Neutral Citation Number: [2019] EWHC 1826 (Ch)

IN THE HIGH COURT OF JUSTICE,
BUSINESS AND PROPERTY COURTS HC-2017-002353
BUSINESS LIST
Transferred from Central London County Court - C10CL334

Rolls Building
7 Rolls Buildings, Fetter Lane
London, EC4A 1NL
Date: 11/07/2019

Before :
MR JUSTICE WALKER

- -

Between :

Mr Habibur RAHMAN	Respondent and Claimant
- and -	
(1) Mr Azizur RAHMAN	First Applicant and First Defendant
(2) ICON COLLEGE OF TECHNOLOGY AND MANAGEMENT LTD	Second Applicant and Second Defendant
(3) ICON TECHNOLOGY (UK) LTD	Third Applicant and Third Defendant

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Mr Thomas Graham, instructed by Penningtons Manches LLP
(as from 1 July 2019, Penningtons Manches Cooper LLP) for all applicants/ defendants
Mr Andrew Clutterbuck QC & Mr Changez Khan, instructed by Laderman & Co for the respondent/ claimant

Hearing date: 28 June 2018

- -

Approved JUDGMENT:
REASONS FOR REFUSING THE VARIATION APPLICATION

Mr Justice Walker:

A. Introduction:

A1 Introduction: QB appeal, Business List & Arnold order

A1.1 The Queen's Bench liability appeal

1. On 28 June 2019 I heard argument on matters falling into two categories. The first category concerned consequential orders following my dismissal on 17 April 2019 of an appeal from an order made on liability by Ms Recorder McAllister ("the judge") after a five-day trial in February 2017 at Central London County Court. That appeal was allocated to the Queen's Bench Division of the High Court of Justice. I gave judgment on 17 April 2019 in my capacity as a judge of that division: see *Rahman v Rahman* [2019] EWHC 1011 (QB).

A1.2 The relief proceedings in the Business List

2. The second category concerned the remainder of the claim after the judge gave judgment below. Her judgment dealt with liability only. Following the judgment, she initially gave directions for the remainder of the claim ("the relief proceedings") in the Central London County Court. However, information provided pursuant to those directions indicated that the sums at stake warranted a transfer to the High Court. The judge made an order for transfer to the Business and Property Courts, Business List. I am told that neither side considered the possibility of applying for a consequential transfer of the appeal, or indeed the application for permission to appeal, to the Business List. I add that Business List matters are dealt with by judges of, or authorised to sit in, the Chancery Division. There were occasions in the present case when the term "Chancery Division" was used to denote the Business List. Where the present judgment deals with such occasions I have simply substituted "Business List".

A1.3 The Arnold order and the variation application

3. In mid-June it became apparent that the terms of my consequential orders in the appeal might depend upon the outcome of a possible application to vary an order made in the Business List by Mr Justice Arnold, with the consent of the parties, on 15 September 2017 ("the Arnold order", see sections A3 and B1.3 below). It was initially thought that the most efficient course would be to transfer the relief proceedings from the Business List to the Queen's Bench Division in this regard. On the assumption that such a transfer would take place an application notice ("the variation application") to vary the Arnold order was filed and issued on 20 June 2019 in the Queen's Bench Division.

A1.4 The combined directions order made in dual capacities

4. I had earlier advised the parties that a possible course would be to seek permission from the Chancellor for me to sit as a judge of the Business List. On 19 June 2019 I was given permission to deal with interlocutory matters in the relief proceedings in the Business List. By an order dated 24 June 2019 ("the combined directions order") I directed that the variation application should be treated as if it had been issued in the Business List. That order also directed that the variation application should be heard on 28 June 2019.

A2 Introduction: the appeal judgment and the parties

5. The appeal was from an order made by the judge on 14 July 2017 ("the liability trial order"). The appellant, Mr Azizur Rahman, was the first defendant in the proceedings below. The respondent, Mr Habibur Rahman, was the claimant in the proceedings below. They share the same surname, but are not related. I shall refer to them as "Aziz" and "Habib" respectively.

6. The main question at trial was resolved in favour of Habib. The judge found that in April 2003 Habib, Aziz and a third party, Dr Nurun Nabi, had made a contract ("the 2003 agreement") under which they were to be equal shareholders in a joint venture. In due course that joint venture was embodied in two companies, the second and third defendants, which I shall refer to as "the Icon companies". As explained in my judgment dated 17 April 2019 ("the appeal judgment"), Habib's case was that the second defendant, Icon College of Technology and Management Limited ("Icon College Ltd") was incorporated for the purpose of conducting the business of a fee paying educational establishment, called Icon College of Technology and Management ("the college"). Dr Nabi was the principal of the college. He, like Aziz, was and is an employee of Icon College Limited, as was Habib during the period from October 2003 to July 2010. The third defendant, Icon Technology (UK) Limited ("Icon Technology Ltd") has never actively traded, but at the time when these proceedings were brought it was the lessee of the premises that housed the college.

7. The judge further found that Aziz, as sole director and shareholder of the Icon companies, was obliged to "allot", in the sense of "procure the allotment of", a one third shareholding to Habib. All avenues of challenge to these findings have been exhausted, subject only to two issues concerning delay in the bringing of proceedings. The judge held that the 2003 agreement was made in April 2003. However it was not until 27 May 2015 that these proceedings were begun. The questions which arose on the appeal concerned findings by the judge that delay was no bar to Habib's claim. Aziz raised issues at trial both on the Limitation Act 1980 and on equitable principles, known as "laches", concerning delay. Aziz made assertions that, as regards relevant parts of Habib's claim, the judge wrongly concluded that Habib was neither barred by the 1980 Act nor barred by laches. In the appeal judgment I gave reasons for rejecting Aziz's assertions on these issues. My order dated 17 April 2019 extended the time within which Aziz may apply to the Court of Appeal for permission to bring a second appeal on these issues of delay in the bringing of proceedings. Aziz has not thus far made any such application to the Court of Appeal. Under my order it would be open to him to make such an application no later than 19 July 2019.

8. In the County Court Mr Changez Khan, instructed by Laderman & Co ("Laderman"), appeared for Habib, while Mr Thomas Graham, instructed by Penningtons Manches LLP ("Penningtons"), appeared for Aziz. On the appeal senior counsel were instructed: Mr Robin Hollington QC led Mr Graham for Aziz, while Mr Andrew Clutterbuck QC led Mr Khan for Habib. Following my dismissal of the appeal on 17 April 2019, Mr Graham has appeared for Aziz and his co-defendants, and Mr Clutterbuck QC and Mr Khan have appeared for Habib.

A3 Introduction: Arnold order including restraint injunctions

9. Following transfer to the Business List, only one substantive step has been taken in the relief proceedings. This was the granting of the Arnold order by consent on 15 September 2017. The Arnold order included the following provisions among others:

> 1. [Aziz] do pay [Habib] the further sums by way of interim payment on the following terms:-
>
> (a) the sum of £200,000 by 4pm on 22nd September 2017;
>
> (b) the said money shall be held by [Habib's] solicitors subject to the undertakings given in schedule A; and
>
> (c) if [Aziz] does not obtain permission to appeal as contained in his application for permission to appeal dated 3rd August 2017, [Aziz] do pay [Habib] the further sum of £300,000 by way of interim payment, such sum to be paid within 28 days of the date of the appeal judgment.
>
> 2. Until the conclusion of proceedings or further order, or unless [Habib] consents in writing, [Icon College Ltd] shall not make [Aziz] any payments other than (i) salary in the sum of £4,973.92 net pcm and (ii) reimbursement of any legitimate business expense personally incurred by [Aziz].
>
> 3. Until the conclusion of proceedings or further order, or unless the claimant consents in writing, [Icon College Ltd] shall not make to Dr Nabi any payments other than (i) salary in the sum of £4,973.92 net pcm and (ii) reimbursement of any legitimate business expense personally incurred by Dr Nabi.
>
> 4. The parties have liberty to apply to vary or discharge the orders made in paragraphs 2 and 3 above.

10. I shall refer to paragraphs 2 and 3 of the Arnold order as "the restraint injunctions". They are, in effect, a form of freezing order which applies only as a bar on certain transactions in certain circumstances. In the present case the barred transactions are payments by Icon College Ltd to Aziz or Dr Nabi in circumstances where the payments are neither salary in the sum of £4,973.92 net each month nor reimbursement of legitimate business expenses personally incurred.

11. It is the restraint injunctions which Aziz and the Icon companies, by the variation application, sought to alter. At the start of the hearing on 28 June 2019 I directed that the variation application should be the first matter argued that day. At the conclusion of oral argument I dismissed the variation application for reasons to be given later. In the present judgment I set out those reasons.

B. The variation application: proposals and evidence

B1 Variation application: background

B1.1 The liability trial order dated 14 July 2017

12. The liability trial order provided in paragraphs 5 and 6:

> Assessment of damages
>
> 5. There shall be an assessment of the damages suffered by [Habib] in respect of [Aziz's] breach of contract as follows:
>
> 5.1 damages in lieu of specific performance of the contract referred to in paragraph 5.2 below; and
>
> 5.2 damages in respect of missed or unpaid distributions (namely distributions made to or for the benefit of others by [Icon College Ltd] but not made to [Habib]), on the following footing:
>
> 5.2.1 [Habib] and [Aziz] entered a contract in September 2003 under which they agreed that [Habib] would eventually be granted a one third shareholding in [Icon College Ltd] and [Icon Technology Ltd];
>
> 5.2.2 [Aziz] was in continuing breach of his obligation to allot shareholding from approximately June 2009 onwards and he ultimately repudiated the contract on 19th November 2010 upon service of his "ET3" Response Form in proceedings in the Employment Tribunal (case number 3203565/2010); and
>
> 5.2.3 "distribution" has its ordinary meaning under section 829 of the Companies Act 2005 save that Dr Nabi and Mahmuda Rahman ([Aziz's] wife) are to be treated as "members" of [Icon College Ltd] for this purpose.
>
> Schedule
>
> 6. By 24th July 2017 [Aziz] shall file and serve a schedule with a signed statement of truth setting out all distributions that have been made or credited by Icon College Ltd (including all those made or credited to [Aziz] personally). This schedule must fully identify:
>
> a. what form each distribution took (in cash or in kind);
>
> b. when each distribution was paid or credited;
>
> c. by what method or transaction each distribution was made;
>
> d. all persons to whom [Icon College Ltd] has made or credited such distributions.

B1.2 The July 2017 schedule dated 24 July 2017

13. The schedule referred to in paragraph 6 of the liability trial order was served by Aziz on 24 July 2017. I shall refer to it as "the July 2017 schedule". Aziz verified the July 2017 schedule in a third witness statement ("Aziz 3") which included a statement of truth signed by him with a date of 24 July 2017.

14. As to distributions made by Icon College Ltd to Aziz the July 2017 schedule set out payments which included:

    (1) payments described as "gross salary" totalling £627,463;

    (2) payments described as "staff bonus" totalling £8,327.94;

    (3) payments described as "loan" totalling £132,555.39;

    (4) payments described as "gross annual bonus" totalling £1,354,685.25;

    (5) payments described as "dividends" totalling £1,855,632.78;

    (6) payments described as "pension" totalling £465,960.70.

15. As to distributions made by Icon College Ltd to Dr Nabi, the July 2017 schedule set out payments which included:

    (1) payments described as "gross salary" totalling £655,108.87;

    (2) payments described as "gross staff bonus" totalling £8,490.30;

    (3) payments described as "staff loan" totalling £97,834.00;

    (4) payments described as "gross annual bonus" totalling £1,362, 113.71;

    (5) payments described as "pension" totalling £296,908.00;

    (6) payments described as "other" totalling £500.00.

16. From these figures it can be seen that, as at 24 July 2017, the July 2017 schedule showed that:

    (1) over and above his total gross salary of £627,463, Aziz had received from Icon College Ltd a total of £3,817,159; and

    (2) over and above his total gross salary of £655,108, Dr Nabi had received from Icon College Ltd a total of £1,765,845.

B1.3 Arnold order interim payments and limited permission to appeal

17. Relevant parts of the Arnold order are set out in section A3 above. The interim payments described in paragraph 1 of that order were additional to an interim

payment of £100,000 on account of damages made in July 2017 pursuant to a requirement in paragraph 10 of the liability trial order. The first additional interim payment of £200,000 was duly made in September 2017. The second additional interim payment, of £300,000 under paragraph 1(c) of the Arnold order, would only arise if a specified trigger occurred: a failure by Aziz to obtain "permission to appeal as contained in his application for permission to appeal dated 3 August 2017".

18. Prior to the Arnold order Laderman had requested an additional interim payment and agreement to proposed restraint injunctions in a letter dated 16 August 2017. That letter made reference both to the amount of dividends received by Aziz as shown in the July 2017 schedule and to "the significant payments" made by Icon College Ltd to Aziz and Dr Nabi. The letter was followed a few days later by an application notice seeking an additional interim payment of £500,000 and also seeking what became the restraint injunctions. The application notice was filed with the court on 24 August 2017, along with a letter from counsel seeking an urgent hearing as vacation business. As will appear later in this judgment, correspondence between Laderman and Penningtons continued, in due course enabling the parties to agree on the terms in the Arnold order.

19. Meanwhile Aziz had prepared an appellant's notice seeking permission to appeal from the liability trial order, along with (among other things) permission to adduce fresh evidence. The appellant's notice was issued in the Queen's Bench Division on 3 August 2017.

20. The application for permission to adduce fresh evidence was refused on the papers by Mrs Justice Jefford on 10 August 2017. The application for permission to appeal was refused on the papers by Mr Justice Jeremy Baker on 15 September 2017. Aziz gave notice that he would make a renewed oral application for permission to appeal. At that stage the grounds of appeal comprised a principal challenge alleging fundamental flaws in the judge's finding that the 2003 agreement had been made, along with a subsidiary challenge to the judge's conclusion on laches. On 8 November 2017 Aziz sought to amend the grounds of appeal so as to challenge the judge's findings on statutory limitation.

21. The oral renewal application was heard by Mr Justice Spencer on 9 and 10 November 2017. In a reserved judgment dated 7 December 2017 Mr Justice Spencer refused permission to adduce fresh evidence and refused permission to challenge the judge's findings in favour of the 2003 agreement. However he granted permission to amend the grounds of appeal so as to rely on statutory limitation, and granted permission to appeal on both statutory limitation and on laches.

22. When refusing permission to appeal against the judge's findings on the 2003 agreement, Mr Justice Spencer noted a complaint by Aziz that the judge had not explained sufficiently why she rejected his evidence on the central issue of agreement. Rejecting this complaint, Mr Justice Spencer commented:

> …the judge... analysed the weaknesses of Aziz's evidence, and in particular the fundamental inconsistency between his oral evidence and his pleaded case and his witness statement.

23. The consequence of Mr Justice Spencer's decision was that the trigger in paragraph 1(c) of the Arnold order took effect: Aziz had not obtained "…permission to appeal as contained in his application for permission to appeal…". It followed that under the Arnold order Aziz was required not only to pay £200,000 by 22 September 2017, but also to pay to Habib the further sum of £300,000 by way of interim payment "… within 28 days of the date of the appeal judgment". My order dated 17 April 2019 included at paragraph 3(2) an initial extension which took effect so as to allow Aziz 28 days from 28 June 2019.

B1.4 The initial preparatory timetable for 28 June 2019

24. My order dated 17 April 2019 included a timetable of preparatory steps to be taken prior to the hearing on consequential orders. Once the date for that hearing had been set as 28 June 2109, the timetable included the following:

    (1) each side was required to advise the other, by 7 June 2019, of the consequential orders sought;

    (2) skeleton arguments and rival draft orders, were to be exchanged by 14 June 2019;

    (3) reply skeleton arguments, along with any revised draft orders, were to be exchanged by 21 June 2019; and

    (4) an agreed list of issues and sub-issues was to be filed by 26 June 2019.

B2 Aziz's proposals for variation

B2.1 The 31 May net dividend proposal

25. The first preparatory step for the 28 June hearing, notification of the consequential orders sought by each side, was scheduled for 7 June 2019. Six days prior to this Penningtons wrote to Laderman on 31 May 2019. In this letter Penningtons sought Habib's consent, "in accordance with" the Arnold order, to:

> … [release of] £1,200,000… as a net dividend to [Aziz]… [to] allow [Aziz] to pay the following:
>
> 1. Interim payment of £300,000 to [Laderman] to be held on account with the other monies in accordance with [Laderman's] undertakings in the Arnold order;
>
> 2. Legal costs (including all the legal costs associated with mediation);
>
> 3. £400,000 which will be set aside as a dividend for [Habib].

26. I shall refer to this as "the 31 May net dividend proposal". I add that, bearing in mind that specific performance of the 2003 agreement had been refused by the judge, the wording of item 3 in the 31 May net dividend proposal does not seem apt. Nothing, however, turns on this.

27. The letter of 31 May said that such a net dividend would, among other things, still leave more than a year's running costs in reserve as at 22 May 2019. In that regard Icon College Ltd's management accounts to 30 September 2018, and bank statements to 7 May 2019, were enclosed with the letter.

28. In conclusion Penningtons' letter of 31 May 2019 stated that if consent were not given:

> ... we will need to make an urgent application to court to have the order varied to permit this payment…

B2.2 The 7 June conditional general release proposal

29. By 7 June, however, when giving notification of proposed consequential orders in the appeal, Aziz was putting forward a different proposal. It is a proposal which he has consistently maintained, in substance, from 7 June 2019 onwards. I shall refer to it as "the conditional general release proposal". It was put forward on 7 June 2019 as paragraph 3 of Aziz's draft consequential order in the appeal:

> 3. … [Aziz and the Icon companies be] released from the [restraint] injunctions upon terms that:
>
> a. [Aziz] shall give [Habib] notice in writing of any payment which would but for such release have been contrary to paragraph 2 or 3 of the [Arnold] order, providing full particulars of the payment including the basis for the payment, within 7 days of the making of any such payment; and
>
> b. to the extent that such payment is in the nature of a "distribution" within the meaning of paragraph 5.2.3 of the [liability trial order], [Aziz] and [Icon College Ltd] shall procure that, when such a distribution is declared and payment is made in respect thereof to [Aziz], 1/3rd of the total distribution declared is retained by [Icon College Ltd] and preserved by [Icon College Ltd] until the final determination of these proceedings or further agreement between the parties, so as to be available for payment to [Habib] if the court so orders or the parties so agree.

30. What was thus proposed on 7 June 2019 by Aziz was very different in substance from the 31 May net dividend proposal. Rather than permitting a one-off dividend it would enable Icon College Ltd to make any distribution it liked to Aziz and Dr Nabi provided that a 1/3 portion was retained and that, no later than a week after the distribution, Habib was notified of what had happened.

31. As put forward on 7 June 2019, moreover, the proposal did not just differ in substance: it differed procedurally. Penningtons' 31 May letter envisaged a specific and urgent application to the court. It did not suggest that judicial consideration of the 31 May net dividend proposal could be left until 28 June 2019 and treated as a matter which was consequential on the dismissal of Aziz's appeal.

B2.3 Laderman's response dated 7 June 2019, emailed on 10 June 2019

32. Laderman's response, in a letter dated 7 June 2019, but emailed on 10 June 2019, included:

    (1) an observation that variation of the Arnold order was not consequential on the dismissal of the appeal but required an application supported by evidence in the Business List;

    (2) a reminder that Habib's application leading to the Arnold order was made after the July 2017 schedule revealed that Aziz had withdrawn from Icon College Ltd a total of £1.35 million in bonuses, and had taken very large amounts even after receipt of the judge's draft judgment stating that Habib was entitled to a 1/3 share of that company;

    (3) an expression of willingness to consider a one-off dividend ensuring that Habib received the £300,000 due under paragraph 1(c) of the Arnold order; and

    (4) a response as regards other proposed payments for Aziz's benefit.

33. The response noted in sub-paragraph (4) above was in these terms:

> … agreement to other payments for the benefit of [Aziz], including towards legal costs, will depend at the very least on satisfactory disclosure by him of his need for such payments. As we have mentioned, he drew huge sums from [Icon College Ltd] in the period up to the date of the Arnold order, which he agreed to knowing full well of his anticipated expenses, and we cannot see how he could now properly need more. Accordingly:
>
> a. what has changed since the date of the Arnold order to justify allowing [Aziz] to depart from what he agreed?
>
> b. what have the sums he withdrew from [Icon College Ltd] following service of the claim form been expended on?
>
> c. why cannot he meet his present proper needs from other sources?
>
> d. please set out precisely what sums he is now proposing to spend and on what.

B2.4 Initial transfer discussions, 11 to 13 June 2019

34. On 11 June 2019 Penningtons emailed Laderman maintaining that the conditional general release proposal was consequential on the dismissal of the appeal. Penningtons added:

> … Our client's ability to comply with the consequential directions (e.g. payment of the £300,000; payment of costs etc.) is reliant on release of the restrictions under paragraphs 2 and 3 of the order made by Mr Justice Arnold dated 15 September 2017…

35. In the light of Laderman's stance that Aziz's variation proposal required an application in the Business List, Penningtons sought agreement to a transfer by consent of the relief proceedings from the Business List to the Queen's Bench Division to enable Aziz's variation proposal to be dealt with at the consequential hearing fixed for 28 June 2019.

36. Laderman sent a reply on 12 June 2019 which:

    (1) noted that Laderman had sent a detailed letter on 10 June 2019 identifying information needed before considering the proposed variation;

    (2) noted that there had been no substantive reply to that letter;

    (3) as to the proposal to transfer the relief proceedings to the Queen's Bench Division to allow the variation proposal to be dealt with on 28 June, asserted that the variation proposal was not consequential on the dismissal of the appeal and thus not appropriate for the hearing on 28 June;

    (4) added that this was not merely a procedural objection, as the proposed variation was substantial and properly required an application and supporting evidence, but no such evidence had as yet been seen; and

    (5) pointed out that:

> It is of course open to [Aziz] at any time to make an application in the [Business List].

37. Penningtons replied to Laderman on 13 June 2019, asserting:

> … you should appreciate that, without releasing our client from paragraphs 2 and 3 of the order... our client will lack the funds with which to:
>
> - make any further payment to your client; or
>
> - pay his own legal fees, …

38. Penningtons asserted, among other things, that as the Arnold order was a species of freezing order, it would clearly be an abuse of process to prevent a party from drawing funds required for the purpose of taking legal advice, or complying with orders of the court. Penningtons attached updated bank statements for Icon College Ltd's account indicating that it held £7.3 million. In addition Penningtons said that in the absence of agreement it would be minded "to make both an application for transfer and/or an abuse of process application."

B2.5 Transfer application dated 14 June 2019

39. Penningtons did not, as had been threatened on 13 June 2019, make an abuse of process application. However on behalf of Aziz and the Icon companies on 14 June 2019 it electronically filed a transfer application in the Business List. A statement of truth in support of the transfer application:

    (1) said at paragraph 17 that to enable Aziz to comply with costs orders, to make a payment on account of damages of £300,000, and to pay his own legal costs, Aziz intended to make a separate application seeking an order discharging or varying the Arnold order in order to:

        (a) release Aziz and the Icon companies from paragraphs 2 and 3 of the Arnold order upon terms intended to give Habib reasonable protection, as set out in the 7 June conditional general release proposal; or

        (b) release Aziz and the Icon companies from paragraphs 2 and 3 of the Arnold order to enable them to make a payment in accordance with the 31 May net dividend proposal;

    (2) said at paragraph 18 that Aziz's ability to comply with the consequential directions was reliant on release of the restrictions in paragraphs 2 and 3 of the Arnold order and therefore "clearly consequential to the dismissal of the appeal", and that Aziz and the Icon companies would be requesting that the application to discharge/vary the Arnold order be heard at the hearing listed before me on 28 June;

    (3) after dealing with the correspondence between 7 June and 13 June inclusive, at paragraph 22 asked that the court make an order of transfer for the purpose of allowing "the matters" to be dealt with by me at the hearing on 28 June 2019.

40. I observe at this point that nothing had been done prior to 14 June 2019 to inform me that there was a proposal by Aziz and the Icon companies to make the transfer application. Nor had anything been done to inform me that at the hearing on 28 June 2019 I would be asked by Aziz and the Icon companies to make an order varying the Arnold order.

B2.6 Skeleton arguments and rival draft orders, 14 June 2019

41. The second preparatory step for the 28 June hearing required the parties to exchange skeleton arguments and rival draft orders by 14 June 2019. This was duly done on that day, and the material exchanged was filed with the Queen's Bench Division. Paragraph 3 of Aziz's 14 June draft order embodied the conditional general release proposal, using the same wording as had appeared in the 7 June draft order (see section B2.2 above).

42. Aziz's 14 June 2019 skeleton said at paragraph 27 that Aziz sought an order releasing him from the restrictions in the Arnold order. It was said that the release was upon terms intended to give reasonable protection to Habib. Reference was made to paragraph 3 of Aziz's draft order in this regard. Aziz's 14 June 2019 skeleton argument continued in paragraphs 28 to 37:

28. The need for a release is plain and obvious. The Arnold Order prevents [Icon College Ltd] from making any payment to [Aziz] or to [Dr Nabi], other than:

(1) salary payments of £4,973.92 net per month;

(2) reimbursement of legitimate business expenses.

29. [Aziz's] salary is plainly insufficient to enable him to fund, in particular:

(1) legal advice on any appeal, and any appeal;

(2) payment of any sum on account of [Habib's] costs of the appeal (see paragraph 1 of [Habib's] Draft Order; paragraph 8 of [Aziz's] Draft Order);

(3) the further £300,000 by way of interim payment sought by [Habib] (see paragraph 7 of [Habib's] Draft Order; paragraph 4 of [Aziz's] Draft Order).

30. In the past, [Icon College Ltd] has made substantial dividend distributions to [Aziz] evidenced by the [July 2017] Schedule ... It is from such distributions that [Aziz] has been able, inter alia, to fund these proceedings. For obvious reasons, he needs further dividends in order to be able to comply with the Order proposed and to fund his own legal fees going forwards. He is plainly entitled to such funds.

31. [Icon College Ltd] is in good health and has ample funds - millions of pounds - in cash:

(1) its Balance Sheet at 30/9/18 shows net assets of £4,274,542.30 (and its Profit & Loss Accounts to 30/9/18 show a net profit of £1,570,326);

(2) its bank statements to 7 June 2019 show a bank balance of £7,350,844.

32. The purpose of the injunction in the [Arnold] Order was merely to preserve the value of [Icon College Ltd] to ensure that [Habib's] claim for damages in lieu of specific performance could be met. It was a form of freezing order. It supplemented orders for interim payments on account of such damages, which gave [Habib] further protection.

33. [Aziz's] Draft Order (paragraph 3) proposes that the restrictions in the [Arnold] Order are lifted but that protections are provided to [Habib] as follows:

(1) a notice provision, under which [Aziz] will give [Habib] particulars of the distribution within 7 days of making it (paragraph 3.a of [Aziz's] Draft Order);

> (2) a 'balancing' provision, under which, if there is a dividend distribution, one third of the total (reflecting [Habib's] one third shareholding found by the trial judge) will be retained and preserved by [Icon College Ltd] until final determination of the proceedings (paragraph 3.a of [Aziz's] Draft Order).

34. It would be wholly wrong, indeed an abuse of process, for [Habib] to continue to refuse [Aziz] access to the funds he needs to comply with the Order which [Habib] himself proposes, and to prevent him from accessing his own funds for the purpose of taking legal advice. One need only contrast the exception for the payment of legal fees in the standard form freezing order.

35. [Aziz's] solicitors explained the need for a variation of the [Arnold] Order for this purpose in a letter to [Habib's] solicitors of 31 May 2019, attaching [Icon College Ltd's] accounts and bank statements. Updated bank statements were also provided on 13 June 2019. However, [Habib''s] solicitors are currently refusing to cooperate. They are insisting that [Aziz] must issue an application, and that the application must be issued in the Chancery Division, and they are even refusing to consent to a transfer of the Chancery proceedings to the QBD to facilitate the application. This is an obvious abuse of process.

36. The issue of the release of funds by [Icon College Ltd] is plainly "consequential upon the dismissal of the appeal", as it will affect the terms of the order now made. It needs to be dealt by this Court, at this hearing. The alternative seemingly desired by [Habib] is for this Court:

> (1) to make orders which it knows [Aziz] cannot comply with, and which [Aziz] is prevented from complying with by [Habib's] own obstructiveness (an abuse of process); or
>
> (2) to make orders which do not take effect unless and until some further order is made by another court on a future occasion in the Chancery Division.

37. If [Habib] continues to obstruct the release of the necessary funds, and [Aziz] is forced to pursue a separate application, [Aziz] will invite the Court to make a different Order to the one currently proposed by [Aziz], in which all timetabling, including the running of time for appealing, is put back until after the conclusion of such release application.

43. It will be seen from those paragraphs that the only ground advanced on 14 June 2019 for seeking to vary the Arnold order was that, in circumstances where Aziz's salary was not enough to fund payments that he would now have to make, Aziz needed further dividends in order to make those payments. An assertion was made that Icon College Limited "is in good health and has ample funds". But this assertion did not include a "sufficient funds assurance" of the kind often found in applications to vary freezing orders. By a "sufficient funds assurance" I mean an assurance, in the context

of the present case, that the proposed variation would ensure that Icon College Limited would hold sufficient funds to enable Aziz to meet the full amount of any such award of damages and costs in favour of Habib as might eventually be made.

44. Habib's 14 June 2019 skeleton noted that it was proposed either by Aziz or by Icon College Ltd to seek to vary paragraph 2 of the Arnold order. The stance of Habib in that regard was set out in paragraphs 21 and 22:

> 21. [Habib] objects to this matter being raised at the present hearing. The hearing has been listed for consideration of issues consequential on the dismissal of the appeal… and [Habib] will oppose any step which risks delay to the final resolution of those issues. Although no evidence has as yet been served by [Aziz] or [Icon College Ltd], it would appear that the proposed variation raises significant legal and factual questions, including regarding why Aziz and [Icon College Ltd] should be able now to resile from the agreed terms.
>
> 22. If [Icon College Ltd] wishes to apply to vary para 2 of the 15/9/17 Order, it can of course do so and it should do so by application supported by evidence. The appropriate court is that where the proceedings are continuing, the [Business List].

B2.7 Events 17 to 19 June: revised timetable including the variation application

45. After preliminary consideration of the material filed on 14 June, I prepared a note dated 17 June 2019. It was sent to the parties on the morning of 17 June. Among other things, it asked for information about the relief proceedings in the Business List, and what steps had been taken in those proceedings. The parties were requested to prepare a joint note dealing with questions raised in my note of 17 June 2019.

46. On the afternoon of 17 June 2019 Laderman, in the light of my enquiries in the note sent that morning, advised the court that Aziz was "already applying… for the proceedings to transferred to the Queen's Bench Division". Laderman attached a copy of the unissued transfer application. Laderman also enclosed a letter sent on behalf of Habib to the court manager of the Business List. That letter said that Habib's material concern was that the consequential hearing listed for 28 June 2019 should not be delayed or diverted from its purpose, namely the final disposition of appeal issues. Laderman's letter to the court manager made further observations, set out below with the addition of paragraph numbers in square brackets for ease of reference:

> [7] It is of course open to [Aziz and the Icon companies] to make such a variation application (they apparently want to draw out £1.2 million net of tax), but any such application will require evidence as to why such a variation from the agreed terms of the Arnold order should now be allowed. Notwithstanding requests by the claimant for such evidence, none has as yet been produced (indeed there is as yet no variation application at all).
>
> [8] Presumably [Aziz and the Icon companies] will eventually produce an application and evidence. That will inevitably raise serious issues between the parties which will have to be resolved at a hearing. That

> hearing will probably not be short. The claimant may also want time to respond to … evidence [filed by Aziz and the Icon companies].
>
> [9] [Habib's] position is therefore that the transfer application is premature. [Aziz and the Icon companies] want the transfer so that Walker J can hear the proposed application at the hearing on 28 June 2019 for which he has given detailed directions. The first question should therefore be: will Walker J hear the application at the hearing? If he decides he will, then a transfer, if it is necessary, can be made.

47. An email from Penningtons on the morning of 18 June 2019 confirmed that it was attempting to get the relief proceedings transferred "for the obvious reason that this will enable Mr Justice Walker to deal with all consequential matters together".

48. In the light of these emails I prepared a note which was sent to the parties at 12:10 on 18 June 2019. It included the following:

> 1. Further to my note of 17 June 2019, I have now seen the email from Laderman … timed at 16:51 that day and its enclosures. Those enclosures included:
>
> (1) … the transfer application … , … asserting that Aziz's ability to comply with directions to be given by me at the hearing fixed for 28 June 2019 is "reliant on release" from restrictions in … the Arnold order …, in which regard Aziz and his co-defendants intend to make a separate application ("the intended release application");
>
> (2) Laderman's letter to the Court Manager dated 17 June 2019, which includes observations that the intended release application will require evidence, that it will "inevitably" require a hearing which "will probably not be short", that the suggested transfer will only be needed if I am willing to hear the intended release application on 28 June 2019, and that I should have an opportunity to consider the position.
>
> 2. I have also seen the email sent by Penningtons Manches at 09:56 this morning. That email does not dispute the points made in Laderman's observations cited above. It asserts that if the transfer application is refused Aziz's current proposals for directions to be made on 28 June will need to be changed "because [Habib's] actions are preventing [Aziz] from funding the taking of legal advice and will prevent him from complying with the order [Habib] now wants the court to make". It adds that Penningtons Manches "are now instructed to prepare an application to vary/discharge the [Arnold] Order" – i.e. what I have referred to earlier as the intended release application.
>
> …
>
> 4. … there have been regrettable delays in the progress of this matter since 2017, and I think it desirable that there be speedy resolution of the question whether the Arnold order should be discharged or varied.

> 5. … I am concerned whether that question can fairly be resolved on 28 June. I am inclined to think, however, that a possible timetable might be for Aziz's intended release application to be issued and served no later than noon tomorrow, Habib's answering evidence to be filed and served by 4pm on Monday 24 June, Aziz's reply evidence by 4pm on Tuesday 25 June, and the time for "reply skeletons" (currently due this Friday) to be put back to 4pm on Wednesday 26 June.
>
> 6. If the parties are content with this timetable, I observe that I have in the past sat as a judge of the Chancery Division. A matter for consideration by the Chancellor might be whether the need to transfer might be avoided by making arrangements for me to sit on 28 June as a judge of the Chancery Division so far as necessary to deal with orders to be made that day.

49. A response from Laderman that afternoon gave provisional consent to the timetable proposed in my note. That consent was subject, among other things, to my being willing to extend the time for argument on 28 June 2019 from half a day to a day. In an email later that evening Penningtons said, in effect, that it would endeavour to meet the timetable proposed in my note.

50. In the event there was some slippage: as noted in section A1.3 above it was not until the morning of 20 June 2019 that the variation application was issued.

B3 The variation application of 20 June 2019 and Aziz 5

51. When issued on 20 June 2019 the variation application was supported by a fifth witness statement of Aziz dated 19 June 2019 ("Aziz 5"). Relevant assertions in Aziz 5 for present purposes can be summarised:

    (1) at paragraphs 28 to 30 of Aziz 5:

        (a) that Habib's claims for £300,000 and £132,287.48 on account of damages and costs left Aziz "in a position where I am struggling to pay my own legal fees";

        (b) that on 31 May 2019 his solicitors had sought Habib's consent to Icon College Ltd "releasing" a dividend of £1.2 million, of which one third would be put aside for Habib to abide the outcome of the proceedings, while the remainder would be used to finance further advice on a second appeal and to finance costs of pursuing such an appeal, costs of the 28 June 2019 hearing, costs for mediation, costs of complying with other directions, and interim payments to Habib on account of legal costs;

        (c) that the letter of 31 May 2019 explained that Icon College Limited's accountant was satisfied that such a dividend could be declared as it was less than 30% of the net available reserves, would be sufficiently covered by reserves as at the last completed year end, and would not jeopardise the cash flow of the business;

(2) at paragraph 31 of Aziz 5, that the letter of 31 May 2019 enclosed management accounts to 30 September 2018 showing reserves of over £4.2 million, and that on 13 June 2019 his solicitors had sent updated bank statements showing £7.3 million in Icon College Ltd's bank account;

(3) at paragraphs 32 to 35 of Aziz 5, that despite seeking orders for various payments from Aziz to Habib, Habib had refused to agree to any distribution of funds to Aziz, and had insisted that any application in relation to the Arnold order had to be made in the Business List;

(4) at paragraphs 36 and 37 of Aziz 5, that a request to agree to transfer the Business List proceedings to the Queen's Bench Division had been refused, presumably for tactical reasons to obstruct attempts to have the matter dealt with on 28 June, that Aziz had issued an application to transfer the proceedings to the Queen's Bench Division, and that Habib's continued resistance to transfer was "grossly unfair";

(5) at paragraph 45 of Aziz 5, in the course of giving "further details" of distributions and expenditure:

(a) that he had "on occasion" paid:

> … some money from my dividends (after tax) to Dr Nabi, based on an internal arrangement between us. …

(b) that an arrangement was in progress which, in effect, would cause him and Dr Nabi to become respectively 60% and 40% shareholders of Icon College Ltd, saying that he and Dr Nabi were:

> … currently arranging for Dr Nabi to become a registered shareholder of 350 shares, and for me to remain the owner of 540 shares.

(6) at paragraphs 52 to 55 of Aziz 5, denied that there was any risk of dissipation of Icon College Limited funds;

(7) at paragraph 56 of Aziz 5, dismissed a suggestion that distributions would have an effect on the valuation of Habib's claim for damages; and

(8) at paragraphs 57 to 62 of Aziz 5, under the heading "Change in circumstances", said that he had incurred substantial legal costs on his appeal "which I have now unexpectedly lost", that he now had to pay further substantial sums, and that this was placing him "under enormous financial strain" and "in an impossible position" in circumstances where his own offer to put in safeguards for Habib had been to no avail.

52. Paragraph 70 of Aziz 5 repeated his assertion that there had been obstructiveness by Habib in refusing to agree to transfer the relief proceedings to the Queen's Bench Division. It added an accusation that Habib had adopted an "extravagant attitude to costs" by instructing leading counsel for the hearing on 28 June 2019.

53. Paragraphs 71 to 74 of Aziz 5 stated:

> 71. I hope that the court will take this obstructiveness into consideration and find a way to make the necessary discharge/variation of the Injunction Order at the hearing on 28 June 2019. Failing that, I will be in a very difficult position, and obviously prejudiced should I be unable to comply with any court directions and obtain my own legal advice/representation on an appeal. If the application is not heard or not granted, I would also have to ask for a different order from the Draft Order currently sought, as it would need the timetable for compliance with any order consequent on payment to be extended until after the application to vary the Injunction Order has been resolved.
>
> 72. The estimated fees for further legal advice are substantial, and the funds for this are simply not available unless I receive a further distribution from [Icon College Ltd]. I have been advised that the cost of advising on and pursuing an appeal would be in excess of £200,000. In addition to that, I am advised that the following further costs estimates apply to costs now being incurred on my behalf:
>
> > (a) hearing on 28 June 2019 without the [variation] application: £10,000;
> >
> > (b) application to transfer between Divisions £6,000;
> >
> > (c) [variation] application … £12,000.
> >
> > These figures do not include the funding of any possible ADR, or of the assessment of damages itself, which will be substantial.
>
> 73. By contrast, [Habib] would not be unfairly prejudiced by an order varying the Injunction Order, as he will have nearly 100% of the one third distributions on account, will receive notice of any distributions, will have a balancing one third of any distribution put aside and reserved for him pending the final determination of the proceedings, and Icon College Ltd will still have extensive cash funds.
>
> Conclusion
>
> 74. I believe [Habib] is refusing to consent to my taking any funds out of [Icon College Ltd] and to the transfer of proceedings from the Chancery Division to the Queen's Bench Division to obstruct my access to justice.

54. It may be noted that Aziz 5:

(1) while making assertions as to Icon College Ltd's financial position, gave no "sufficient funds assurance";

(2) while claiming that there was no risk of dissipation, gave no details explaining what had become of dividends and bonus totalling more than £3.2m paid to him by Icon College Ltd during the period covered by the July 2017 schedule (see section B1.2 above); and

(3) while saying that Aziz needed the variation order, failed to give any information about Aziz's personal finances, and made no attempt to justify the failure to do this.

B4 An alternative variation: revival of the net dividend proposal

55. As noted in sections B2.1 and 2.2 above, Aziz's initial proposal on 31 May 2019 was that there be permission for a "one-off" net dividend of £1.2m. This was replaced on 7 June 2019 by the more radical conditional general release proposal.

56. Aziz's 14 June draft order and accompanying skeleton argument, as regards variation of the Arnold order, focused entirely on the conditional general release proposal. The 14 June skeleton argument mentioned Penningtons' 31 May 2019 letter, but did not explain that it had sought a more limited variation than was now being proposed.

57. Also on 14 June, however, Aziz filed in the Business List his transfer application. Paragraph 17 of the witness statement in support of the transfer application described the application which Aziz intended to make "discharging or varying the Arnold order". As noted in section B2.5 above, paragraph 17 set out two alternatives. The first of these was the conditional general release proposal. The second alternative was the 31 May 2019 net dividend proposal.

58. What happened on 20 June 2019 was that the draft order accompanying the variation application set out both the conditional general release proposal and, as an alternative, a revised version of the 31 May 2019 net dividend proposal. This revised version remained a proposal for a £1.2m net dividend of which £300,000 would be used to make an interim payment on account of damages. However the setting aside of £400,000 was no longer expressed to be "as a dividend for Habib", but was instead to abide the determination of the court. As to the remaining £500,000, this would no longer be expressly for legal costs.

59. I shall call this alternative "the revised net dividend proposal". It was in these terms:

> [OR IN THE ALTERNATIVE:
>
> 2. The Arnold Order is varied such that, by way of exception to the injunctions in paragraphs 2 and 3 of the order, [Icon College Ltd] is hereby permitted (without prejudice to the requirements of the Companies Act) to make a dividend distribution to [Habib] in the total sum of [£1,200,00] (the "permitted sum") upon the following terms:
>
> a. [Icon College Ltd] shall pay £300,000 of the permitted sum directly to the claimant's solicitors in satisfaction of paragraph 1(c) of the order, on terms that such sum shall be held and preserved by [Habib's] solicitors

together with any interest accrued thereon for 28 days from the date of this order unless [Aziz] shall prior to that date issue and serve an application for permission to appeal from the order of Mr Justice Walker of 17 April 2019, in which case such undertakings shall continue until 28 day days from the dismissal of such application for permission to appeal or, if permission is granted, from the date of final determination of such appeal or further order.

b. [Icon College Ltd] shall retain and preserve £400,000 (less any tax) of the permitted sum (being one third thereof) until the final determination of these proceedings or further agreement between the parties, so as to be available for payment to [Habib] if the court so orders or the parties so agree.]

B5 Transfer application on 20 June 2019 overtaken by events

60. A hearing of the transfer application had been scheduled to take place in the Business List before Deputy Master Stephen Lloyd on the afternoon of 20 June 2019. An attempt was made to pre-empt this hearing by filing a consent order for transfer which had been signed that morning. Laderman, however, said that its consent had only been given if I were to extend the time for argument from half a day to a day. If such consent were given then the parties agreed the timetable set out in my note of 18 June 2019.

61. In a note to the parties sent at 12:59 on 20 June 2019 I advised that the time for argument on 28 June was extended. I added that I had the permission of the Chancellor to act on 28 June as a judge of the Business List for the purposes of the variation application in addition to sitting as a judge of the Queen's Bench Division for the purposes of the appeal. There was thus no longer any need for the transfer application, and the hearing scheduled for the afternoon of 20 June was accordingly vacated.

B6 The combined directions order of 24 June 2019

62. My combined directions order of 24 June 2019 (see section A1.4 above) embodied the remainder of the agreed revised timetable. Accordingly Habib's answering evidence was to be filed later that afternoon, and Aziz's evidence in reply by 4pm the following day. Paragraph 3 of that order put back the time for the second round of skeleton arguments, which were to cover all matters to be dealt with at the 28 June hearing, to 4pm on 26 June 2019.

B7 Anwar 2 dated 24 June 2019

63. In response to Aziz 5 Ms Sadia Anwar of Laderman made a second witness statement dated 24 June 2019 ("Anwar 2"). Among other things, Anwar 2:

(1) as to drawings from Icon College Ltd by Aziz and Dr Nabi:

(a) noted in paragraph 12(a) that the July 2017 schedule showed Aziz and Dr Nabi withdrawing between May 2015 and July 2017 a total of £3.25 million over and above their usual salaries;

(b) recorded in paragraph 12(b) that at the liability trial Aziz admitted that prior to that trial he had withdrawn money from Icon College Ltd and fictitiously labelled the drawings "loan repayments", when in fact no corresponding loan had ever been made;

(c) also recorded in paragraph 12(b) Habib's concern that since the liability trial Aziz was mis-describing such withdrawals as "bonuses";

(d) noted in paragraph 13 that a skeleton argument for Aziz dated 13 June 2017 had said both:

> (1) there is no evidence of any risk of dilution or diminution of value or other dissipation.
>
> (2) … if [Aziz] was the sort of person who might be inclined to do any such thing, logic dictates that would have happened long ago.

(e) observed in paragraph 14 that (despite what was said in Aziz's 13 June 2017 skeleton) the July 2017 schedule showed that on 31 May 2017 Aziz had withdrawn £800,000, comprising £500,000 for himself and a further £300,000 for Dr Nabi; and

(f) added in paragraphs 13 to 15 that in the absence of any explanation by Aziz the 31 May 2017 withdrawal "was obviously influenced by the pending proceedings", proved Aziz to be precisely "the sort of person" who might be inclined to dissipate assets, showed that what was said in the 13 June 2017 skeleton was a "cynical bluff", led Habib to suspect an element of bad faith, and caused a concern that Aziz was deliberately reducing the value of Icon College Ltd and potentially dissipating his own assets in order to frustrate any enforcement of judgment;

(2) in paragraphs 16 to 23, described events in August and September 2017, including:

(a) an initial approach in which Laderman explained Habib's concerns and sought an injunction and interim payment;

(b) issue, on 23 August 2017, of an application by Habib for an injunction and an interim payment, supported by the first witness statement of Ms Anwar ("Anwar 1");

(c) negotiations during the period 25 August to 14 September 2017; and

(d) agreement of the terms of what became the Arnold order, which involved concessions on both sides and, while it included a standard

"liberty to apply" provision, "was never intended to mean that either party could re-apply and re-argue at will";

(3) at paragraphs 26 to 28, took issue with Aziz's claim of change in circumstances (paragraphs 57 to 62 of Aziz 5), saying that all that had happened was that contingencies appreciated in 2017 had materialised:

(a) he had known in September 2017 that he had undertaken to make a first instalment interim payment of £200,000 immediately and was agreeing to pay a further £300,000 interim payment;

(b) he had known that pursuing his appeal would incur legal costs and nonetheless chose to instruct leading counsel; and

(c) he must have appreciated that if he lost his appeal he would have to fund the £300,000 agreed further interim payment, Habib's costs of the appeal, and his own costs of the ensuing damages assessment;

(4) at paragraphs 29 to 41, characterised what Aziz had said about access to justice (paragraph 74 of Aziz 5) as "unconvincing and bordering on cynical":

(a) the context for Aziz's complaint was that for over four years Aziz had contested liability at a five-day trial, a two-day hearing on permission to appeal including an unsuccessful appeal to adduce fresh evidence, and a two-day appeal hearing;

(b) as to Aziz's suggested need for funds to pursue a second appeal, Aziz had failed to answer requests to explain the basis for such an appeal;

(c) even if Aziz had run out of money he could engage lawyers on a deferred fee basis (and was thus in a better position than Habib had been when for extensive stretches of the litigation Habib had to act in person);

(d) as to his personal means, Aziz had given no evidence at all, despite a detailed request made in a letter from Laderman dated 7 June 2019;

(e) while Aziz had said he was "struggling", he had not said he was "unable" to pay his own legal fees, and had not given details of those fees;

(f) Aziz had not explained what had happened to £2.844 million (on top of salary, a "staff bonus" of £6,603.85 and a pension payment of £120,000) drawn from Icon College Ltd, in circumstances where the only known payments by Aziz were the £300,000 interim payment [i.e. £100,000 ordered by the judge and £200,000 under paragraph 1(a) of the Arnold order] and £77,468 of costs paid under the liability trial order;

(g) despite a request from Laderman on 18 June 2019 Aziz had failed to disclose anything further as regards his assets, in circumstances where he had previously given sworn evidence that he had transferred his shareholding to his wife to declare a dividend in her name, and Dr Nabi had given evidence that he had been receiving dividends "through Aziz", and where it appeared from an earlier witness statement of Aziz that he had been accustomed to use bank accounts in Bangladesh in the names of family members to receive company funds; and

(h) in circumstances where Aziz kept funds and assets (whether his or Icon College Ltd's) in all sorts of locations, disclosure of bank accounts and assets in his name might be a start, but would not necessarily be convincing evidence;

(5) in paragraph 42, urged the court to treat Aziz's evidence with extreme caution and to focus on gaps in his evidence, in circumstances where he deliberately avoided going into detail, he failed to provide corroborating evidence on personal wealth, and he had been found by Employment Judge Pritchard, Ms Recorder McAllister and Mr Justice Spencer to be an untruthful witness who did not come up to proof on his witness statements;

(6) in paragraphs 43 to 50, described attempts in Aziz 5 to give reassurances or "safeguards" as secondary, and in any event, not credible in circumstances where Aziz had previously given assurances which have turned out to be false:

(a) first, there had been the withdrawal of £800,000, just days prior to the statement that Aziz was not "the sort of person" to dissipate assets: see sub-paragraph (1) above;

(b) second, as part of an assertion of bad faith in negotiations leading to the Arnold order, Ms Anwar said that Aziz 5 had identified a declaration of a dividend on 6 April 2017 of £39,000, and a payment by Icon College Ltd on 24 June 2017 of £177,748 to Aziz's solicitors, both of which were omitted from the July 2017 schedule when they should have been included;

(c) third, as part of the same assertion, Ms Anwar noted an assurance given by Penningtons on behalf of Aziz on 1 September 2017 that no amounts other than salary had been drawn and paid to Aziz or Dr Nabi since 24 July 2017, that there were currently no loans due from Icon College Ltd to Dr Nabi or Aziz, and that Aziz did not currently envisage any bonus being due to him or Dr Nabi in the immediate future, whereas Aziz 5, in addition to identifying omissions from the July 2017 schedule (see sub-paragraph (b) above) revealed that Aziz procured Icon College Ltd on 30 July 2017 to declare a dividend of £355,000, and on 12 September 2017 to declare and pay a dividend of £500,000, in his favour;

(7) in paragraphs 52 to 54, noted that despite a request on 28 March 2019 for full accounts (rather than the highly abbreviated accounts filed at

Companies House) Aziz had refused to provide them, and in Aziz 5 had cited extracts only without exhibiting any accounts.

B8 Aziz 6 dated 25 June 2019, including the Aziz 6 table

64. On 25 June 2019 Aziz made a sixth witness statement ("Aziz 6"). I summarise material assertions in Aziz 6:

(1) at paragraph 5 of Aziz 6, that the reason for not disclosing all personal assets in Aziz 5 was that Aziz found disclosure of such matters "extremely intrusive into my personal affairs, particularly disclosure to Habib, who I have been in a long standing dispute with and who I am afraid to say I do not trust", adding:

(a) that he did not see why disclosure of personal assets was necessary for the purpose of the variation application; but

(b) in the light of Anwar 2 he had decided to disclose his personal assets, giving details in this witness statement;

(2) at paragraph 6 of Aziz 6, that as there was a tight timescale Aziz would not address every point raised in Anwar 2 but would instead focus on matters he believed were fundamental;

(3) as to "dissipation of assets" Aziz said in paragraphs 8 and 9 of Aziz 6 that:

(a) he had not attempted and was not attempting to put any assets out of the reach of Habib;

(b) he had not attempted, nor was he attempting, to deliberately reduce the value of the college: as explained in Aziz 5 he understood that any valuation of Habib's shareholding would inevitably take account of past dividends;

(c) he had offered to put aside "balancing" dividends for Habib to match further dividends;

(d) he had already explained that Icon College Ltd had very substantial reserves;

(e) as shown in the present witness statement Aziz had substantial assets which Habib could enforce against him if necessary; and

(f) there were ample assets to meet Habib's continuing damages claim, and there was no valid reason to prevent Aziz from accessing his dividends from Icon College Ltd;

(4) under the heading "Negotiations and consent order" Aziz said at paragraphs 12 to 16 of Aziz 6:

(a) that the Arnold order had been agreed so as to avoid substantial costs which would be involved in fighting an application for an injunction, but it had never been Aziz's understanding, nor Penningtons'

understanding, that this was to be set in stone forever regardless of how matters developed;

(b) what is more, the ability to vary the order if circumstances changed was expressly discussed in correspondence and put forward by Habib's solicitors as a reason to accept their suggested wording, in response to which Aziz's solicitors made it clear he might need further funds to be released in the future;

(c) that it was always his understanding and that of his solicitors that the Arnold order could be varied or discharged, such an option being clear from paragraphs 2, 3 and 4 of that order;

(5) under the heading "No change of circumstances" Aziz said at paragraphs 17 to 29 of Aziz 6:

(a) that there clearly had been a change in circumstances, adding, "I am certainly not in the position I thought I would be in nearly two years ago";

(b) that since then he had succeeded on permission to appeal but had been unsuccessful on appeal;

(c) that when the Arnold order was made in September 2017 he had not intended to instruct leading counsel, but later decided to do so;

(d) that since September 2017 he had incurred significant legal expenses and now faced having to pay further substantial sums to Habib and the further costs of an assessment of damages trial:

> … all of which I had hoped would not be needed had I succeeded on the appeal.

(6) Under the heading "Access to justice" Aziz said in paragraphs 18 to 29 of Aziz 6:

(a) that Ms Anwar was:

> … trying to shut down an individual's right to appeal by preventing him from accessing his own funds.

(b) that Penningtons was not prepared to offer a deferred fee basis agreement, and that given the length of time that the proceedings had been under way it would be utterly undesirable to change solicitors at this late stage;

(c) that his assets consisted of matters set out in a table ("the Aziz 6 table") which gave valuations for two residential properties in London and one in Bangladesh, an account with Barclays Bank and two accounts with HSBC, a private pension and a stakeholder pension and a car;

(d) that the estimated total value of all his assets was thus approximately, £1,526,991.13, while the total available in cash was approximately £425,383.04, this cash amount being insufficient to meet his prospective obligations set out in Aziz 5;

(e) that Ms Anwar had been wrong to say that Penningtons had not responded to her letter of 7 June and also wrong to say, in relation to the legal fees which Aziz was struggling to pay, that Aziz had not said what those fees were or whether they were incurred or future fees;

(f) that as to his legal costs, the overall total was conservatively estimated to be in the region £625,000 comprising £30,000 in respect of all aspects of the 28 June hearing, £200,000 in respect of the appeal, £30,000 for mediation and £250,000 for the assessment of damages trial, giving rise to a sub-total of £510,000 with additional VAT of £102,000;

(g) as to Ms Anwar's suggestion that he should source funds from his wife and Dr Nabi, that this was "not possible and quite frankly, in terms of Dr Nabi, quite ludicrous"; and

(h) as to "offshore and abroad funds" that he confirmed assurances in an earlier witness statement that he did not have any funds, in any form, offshore or overseas, and that his only asset overseas was the house in Bangladesh as set-out in the Aziz 6 table (see subparagraph (6)(c) above);

(7) under the heading "False assurances" Aziz said in paragraphs 30 to 32 of Aziz 6:

(a) that Ms Anwar had not said why Aziz's suggested safeguards were not sufficient;

(b) as to Ms Anwar's suggestion that Aziz acted in bad faith in omitting items from the July 2017 schedule when they should have been included and in what was said by Penningtons on 1 September 2017 (see subparagraph (5) of the summary of Anwar 2 above), that any payment he had taken had been taken to meet legitimate needs, and that prior to the Arnold order nothing prevented him from taking further funds from Icon College Ltd by way of dividend to ensure that he could pay the substantial sums being demanded by Habib;

(c) that as regards the £39,000 dividend declared in April 2017, this was subsequently reconciled so that fees payable to Penningtons were retrospectively split equally between him and Icon College Ltd;

(d) that £147,132 of the £355,000 declared on 30 July 2017 was the subject of a similar reconciliation and retrospective spilt;

(e) that £177,748 paid to Penningtons on 24 June was originally paid by Icon College Ltd, and had subsequently been reconciled, but Penningtons had not been aware of that reconciliation until recently;

(f) that there was a similar reconciliation and retrospective split in relation to a further £6,081, being part of £20,879.44 originally paid Icon College Ltd to Penningtons in respect of legal fees invoiced on 31 August 2017;

(g) that a further £23,401.97 was the subject of a similar reconciliation, being a proportion of a sum of £34,008.97 paid by Icon College Ltd to Penningtons in respect of legal fees also invoiced on 31 August 2017;

(h) the above figures totalled £354,362.01, slightly less than the dividends declared on 30 July 2017;

(i) that the £500,00 dividend paid on 12 September 2017 was in part used to pay Habib the additional £200,000 interim payment on account of damages required by the Arnold order, and also to fund ongoing legal fees;

(8) under the heading, "The Company's figures", Aziz said in paragraph 34 of Aziz 6 that he now attached the previous five years' accounts for Icon College Ltd, save that accounts to 30 September 2017 had not been completed, and he had instead provided the management accounts for the year ended September 2017.

C. Submissions and analysis

C1 Submissions and analysis: introduction

65. In accordance with the combined directions order the parties exchanged further skeleton arguments on 26 June 2019. In my analysis below I deal, where appropriate, with submissions in the initial skeleton arguments of 14 June, in the further skeleton arguments of 26 June, and with oral submissions on 28 June 2019.

C2 Aziz's history of untrue statements

66. Aziz did not contest the assertions in Anwar 2:

(a) at paragraph 12(b), that at the liability trial Aziz admitted that prior to that trial he had withdrawn money from Icon College Ltd and fictitiously labelled the drawings "loan repayments", when in fact no corresponding loan had ever been made; and

(b) at paragraph 42, that Aziz had been found by Employment Judge Pritchard, Ms Recorder McAllister and Mr Justice Spencer to be an untruthful witness.

67. I do not need to examine here the context in which Aziz made these untruthful assertions. There was no new finding by Mr Justice Spencer, who simply repeated part of what had been said by the judge in the liability trial judgment (see section B1.3

above). It is enough to note that the relevant findings involved a sustained willingness by Aziz, when it suited him, to disregard the need for truth.

C3 Aziz's claimed explanation for lateness

68. The opening oral submissions for Aziz frankly acknowledged the lateness of the variation application. Frankness was called for in this regard. It was undoubtedly right to accept that the variation application had been made at a late stage:

(1) On the morning of 6 March 2019 Aziz had been sent my draft judgment dismissing the appeal. From that time on there were obvious financial implications for Aziz. First, it was obvious that Habib would call for payment of the £300,000 due under paragraph 1(c) of the Arnold order, and that Habib would seek an interim payment on account of his costs of the appeal. Second, it was similarly obvious that if Aziz wanted to pursue a second appeal he would need to pay for legal advice, and that if he were to pursue an appeal he would need to make provision for the costs of doing so. Third, unless there were a speedy compromise or a second appeal, it was similarly obvious that Aziz would need to make provision for the costs of the relief proceedings, or at least for mediation in that regard.

(2) On receipt of the draft judgment an immediate task for the parties was to identify such consequential orders as could be agreed. No reminder should have been needed in this regard, but if a reminder were needed then it was given in the email from my clerk to the parties of 6 March 2019 attaching the draft judgment. That email asked the parties to agree a date for a hand down hearing when I would make such consequential orders as were agreed by the parties and approved by me.

(3) If Aziz did indeed need a variation to the Arnold order so as to cope with the financial implications of dismissal of the appeal, then it was on 6 March 2019, or in the day or two which followed, that Aziz should have urgently worked out the variation needed and sought Habib's agreement to it, so that the variation Habib wanted could be included in the hand down order. A question might arise as to whether, without specific authorisation to sit as a judge of the Chancery Division, I could deal with it. If not, then that made it even more urgent to make arrangements enabling me, or a Chancery Division judge, to put the variation in place.

(4) Yet it was only on 31 May 2019 that Aziz first made the suggestion that such a variation was needed. By this time Aziz had had the best part of three months in which to consider his position. He had moreover had more than 6 weeks since my hand down order of 17 April 2019 had set out a structured preparation framework, designed to ensure that issues arising as to consequential orders would be worked through carefully in advance of the hearing and would require no more than half a day's hearing time.

(5) Penningtons' 31 May 2019 letter, putting forward the 31 May net dividend proposal, recognised that if Habib did not consent to that proposal then an urgent application to the court would be needed: see section B2.1 above. Yet when consent was not forthcoming no urgent application was made. Indeed the

31 May net dividend proposal was not at that stage pursued. Instead Aziz produced the 7 June conditional general release proposal – something more radical, and less likely to be agreed by Habib, than the 31 May net dividend proposal.

(6) Having apparently switched horses on 7 June to the conditional general release proposal, Aziz did nothing on 7 June to pursue the procedural course previously identified as required, an urgent application to the court. The suggestion on 7 June was simply that the variation could be included in the order to be made by me on 28 June.

(7) A side-issue then arose in correspondence between solicitors. Laderman pointed out, rightly, that if Aziz wanted to vary the Arnold order then he would need to make an application in the Business List. Penningtons' response asked, among other things, that Habib consent to transfer of the relief proceedings from the Business List to the Queen's Bench Division.

(8) On 13 June Penningtons had not yet responded to the request in Laderman's letter of 10 June seeking information about Aziz's proposed payments by Icon College Ltd for his benefit. Nor had any step been taken to inform me of any proposal to transfer the Business List proceedings for the purpose of including a variation of the Arnold order in the order that Aziz would ask me to make on 28 June. Nonetheless, as set out in section B2.4 above, Penningtons emailed Laderman that day saying that in the absence of agreement to transfer it would be minded "to make both an application for transfer and/or an abuse of process application."

(9) On 14 June the stance taken by Aziz at paragraph 37 of his skeleton argument (see section B2.6 above) was not that the proposed transfer from the Business List could be utilised so as to enable resolution on 28 June of the question whether the Arnold order should be varied. Far from it. If Habib would not agree to variation, then what Aziz proposed was that "all timetabling, including the running of time for appealing, is put back until after the conclusion of [a separate] application [to vary the Arnold order]."

(10) It was only on the evening of 18 June, after I had suggested a possible timetable designed to enable me to determine on 28 June whether the Arnold order should be varied, that Aziz took urgent steps to issue the variation application.

69. The opening oral submissions claimed that there were three explanations for the lateness of the variation application:

(a) it was alleged that when the terms of the Arnold order were agreed it was on the basis that there would be further drawdowns from Icon College Ltd, and that there was "sufficient" in that company;

(b) it was alleged that Habib was amply protected against enforcement problems by the value and assets of Icon College Ltd, of which Aziz was the majority shareholder (under the 60%/40% split described in Aziz 5: see section B3 above); and

(c) it was alleged that Aziz thought it would be uncontroversial that he would draw down from Icon College Ltd for funds he needed to pay to Habib and to fund any appeal.

70. None of these three claimed explanations can possibly explain Aziz's failure from shortly after 31 May until late on 18 June to take the procedural course which Aziz's solicitor had recognised on 31 May as requisite: to make an urgent application to the court. The position from at latest Tuesday 4 June until Tuesday 18 June, was that whatever the merits of these three explanations:

(a) Aziz knew that Habib had not agreed to his proposal for variation of the Arnold order;

(b) Aziz knew, as acknowledged in Penningtons' letter of 31 May, that an urgent application to the court was required; and

(c) Aziz failed to make such an application.

71. Turning to the position immediately after my draft judgment was emailed on 6 March 2019, I cannot see how these claimed explanations, even taken at face value, can possibly justify Aziz's failure to raise at that time the alleged need to vary the Arnold order. For the reasons set out in subparagraph (3) above, at the very least my request on 6 March 2019 that the parties advise agreed consequential orders ought to have prompted Aziz, if he did indeed need a variation of the Arnold order, to work out the variation he wanted and seek Habib's consent to it.

72. Moreover I am not persuaded that any of the three claimed explanations has merit. It is convenient to start with Aziz's first and third explanations, putting on one side the assertion in the first explanation that there was "sufficient" in Icon College Ltd. As justification for saying that the terms of the Arnold order were agreed on the basis that there would be further drawdowns from Icon College Ltd, and for thinking it would be uncontroversial for Aziz to draw down from Icon College Ltd for funds he needed to pay to Habib and to fund any appeal, Aziz relies on an exchange of correspondence between solicitors prior to the making of the Arnold order.

73. Laderman on 5 September 2017 wrote to Pennington, noting that Penningtons had confirmed that there were no loans due from Icon College Ltd to Dr Nabi or Aziz, and had also confirmed that Aziz does not envisage any bonuses being due to him or Dr Nabi. Laderman's letter continued:

> In view of this, you should have no objection to our draft order because: (a) there are no outstanding loans; (b) there is no intention to pay any bonuses; and (c) reimbursement of business expenses is catered for. If circumstances change, i.e. [Icon College Ltd] wants to make any other payments, paragraph 4 provides liberty to apply.
>
> Further:-
>
> 1. …

> 2. We … do not understand your position … We are not seeking to restrict [Icon College Ltd] from dealing with any legitimate business matters. We are only preventing [Icon College Ltd] from paying sums to [Aziz] and Dr Nabi over and above their salary. This does not affect [Icon College Ltd] from managing its business or affect your client's ability to deal with or dispose of his assets. …

74. Aziz's oral submissions relied on the sentence saying that if Icon College Ltd wanted to make any other payments, paragraph 4 provided liberty to apply. I cannot see how this assists Aziz. Laderman noted that there was liberty to apply, but it is elementary that such a liberty merely enables a party to bring the matter before the court. It could not conceivably be read as a guarantee that the court would give the applying party what that party wanted.

75. Aziz's oral submissions also drew attention to point 2 in Laderman's letter of 5 September 2017. Again I cannot see how this assists Aziz. Point 2 noted that the then current draft order prevented Icon College Ltd from paying sums to Aziz and Dr Nabi over and above their salary. The letter pointed out that this did not affect Icon College Ltd's ability to manage its business. That was plainly right. There might be a dispute as to whether a proposed course of action was a payment to Aziz over and above his salary, or merely involved Icon College Ltd managing its business. If there were such a dispute then it could be put before the court for determination under the liberty to apply.

76. Point 2 of Laderman's letter of 5 September 2017 also said that the draft order did not affect Aziz's ability to deal with or dispose of his assets. Plainly this was a reference to assets other than any such right as Aziz might have to insist that Icon College Ltd pay him a sum over and above his salary. Any other reading would make a nonsense of the draft order. Again, there might be a dispute as to whether a proposed course of action was a payment to Aziz over and above his salary, or merely involved Aziz dealing with or disposing of an asset not falling within that category. If there were such a dispute then it could similarly be put before the court for determination under the liberty to apply.

77. The oral submissions then noted that Penningtons' reply dated 6 September 2017 said that the confirmation it had given was only that no bonuses to Aziz or Dr Nabi were envisaged in the immediate future. There might also be future loans by them to Icon College Ltd which Icon College Ltd would then repay. To allow for future payments Penningtons proposed that they might be permitted by wording which allowed future payments to be made on 14 days' prior notice. In reply, a letter dated 7 September 2017 from Laderman said:

> The position remains that (a) there are no outstanding loans (b) there is no intention to pay any bonuses at *present* and (c) reimbursement of expenses has been catered for. As such, the liberty to apply clause in our draft order is sufficient to deal with any *future* matters that may arise.

> Notwithstanding the above, in an effort to finally resolve matters and avoid a contested hearing, we have amended the draft order to include a provision: -
>
> (i) to return to court and review the injunction in the event that your client is successful in obtaining permission to Appeal; and
>
> (ii) whereby our client's consent is required for further payments to be made.
>
> These amendments address any concerns your client may have about the length of the injunction and address any *future loans* that may be payable (even though you cannot provide us with an example of when such a loan would be payable to the company and then repayable to your client). These provisions along with written consent allows the parties to agree matters and avoid the time and cost of making a specific application to the court. We trust these now deal with your concerns.

78. In its response dated 8 September 2017 Penningtons said:

> Our client is agreeable to the revised wording at paragraphs 2 and 3 of the draft order.
>
> We do not see the need for paragraph 4 as the parties have liberty to apply to vary or discharge the orders in paragraph 2 and 3. We do not think this adds anything.

79. These exchanges do not appear to me to assist Aziz. It is not clear what the revised draft included at paragraph 4. It must have been something other than the liberty to apply found in paragraph 4 of the Arnold order. Be that as it may, this correspondence simply shows that the parties were, as regards any future payment, in agreement that either side could ask the court under the liberty to apply to decide whether a proposed future payment should be allowed. By definition, this would be a proposed future payment which Habib had not consented to.

80. Accordingly, on review of the correspondence relied on in oral submissions, nothing justifies Aziz's assertion that the terms of the Arnold order were agreed on the basis that there would be further drawdowns from Icon College Ltd. Nor is there anything in the correspondence that justifies Aziz's assertion that the Arnold order was agreed on the basis that it would be uncontroversial for him to draw down from Icon College Ltd funds he needed to pay to Habib and to fund any appeal.

81. I turn to the second claimed explanation, along with the assertion in the first claimed explanation that the Arnold order was agreed on the basis that there was "sufficient" in Icon College Ltd. Aziz's case in this regard has two elements. The first element is that in 2019 no difficulty was foreseen in securing a variation to the Arnold order *because* Habib was amply protected against enforcement problems by the value and assets of Icon College Ltd. The second is that this was part of the basis for agreeing the Arnold order. I reject both these elements. Neither has any express support in

Aziz's evidence. Nor is either supported in the correspondence relied on before me. I note that in Aziz 6 it was suggested by Aziz at paragraph 9 that there are ample assets to meet Habib's damages claim. In section C4 below I explain why it is too late for Aziz to seek to rely on a "sufficient funds assurance" of that kind. For present purposes the relevant point is that neither Aziz 5 nor Aziz 6 says that a belief on his part that this was so was a factor in his delay in bringing the variation application.

82. Accordingly I conclude that Aziz has no good excuse for the lateness of the variation application. This is a factor which in itself would weigh against the grant of the application. Additionally, and importantly, Aziz's failure to make any mention before 31 May 2019 of a suggested need to vary the Arnold order casts considerable doubt on whether there was in truth any such need.

C4 Late attempt to rely on a sufficient funds assurance

83. Oral submissions for Aziz included an assertion about Habib. The assertion was that Habib had not said that he needed the Arnold order to be maintained so as to preserve sufficient funds to enable him to enforce a judgment in the relief proceedings for damages and costs. It was noted in this regard that Habib had not served evidence as to how much would be needed for this purpose.

84. It seems to me that if Aziz had wanted to say that the Arnold order as varied would safeguard sufficient funds to enable Habib to enforce a judgment in the relief proceedings for damages and costs, then this should have been advanced as part of the variation application. As identified in sections B2.6 and B3 above, however, although the conditional general release proposal had been advanced in Aziz's 14 June 2019 skeleton, there had been no suggestion of a sufficient funds assurance in that skeleton. Similarly, when Aziz 5 was filed in support of the variation application, it was not suggested that either the conditional general release proposal or the revised net dividend proposal carried with it a sufficient funds assurance.

85. It was only in Aziz 6 that Aziz first made an assertion that there were ample assets to meet Habib's damages claim. That assertion came far too late. For that reason alone it cannot be advanced. Habib has had no opportunity to deal with it.

86. Even if it were a permissible assertion, moreover, it is unsupported by any analysis of what Habib's damages claim may be worth. On Aziz's own account Icon College Ltd is at present an extremely valuable asset. Its bank statements suggest that it has a large credit balance. But it is by no means clear that either of the proposed variations would mean that Aziz would, either in Icon College Ltd or elsewhere, retain accessible assets sufficient to cover such damages and costs as Habib might be awarded in the relief proceedings.

C5 Aziz's assertion of financial need

87. I noted in section B2.6 above that Aziz's 14 June 2019 skeleton relied on a single ground in support of the conditional general release proposal. This was that Aziz needed to be able to draw down further dividends in order to fund the payments which he now had to make. The same applied to Aziz 5.

88. I observe that even if true this could provide no justification for the conditional general release proposal. Among other reasons, the notion that Habib could be adequately protected by notice 7 days after a distribution had been made was absurd. The assertion of financial need, even if true, could not warrant more than an order along the lines of the revised net dividend proposal.

89. Yet even in relation to the revised net dividend proposal Aziz 5 offered no more than Aziz's own assertion of need. He gave no information about his own personal finances. For the reasons given in section C2 above I approach Aziz's assertion of need with great caution. For the reasons given in section C3 above the background circumstances give no reason to think that there was in truth a need to seek a variation of the Arnold order: on the contrary, they cast considerable doubt on Aziz's assertion that there was such a need.

90. In the circumstances of the present case Laderman's letter of 7 June, emailed on 10 June, made reasonable requests for information about the proposed payments. No substantive response of any detail was given in correspondence to those requests. Nor did Aziz 5 give such a response.

91. Aziz, however, later decided that he would set out information about his personal finances. He purported to do so in the Aziz 6 table and elsewhere in Aziz 6.

92. I decline to allow Aziz to rely in his favour on anything in Aziz 6 about his personal finances. A timetable had been set which would, after weeks of skirmishing, force Aziz to set out the evidence he relied on. Aziz did this, albeit late, by serving Aziz 5 on Thursday 20 June 2019. Habib was then to file in evidence in response by 4pm on Monday 24 June. He did so by serving Anwar 2. There was then permission for Aziz to file reply evidence. The information given about his personal finances in Aziz 6, however, cannot properly be regarded as reply evidence. If it were to be relied upon, it ought to have formed part of Aziz 5. By keeping it back until Aziz 6 the result is that Habib has had no opportunity to respond to it.

93. In these circumstances I am not persuaded that Aziz's assertions of need in Aziz 5 can be accepted as truthful.

94. In any event I add three comments on the information concerning personal finances in Aziz 6:

    (1) Aziz 6 revealed that Aziz had bank accounts holding in excess of £425,000. It is difficult to see how this can be reconciled with statements on his behalf (for example in Penningtons' letter of 13 June 2019, section B4 above) that he lacked sufficient funds to pay any of the amounts sought by Habib;

    (2) Like Aziz 5, Aziz 6 did not attempt to give any detailed explanation of what had happened to the dividends and bonuses that he had received from Icon College Ltd during the period covered by the July 2017 schedule;

    (3) Aziz 6 began with an attempt to explain why in Aziz 5 he had not disclosed information about his personal finances. The reasons he gave were that he found such disclosure intrusive, that he did not trust Habib, and that he did not see why it was necessary for the purpose of the variation application. I recognise

> that disclosure is intrusive, and unwelcome where it reveals personal information to an adversary. Even so, for Aziz to say that he did not see why such disclosure was needed seems to me to indicate a one-sided approach. What is clear is that Aziz took a deliberate decision not to include personal financial information in Aziz 5. Having made that decision, he must bear the consequences.

95. For all these reasons Aziz's variation application fails in its own terms. The assertion of need, on which the application was founded, has not been made good.

C6 Other aspects of the variation application

96. I have not dealt with a number of additional contentions. They do not in my view call for resolution in present circumstances. Among them is a contention by Habib that the variation application was bound to fail because the circumstances relied on by Aziz were either no different from those pertaining at the time of the Arnold order, or no different from those which might at the time of that order have reasonably been expected to eventuate: see *Chanel v Woolworth* [1981] 1 WLR 485. As the application fails for other reasons it is unnecessary to examine this contention. I observe here only that Aziz and the Icon companies relied on estoppel by convention said to arise from the correspondence set out in section C3 above. On the facts in the present case it seems to me that there is an important distinction between jurisdiction of the court to deal with an application to vary, and the principles of law which are to be applied by the court if there is jurisdiction to deal with the application. It might have happened, although it did not happen here, that Habib advanced a contention that there was no jurisdiction for the court to entertain any application to vary the Arnold order. If that had happened, then the mutual understanding of the parties concerning the liberty to apply would have estopped Habib from relying on such a contention. But Habib's essential point in this regard, as advanced in the present case, concerned the law as to what the outcome should be if an application were made. For the reasons given in section C3 above the correspondence does not show any mutual assumption as to what that outcome would be.

97. The other aspect which calls for mention concerns assertions that Habib's stance on the transfer application amounted to an abuse of process and an attempt to obstruct justice (see Penningtons' letter of 13 June 2019 set out in section B2.4 above, and Aziz 5 at paragraphs 36, 37, 70, 71 and 74). These assertions were baseless and should never have been made. It was perfectly reasonable, indeed as noted above plainly right, for Laderman to point out that the Arnold order could only be varied by an application in the Business List. It was similarly perfectly reasonable to observe that the transfer application could only serve a useful purpose if I was willing to add significantly to what had been envisaged for the hearing on 28 June 2019 by agreeing to deal with an as yet unissued variation application.

D. Conclusion

98. It was for these reasons that on 28 June 2019 I dismissed the variation application.