and bearing in mind that the time taken to nominate an independent accountant is completely outside the parties’ control, I conclude that the call option agreement clearly contemplates that completion may not be achievable before the date specified for completion in the exercise notice. In those circumstances, I fail to see how the parties could ever have regarded time as being of the essence of completion of the option contract. Independently of this, however, and in the context of the other provisions of the call option agreement, which provide for the lapse of the option (as to which time was expressly made of the essence) and its consequences, I have no doubt whatsoever that time was clearly never of the essence of completion of the option contract.
100. Second, I am satisfied that this is not one of those cases where equity treats time as being of the essence of the option contract because its subject-matter is the sale and purchase of shares in a company carrying on business as a going concern. The most helpful recent discussion of the question whether time was of the essence of completion, in the context of a contract for the purchase of the entirety of the shares in a private company, is the judgment of Davis J in *MSAS Global Logistics Ltd v Power Packaging Inc* [2003] EWHC 1393 (Ch) at [40-48]. Davis J undertook a

comprehensive review of the authorities. First, he cited observations of Parker J in *Re Schwabacher* (1908) 98 L.T. 127 to the effect that with regard to contracts for the sale of shares, as well as of a business as a going concern, time is of the essence at law and in equity. Parker J said this (at page 129):

With regard to contracts for the sale of shares, I think that time is of the essence both at law and in equity. Shares vary continuously in price from day to day and that is precisely why courts of equity have considered such a contract to be one in which time is of the essence of the contract, and not like a contract for the sale and purchase of real estate, in which time is not of the essence of the contract. It is in effect analogous to another class of cases in which equity views time as always being of the essence of the contract - namely where there is a purchase of a business and its goodwill as a going concern.

101. Next, Davis J referred to *Hare v Nicoll* [1966] 2 QB 130 (which involved an option relating to a block of shares in a private company, which were of a highly speculative nature and liable to considerable fluctuation in value). Having stressed that the shares were of a volatile character, all three members of the Court of Appeal (Willmer, Danckwerts and Winn LJJ) indicated the view that time would be of the essence. Winn LJ, in particular, expressed himself quite broadly (at page 147 F–G):

In my judgment, where there is a provision for the purchase of shares upon payment by a stated date, it is to be presumed, in the absence of any contrary indication, that the parties to such a contract have impliedly stipulated and mutually intend that the time of payment shall be of the essence of the contract.

102. Third, Davis J cited from *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] 1 QB 842 (also involving the sale of shares) where Sir Nicolas Browne–Wilkinson V-C (with the agreement of Woolf and Staughton LJJ) said this (at page 857):

In equity, time is not normally of the essence of a contractual term. The rules of equity now prevail over the old common law rules: section 41 of the Law of Property Act 1925. However, in three types of cases time is of the essence in equity: first, where the contract expressly so stipulates; secondly, where the circumstances of the case or the subject matter of the contract indicate that the time for completion is of the essence; thirdly, where a valid notice to complete has been given. In the present case there was no express stipulation that time was of the essence. The subject matter of the sale (shares in unquoted private companies trading in a very volatile sector) is such that if a date for completion had been specified, in my judgment time would undoubtedly have been of the essence of completion: *In re Schwabacher* (1908) 98 LT 127 and *Hare v Nicoll* [1966] 2 QB 130. For the reasons I have given, time could not be of the essence of completion on a date which was neither specified nor capable of exact determination by the parties. The only question is whether time was made of the essence by the service of a valid notice to complete.

103. Finally, Davis J noted that in *Grant v Cigman* [1996] 2 B.C.L.C. 25, in the course of an interlocutory judgment, Judge Weeks QC (sitting as a judge of the High Court) indicated the view (at page 31) that the dicta in *Re Schwabacher* and of Winn LJ in *Hare v Nicoll* might be too wide and that:

A property company may be different to a trading company and a company in one line of business may be different from a company trading in another less dynamic market.

104. After this full review of the authorities, Davis J concluded thus (at [43]):

Ultimately, as it seems to me, the question is one of the interpretation of the particular contract, the words used being set in the factual context in which the contract is made and regard being had to the subject matter of the contract.

I agree with this analysis of the authorities.

105. In the *MSAS Global Logistics* case, Davis J found the very wording of the relevant contractual provision – in particular the words "*but in any event no later than 10 January 2003 (unless the Vendor and Purchaser shall agree otherwise)*" – to be indicative of time being of the essence of completion; and that was strongly supported by the subject-matter of the contract, which was not just a parcel of shares in a private company, but the entirety of those shares, legal ownership of which would give effective control of the company to the purchaser so that, in effect, the whole business was being sold as a going concern. I recognise that certain of the features which led Davis J to the conclusion that time was of the essence of completion of the share purchase contract in that case are present also in the instant case: Effectively, the sale was of a business as a going concern, and NutriMedical has little in the way of tangible assets, its principal assets being the benefit of its recipes and its customer connections. I also note (from paragraph 9 of the judgment) that the agreement in that case contained a clause (19.3) which is in similar terms to clause 17.3 of the call option agreement yet that did not deter Davis J from deciding that time was of the essence of completion.
106. However, there are also significant differences: Here, the call option had been in existence for over three years, and the parties had enjoyed close business connections for even longer. There was no objective commercial imperative which required the parties to achieve completion of the sale and purchase by any particular date. Further, NutriMedical is effectively Mr Ketelaar, and the parties had agreed that he was to stay on as CEO of NutriMedical following the exercise of the option. Provided the Company Value at the date of exercising the option was positive (as the defendants assert), through the issue and allotment of shares in the claimant to Nutrition4U, as the seller, Mr Ketelaar would retain a financial interest in the continuing success of NutriMedical. In any event, and perhaps crucially, because the formula for determining Company Value proceeds by reference to the date the call option was exercised, the consideration for the purchase of the option shares is not affected by any delay in completion, so there is no question of any relevant volatility in the value of the option shares. Critically, also, and for the reasons I have already given, here the express terms of the call option agreement clearly negative any intention that time should ever be of the essence of completion of the option contract.

107. I note that at [48] Davis J records his finding that in that case it was clear that, at the time, the parties, and their advisers, had been proceeding on the footing that (subject to any issue of waiver) they were indeed required to complete by the longstop date fixed by the contract. However, Davis J expressly acknowledged that he did not think that this was relevant to the issue of interpretation. I agree; and therefore the subjective intentions of Mr Ketelaar and Mr Eraut, who negotiated the call option agreement, still less those of Mr Aymes, are irrelevant to the question whether time was of the essence of completion of the option contract.
108. In my judgment therefore, on a fair reading of the provisions of the option agreement, and having regard to its subject matter, time was not of the essence of completion of the option contract.
109. In any event, in this case it is immaterial whether or not time was of the essence of completion. As pleaded at paragraph 9B of the final iteration of the particulars of claim, the effect of time being of the essence is that the party not in default could have treated the defaulting party as being in repudiatory breach of contract, and elected to terminate the option contract for breach. However, as Mr Bacon fairly acknowledged, both in opening and again in his closing speech, nowhere in the various iterations of the pleaded defence is there any allegation that Nutrition4U ever purported to terminate the option contract by reason of any repudiatory breach on the part of the claimant. That is for the good reason that there is no evidence of the acceptance of any repudiatory breach of contract on the part of the claimant until one comes to Freeths' letter of 24 September 2020. Indeed, the claimant goes further and alleges that, in fact, the conduct of the defendants after 29 May 2020 was such as to affirm the existence of the option contract, even if time had been of the essence of completion. I have already rehearsed the relevant events and correspondence in Part II of my judgment, in which I relate the background to this case. Freeths' letter of 21 August 2020 clearly recognises the continuing vitality of the option contract. Their later letter of 24 September 2020 does include the assertion that the option contract was thereby terminated for repudiatory breach of contract; but, by this time, it was almost certainly too late for the defendants to be purporting to terminate the option contract for failure to complete on 29 May. In any event, I have found that time was not of the essence for completion; and termination for repudiatory breach of contract is not pleaded by the defendants. Had they wished to put an end to the option contract for failure to complete on or before 29 May 2020, the remedy properly available to them was to serve notice fixing a reasonable time for completion, and making time of the essence of completion by that date.

VI: Company Value

110. The question to be considered in this part of my judgment is whether the €537,500 consideration paid for the grant of the call option falls to be included in the formula for calculating the purchase price of the option shares contained in Schedule 1 to the call option agreement.
111. The sum of €537,500 comprises the total of the annual sums of €150,000 p.a. that the claimant paid to NutriMedical, apportioned across three years and seven months (as recorded in recital (C) to the call option agreement. As Mr Eraut explained in his written response to questions, this sum was intended to compensate NutriMedical for the loss of margin from selling to the claimant for a long period (four years) in

exchange for its co-operation in supplying the recipe which enabled the claimant to develop an alternative product with a more reasonably priced and amenable supplier than Even Sante. The negotiation of the call option agreement became protracted which is what led to the annual payments not being for an 'even' period of four years.

112. Mr Latimer submits that the option consideration should be excluded from Company Value because it was never intended that the claimant's own payments should inflate the price it was to have to pay for the option shares. Relying on the evidence of Mr Pickles, Mr Latimer contends that the payments of the Option Consideration should be regarded as consideration for the grant of the call option rather than as a trading receipt, and they therefore fall outside the scope of 'Turnover' for the purposes of Schedule 1. Alternatively, if they do fall within the concept of 'Turnover', sales to the claimant are expressly excluded from the calculation of NutriMedical's Turnover (and, by extension, are excluded from the calculation of Relevant Margin). Mr Latimer submits that those sales included the €150,000 per year (or €537,500 in total) paid by the claimant to NutriMedical as the Option Consideration.
113. Mr Latimer asserts that a proper use of commercial common sense is to resolve any ambiguities in, or to test potential alternative constructions of, a contract. He submits that the important, commercial point here is that the value of NutriMedical to the claimant was the potential or future value of NutriMedical's business. But the annual payments of €150,000 were not going to be repeated after the claimant had purchased the option shares. Indeed, the payments ended on 31 March 2020; and the right to serve the exercise notice did not arise until 1 April 2020. It would be contrary to common sense for the claimant to pay €150,000 p.a. to NutriMedical and then to value that company on the basis that those payments would be repeated as future profits from sales to third parties. The claimant would never see its €150,000 p.a. again. This money was received by NutriMedical as its own, which it was free to spend as trading capital, or salary, or for research and development, or for tax, or for dividends. There is no suggestion that the money was ring-fenced and somehow waiting for the claimant to reclaim it. This is reinforced by the fact that the claimant would not agree (and, Mr Latimer would say, looked at objectively, it did not agree) to pay €150,000 p.a. and then have that inflate the purchase price. From the defendants' point of view, that also produces a too-good-to-be-true result, in which (a) NutriMedical receives €150,000 p.a. and can do what it will with the money, (b) Nutrition4U receives a price based on an extra €150,000 p.a. (or a total of €537,500) of turnover for its subsidiary, and (c) the claimant neither receives the €150,000 p.a. in cash nor purchases a recurring €150,000 p.a. of business with third parties. If anything more were needed, a multiplier of six is then applied to the Relevant Margin by paragraph 2 of Schedule 1 to the call option agreement (i.e. $\text{Company Value} = \text{RM} \times 6 + \text{Net Assets}$), thereby significantly inflating the effect on Company Value. Consequently, Mr Latimer submits that there was even less reason to allow Relevant Margin to be boosted by €150,000 p.a. because the Company Value is increased significantly by the multiplier. The defendants are said to offer no real answer to this.
114. Mr Bacon submits that on the true construction of Schedule 1 to the call option agreement, the Option Consideration (defined in recital (C)) should not be treated as 'Sales to AIL' and deducted from Turnover for that or any other reason. The reference to 'Sales to AIL' was clearly a reference to actual sales to the claimant at cost, with no additional margin (in accordance with clause 7.1). If the parties had intended that the

Option Consideration, or any part of it, should be deducted, the call option agreement would have expressly provided for this. The Option Consideration is a defined term in that agreement and the parties could very easily have used that defined term as a further deduction from Relevant Margin in Schedule 1 had there been any intention that it should be deducted from Turnover.

115. It is the defendants' case that the Option Consideration was paid to NutriMedical – and not to Nutrition4U as the holder of the option shares - because it was being paid in lieu of a profit margin on sales made by NutriMedical to the claimant. That is consistent with all of the witness evidence (including that of Mr Aymes); and it features at paragraph 15 (4) of Mr Latimer's skeleton argument as one of his *'facts agreed or not seriously disputed'*. Mr Bacon submits that it would defy commercial common sense for the parties to agree that the Option Consideration should be paid to NutriMedical (as opposed to Nutrition4U as the owner of the shares) and that this should then be excluded from the calculation of the Company Value. The worked example in Schedule 1 refers to a deduction for *'Sales to AIL'* but this does not refer to the Option Consideration. It also expressly deducts *'€150,000'* with the explanation in the preceding text that this is *'for CEO salary for the penultimate financial year preceding the exercise of the Option, namely Year 3'*; but again there is no similar reference to the Option Consideration. Mr Bacon submits that any alternative construction would make no commercial sense. It would be double-counting the express deduction of €150,000, which was neither what the parties intended or the call option agreement provides. The sum of €150,000 (for CEO salary) should be deducted from Turnover; but the very same sum should not be deducted a second time, either as *'Sales to AIL'* or for any other reason.
116. For all these reasons, the court should refuse the claimant's invitation to declare that the €150,000 paid by the claimant to NutriMedical in Years 3 and 4 should be excluded from *'Relevant Margin'* or *'Turnover'* in Schedule 1 to the call option agreement, with the effect that the Consideration payable for the option shares is €1. Rather, the court should find, in accordance with the evidence of Mr Southall, that the Company Value of NutriMedical is €526,930, and that the Consideration payable by the claimant to Nutrition4U for the option shares is to be satisfied by the issue and allotment to Nutrition4U of the corresponding number of shares in the claimant.
117. It is common ground between the accountancy experts that that the Option Consideration does not reflect either exceptional profits/losses or profits/losses of a capital nature and so does not fall to be excluded by paragraphs 4 (b) or (c) of Schedule 1 to the call option agreement. The area of dispute between them is whether or not the Option Consideration falls to be deducted from *'Turnover'* either as a capital contribution or as sales to the claimant. Ultimately, as both experts acknowledge, this is a matter of legal interpretation, rather than of accountancy practice.
118. On this issue, I have no hesitation in preferring the submissions of Mr Bacon to those of Mr Latimer. For the reasons Mr Bacon advances, I find that on the true construction of the call option agreement, and having regard to its language, its commercial purpose, the factual matrix, and commercial common sense, the Option Consideration received by NutriMedical in Year 3 (and repeated in Year 4) should be included within NutriMedical's Turnover for the purposes of Schedule 1 to the Option Agreement.

119. As regards the language of the call option agreement, Mr Latimer points out (at paragraph 78 of his skeleton argument) that in paragraph 1 of Schedule 1 to that agreement, the parties have gone to some trouble to indicate how '*Turnover*' (and thus '*Relevant Margin*') is to be calculated. Although '*Turnover*' is not one of the many terms expressly defined in the call option agreement, in paragraph 1 of Schedule 1 the parties have expressly specified various matters to be deducted from Turnover but, notwithstanding that it is a defined term, there is no specific mention there of the Option Consideration. I view that as a significant omission: had the parties intended that it should be deducted, I have no doubt that they would have said so expressly, and not left it to be addressed by way of inference.
120. As regards the commercial purpose of the option agreement, its factual matrix, and commercial common sense, in my judgment these all point to the inclusion of the Option Consideration in NutriMedical's Turnover. Mr Latimer would say that it is counter-intuitive for the consideration paid for the grant of a share purchase option to be treated as part of the turnover of the company when calculating the price to be paid for that company's shares. However, it is also counter-intuitive for the option consideration to be paid to the company whose shares are to be acquired, rather than to the seller of those shares. The explanation in the present case is that the option consideration was being paid in lieu of a profit margin on sales previously made by NutriMedical to the claimant. This reflected the close business and trading connection between the two companies prior to the entry into the call option agreement, and the contribution that ready access to NutriMedical's recipes made to the claimant's ability to change supplier from Even Sante to Unidiet. NutriMedical received the annual payments of €150,000 by virtue of the call option agreement, but it did so only because clause 7.1 of that agreement provided for sales of products and services between the claimant and Nutrition4U – in reality, and by extension, NutriMedical – to be at cost, with no additional margin applied by either party. That arrangement fed through into the new trading relationship with Unidiet when it replaced Even Sante as the source of supply of nutritional products based upon NutriMedical's recipes. This was clearly explained by Mr Eraut in his answers to questions 12, 13 and 15 (addressing the purpose of the call option agreement, the option period, and the Option Consideration of €537,500) which I have cited in paragraph 28 above. I therefore reject Mr Latimer's suggestion that the €150,000 payments should be viewed as '*out of the ordinary run of trade*'. I consider that the accountancy experts are right in their joint opinion that the Option Consideration reflects neither exceptional profits/losses nor profits/losses of a capital nature.
121. I therefore decline the claimant's invitation to declare that the €150,000 paid by the claimant to NutriMedical in Years 3 and 4 should be excluded from '*Relevant Margin*' or '*Turnover*' in Schedule 1 to the call option agreement, with the effect that the Consideration payable for the option shares is €1. Instead, I find that the Company Value of NutriMedical is €526,930, and that the Consideration payable by the claimant to Nutrition4U for the option shares falls to be satisfied by the issue and allotment to Nutrition4U of the corresponding number of shares in the claimant.

VII: The CEO contract

122. Mr Latimer emphasises that the claimant was always ready and willing to enter into a service contract in similar terms to the existing service contract between Mr Ketelaar and NutriMedical, as supplemented by the mandatory terms set out in Schedule 3 to

the call option agreement. In anticipation of the exercise of the option, on 21 February 2020 Mr Ketelaar had provided the claimant with a draft employment contract in purported compliance with clause 8.4 of the call option agreement. Since he had been advised that a service contract would violate Dutch tax law, he provided the claimant with an employment contract which, amongst other matters, included rights to shares in the claimant. The claimant's initial position, and its originally pleaded case, was that Mr Ketelaar should be provided with a CEO contract in the form of a service contract regardless of the Dutch tax position. I agree with Mr Bacon that it would be unreasonable, and contrary to the good faith provisions of the call option agreement, for the claimant to have insisted upon the entry into a service contract which the parties' Dutch lawyers both accept is not compatible with Dutch tax law. It is only since the exercise of the call option – and, indeed, the date fixed for completion - that the claimant has ceased to insist on a fiscally non-compliant service contract. Whatever the position in the past, it is now common ground that if specific performance is granted, the claimant will agree to enter into an employment contract with Mr Ketelaar.

123. Mr Latimer's position is that it was reasonable for the claimant to offer to enter into an employment contract with Mr Ketelaar on the terms that were on offer at trial. According to the Dutch law expert, the majority of the draft contract is already reasonable; and the claimant is willing to negotiate around the remaining provisions in light of the findings in the expert report. In stark contrast, Mr Latimer objects that there is no movement from Mr Ketelaar, who will only negotiate on his version of the contract, and will not even discuss any alternative. Tellingly, Mr Latimer complains that Mr Ketelaar has never asked for his employment contract to be referred to the Dutch law expert. He has avoided any scrutiny of the terms of his proposed employment contract; but that has come at the cost of there being no expert evidence which supports his preferred draft. Mr Latimer submits that the terms offered by the claimant are substantially reasonable, and that the appropriate declaration (and, indeed, the terms of any draft employment contract) can be resolved before the end of the trial. Mr Latimer says that the claimant has conceded an employment contract when it was not obliged to do so, and has prepared a draft which meets most of Mrs Hermans's requirements in its present state. There is no reason to doubt the claimant's ability to negotiate the remainder with Mr Ketelaar; although Mr Latimer points out that that if he does not wish to remain as CEO following completion of the share sale, the matter becomes academic.
124. Mr Bacon emphasises that, from the outset, Mr Ketelaar has been willing to enter into an employment contract, and he remains willing to do so. He submits that the court cannot nevertheless impose on Mr Ketelaar a contract that is unreasonable as a matter of Dutch law and practice; and his primary position is that the draft contract of employment proffered by Mr Ketelaar on 21 February 2020 should be the basis for discussion and agreement. Mr Bacon submits that should the court decree specific performance of the option agreement, the court should fix the machinery by which the contents of Mr Ketelaar's employment contract is to be determined. The parties are in agreement that the power to do so arises from the court's jurisdiction, confirmed by the House of Lords in *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444. He says that it is impossible to see how a court in this jurisdiction can properly determine the terms of the Dutch law contract; and this issue will therefore have to be resolved either by agreement, or through the further involvement of the Dutch law expert.

125. In light of the Dutch law expert's conclusions, I cannot find that it was reasonable for the claimant to offer to enter into an employment contract with Mr Ketelaar in the terms proposed by the claimant in either September 2020 or May 2022. Indeed, Mr Latimer's closing note summarises the position (at paragraph 64) thus (with emphasis supplied): "*In short, **the majority** of the draft contract is reasonable already and [the claimant] is willing to negotiate around the remainder.*"
126. Equally, in light of Mr Ketelaar's failure to engage with the Dutch law expert over the terms of the draft contract he had proffered in February 2020, I cannot be satisfied that those terms were reasonable either. I am satisfied, however, that neither party acted in repudiatory breach of contract, either in proffering particular terms, or in failing to agree the terms of the counter-party's proposed draft employment contract, whilst particular provisions remained genuinely in dispute. In any event, apart from Freeths' letter of 24 September 2020 (previously referenced) neither party has sought to rely on any such breach as entitling them to put an end to the option contract; and Mr Bacon twice accepted during the course of the trial that the defendants have advanced no pleaded case that the option contract has been terminated for breach. In the interests of dealing with the case proportionately, expeditiously, and cost effectively, I consider that the court should do as much as it possibly can to resolve outstanding issues on the terms of the CEO contract. Because of the defendants' failure to engage with the Dutch lawyer on their form of the employment contract, it seems to me that I must perforce proceed by reference to the claimant's draft.
127. As indicated in the course of reviewing the witness evidence, in some respects I find Mrs Hermans's unchallenged expert opinion evidence to be equivocal; and, in other respects, I do not agree that all of the opinions she expresses are properly matters to be determined by reference to Dutch employment law and practice. Assisted by the helpful appendix to Mr Latimer's skeleton argument, my findings on the contentious aspects of the draft employment contract that were referred to the Dutch employment law expert are as follows:
- (1) Article 1.2 (Previous employment):
- This is reasonable.
- (2) Articles 4.1 and 4.2 (Indexation):
- Both parties agree that the initial annual salary of €96,000 should be index-linked moving forwards. Since the notice exercising the option specified a completion date of 29 May 2020, and the delay in completion has been attributable to the parties' inability to agree the Option Consideration and other detailed terms of the transaction documents, I consider that it is reasonable for the initial salary to be increased as from 29 May 2021 and annually thereafter. It should be referred to the Dutch advocate to determine which particular CBS index is more generally adopted in the employment contracts of chief executive officers serving in the Netherlands.
- (3) Articles 4.6, 4.7 and 4.9 (Bonuses):
- The re-drafting of articles 4.6 and 4.9 should be referred to the Dutch advocate, who shall be entitled to require further assistance from NutriMedical's company accountants in providing greater clarity as to the way these articles are to work in

practice. Given the protection afforded to the claimant by clause 11 of the option agreement, and in light of the Dutch lawyer's opinion, I find that both articles 4.7 (a) and 4.7 (b) are unreasonable.

(4) Article 8 (Pension):

This is reasonable.

(5) Article 9.1 (Illness)

This is unreasonable.

(6) Article 10.4 (Fine)

This is unreasonable.

(7) Article 13 (Non-competition/solicitation)

This is unreasonable.

(8) Article 15 (Penalty)

The Dutch law expert considers this to be reasonable although she notes that a contractual penalty can be mitigated by the court if they consider it to be disproportionate in the circumstances. However paragraph 5 of Schedule 3 to the call option agreement provides for the CEO service contract to be governed by, and construed in accordance with, English law, and it confers exclusive jurisdiction on the English courts to settle any dispute or claim arising out of or in connection with it. There is therefore no scope for mitigation of any penalty by the Dutch courts. I have no doubt that the English courts would decline to uphold such a clause, which applies uniformly to breaches of four different articles of the proposed CEO agreement. I do not consider that this is properly a matter which falls to be determined by reference to Dutch employment law or practice; and I find that this penalty clause is unreasonable.

(9) Article 19 (Amendment)

This is reasonable.

(10) Article 21.2 (Resignation from office)

Since this is mandated by paragraph 3 (a) of Schedule 3 to the call option agreement, it is clearly reasonable. The Dutch law expert's views are infected by her misunderstanding of the true intended meaning and effect of this provision, something for which the defendants' Dutch lawyer must bear the responsibility from the comment (in the letter dated 22 September 2022) that: "*Mr Ketelaar works from home, it goes without saying that a resignation from his home address does not make sense at all.*"

128. I trust that, with this guidance, all remaining issues arising out of the terms of the CEO contract can now be resolved with the further assistance of the Dutch law expert; but, in any event, I give the parties permission to apply regarding those terms.

VIII: Breach

129. I have already observed that there is no counterclaim for damages or other relief by any of the defendants. Nevertheless, they rely on breaches of the call option agreement on the part of the claimant as reasons for refusing any order for specific performance. I have already rejected the defendants' case that the contractually agreed date for completion of 29 May 2020 was of the essence of the option contract. The defendants allege that the claimant was in breach of clause 3.3 of the call option agreement in failing to provide the transaction documentation immediately upon the exercise of the option on 1 April 2020. The defendants also allege that, in breach of clause 24 of the call option agreement, the claimant did not act in good faith towards the defendants, and failed to use reasonable endeavours to ensure that the terms of the option contract were observed before the appointed date for completion passed. In support, the defendants contend that the claimant refused to agree to appoint an independent valuer of NutriMedical (pursuant to paragraph 3 of Schedule 1) and failed to ask for any extension of time before the date fixed for completion had passed.
130. I have already found that the claimant was late in providing the defendants with the transaction documentation, which was not produced until 16 April, more than two weeks after the exercise of the option. However, I find that this has caused no actual damage to any of the defendants because the late provision of the transaction documentation did not contribute to the failure to complete by 29 May 2020. I have also found that once the parties' disagreement over the calculation of NutriMedical's company valuation emerged, it should have been apparent to all parties that the dispute over the price payable for the option shares would be incapable of resolution before completion fell due on 29 May. Thereupon, both parties should have taken steps towards agreeing a later date for completion, ideally by reference to the resolution of the dispute over the determination of the purchase price for the option shares, and they should have embarked upon the process of referring the dispute to the determination of an expert accountant, using the procedure prescribed by clause 12 of the call option agreement.
131. However, I also find even if the parties had promptly invoked the expert determination provisions of clause 12 as soon as the dispute over NutriMedical's Company Value had materialised, completion would not have taken place before 29 May. Further, it would soon have become apparent that the dispute over valuation fell outside the '*final and binding*' provisions of the expert determination clause since it was essentially a dispute about the legal interpretation of the option agreement rather than an accountancy issue. Before the parties could complete, there were genuine issues of construction concerning the price properly payable for the option shares that could only be determined by recourse to the courts. Pending such determination, I do not consider that one party rather than the other can properly be said to have been acting in breach of contract in failing to complete the option contract. As the case developed, Nutrition4U was denying - as we now know, wrongly - the continuing existence of a specifically enforceable option contract whilst the claimant was asserting - as we also now know, wrongly - that only a nominal consideration was payable for the option shares.
132. In these circumstances, I find that both the claimant and Nutrition4U were equally responsible for the failure to complete the option contract. If one was in breach of

contract in failing to complete, then the other was equally in breach; although I consider that the better analysis is that both were relieved from completing until all disputes were finally determined. Certainly, I do not consider that either party can be held liable in damages for the non-completion of the option contract. It was in anticipation of this outcome that I proposed – and the parties agreed – that the cross-examination of the expert accountants should not extend to the issue of damages for breach of contract, leaving the matter over for an inquiry as to damages should this prove necessary (which it is not).

133. Mr Latimer confirms that no breach of contract is alleged on the part of Mr Ketelaar. He is free to accept an employment contract and work as the CEO of NutriMedical following completion of the option contract should he wish to do so; but Mr Latimer recognises that there cannot be specific performance of a contract for personal services. In effect, Mr Ketelaar can stay or go as he pleases.

IX: Specific performance

134. I now turn to consider whether the claimant is entitled to specific performance of the option contract and, if so, the terms of any order for specific performance.
135. My conclusions on breach feed through into my findings on the issue of whether the court should grant the claimant specific performance of the option contract. This is because it is Mr Bacon's submission that the claimant's failure to act in good faith, and its delay in seeking specific performance, mean that the court should not grant such relief. Mr Bacon also relies upon the requirement for a claimant to come to court with '*clean hands*' when seeking specific performance. He submits that the claimant knew that the failure to complete was stifling the defendants' ability to make any decisions; and he relies upon the claimant's on-going contempt for Mr Ketelaar, and its negative and disparaging attitude towards the defendants, from June 2019 at the latest.
136. For the reasons I have already given, I reject these submissions. In circumstances where both parties to the option contract are equally liable for the failure to complete, I do not consider that equitable considerations militate against the grant of specific performance on grounds of delay provided this remedy is otherwise appropriate. Pending resolution of the disputes over the continuing existence of the option contract, and the price payable for the shares in NutriMedical, I find that the parties were in a state of limbo. I have already found that the matters addressed by Mr Ketelaar at paragraphs 41 to 58 of his witness statement resulted from the defendants' opposition to the order for specific performance the claimant seeks, and the dispute over the share consideration, rather than any breach of the call option agreement on the part of the claimant. Insofar as the defendants rely on (unpleaded) allegations of prejudice flowing from non-completion of the option contract, as Mr Latimer points out, once 29 May 2020 had come and gone without completion having taken place, it lay within Nutrition4U's power to serve a notice fixing a reasonable date for completion of the option contract, and making time of the essence. I have also found that from about the beginning of June 2019, the defendants were '*shut off*' from the claimant's organisation; but this came about because Mr Aymes had misconstrued Mr Ketelaar's observations about his reduced motivation at the May 2019 breakfast meeting in Amsterdam. I acknowledge that the requirement for the claimant to come to court '*with clean hands*' when seeking specific performance applies equally to the

claimant's conduct since the contract was made as to the earlier period when the contract was being negotiated and concluded. However, I do not consider that any of the matters raised by Mr Bacon, whether viewed individually or collectively, amount to conduct that is so reprehensible or unfair as to preclude specific performance on the basis that the claimant lacks '*clean hands*'.

137. Mr Bacon has referred me to the following passage at para 17-038 of *Snell's Equity* (34th edn):

A claimant who seeks to enforce a contract must show (i) that he has performed, or has been ready and willing to perform, all terms and conditions (apart from trivial ones) then to be performed by him; (ii) that he is ready and willing to perform all terms and conditions thereafter to be performed by him; and (iii) that he has not acted in contravention of the essential terms of the contract.

However, it is necessary to read on:

But where the defendant has repudiated and the claimant has elected to keep the contract alive and enforce it, it is not incumbent on a claimant to show that he was in a position to complete (e.g. if he is the purchaser, by having the price available) during the period from repudiation by the defendant to the date of the order for specific performance, as long as he was in such a position at the date of the order. Trivial breaches, such as a purchaser's omission, by a mere oversight, to pay a deposit on time will not necessarily debar a claimant from obtaining specific performance. In practice, the question is whether the obligation which the claimant has failed to perform is sufficiently important (having regard to its connection with the obligation which the claimant is seeking to enforce) to make it inequitable to grant specific performance.

The foot-notes refer to observations of Walton J in *Davis v Spalding* (1974) 231 E.G. 373 to the effect that "*so long as that repudiation was running the plaintiffs need not show either that they had, or that they were in a position to get, the money needed at completion. To suggest otherwise would in his judgment place a totally unnecessary burden upon them. Why should they prepare for an event which was not, or not yet, going to take place?*"

138. In the present case, the defendants, through their solicitors, Freeths, had made it clear to the claimant that they were not going to complete the option contract: see their letters of 24 September and 10 November 2020. In such circumstances, I hold that it is sufficient for the claimant to demonstrate that it is ready, willing and able to complete the option contract at the date of the order for specific performance. Indeed, in my judgment that is so in any case where completion is delayed because of a genuine dispute over the meaning and effect of an option contract which has the effect of preventing completion taking place before the resolution of that dispute.
139. Mr Latimer submits that the shares in NutriMedical are unique and that the claimant has already effectively paid €537,500 to purchase those shares (in the form of the €537,500 payment for the grant of the call option). I note that this is a little less than the assessment of Company Value arrived at by Mr Southall (for the defendants) of

€526,930. Mr Latimer points out that it is well settled that specific performance will be granted in respect of unique assets such as shares in a private company. As Robert Walker LJ explained in *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104 at page 113 G-H:

This court has heard extensive submissions on these points, supported by a good deal of authority. The starting point, on which both sides agree, is that a contract for the sale of shares (at any rate in a company whose shares are not quoted and readily obtainable on the market) is, like a contract for the sale of land, at first sight enforceable by specific performance; and that the effect of specific performance being available is to make the vendor under an uncompleted contract of sale a trustee of some sort for the purchaser.

Ward and Hirst LJJ both agreed.

140. To a similar effect are observations of Lewison J in *Mills v Sportsdirect.com Retail Ltd* [2010] EWHC 1072 (Ch), [2010] 2 B.C.L.C. 143 at [75]:

In general a contract for the sale of shares in a publicly quoted company will not be specifically enforceable. This is because damages will generally be an adequate remedy. From the seller's perspective a buyer's failure to pay sounds in money only, and thus damages will adequately compensate him. From the buyer's perspective if the seller fails to deliver the shares, he will normally be able to go into the market and buy more shares himself, with the result that again he can be adequately compensated in damages. However, where the shares are not readily available in the market the position is different. In such a case the contract is specifically enforceable. Shares will not be readily available in the market if, for instance, the company is a private unquoted company. But even if the company is a quoted company whose shares are listed on a recognised stock exchange, a contract for the sale of shares may be specifically enforceable if the quantity of shares contracted to be sold cannot readily be acquired in the market.

141. Mr Latimer submits that the old test of whether damages are an adequate remedy is really just one limb of a wider question: should the claimant be confined to a remedy in damages? He refers me to observations of HHJ Behrens in *Pena v Dale* [2003] EWHC 1065 (Ch), [2004] 2 BCLC 508 at [132]:

Mr Kosmin points out that specific performance is a discretionary remedy and that in exercising its discretion, the court may take into account as a ground for refusing specific performance or granting it subject to conditions circumstances which could not be taken into account in an action for damages for breach of contract, such as the conduct of the claimant or the hardship which such an order would inflict on the defendant ... The correct modern test is not 'Whether damages are an adequate remedy?' but rather whether 'Is it just, in all the circumstances, that the plaintiff should be confined to his remedy in damages?'

Mr Latimer says that Nutrition4U has yet to identify – let alone plead – any such justification in the present case.

142. Mr Latimer contends that the decree of specific performance should be granted and that none of the “*jumble of reasons*” pleaded against the grant of a decree survives the arguments set out above. In closing he emphasised that there was no basis for any finding that the claimant had come to court with ‘*unclean hands*’; there was no dishonesty in the transaction itself, no misrepresentation falling short of grounds for rescission, and no secret profit was being made .
143. The only other defence raised is delay. Mr Latimer struck a sensible balance between attempts to resolve the matter out of court and bringing the claim promptly. He says that Nutrition4U has suffered no prejudice by any alleged delay. He relies on the suggestion at paragraph 17-044 of *Snell’s Equity* “*that delay alone is not sufficient to bar specific performance, unless the defendant has been prejudiced by the delay*”. Mr Latimer points out that a reluctant seller, such as Nutrition4U, cannot rely on its own refusal to accept the binding nature of the exercise of the option, and consequent litigation, as amounting to delay and thereby avoid specific performance. He relies upon observations of Mummery LJ (with the agreement of Jacob and Neuberger LJJ) in *Taylor v Crotty* [2006] EWCA Civ 1364 at [25]:

I turn to the second ground, which relates to the exercise of the judge’s discretion to grant specific performance of the contract. In my judgment, there are no grounds for interfering with the judge’s discretion that a decree of specific performance was appropriate in this case. The landlord is unable to point to any prejudice or equity that has arisen, which would be a ground for denying to the tenant the right to performance of the contract created by the valid exercise of the option. I agree with HHJ Langan QC that it does not lie in the mouth of [the] landlord to complain of delay in relation to the right to complete a contract, which the landlord refuted because the landlord disputed the validity of the exercise of the option. The landlord’s position could have been protected by the service of a notice making time of the essence, but this understandably was not done because the landlord was disputing the very existence of a valid contract.

The end result, so Mr Latimer contends, is that there is no real defence to specific performance.

144. I accept Mr Latimer’s submissions. I have no doubt that an order for specific performance of the option contract is the appropriate remedy in this case. The subject matter is shares in a private company which are not readily available on the open market. Damages are not an adequate remedy for the claimant. First, because they will not adequately compensate the claimant for what it would have lost were specific performance refused. The real value of Nutrition4U to the claimant lies in the business synergies between the two companies which led them to work together in the first place and then to the creation of the call option agreement. Secondly, because damages will be difficult to quantify and assess. Thirdly, because there is no guarantee that any damages awarded to the claimant will be paid. Fourthly, because the claimant has already paid more for the grant of the call option than the Company Value of NutriMedical, as determined in accordance with Schedule 1 to the call option agreement (although I recognise that, in return, during the option period the claimant was able to trade with the defendants at cost price).

145. In my judgment, the defendants have established no sufficient prejudice or equity which would be a ground for denying to the claimant the right to specific performance of the option contract. I am satisfied that, in all the circumstances, it would be unjust for the claimant to be confined to a remedy in damages. I recognise that the court should be reluctant to force parties to enter into, or continue in, a personal relationship against the will of one of them. There can be little doubt that as a result of the deep personal antagonism between Mr Aymes on the one hand and Mr Ketelaar on the other, an order for specific performance may be the precursor to yet further expensive litigation. However, as Mr Latimer points out, Mr Ketelaar is free to accept an employment contract, and to work as the CEO of NutriMedical, following completion of the option contract but if he prefers to leave there is nothing to stop him doing so. Further, clause 14.4 of the call option agreement provides for the parties to use their reasonable endeavours to maintain the same working business relationship as in years one to four, except that no consideration is to be paid to the CEO if the option is not exercised. There may be a question as to whether this provision strictly applies where the option has been exercised but specific performance is refused. I consider that it would be unfair to the claimant not to allow it the benefit of this provision; yet, if enforced, it may give rise to the potential for further friction and litigation. It seems to me far better specifically to enforce the option contract, which will also avoid the need for, and the costs of, an inquiry as to damages instead of specific performance.

X: Conclusion

146. I would respond to the agreed list of issues as follows:

147. 1: Has the option lapsed?

No. It is common ground that the claimant validly exercised the option pursuant to the exercise notice served on 1 April 2020. Once exercised, there was nothing capable of lapse.

148. 2: Was time of the essence of completion of the option agreement?

Time was of the essence of the exercise of the option but not of completion of the ensuing option contract.

149. 3: If time was of the essence of completion of the option agreement and if the Option has lapsed, is it no longer possible for completion to take place?

This question does not arise because time was not of the essence of completion of the option contract

150. 4: Is the Option Consideration of €537,500 to be included or excluded from the calculation of Company Value at Schedule 1 to the option agreement?

This is best considered under issue 5.

151. 5: Are the annual sums of €150,000 (being constituent parts of the sum of €537,500) to be included or excluded from Turnover?

Included.

152. 6: Are the annual sums of €150,000 exceptional profits or profits of a capital nature to be excluded from the calculation of Company Value or not?

No.

153. 7: Is it reasonable for the claimant to offer to enter into an employment contract in the terms submitted to the Dutch law expert or on any other terms offered by the claimant before trial?

Not entirely, no. I have given guidance as to the terms which should be included in the CEO employment contract in Part VII of this judgment. I trust that, with that guidance, all remaining issues arising out of the terms of this contract can now be resolved with the further assistance of the Dutch law expert; but, in any event, I give the parties permission to apply regarding those terms.

154. 8: Is the claimant in breach of the option agreement?

8.1 Has the claimant failed to act in good faith towards the defendants?

8.2 Has the claimant failed to use all reasonable endeavours to ensure that the terms of the call option agreement were observed?

Not in any material respects so as to give rise to any liability in damages or to disentitle the claimant from an order for specific performance of the option contract.

155. 9: Is Nutrition4U in breach of the option agreement?

Not in any material respects so as to give rise to any liability in damages.

156. 10: Is Mr Ketelaar in breach of the option agreement?

No.

157. 11: If any party is found to be in breach of the option agreement, what are the consequences?

None

158. 12: Should the claimant be granted any of the four declarations appearing in paragraph 42 of the Re-Amended Particulars of Claim? (The effect of the Re-Amended Defence is that the second declaration is admitted, i.e. that the option was validly exercised; the issue is whether the option subsequently lapsed).

Subject to any further submissions that the court may receive after the circulation of this judgment in draft form, the court will grant declarations that: (1) the claimant and Nutrition4U entered into, and remain bound by, a contract in the terms of the written call option agreement dated 31 August 2016; (2) the claimant validly exercised the option pursuant to that agreement by serving an exercise notice upon Nutrition4U on 1 April 2020; (3) time was not of the essence of completion of the option contract that ensued and that contract remains capable of specific enforcement; (4) 'Relevant Margin' or 'Turnover' in Schedule 1 to the call option agreement includes the €150,000 paid by the claimant to NutriMedical in Year 3 and repeated in Year 4; and,

on the facts of the present case, the Company Value of NutriMedical, as determined in accordance with Schedule 1 to the call option agreement, is €526,930; and (5) it was not reasonable for the claimant to offer to enter into an employment contract with Mr Ketelaar, either in the terms proposed on 8 September 2020 or on such other terms as have been offered openly by the claimant by the date of trial.

159. 13: Should the claimant be granted a decree of specific performance against Nutrition4U or alternatively damages in lieu of specific performance as alleged at paragraphs 45-46 of the Re-Amended Particulars of Claim?

The claimant is entitled to an order for specific performance of the option contract.

160. 14: Has the claimant suffered loss and damage by reason of Nutrition4U's alleged breach of the call option agreement? If so, how and why did that loss and/or damage arise and what is the quantum of that loss?

No.

161. 15: On the claimant's alternative case, if the court concludes that it was *not* reasonable for the claimant to offer to enter into an employment contract on the terms which the claimant has offered, should the court exercise its jurisdiction pursuant to *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 and supply the machinery by which the terms of the employment contract should be determined, as alleged at paragraph 41 of the Particulars of Claim? If so, what machinery should the court provide? (By the Re-Amended Defence, and on the condition that the court finds that completion of the option agreement is still possible, Mr Ketelaar is content to invite the court to fix the machinery by which the contents of an employment contract should be determined.)

See the response to issue 7 at paragraph 153 above.

162. I propose to hand this judgment down at a remote hearing without the need for any attendance. I would invite the parties to seek to agree a substantive order to give effect to this judgment. I will adjourn consideration of the issue of costs to a further remote hearing to be attended by counsel when any issues as to the terms of my substantive order can also be addressed. I adjourn consideration of any application for permission to appeal by either party to that further hearing. I will extend the time for appealing until 21 days after that adjourned hearing. I invite the parties to agree an order giving effect to those interim arrangements. I conclude by expressing my thanks to both counsel for their considerable assistance in this case.
163. That concludes this reserved judgment.