Neutral Citation Number: [2019] EWHC 1011 (QB)

Appeal No: QB/2017/0190

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

On appeal from the order of Recorder Ann McAllister
dated 14 July 2017 in Central London County Court Case No: C10CL334

Rolls Building
7 Rolls Buildings, Fetter Lane, London, EC4A 1NL
Date: 17/04/2019

Before :

MR JUSTICE WALKER

- -

Between :

Mr Habibur RAHMAN	Claimant and Respondent
- and -	
Mr Azizur RAHMAN	First Defendant and Appellant

- -

- -

Mr Robin Hollington QC & Mr Thomas Graham
(instructed by Pennington Manches LLP) for the first defendant and appellant

Mr Andrew Clutterbuck QC & Mr Changez Khan
(instructed by Laderman & Co) for the claimant and respondent

Hearing dates: 10 and 11 July 2018

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Approved JUDGMENT: Decision on the appeal

Mr Justice Walker:

A. Introduction:

A1 Introduction: general

1. This is an appeal from an order dated 14 July 2017 ("the July 2017 order") made by Ms Recorder McAllister ("the judge") after a five-day trial in February 2017 at Central London County Court. 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.

2. The main question at trial was resolved in favour of Habib. The judge found that in 2003 Habib, Aziz and a third party, Dr Nurun Nabi, had made a contract under which they were to be equal shareholders in a joint venture. The judge further found that Aziz, as sole director and shareholder of two joint venture 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. I shall accordingly refer to the contract made in 2003 as "the 2003 agreement".

3. These proceedings were begun by a claim form issued on 27 May 2015. The questions which arise on the appeal concern findings by the judge that delay was no bar to Habib's claim. Aziz relied at trial both on the Limitation Act 1980 and on equitable principles, known as "laches", concerning delay. Aziz says 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.

4. In the proceedings below Mr Changez Khan, instructed by Laderman & Co, appeared for Habib, while Mr Thomas Graham, instructed by Pennington Manches LLP, appeared for Aziz. On this appeal senior counsel have been instructed: Mr Robin Hollington QC leads Mr Graham for Aziz, while Mr Andrew Clutterbuck QC leads Mr Khan for Habib.

A2 Introduction: Habib's case below

5. In broad terms, Habib's case below, in amended particulars of claim dated 13 September 2016, was that:

    (1) he, Aziz, and Dr Nabi, had agreed in 2003:

        (a) to go into business together by setting up a fee-paying college, to be called Icon College of Technology and Management ("the college"); and

        (b) that the business of the college was to be conducted through a limited company, of which all three co-venturers were eventually to be equal shareholders and directors.

    (2) as to the second defendant in the proceedings below, Icon College of Technology and Management Limited ("Icon College Ltd"):

(a) at the time of the proceedings below Aziz was the sole shareholder and director;

(b) it was incorporated on 18 September 2003 for the purpose of conducting the business of the college;

(c) Aziz told Habib that Habib could not become a member of Icon College Ltd at that time, as Habib did not then have permanent leave to remain in the United Kingdom;

(d) Habib was appointed company secretary of Icon College Limited on 1 October 2003;

(e) Habib then was generally involved in the management of Icon College Ltd at a level consonant with his case that he was one of three co-venturers who were eventually to be equal shareholders and directors;

(f) on 18 December 2003 Habib made a payment of £5,000 in consideration of an eventual allotment of shares in Icon College Ltd to him, in addition to cash contributions and other payments to the use of Icon College Ltd totalling £4,473.19.

(3) as to the third defendant in the proceedings below, Icon Technology (UK) Limited, which I shall refer to as "Icon Technology Ltd":

(a) Aziz also promised Habib that he would allocate 1/3 of the shares in Icon Technology Ltd to Habib;

(b) Icon Technology Ltd never has actively traded, but at the time of the proceedings it was the lessee of the premises that housed the college; and

(c) Aziz, at the time of the proceedings, was the only shareholder in and director of Icon Technology Ltd.

(4) Habib is and has at all material times been ready and willing to accept an allotment of shares in both Icon College Ltd and Icon Technology Ltd; and

(5) notwithstanding, among other things, a written demand dated 6 May 2015 ("the May 2015 demand") Aziz had neglected and refused to allot any shares, whether in Icon College Ltd or in Icon Technology Ltd, to Habib.

6. In these circumstances Habib:

(1) sought specific performance of his agreement with Aziz for allotment to him of 1/3 of the capital of both Icon College Ltd and Icon Technology Ltd, and also sought the rectification of the registers of those companies;

(2) said additionally that by reason of Aziz's refusal to allot shares, Habib had suffered loss and damage, and sought "equitable damages in addition to or in

lieu of specific performance or else damages in breach of contract at common law";

(3) alternatively said he was entitled to recover back, as having been paid on a consideration that had wholly failed, the contributions to Icon College which he had made; and

(4) sought interest, to be calculated in various alternative ways, including claims that "in the case of any dividends declared" interest should be paid from the date or dates of payment by Icon College Ltd or Icon Technology Ltd to Aziz.

A3 Introduction: Aziz's case below

7. In broad terms, the case advanced by Aziz, in an amended defence also dated 13 September 2016, included assertions that:

(1) he was the sole director and shareholder of both Icon College Ltd and Icon Technology Ltd;

(2) while Habib had been appointed company secretary of Icon College Ltd on 1 October 2003, he was removed from that post on 14 October 2008;

(3) Aziz had setup Icon Technology Ltd in 2001 as an IT training and support company;

(4) Habib had been company secretary of Icon Technology Ltd from 11 October 2001 until 14 October 2008;

(5) while Icon Technology Ltd became lessee of the premises from which the college operated, the lease was now held in the name of Icon College Ltd;

(6) Habib's alleged 2003 agreement was denied;

(7) Habib's alleged 2003 agreement was insufficiently certain to be legally enforceable;

(8) while it was accepted that Icon College Ltd was incorporated on 18 September 2003, this was not done with the intention that Aziz, Habib and Dr Nabi would eventually be equal shareholders and directors;

(9) Aziz denied telling Habib that Habib could not become a member of Icon College Ltd because Habib did not at that time have permanent leave to remain in the United Kingdom;

(10) Habib was not involved in the management of the college at all, but by contrast generally dealt with administrative matters and provided support where needed;

(11) while certain payments by Habib were admitted, others were not admitted, and none was made pursuant to a contract to allot shares;

(12) as to Habib's claim in relation to Icon Technology Ltd, there had been no promise to allot 1/3 of its shares to Habib, the amended particulars of claim failed to plead that Habib provided any consideration for this alleged promise, and in any event the agreement alleged by Habib in that regard was insufficiently certain to be legally enforceable;

(13) while the demand made in the May 2015 letter was admitted, Habib was not entitled to what was demanded;

(14) Aziz denied Habib's claim to be entitled to specific performance, denied that Habib had suffered loss and damage, and denied Habib's claim of total failure of consideration, along with Habib's claims to interest;

(15) Without prejudice to Aziz's primary contention:

(a) Habib was barred by his own laches (of which particulars were given as set out below) from maintaining any claim for specific performance;

(b) Habib's alleged cause of action for equitable compensation accrued more than six years before the present claim was bought and was therefore barred by sections 5 and 36 of the Limitation Act 1980; and

(c) Habib's alleged causes of action for damages for breach of contract and for restitution accrued more than six years before the present claim was brought and were therefore barred by section 5 of the Limitation Act 1980.

8. Aziz's particulars of laches stated:

(1) The acts on the part of the first defendant of which the claimant complains took place in or soon after September 2003. At the latest the claimant knew of the existence of all the matters pleaded in the particulars of claim by early 2004 (being both a reasonable time and a "short while" after Icon College was incorporated in September 2003).

(2) The claimant alleged in his Employment Tribunal claim against Icon College dated 20 October 2010 that he would be a shareholder in Icon College "within a short period" of the company being established in September 2003 and that he raised this issue in meetings with the first defendant in March 2006 and March 2008, and that he had an argument about "his shares" with the first defendant in April 2009 during which the first defendant allegedly told him that he could go to the courts to resolve the dispute.

(3) The claimant referred to taking legal advice regarding a claim for recognition of his alleged share in Icon College in his complaint to the Employment Tribunal dated 20 October 2010.

(4) Icon College's response to the Employment Tribunal claim (signed by the first defendant as director of Icon College) dated 19 November 2010

refuted the claimant's allegations that there was an agreement that the claimant would be a shareholder in Icon College or Icon Technology.

(5) After resolution of the Employment Tribunal claim on 5 May 2014 nothing further was heard from the claimant in respect of the subject matter of this claim until three weeks before commencement of this action.

(6) Since September 2003 the first defendant has expended time and effort in growing the business of Icon College, for example:

(i) The first defendant has worked long days at the college: often 6 days per week and from 9am to 9pm.

(ii) During the first few years of operations, the first defendant took on considerable personal debt to finance Icon College by borrowing on credit cards and remortgaging his home. Accordingly he took on considerable personal and professional risk to establish the business as a going concern.

(iii) In 2004 Icon College took out a loan of £80,000 from HSBC. As the first defendant was (and remains) the sole director and shareholder of the college he therefore indirectly took on further risk.

9. The detail given by Aziz on laches in his amended defence contrasts strongly with a complete failure to give detail in what his amended defence said about statutory limitation. The only substantive parts of the amended defence that addressed statutory limitation were paragraphs 40 and 41:

> 40. The claim for equitable compensation in paragraph 3 of the prayer for relief is time-barred as the cause of action accrued more than 6 years before this claim was brought and is therefore barred by Sections 5 and 36 of the Limitation Act 1980.
>
> 41. The alleged causes of action for damages for breach of contract in paragraph 14 and paragraph 3 of the prayer for relief, and for restitution in paragraph 15, accrued more than 6 years before this claim was brought and are therefore barred by section 5 of the Limitation Act 1980.

10. This failure was partially remedied, without objection by Habib, in a skeleton argument dated 1 February 2017 ("Aziz's February 2017 skeleton"). At paragraphs 74 and 77 Aziz's February 2017 skeleton made reference to what I shall call "Aziz's February 2017 milestones":

> Milestones
>
> 74. The relevant milestones, chronologically, are as follows:

(1) In April 2003 the alleged contract on which C sues is said to have been made.

(2) On C's case, by March 2006 (within 3 years of the alleged contract) C was raising the issue of a one third shareholding with D1 [C w/s paragraph 32].

(3) 5th January 2007 is the date of the first of the various hand-written notes which appear to evidence (assuming in C's favour, for argument's sake, that they are reliable) the question of shares being discussed in conversations between C, D1 and Dr Nabi [p.330].

(4) In March 2008, according to C in his Grounds of Complaint in the employment Tribunal proceedings which he later brought against D2 [at paragraph 24, p. 517, Tab 104] D1 was avoiding the issue of share distribution, and C therefore called a meeting "for my share distribution" on 6th March 2008.

(5) Consistently, C's main witness, Ashraf Mahmud, states that the dispute between the parties started in 2008 [AM w/s paragraph 12].

(6) On 14 October 2008, C was removed as company secretary of D2 and D3.

(7) On 24 April 2009, according to C in his ET Grounds of Complaint, C and D1 "had a big argument and during that argument he told me if I wanted I could go to the courts" (paragraph 27; p.518).

(Note: the above milestones all occurred more than 6 years before the present proceedings were issued).

(8) On 22 July 2010, D2 terminated C's employment [p.353].

(9) On 18 July 2011, C demanded by letter [p,359] that "my investment and share matters" by resolved.

(10) On 19 July 2011 D2 replied that C's claim was vexatious and frivolous [p.360].

(11) In 2012 D2 nearly collapsed, but was rescued in late 2012 by D1 introducing a new business model based on UK home students [D1 w/s paragraph 56-7].

(12) On 6 May 2015 C's solicitors Gunner Cooke alleged an agreement that C was entitled to a one third shareholding in D2 and demanded it.

(13) On 27 May 2015 this claim was issued ...

...

> 77. The cause of action for breach of contract at common law arises at the date of breach. C's case is that D1 was in breach of a contract to allot shares in D2. In the absence of an express date for compliance, a contractual obligation will either be required to be fulfilled within a reasonable time or upon demand. On C's *own* evidence (as set out in the milestones at paragraph 74 above), he was demanding the shares by March 2008, calling "*for my share distribution*" on 6th March 2008 (p.517). Similarly, viewed from the perspective of Mr Mahmud's evidence on behalf of C, the dispute between the parties started in 2008 [AM w/s paragraph 12]. And even more specifically, on 24 April 2009 (according to C in his ET Grounds of Complaint), C and D1 "*had a big argument and during that argument he told me if I wanted I could go to the courts*" (paragraph 27; p.518). All three of those events occurred more than 6 years before the proceedings were issued, and the claim is thus time barred.

A4 Habib's reply below

11. In paragraph 25 of his amended reply dated 27 September 2017 Habib addressed the particulars of laches in paragraph 39 of Aziz's amended defence:

> 25. As to paragraph 39 and the numbered sub-paragraphs thereof:
>
> (1) Sub-paragraph 39 (1) is denied. The claimant makes no complaint about anything that the First Defendant did in September 2003 or in 2004. Almost six years later, on 3rd June 2009, the parties were in discussions evidenced in a writing signed by the Claimant, the first Defendant and Dr Nabi, about their respective contributions.
>
> As of 3rd June 2009, the First Defendant had still not intimated in any way to the Claimant that he did not consider himself bound by the agreement reached in September 2003, rather the contrary.
>
> (2) As to sub-paragraph 39 (2), in April 2009 the First Defendant had not repudiated the agreement reached in September 2003. Indeed, he did not unequivocally do so at any time before 21st May 2015 when his solicitors, Pennington Manches answered the letter of claim sent by the Claimant's solicitors on 6th May 2015.
>
> (3) The Claimant's cause of action accrued not when the parties' agreement was made but only upon breach, which, the Claimant contends by way of his primary case, was not until 21st May 2015.
>
> (4) By way of the Claimant's secondary case, even on 3rd June 2009, the First Defendant had not committed a repudiatory breach; see further sub-paragraph (7) below. The claim form herein was issued on 27th May 2015.
>
> (5) Sub-paragraph 39 (3) is admitted, so far as it goes.

> (6) Sub-paragraph 39 (4) is denied, at any rate if the word "refuted" is to be taken as bearing its natural and ordinary meaning of "disproved". If on the other hand the word "refuted" is to be taken as meaning no more than "denied", the denial is noted, and issue is joined upon it, but the Second Defendant, Icon College was in any event the subject of and not a party to the agreement reached in September 2003.
>
> (7) Even if the second defendant Icon College's response to the claimant Employment Tribunal ("ET") claim is to be taken as a repudiation of the agreement reached in September 2003, the claimant's cause of action accrued no earlier than 19th September 2010.
>
> (8) Sub-paragraph 39(5) is admitted, so far as it goes. The claimant will however also say that proceedings in the ET were compromised by a written settlement agreement made on 5th May 2014 ("the Compromise"). The combined effect of clauses 1.2, 4.5 and 5.5 of the compromise is to preserve the claimant's right to claim for one-third of the shares in the second defendant.
>
> (9) As to subparagraph 39(6) the claimant admits that since September 2003, the first defendant has expended time and effort growing the business of the second defendant. So however have Dr Nabi and the claimant, until the first defendant wrongfully excluded the claimant from the second defendant's business.
>
> (10) So far as alineae (i), (ii) and (iii) of subparagraph 39(6) are concerned, the claimant is unable to admit them, since they aver matters outwith his personal knowledge, so that the first defendant is required to prove them.
>
> (11) Unless moreover the first defendant gave a personal guarantee to HSBC, which the claimant notes is not suggested, the matters alleged at alinea (iii) of subparagraph 39(6) would not even if true support the plea that the first defendant took on further risk as a matter of law, alternatively a mixed question of fact and law.

12. Although the amended reply did not expressly say so, a number of assertions in paragraph 25 of the amended reply were relevant to questions arising on statutory limitation. In particular, subparagraphs (1) to (4) and (7) made assertions as to the date on which Habib's cause of action accrued. Habib's primary case was that it did not accrue until 21 May 2015 when Aziz replied to the May 2015 demand. His secondary case was that his cause of action did not accrue until Icon College Ltd filed its response in the Employment Tribunal claim. Subparagraph (7) identified the date on which that response was filed as being 19 September 2010.

13. In addition, so far as Habib's damages claim for breach of contract was concerned, paragraphs 27 and 28 of Habib's amended reply said that in any event Habib's cause of action accrued no earlier than 19 September 2010. It is acknowledged by all concerned that the date of 19 September 2010 given in these parts of the pleading was

a slip: what was intended was 19 November 2010, which was in fact the date on which Icon College Ltd lodged its response to Habib's Employment Tribunal claim.

A4 Introduction: the March and July 2017 judgments

14. On 21 March 2017 the judge circulated a draft of a written judgment ("the March 2017 judgment") holding that there had indeed been a contractual agreement as asserted by Habib, and that Habib was entitled to call for the allotment of a 1/3 shareholding in Icon College Ltd and Icon Technology Ltd. A hearing then took place on 19 June 2017 ("the June 2017 hearing") on the questions whether specific performance or damages in lieu should be granted, and on the issue of statutory limitation in relation to the claim by Habib for damages for breach of contract. The judge decided that specific performance was inappropriate and that instead Habib should be awarded what I shall call "in lieu damages". She also concluded that Habib's contractual claim for damages was not barred by statutory limitation. A draft of a supplementary judgment ("the July 2017 judgment"), circulated on 11 July 2017, dealt with these matters. Final versions of both judgments were handed down on 14 July 2017.

15. Neither judgment made an express finding that Habib was entitled to equitable damages or common law damages additional to specific performance or in lieu damages. At paragraph 5.2, however, the July 2017 order awarded not only in lieu damages but also:

> 5.2 damages in respect of missed or unpaid distributions (namely distributions made to or for the benefit of others by the second defendant but not made to the claimant), on the following footing:
>
> 5.2.1 the claimant and the first defendant entered a contract in September 2003 under which they agreed that the claimant would eventually be granted a one third shareholding in the second defendant and third defendant;
>
> 5.2.2 the first defendant was in continuing breach of his obligation to allot shareholding from approximately June 2009 onwards and he ultimately repudiated the contract on 19 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 (the first defendant's wife) are to be treated as "members" of the second defendant for this purpose.

A5 Introduction: permission to appeal

16. Aziz issued an appellant's notice on 3 August 2017. The history of events after that is not straightforward. For present purposes, it is enough to note that the question whether to grant permission to appeal was the subject of an oral hearing before Mr Justice Spencer on 9 and 10 November 2017. His reserved judgment on this question,

dated 7 December 2017, noted that an extensive volume of documents and authorities had been placed before him, including a full transcript of the entire trial and subsequent hearing. Aziz's main ground of appeal sought to attack the finding that there had been a contractual agreement. It noted that Habib's claim concerned oral discussions which took place fourteen years earlier. It asserted that the judge had failed to apply relevant guidance when considering the credibility of witnesses. Mr Justice Spencer rejected the contention that this was an arguable ground of appeal, saying that it relied on citations from the March 2017 judgment which had been taken out of context.

17. In addition, Mr Justice Spencer rejected an application to rely upon fresh evidence. This left two remaining pleaded grounds of appeal, which I shall call "the laches ground" and "the Icon Technology ground". Mr Justice Spencer refused permission on the Icon Technology ground, which had not been addressed in oral argument before him.

18. In his judgment of 7 December 2017 Mr Justice Spencer put on one side the laches ground, which he dealt with only after setting out his conclusions on an application to amend the appellant's notice. This application sought to rely upon what I shall call "the limitation ground". On this aspect Mr Justice Spencer's judgment at paragraph 53 onwards identified the limitation issue and its development during the trial and in the closing submissions, culminating in the judge's reserved decision on the issue. Mr Justice Spencer noted that, in certain respects at least, the proposed limitation ground differed from the way in which Aziz's case had been put in argument below. He commented that the analysis was "far from straightforward". After analysing the arguments he concluded in paragraph 82 that:

> …although by no means overwhelming, there is at least a real rather than fanciful prospect of the appeal [on limitation] succeeding.

19. Mr Justice Spencer then considered arguments objecting to the lateness of the proposed amendment, but concluded that it was proper to allow the amendment to be made. Having done so, he granted permission to appeal on the limitation ground.

20. Mr Justice Spencer then turned to the laches ground. As to that, he said in paragraph 93:

> The legal argument in relation to limitation is closely entwined with the legal issues raised in the grounds of appeal in respect of the judge's conclusion that the claim for equitable relief was not barred by laches. In my judgment the issues are so closely entwined that I should grant permission on the laches ground as well. Had it stood alone the position might have been different. If, however, the court were to conclude at the full appeal that there is merit in the limitation argument barring the common law claim for contractual damages for failing to allot shares to Habib, that might also have an important bearing on whether the judge's conclusion in relation to laches could properly stand.

21. The conclusions reached by Mr Justice Spencer were embodied in an order dated 13 December 2017. It gave permission for the laches ground of appeal along with, by amendment, the limitation ground at paragraphs 6 to 8. I deal with those paragraphs in section C below.

22. Thus there are two grounds of appeal for which Aziz has permission: the limitation ground and the laches ground. However, as appears below, at the hearing before me, both sides contended that permission should be given to advance additional points.

B. Overview of the judge's factual findings

B1 Factual findings: the March 2017 judgment introduction

23. The March 2017 judgment begins with an introduction comprising paragraphs 1 to 7. For present purposes I draw attention to undisputed matters recorded in the last sentence of paragraph 2:

> Habib was granted permanent residence in the United Kingdom in 2004; Aziz in 2003.

B2 March 2017 judgment, "Background and evidence"

24. After paragraph 7, the March 2017 judgment consists of two main sections. The first has a heading, "Background and evidence". This is a section which contains both matters which were common ground and assertions which were not, interspersed with factual findings along the way. Within this section there are two subheadings. I deal with them in sections B2.1 and B2.2 below.

B2.1 March 2017 judgment, "Background and evidence: the early years"

25. Under the subheading "The early years" paragraphs 8 to 31 of the March 2017 judgment described:

    (1) the period from 1995/1996, when Habib and Aziz met, and Aziz started working as a computer systems engineer at Integrated Business Computer Systems Ltd ("IBCS"), a London based computer company providing IT hardware and software support;

    (2) the period from 1999, when Aziz, Habib and Dr Nabi were associated in various ways with a non-profit making company set up by IBCS and called Millennium Advanced Technology Training ("MATT"), through to 2003 when MATT was closed as a result of it being investigated for fraud;

    (3) developments during 2003, when an original idea of developing an IT training and support company, using Icon Technology Ltd, evolved over the summer of 2003 to the point where Icon College Ltd was incorporated in September 2003 and the college, under Dr Nabi as Principal, enrolled its first students in February 2004;

(4) conflicting accounts as to what was said or not said in relation to share holdings and directorships in the period 2003 to 2006;

(5) a marked divergence between denials by Aziz and Dr Nabi, prior to trial, of any agreement and of any management role involving Habib, and acceptance in oral evidence that Habib, Aziz and Dr Nabi were co-founders and business partners.

B2.2 March 2017 judgment, "Background and evidence: subsequent events"

26. Under the subheading "Subsequent events" paragraphs 32 to 47 of the March 2017 judgment described:

(1) in paragraph 32, the long hours worked by each of Habib, Aziz and Dr Nabi in the early years, and their differing roles:

> …the number of students grew. The courses offered included IT, business studies, electrical engineering, law, management and tourism. Each of the founding members had a slightly different role. Habib concentrated on general administration and marketing. Aziz was effectively the managing director. Dr Nabi concentrated on the academic side.

(2) also in paragraph 32 an initial period when the co-founders took no salary, after which:

> [the] first salaries to them were paid in February 2005. Habib took £1500 a month in salary: Aziz and Dr Nabi took £2000 a month by way of loan repayments.

(3) in paragraph 33, common ground that by 2006, if not before, Habib was pressing for his shareholding and his directorship to be formalised;

(4) in paragraphs 34 to 39, other evidence as to discussion of these matters and of what had been paid in by, and should be paid out to, the cofounders;

(5) in paragraph 40, removal of Habib as secretary of both Icon College Ltd and Icon Technology Ltd on 14 October 2008;

(6) in paragraph 41, evidence concerning what happened at the "final substantive meeting between the parties" on 3 June 2009;

(7) also in paragraph 41, a discrepancy between a "calculation sheet" showing what each of Aziz, Habib and Dr Nabi had received from Icon College Ltd and spreadsheets prepared in 2009;

(8) in paragraph 42, a recap of the issues at trial as to the basis on which shares were to be allocated;

(9) in paragraph 43, events leading up to termination of Habib's contract of employment;

(10) in paragraphs 44 and 45, proceedings brought by Habib in the Employment Tribunal, eventually settled in 2014, in which an initial finding against Habib was set aside when a witness against Habib resiled from his written evidence;

(11) in paragraph 46, setbacks at the college which were overcome by recruiting in the UK home market and offering weekend and evening courses; and

(12) in paragraph 47, attempts made to resolve the shares issues in 2010, 2011 and 2013.

B3 March 2017 judgment: "submissions and findings"

27. The second main section in the March 2017 judgment is headed "Submissions and findings". This section contains:

(1) findings upholding Habib's case as to what was agreed in 2003;

(2) a description of an acceptance by Aziz in oral evidence that the only reason for not registering Habib and Dr Nabi as shareholders at the outset was because of particular difficulties they faced;

(3) a discussion of events after 2005 which, the judge said, were:

> relevant in the main, to the issue of laches.

(4) findings rejecting the defence of laches.

B4 March 2017 judgment: did it deal with limitation?

28. The March 2017 judgment did not expressly state whether the statutory limitation defence succeeded or failed. One of the purposes of the June 2017 hearing was to ask the judge for clarification in that regard. In paragraph 5 of the July judgment, as set out in section C3.2 below, the judge said that in paragraph 41 of her March 2017 judgment she had dealt with the limitation defence by describing:

> …a further and important meeting… in June 2009 when it was clear… that the matters were still being discussed and promises made to [Habib] that things would be sorted out.

29. The judge returned to this point in paragraph 9 of the July judgment (see section C3.2 below). When recording her conclusion that there was no limitation bar in this case, she added in parentheses:

> …and indeed I have already reached this conclusion…

B5 Factual findings: the July 2017 judgment

30. The July 2017 judgment, after an introduction, contains two main sections. The first, headed "Specific performance or damages", deals with submissions at the June 2017

hearing on the question whether an order for specific performance, as envisaged in the March 2017 judgment, should be replaced by an order for damages in lieu of specific performance. The judgment concludes that it should.

31. The second main section of the July 2017 judgment is headed, "The limitation point". This contains:

(1) findings, noted in sections C1 and C3 below, as to when:

> the breach of the initial promise to allot a share to [Habib] occurred…

(2) a conclusion, discussed in section C5 below, that:

> …there was a continuing obligation to allot a share to [Habib].

C. Limitation: argument and analysis

C1 Limitation: introduction

32. Section 5 of the Limitation Act 1980 states:

> 5. An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

33. It is common ground that the contract asserted by Habib is a simple contract, and that the cause of action for breach of such a contract accrues on the date of that breach. In the present action, accordingly, section 5 applies to Habib's contractual claim for damages against Aziz for the failure by Aziz to allot shares in breach of the 2003 agreement. I shall refer to this as "Habib's breach of contract damages claim". For present purposes I shall assume this is the claim which led to the award of damages in paragraph 5.2 of the July 2017 order: see section A4 above. The crucial question for the purposes of section 5 is, when did the relevant breach occur? If it occurred before 27 May 2009, and the obligation to allot shares was not a continuing one, then Habib's cause of action for his breach of contract damages claim is barred by section 5.

34. The judge's primary conclusion, expressly set out in the July 2017 judgment, was that Aziz's breach of contract occurred shortly after the meeting on 3 June 2009. It followed from this that the action was brought within the time limit under section 5. Aziz makes two challenges to this conclusion. Aziz's primary challenge asserts that Aziz's breach of contract occurred, and Habib's cause of action accrued, in 2004. Aziz's alternative challenge is that the breach, and consequent accrual, occurred in 2006. I deal with the judge's primary conclusion, and Aziz's challenges to it, in sections C3.3 to C3.8 below. In those sections I also deal with two suggested answers advanced by Habib. The first, described by Habib as "Analysis 1", was said to be concerned with "waiver". The second, described by Habib as "Analysis 2", was that "a reasonable time" for performance by Aziz was not exceeded until after the June 2009 meeting.

35. The judge's alternative conclusion was that, until 19 December 2010 [this was a slip for 19 November 2010, see paragraph 5.2.2 of the July 2017 order at section A4 above] there was a continuing obligation on Aziz to allot Habib's share. If that were right, then Aziz's failure to allot Habib's share during the period from 27 May 2009 to 19 December 2010 would constitute a breach of contract for which the cause of action accrued within six years of the date on which the present proceedings were issued. I deal with the judge's alternative conclusion, and Aziz's response to it, in section C8 below.

36. Before turning to those matters, however, in section C2 below I set out the limitation ground. In section C3 below I identify the factual elements in the limitation ground. I then seek to identify relevant paragraphs in the judgments, both as regards those factual elements and as regards the factual elements in 2009 identified by the judge as giving rise to "the breach of the initial promise to allot a share".

C2 The limitation ground

37. The limitation ground (see section A5 above) comprised paragraphs 6 to 8 in Aziz's amended grounds of appeal:

> 6. Further or alternatively, the judge erred in law in her further judgment (dated 11 July 2017) in rejecting the defendant's defence that C's claim was statute barred. If, as C gave evidence and the judge found: (a) the contract upon which C relied was concluded in 2003 and included a term that C would receive his shareholding as soon as the question of his permanent residency was resolved; and (b) a dispute arose between the parties in 2006 as to C's entitlement, then the cause of action for breach thereof accrued at the latest:
>
> (1) in April 2004, when that question was resolved (on C's own evidence) and C sought his shares from D1 (on C's own evidence), or alternatively;
>
> (2) in 2006 when a dispute arose (on C's own evidence).
>
> 7. The judge erred in law in holding that D1's duty to procure the issue of the shares to C was a continuing one and that the cause of action continued to accrue until 2010.
>
> 8. C's claim became statute barred, therefore, either in April 2010 or by 2013. This action was commenced on 27 May 2015, on any basis years out of time.

38. There is an important distinction between paragraph 6 and paragraph 7 of the amended grounds of appeal. Paragraph 7 deals with cases where a cause of action "continued to accrue". By contrast, paragraph 6 is concerned with what can be described as the ordinary position, under which, once a cause of action has accrued, subsequent circumstances involving the same breach do not give rise to a new cause of action. In section C3 below I deal with what the judge said in the context of the ordinary position. Also in that context I deal in sections C4 and C5 with Aziz's

submission that breach had occurred and a relevant cause of action had accrued, either in 2004 or 2006 respectively. It is convenient to refer to the alleged breaches under discussion as "definitive breaches", as these sections are concerned with circumstances which definitively set the date when the relevant cause of action accrues and have the consequence that later events involving the same breach do not give rise to a new cause of action.

C3 Definitive breach: 2004, 2006, or June 2009?

C3.1 Definitive breach: judge's conclusion and rival assertions

39. As noted earlier, the judge's conclusion was that "the breach of the initial promise to allot a share to Habib" occurred shortly after a meeting on 3 June 2009. The rival assertions of Aziz, as set out in paragraph 6 of Aziz's amended grounds of appeal (see section C2 above), rely on three events:

    (1) resolution of Habib's permanent residency, said to have occurred in April 2004 (paragraph 6(a) and 6(1) of the amended grounds of appeal);

    (2) Habib seeking his shares from Aziz, also said to have occurred in April 2004 (paragraph 6(a) and 6(1) of the amended grounds of appeal); or

    (3) a dispute between the parties as to Habib's entitlement which is said to have occurred in 2006 (paragraph 6(b) and 6(2) of the amended grounds of appeal).

C3.2 Definitive breach: Aziz's submissions and what the judge said

40. Aziz's closing submissions on limitation at the trial, preceding those for Habib, focussed on events in March 2008 and April 2009 (transcript of 10 February 2017, pages 34 and 35). Referring to Aziz's February 2017 milestones (as set out in section A3 above), Aziz's oral submission stated, with emphasis added by me:

> MR GRAHAM: … so as far as limitation is concerned, there are clearly fundamental issues for any contractual claim brought by the claimant in respect of contractual claims. I set out at para 74 of the skeleton the relevant chronological milestones and the cut off point is after para 7 which you can see on p. 15. The limitation cut off point appears underlined after that because the claim was issued on 27 May 2015. Before that one has four pieces of evidence where the claimant claims---- well, *three important ones* perhaps for this purpose where the claimant claims that the dispute had arisen before that date, so item 4 under 74, March 2008, grounds of complaint to the Employment Tribunal, in that document he says in March 2008 he had demanded his share distribution. Then you have got the evidence of Mr Mahmud. Actually, on reflection, I am not going to rely on anything Mr Mahmud says save insofar, of course, as it is inconsistent with the claimant's own case but it is notable that he does say that. *The dispute started in 2008*. Then 7, 24 April, 2009, the next important date, again in the ET grounds of complaint he says that he and Aziz had a big argument and during that argument, "He told me if I wanted I could go to the courts",

> so it could not be clearer. If that is right, then any contractual claim is dead, save for a specific performance claim.

41. There was no distinct assertion in Aziz's closing submissions to the judge that Habib's cause of action had come into existence on the date of any of the events identified in paragraph 6 of the amended grounds of appeal. It is therefore unsurprising that the judge made no finding as to whether those events gave rise to a cause of action. What she said about these events, to the extent that she addressed them at all, and about the events upon which she relied, is set out below.

42. The same was true as regards Aziz's oral submissions at the June 2017 hearing. Those submissions, too, referred to Aziz's February 2017 milestones. They stated, again with emphasis added by me:

> MR GRAHAM: Everything up to item 7, if found to be the relevant date, puts the relevant claim, the claim for damages, outside the limitation period because those all occurred more than six years before proceedings were commenced.
>
> THE RECORDER: It was May 2015, was it?
>
> MR GRAHAM: May 2015. *The key ones*, and these all derive from the claimant's own evidence or his claims in the Employment Tribunal proceedings, are 4, 5, 6 and 7.
>
> "4. In March 2008, according to C in his grounds of complaint in the Employment Tribunal…"—at that point – "D1 was avoiding the issue of share distribution, and C therefore called a meeting 'for my share distribution' on 6 March 2008."
>
> So, on the claimant's own case, that was clearly a demand for the distribution of shares. So that's a clear demand whereby he seeks the distribution of his shares. *That demand is clearly not acceded to* and *that it is* the date, *the first date one can take as the date of the breach of contract on which the claimant relies.* At that point, if you make your demand and it's refused, you can't just sit back and say "Well, I'll think about making a claim." The clock is ticking. The clock is ticking and you've got your six years, which is no short time.
>
> That is consistent (item 5 in that milestone list) with what Mr Mahmud said when he said in his witness statement, and your Honour seemed to accept Mr Mahmud's evidence generally, that the dispute between the parties started in 2008. We also have the fact (item 6 not directly relevant) that he was removed as the company secretary in 2008.
>
> Then one has item7:
>
> "on 24 April 2009, according to C in his Employment Tribunal grounds of complaint, C and D1 'had a big argument and during the argument he told me if I wanted I could go to the courts.'"

> So that is a crystal-clear rejection of the claimant's claim for shares. So *one has the demand in March 2008, which was clearly not acceded to,* and one has *at the very latest, on 24 April 2009,* on the claimant's own evidence, a big argument and the *defendant saying in crystal clear terms, "Go to court if you want to make that claim". The clock is clearly running at that point.* There is *no question but that the limitation clock is running there.* …

43. In the March 2017 judgment, under the main heading "Background and evidence" (see section B2.1 above), the subsection headed "The early years" included paragraphs 10 and 11:

> 10. Habib and Aziz became very close from the early days of their friendship, and were, to use Habib's term, more like brothers than friends. In 1997 or 1998 Aziz helped Habib find accommodation through a housing association. In 2001 Aziz bought a house in Stratford. Habib lived with him, on and off, until 2004. They considered themselves, and acted as, equals.
>
> 11. The discussion relating to the setting up of Icon Technology took place in September 2001. In his witness statement Habib stated that he paid 50 pence in respect of the only £1 share. In evidence he resiled from this, but maintained that it was agreed at the outset that he would be a shareholder and director as soon as the question of his permanent residency was resolved.

44. In the March 2017 judgment, under the main heading "Background and evidence" (see section B2.2 above), the subsection headed "Subsequent events" included paragraphs 33, 34 and 36 dealing with events in 2006:

> 33. By 2006, if not before, Habib was pressing for his share-holding and his directorship to be formalised. There is an issue as to whether the issue was raised formally at a meeting on 12 March 2006 (as he claims) or on 8 April 2006 as Aziz and Dr Nabi claimed. There is a written record of what seems to have been discussed on 8 April 2006, but no record of any earlier meeting. I have seen the original diaries and notebooks kept by Aziz and Habib for these years. They show (amongst other things) the wide ranging nature of tasks carried out by Habib in dealing with students and in all aspects of the administration of the college. I bear in mind that it is at least possible that some of the entires were not made on the dates given. For example, there appears to be a note in Aziz's diary of a meeting with Habib on 13 March 2007 which says, at the bottom of the page, 'Secretary position to be withdrawn' 'authorised signatory position to be withdrawn'. This does not sit easily with other notes made later that year and later when it is clear that the issue of the directorship and shares are still being discussed.
>
> 34. Habib's evidence is that Aziz agreed in March 2006 to make him a director formally and to deal with the allocation of shares. Informally,

> in any event, it is clear that he was treated as a director by the others and by the staff. By the way of example, as late as January 2010, a letter of resignation from Mithra Dulloo was addressed to Aziz as managing director and director of admissions, Dr Nabi as principal and director of studies, and Habib as director and student counsellor. Aziz's evidence on this is that he accepted that he considered Habib to be a director. In notes of meetings, he referred to the three as 'directors'. But, said Aziz, he was treated as director 'internally', ie within the organisation only.
>
> …
>
> 36. The notes of the meeting on 8 April 2006, made by Aziz, describe Habib as a director. They also purport to show that, by reference to what each had put into the business, the shares would be as follows: Dr Nabi 34.92%; Aziz 53.96% and Habib 11.11%. There is no dispute but that each paid in different amounts. There is an issue as to the exact amount paid by Aziz and Dr Nabi, and the dates when these sums were paid. There is no proper paper trail relating to these. Aziz's evidence is that the figures are based on a notebook/ledger which Habib kept, but which he denies having, and refer to payments made early on, by the end of 2003. When the student revenue began to come in, and the college obtained a loan, it was not necessary for them to continue spending their own money.

45. The same subsection of the March 2017 judgment included paragraphs 38 to 41 dealing with the period 2006 to 2010:

> 38. A number of other meetings took place between Aziz, Habib, and Dr Nabi between April 2006 (if not earlier) and March 2010 (when a letter was written dismissing him). It is clear from the (unsigned) notes of the meetings that the issue of shares and directorships was constantly discussed. The same percentages appear in later notes. Habib's case is that there is no link between the monies they each paid towards the setting up of the college and the agreement that they would be equal shareholders. Each was fully repaid for the monies initially paid.
>
> 39. A source of tension and disagreement arose from the fact that, as Habib was on a salary (and did not take out money by way of loan-reimbursement) the college had to pay tax and NI. The reason for this was to allow him to bring his wife from Bangladesh. There was a clear disagreement about how this difference in payment/reimbursement should be dealt with. Other difficulties also arose: Aziz and Dr Nabi clearly took the view that Habib had taken more time off than he should have done, and that his time keeping was not as good as it could have been. Relations between Habib and Dr Nabi were also strained. In evidence, Aziz stated that Dr Nabi was not pressing for a share, and difficulties would have arisen if Habib had been given one.

> 40. Habib was removed as company secretary of both Icon College and Icon Technology on 14 October 2008. There is a disagreement as to the reasons for this: Habib says he was told that the law had changed, Aziz said that it was because Habib had become increasingly arrogant. Further meetings took place in April 2009, but again no resolution was reached. The notes of a meeting on 7 April 2009 made by Habib refer to a 'director's meeting'. On April 28 2009 a further note in Aziz's writing states 'once the accounts are agreed, shareholding will be discussed.' The notes (kept variously by both sides) and the evidence bear out Habib's evidence that there was a reluctance on Aziz's part to conclude matters, in spite of the fact that he was being repeatedly pressed to do so.
>
> 41. The final substantive meeting between the parties took place on 3 June 2009. Habib made a note of this. The note states: 'solve old calculation. Share allocation. Directorship issue'. An agreement was reached that Habib owed £700.00 to Icon College (in relation to the tax issue) but that he would not need to pay it. All three were to sign a calculation sheet. The note then reads 'next meeting will solve about share and directorship' and ends with 'Aziz raised new issues'. A sheet was signed by all three showing what each had received from the college by way of salary and loan repayment. These figures do not tally with the spreadsheets referred to earlier. Aziz had received a total of £147,000 odd; Dr Nabi £115,000 and Habib £47,000 odd. The first dividend was paid out, I believe, in 2008/9. Dr Nabi was receiving dividends, he stated, through Aziz.

46. The section of the March 2017 judgment headed "Submission and findings" (see section B3 above) included paragraphs 56 to 59:

> 56. Once Aziz accepted in evidence, as he did, that the founding members were equals, and that the only reason for not registering Habib and Dr Nabi as shareholders at the outset was because of particular difficulties they faced, many of the points taken against Habib fall away. Put another way, the reason given for not registering Habib's shareholding is an implicit admission that he had a right to be registered.
>
> 57. Moreover, the contention that no discussion took place as to the amount of shares each would have become very difficult to accept. If no such discussions took place, it seems to me that this was only because each understood, and acted on the basis that, they would be equal shareholders. There was nothing, at the time, to justify departing from the obvious conclusion that they were equal shareholders from the outset, who would be allotted shares in due course.
>
> 58. In any event, it seems to me highly improbable that no discussions as to shares took place at a time when the three individuals came together to set up a new venture. The three met over the summer on a number of occasions. All had been made redundant. All needed to

> borrow money to invest. All did invest. In Habib's case the investment was in both companies. Although each had a different role, the plan was to pool their respective strengths. This was a partnership of equals. I accept Habib's evidence on this point. I found Aziz a less impressive witness. Dr Nabi, I suspect, is someone who takes offence easily and has a very strong sense of amour proper. He is someone who, to my mind, can adopt firm, even belligerent, views on matters dependant more on his mood than on an accurate recollection of facts.
>
> 59. In this case I am satisfied that the three founding members of the college agreed at the outset that they were equal shareholders and would each be directors. This was a joint venture from the outset. Aziz was never intended to be the sole shareholder and director. The formality of allotting shares would take place in the case of Habib on the resolution of his immigration status, and in the case of Dr Nabi when the shadow of the MATT fraud investigation was lifted. The agreement, in so far as Habib is concerned, related both to Icon Technology and Icon College. The discussions, sometime later, about the respective contributions of the three founding members relate to the question of how much each should and did take by way of salary and loan repayment. This is a separate question from the initial agreement that they would be all equal shareholders and directors.

47. The July 2017 judgment, under the heading "The limitation point" (see section B4 above), included paragraphs 5 to 9:

> The limitation point
>
> 5. This relates to the claim for damages which it is said arise by reason of the fact that the defendants failed to allot a share to the claimant. This issue touches on the time sequence in this case, and it is said on behalf of the defendants that on the basis of the time line prepared in the skeleton argument it is too late now for the claimant to bring a claim for contractual damages. I have dealt with that in my judgment by finding that the time line goes further forward than that relied on by the defendants and it seems to me right (without going back over the whole history of the matter) to restate that there was a further and important meeting between the claimant and the first defendant in June 2009 when it was clear, as I have said, that the matters were still being discussed and promises made to the claimant that things would be sorted out. This is dealt with in paragraph 41 of my draft decision, where I noted what was recorded at the meetings, and in particular the note which reads 'Next meeting will solve about share and directorship'. It seems to me that if one were to look at this, in the context of the history, the breach of the initial promise to allot a share to the claimant occurred within a reasonably short time after that. The precise date does not matter, since the proceedings were issued within 6 years of the June meeting.
>
> …

> 8. This is a case where the first defendant was continuing to make promises and was assuring the claimant that in due course matters would be sorted out and that there was no clear and unequivocal denial of this until very much later, when the employment tribunal action began. The relevant date, on this analysis, is 19 December 2010 [a slip for 19 November 2010: see section C1 above].
>
> 9. I find therefore that there is no limitation bar in this case (and indeed I have already reached this conclusion) preventing the claim for contractual damages being pursued by the claimant in this case.

C3.3 Breach in 2004: was there a need for a demand?

48. In paragraph 6 of the amended grounds of appeal, as elaborated in a skeleton argument dated 2 February 2018 ("Aziz's February 2018 skeleton"), Aziz said that the judge found that the 2003 agreement:

> …included a term that [Habib] would receive his shareholding as soon as the question of his permanent residency was resolved.

49. Aziz then pointed out that Habib's own evidence was that he acquired permanent residency in April 2004. It follows, submitted Aziz, that a duty to procure allotment of Habib's shares arose in April 2004 and was breached then. His cause of action would have thus accrued in April 2004, and would have become time barred at the end of April 2010.

50. In this context a theoretical question arises as to whether Aziz's obligation only arose once Habib had made a request for his shares to be allotted. This question is theoretical because there was in fact such a request by Habib in 2004: see section C3.4 below. I shall nevertheless explain briefly the view that I take on this question.

51. The judge's findings as to the express terms of the 2003 agreement are discussed in paragraph 24 of a skeleton argument for Habib dated 1 March 2018 ("Habib's March 2018 skeleton"). That paragraph notes that the judge did not set out findings on the terms of the 2003 agreement as if in a pleading. Nevertheless it suggests that the express terms that she found can be ascertained from the March and July 2017 judgments, and from paragraph 5 of the July 2017 order, as being that, so far as Icon College Ltd was concerned:

> (a) [Aziz] was to transfer a one third shareholding in [Icon College Ltd] to [Habib].
>
> (b) The obligation was conditional on [Habib] first arranging his immigration status.

52. As I understand it, Aziz recognises that he is no longer able to dispute this identification of express terms. Habib then advances a submission, however, that because Habib would know "in the natural course of events" when the condition at (b) was satisfied, it would therefore be for Habib to notify Aziz of its satisfaction and to call for his shares, after which Aziz would have a reasonable time to comply. I shall

refer to what is contemplated by this submission as "the Habib natural course implied term". No such implied term was suggested at the hearing below. Habib's March 2018 skeleton suggests that the "correct analysis" of paragraph 59 of the March 2017 judgment includes the Habib natural course implied term. Aziz points out, however, that there is no reference in the March and July 2017 judgments to any need for "Habib to notify Aziz… and to call for his shares".

53. In support of his contention, Habib adds that Aziz accepted below in Aziz's February 2017 skeleton that:

> In the absence of an express date for compliance, a contractual obligation will either be required to be fulfilled within a reasonable time or upon demand.

54. To my mind, however, this passage does not involve a concession that there must have been a demand before a cause of action can accrue. On the contrary, while it envisages that a cause of action may accrue "upon demand", it also alternatively envisages that a cause of action may accrue if the contractual obligation is not fulfilled within a reasonable time. For these reasons I conclude that, subject to any new arrangement being made, what is to be implied is that the obligation to allot shares will, once Habib's immigration status was arranged, be required to be fulfilled within a reasonable time or upon demand, and if there is a demand then a reasonable time is to be allowed for complying with that demand.

55. For present purposes I put on one side points taken by Habib on "waiver" and what is meant by "a reasonable time". Subject to those points, Aziz is in my view right to say that, even if there had not been a demand, there was an implicit obligation to allot Habib's shareholding within a reasonable time of Habib securing permanent residence. Whether a reasonable time had been exceeded would depend, among other things, on whether Aziz knew or ought to have known that Habib had secured permanent residence.

C3.4 Was there a demand in 2004?

56. As regards the question whether there was a demand in 2004, for present purposes I proceed on the same as basis as in section C3.3 above: I put on one side points taken by Habib on "waiver" and what is meant by "a reasonable time". The judge made no finding as to a request by Habib in 2004 for his shareholding to be allocated. On the present appeal Aziz, without objection by Habib, relies on an exchange during the course of Habib's cross examination by Mr Graham on 7 February 2017:

> Q…you say, I think, that you started asking for a distribution of shares in about 2006.
>
> A I think we discussed - I raised the question to Mr Aziz in 2004 when I got my permanent residence and Mr Aziz say ----
>
> Q 2004 you started ----

> A Yes, I raised the question, very normal, but not like pressing him, just normally asking can he sort this problem, he said, "Okay, wait until", because company is not viable condition, Mr Nabi still has a problem, so let Dr Nabi's name to be clear, then we include your name and distribute the share.

57. In this passage Habib is not describing a formal demand. He is, however, describing what any commercial person would expect. This is that once his permanent residency was secured, Habib asked Aziz to sort out Habib's shareholding. There is no commercial reason to expect a formal demand in this regard. Indeed, that is exactly the opposite of what one would expect between two co-venturers. Subject to the points mentioned earlier, Habib's request, made after he had satisfied the condition as to residence, seems to me to give rise to an obligation upon Aziz to allot Habib's shareholding within a reasonable time.

58. I note that in 2004 Aziz, according to Habib's evidence, gave a reason for waiting before allotting Habib's shareholding. As to this, I deal in section 3.6 below with what the judge said about discussions of this kind.

C3.5 Was there a demand in 2006?

59. The evidence about relevant events in 2006 was described by the judge in paragraphs 33, 34 and 36 of the March 2017 judgment: see section C3.2 above. In those paragraphs the judge held that in 2006 Habib was pressing for his shareholding "to be formalised".

60. There was an issue that the judge did not resolve. Habib said that his "pressing" occurred at a meeting in March 2006. Aziz said that in occurred at a meeting in April 2006.

61. This unresolved issue is irrelevant for present purposes. The judge, in effect, found that in 2006 Habib was making it clear that he wanted his shares allocated. Subject to Habib's answers concerning "waiver" and "reasonable time", it follows that there was in 2006 a request by Habib for his shares. This in turn would, if such an obligation did not already exist, give rise to an obligation on Aziz, within a reasonable time, to allot those shares.

C3.6 Habib's answers: "waiver" & "reasonable time"

62. Aziz's February 2018 skeleton noted that the judge held that the breach of the initial promise to allot a share to Habib occurred within a reasonably short time after the June 2009 meeting. In support of Aziz's argument that the definitive breach had occurred in April 2004, or at the latest March 2006, Aziz added at paragraph 20 what I shall call "Aziz's immateriality of discussions contention":

> The fact there may have been continuing discussions between the parties from time to time in relation to shareholdings after April 2004, or even March 2006, is neither here nor there for the purposes of the limitation defence.

63. Habib, by contrast, relied heavily on the judge's findings as to the discussions which occurred up to and including the June 2009 meeting. Habib's March 2018 skeleton at paragraph 30 identified two alternative ways in which the judge's findings about those discussions provided an answer to the limitation defence. As noted in section C1 above, those answers were called "Analysis 1" and "Analysis 2". I deal with them in turn below. Before doing so, I note that they have a common feature. Both were said to reflect features of the judge's reasoning when reaching her conclusion that it was only within a reasonably short time after the June 2009 meeting that "the breach of the initial promise occurred".

64. Under the heading "Analysis 1: waiver" Habib's March 2018 skeleton identified three features of that analysis:

> a. What had been happening over the years was that whenever the Respondent raised the question of his shares there was a conversation with the Appellant which resulted in the Respondent giving the Appellant more time.
>
> b. In legal terms the Respondent was being successfully persuaded to waive or defer his right under the Agreement to call for his shares and was allowing the Appellant more time to perform.
>
> c. The Appellant's alternative, to the effect that there was a breach in 2004 and for the next 5 years the Respondent failed to enforce his contractual right is not a realistic interpretation of the events. Whatever was happening between 2004 and 2009, it was clearly consensual. The two parties were running the business together, attending directors' meetings together and at times living together. To conclude that one was in continuing breach of a contractual duty to the other is unrealistic. The obvious conclusion is that the requirement to perform had been consensually put on hold pending a final demand from the Respondent.

65. In a reply skeleton argument dated 27 April 2018 ("Aziz's April 2018 skeleton") Aziz invoked two threshold objections affecting both Analysis 1 and Analysis 2:

(1) the March judgment, at paragraphs 11 and 59, held that Habib's entitlement to allotment of shares arose on the resolution of Habib's immigration status. It was not open to Habib to put forward a different interpretation which was neither pleaded nor argued below.

(2) Analysis 1 and Analysis 2 both involved matters neither pleaded nor argued below, and inevitably not explored in evidence or supported by any relevant findings of fact by the judge; alternatively if the judge made findings on these points, then Aziz had not had a proper opportunity of meeting them and the judge had in effect "gone on a frolic of her own" on points which, if they had been raised, would at the very least have given rise to arguments in respect of which the judge would have had to make specific findings.

66. I can deal with the first threshold objection at once. In section C3.3 above I have rejected Habib's attempt to put a gloss on paragraphs 11 and 59 of the March 2017 judgment. For the reasons given there, I do not consider that, once Habib's immigration status was resolved, he had to make a demand before his cause of action accrued. For the reasons given in sections C3.3 and C3.4, however, that conclusion is immaterial because Habib in fact made a demand in 2004. Moreover, there can be no doubt that Habib's cause of action would arise only once Aziz had a reasonable time within which to allot Habib's share. It is absurd to imagine that a legal cause of action would arise at a stage when Aziz neither knew, nor ought to have known, that Habib's immigration status was resolved.

67. In truth, Aziz's first threshold objection does not engage with the arguments in Analysis 1 and Analysis 2. Both those analyses assume that, were it not for the discussions which took place, Habib's cause of action would have accrued well before June 2009.

68. In support of the second threshold objection Aziz's April 2018 skeleton at paragraph 16 relied on four matters:

> (1) If, as C claims, there was ever any requirement for a demand by C, such demand was made soon after C acquired permanent residency: see para.9(6) of D1 Skel 1.
>
> (2) C made a demand by March 2006 at the latest. The Judge found that "By 2006, if not before, [C] was pressing for his shareholding and his directorship to be formalised" [J1/para.33]. That ruling reflected, inter alia: C's claim in the ET proceedings that he raised the issue of share distribution in a meeting with D1 in March 2006 [ET1, para.14; F3/T64/p.998]; and C's assertion in C w/s para.32 [F2/T42/p.936] that at a meeting on 12 March 2006 C stated that the parties needed to formalise their equal shareholdings and register C and Dr Nabi as directors and shareholders.
>
> (3) C's own uncontested evidence and that of his main witness, both otherwise accepted by the trial judge (and emphasised in D1's submissions), which show that any breach had clearly occurred prior to 27 May 2009:
>
> > (a) C's main witness, Ashraf Mahmud, stated in his witness statement that the dispute between the parties started in 2008 (A.Mahmud w/s para.12 [F2/T39/p.918]);
> >
> > (b) C stated in the detailed Grounds of Complaint which formed part of his ET1 dated 20/10/10, para.27, "I had an argument with Aziz in April 2009 about my shares. We had a big argument and during that argument he told me if he wanted I could go to the courts" [F3/T64/p1002].3
>
> (4) Even as late as the meeting of 3/6/09 [F3/T59/p. 973-4], said in J2 para.5 to show "the matters still being discussed and promises made to

> the Claimant that things would be sorted out, and in the discussions that followed, all that C's diary entry of that meeting said was "Next meeting will solve about share and directorship" and, taken in conjunction with the discussions leading up to this meeting, C's own evidence pointed to escalating discord between the two: C's witness statement paras. 42-43, 46-47, 50-51 [F2/T42/pp.937-939]: said nothing about any assurances being given to him by D1; in C's cross-examination C said nothing about assurances being given to him but rather referred to difficulty and difference between them at that meeting. C was asked in cross-examination about his 3/6/09 Note (p.342-3 in the trial bundle; p.973 in the appeal bundle) [Transcript, Day 2, F1/T22/p.282]:
>
> "Q It appears from that note that not all issues were resolved, so those calculations were resolved, but not all issues were resolved.
>
> A No.
>
> Q Was the issue that was raised there about your conduct and attitude and commitment to the company?
>
> A We have some problem, we have some argument obviously, but not relevant to this, you know. We have dissatisfaction. I mean, if I go that I will probably have to bring all employment discussion here.
>
> Q So it might have been that issue.
>
> A *We have difference, at that moment we are obviously not good situation with each other."* (emphasis added [by Aziz]).

69. Apart from the threshold objections, Aziz's April 2018 skeleton made a further point in relation to Analysis 1. This was that no authority had been relied on by Habib in support of that analysis.

70. At the hearing before me the opening oral submissions on behalf of Aziz did not explicitly address either Analysis 1 or Analysis 2. Habib's oral submissions addressed them at an early stage, beginning by noting that the limitation ground of appeal involved no challenge to the judge's factual findings. As to those findings, Habib's submission was that she described a relationship between Aziz and Habib that could be summarised as "consensual". Aziz was bound by the September 2003 agreement to transfer a shareholding to Habib. That obligation became enforceable when Habib's immigration status was resolved in 2004. During the period after the obligation became enforceable, Aziz and Habib worked together in close proximity. They frequently discussed performance of the obligation. In the early years there was no hostility. Later there had been signs of impatience on Habib's part.

71. By contrast, submitted Habib, the picture which Aziz now sought to paint was one in which Aziz and Habib worked together, but not on the basis that Habib would wait while issues concerning the allotment of the shares were discussed. It was simply incompatible with the March and July 2017 judgments, submitted Habib, to say that

Aziz and Habib were working so closely together against a background in which Aziz was literally in breach of contract all long. In these circumstances, submitted Habib, the judge's findings in paragraphs 38 onwards of the March 2017 judgment and paragraph 5 of the July 2017 judgment were findings of constant discussions involving promises that things would be sorted out, and that during those discussions, albeit with some impatience on Habib's part, there was either a waiver by Habib of his entitlement to an immediate transfer, or both were consensually extending the time for performance.

72. It was only in Aziz's oral reply submissions that Aziz's case in answer to Analysis 1 and Analysis 2 was orally developed. So far as Analysis 1 is concerned, it is relevant to note here that a rhetorical question was asked by Aziz: on what basis can the delay after April 2004 be justified? Aziz's oral reply submissions responded to his own rhetorical question by saying that a reassertion of Habib's claim had no relevance to the defence of statutory limitation. The oral reply submissions then repeated the part of the second threshold objection (made in Aziz's April 2018 skeleton) complaining that Habib had not pleaded that there had been any waiver, or any agreement by conduct to extend time.

73. Turning to the July 2017 judgment, the oral reply submission for Aziz was that the judge was making no new finding of fact. In the July 2017 judgment, submitted Aziz, there was only one promise on the part of Aziz identified, and that was in June 2009. Despite what was said in the second to last sentence of paragraph 5 of the July judgment, what was said in the March 2017 judgment involved no promise on the part of Aziz. Moreover, a promise "to sort out" the share allocation was, submitted Aziz:

> … a promise writ in water, it amounts to nothing.

74. The final point made orally by Aziz was that there was no reason to think that the meeting in June 2009 had any particular significance. Indeed if there were promises earlier, then that would be a further reason for thinking that a promise in June 2009 had no particular significance.

75. At the end of oral reply submissions for Aziz a request was made, and was granted, for permission to lodge further submissions in reply. Those submissions were filed on 13 July 2018, and I shall refer to them as "Aziz's 13 July further submissions".

76. Analysis 1 featured in Aziz's 13 July further submissions only in a section of those submissions dealing with an application to amend Habib's respondent's notice. This passage, however, involved a mistake both as to what the proposed amendment was concerned with, and as to what I had said on 11 July 2018. These errors were pointed out in further written submissions by Habib on 17 July 2018 ("Habib's 17 July further submissions"). What had led to the application to amend the respondent's notice was an observation by me about Analysis 2. I suggested that, if Habib wished to press the argument in Analysis 2, it might be necessary to do so on the basis that it was an "additional ground" for supporting the judge's decision. The resulting application to amend, advanced orally during the afternoon of 11 July 2018, was confined to Analysis 2. In the context of Analysis 1 there is accordingly no need to deal with what was said in Aziz's 13 July further submissions.

C3.7 Habib's answers: conclusions on Analysis 1

77. At the outset I note Aziz's observation that no authority was referred to in support of Analysis 1. As to that, at no stage did Aziz contest Habib's assertion that waiver of entitlement to an immediate allocation, or a consensual extension of time for performance, would prevent a cause of action from arising so long as the waiver, or extension, was in place. It is in my view elementary as a matter of principle that this part of Analysis 1 is correct. If without any reservation of rights Habib does what Aziz wants, and says by words or conduct that he will wait for the time being, Habib cannot later say Aziz was in breach during the period when Habib had given Aziz extra time.

78. On that legal basis I turn to Aziz's second threshold objection insofar as it applies to Analysis 1. It has two stages. Both stages challenge Habib's ability on appeal to say that "the continuing negotiations between the parties" put on hold Aziz's obligation to perform. The first stage complains that the relevant arguments were neither explored in evidence nor supported by any relevant findings of fact by the judge. The second stage is a fall back: if the judge did make relevant findings, Aziz complains he did not have a proper opportunity of answering them, adding that if he had been afforded such an opportunity he would at the very least have had arguments in respect of which the judge would have had to make specific findings.

79. It seems to me, however, that as regards Analysis 1 the second threshold objection is not open to Aziz. The reason is that Analysis 1 relies on judicial findings of fact to which there is no challenge in Aziz's grounds of appeal. Moreover, these are findings of fact which the judge plainly regarded as constituting an answer to the limitation defence. In these circumstances, if Aziz wanted to challenge those findings of fact, or indeed the judge's reasoning that they provided an answer to the limitation defence, it was necessary for Aziz to include such challenges in his grounds of appeal.

80. Aziz did not include any such challenges in his grounds of appeal. That of itself bars Aziz, in relation to Analysis 1, from relying on the second threshold objection. Lest that be wrong however, I examine Analysis 1 and the second threshold objection in more detail below.

81. It is convenient to begin with Aziz's assertion that Analysis 1 involved matters neither pleaded nor argued below. As to what was pleaded, however, it seems to me that Aziz's own pleading was defective. Aziz's amended defence gave no detail at all: see section A3 above. By contrast, Habib's opening subparagraph in paragraph 25 of his amended reply set out key factual elements of Analysis 1:

    (a) Habib made no complaint about anything that Aziz did in September 2003 or in 2004;

    (b) Almost six years later, on 3 June 2009, the parties were in discussions.

82. As to what was argued, it seems to me that well before the trial began, Aziz had appreciated that he had to take account of the discussions. This can be seen from Aziz's case as to milestones, set out in his February 2017 skeleton (see section A3 above). Milestone (3) left open a question as to whether hand-written notes of

discussion were (to the extent that they formed part of Habib's case) actually reliable. Milestones (4) to (7) portrayed a relationship which, from March 2008 onwards, was a relationship of discord rather than discussions.

83. None of Aziz's case as to milestones was pleaded by Aziz. He can hardly complain at the fact that he was allowed at trial to develop his "milestones" case without amending his pleading. In his February 2017 skeleton and in his closing submissions at the conclusion of the trial Aziz, to my mind with commendable realism, made and adhered to a decision not to rely on events prior to March 2008. That decision no doubt reflected an assessment that discussions prior to then made it unrealistic to suggest that Aziz had been in breach before March 2008. Importantly, it was only once milestone (4) had been reached, in March 2008, that Aziz said that Habib's cause of action had accrued: see paragraph 77 of Aziz's February 2017 skeleton set out in section A3 above.

84. The judge's findings of fact explicitly covered the period from September 2003 to March 2006, and the period from 2006 to March 2008, as well as the period from March 2008 to April 2009 which Aziz focussed on in his closing submissions. In particular:

(1) in paragraph 56 of the March 2017 judgment the judge noted Aziz's admission in evidence that the only reason for not registering Habib and Dr Nabi as shareholders at the outset was because of particular difficulties they faced. As set out in section C3.4 above, Habib had explained what happened in 2004 when he obtained permanent residence: Aziz asked him to wait until Mr Nabi was cleared. Aziz's own account, as recorded by the judge, effectively acknowledges a willingness of the co-venturers not to register shareholdings at the outset and the reasons for it. It is impossible to see how Aziz can dispute what is said in paragraph 56 of the March 2017 judgment. That is a complete answer to the assertion in the grounds of appeal that a cause of action accrued when, or shortly after Habib's own difficulties were resolved – for at that stage Dr Nabi's difficulties had not been resolved.

(2) Habib duly waited. As set out in paragraph 33 of the March 2017 judgment, in 2006 if not before, Habib was pressing for his shareholding to be formalised. In the context of co-venturers who are working together, the natural meaning of this is that Habib was pressing to move away from a position where the co-venturers were deferring the allocation of shares. The March 2017 judgment notes, at paragraph 33, Habib's evidence that in response Aziz agreed to deal with the allocation of shares. Reflecting this, paragraph 38 of the March 2017 judgment commented on the overall position from 2006 to 2010 saying that it was clear that the issue of shares "was constantly discussed".

85. Thus the March 2017 judgement described a position involving continuing discussions throughout the period April 2006 to March 2010. In Aziz's February 2017 skeleton, in his closing submissions to the judge, and at the June 2017 hearing Aziz focussed his arguments on the position in the second half of that period. This inevitably involved accepting that in the first half of that period there were continuing discussions and they had the effect of postponing the date for performance.

86. In these circumstances there is no merit in Aziz's second threshold objection. The judge concluded, in response to Aziz's claim concerning events from March 2008 onwards, that continuing discussions prevented a cause of action arising until shortly after the June 2009 meeting. When bringing the present appeal Aziz included no challenge to the judge's rejection of Aziz's claims concerning events from March 2008 onwards. Far from considering that a promise to sort out things "amounts to nothing" the judge plainly took the view that promises of that kind characterised a history which had the consequence that no breach occurred until the discussions came to an end.

87. The reasons for the judge's rejection of the limitation defence applied effectively to the whole period from September 2003 to shortly after the June 2009 meeting. That being so, it seems to me absurd for Aziz to say that he can on appeal put forward a new case which blithely relies on events before March 2008, thereby avoiding the need to deal with the judge's reasons for rejecting Aziz's case on events from March 2008 onwards. If Aziz is to rely on events before March 2008, it must be for him to demonstrate that the judge's reasons for rejecting his claim as argued below do not equally apply to the claim he now seeks to advance.

88. An additional point advanced orally on behalf of Aziz queried why the June 2009 meeting should be different from any other. As it seems to me, the answer is obvious from the March 2017 judgment. Paragraph 41 of that judgment began by pointing out that the meeting that took place on 3 June 2009 was the final substantive meeting between the parties. At that meeting, as previously, Habib's note was that the next meeting would solve the share issues. Unlike previous meetings, however, there was no next meeting.

89. Standing back and looking at the history in the context of Analysis 1, it seems to me that on this appeal Aziz has unjustifiably departed from a reasonable, albeit unsuccessful, stance in his February 2017 skeleton and in his closing submissions at trial. On this appeal Aziz effectively says to Habib, "I know you waited when I asked, but I was in breach and you should have sued me". The notion that the parties' conduct put them in such a position is as uncommercial as it is morally unattractive.

C3.8 Habib's answers: conclusions on Analysis 2

90. I can deal with Analysis 2 shortly. I do not consider that the judge was making any finding on the footing that a reasonable time for performance could be said, in the absence of willingness by Habib to allow Aziz further time for performance, nevertheless to have been put back time and time again. A conclusion of that kind would require an objective analysis, whereas the judge's analysis was subjective.

91. Nor do I consider that there is, even arguably, any merit in Analysis 2. Suppose Habib had, at any stage, not been willing to allow Aziz further time. A creditor who refuses to allow a debtor more time would normally expect to be able to insist from then on that the debtor must perform. Where a creditor has made it clear that no further time will be allowed, it would normally be inconsistent with the creditor's contractual rights to say that a reasonable time for performance was deferred while discussions between the parties continued.

92. In these circumstances I am satisfied that if Habib were to be allowed to advance Analysis 2, he would need to succeed on the application that he has now made for an extension of time in which to file a notice seeking to support the judge's decision on grounds which were not relied on by the judge below. Aziz objects, saying among other things that the notice comes far too late. I do not need to deal with the question of lateness. I refuse an extension of time because, as explained above, Analysis 2 has no merit.

C3.9 Limitation: The judge's finding of continuing breach

93. In the July 2017 judgment, paragraph 6 stated:

> 6. It is also said on behalf of the claimant that this is a case where there is a continuing breach of the duty to allot a share to the claimant and my attention was drawn in particular to the case of *Tomlinson v Pickup* [2014] EWHC 495 which is a decision in the High Court in which the judge considered the question of limitation in a case not dissimilar to this and found that there was a continuing obligation to allocate a share to the claimant in that case.

94. This conclusion was challenged in paragraph 7 of the limitation grounds of appeal. In support of paragraph 7, Aziz's February 2018 skeleton noted:

(1) that the case cited by the judge, *Tomlinson v Pickup*, had applied an earlier High Court decision, *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384.

(2) regrettably, the judge had not been referred to a more recent decision of the Court of Appeal, *Capita (Banstead 2011) Ltd v RIFB Group Ltd* [2015] EWCA Civ 1310, [2016] QB 835. In the *Capita* case the Court of Appeal noted that the *Midland* decision was incompatible with the decision of the Court of Appeal in *Bell v Peter Browne & Co* [1990] 2 QB 495. The approach which the court must adopt is set out in the judgment of Nicholls LJ at pages 500 to 501 in *Bell*:

> A remediable breach is just as much a breach of contract when it occurs as an irremediable breach, although the practical consequences are likely to be less serious if the breach comes to light in time to take remediable action. Were the law otherwise, in any of these instances, the effect would be to frustrate the purpose of the statutes of limitation, for it would mean that breaches of contract would never become statute-barred unless the innocent party chose to accept the defaulting party's conduct as a repudiation or, perhaps, performance ceases to be possible.
>
> For completeness I add that the above observations are directed at the normal case where a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligation at the time when performance is due under the contract. In such a case there is a single breach of contract. By way of contrast are the exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation. In such cases the

> obligation is not breached once and for all, but it is a contractual obligation that arises anew day after day, so that on each successive day there is a fresh breach. A familiar example of this is the usual form of repairing clause in a tenancy agreement…

95. Aziz submitted that if the judge had been referred to the *Capita* case she would have been bound to conclude that the present was a case in which there was no contractual obligation arising anew for performance day to day.

96. I shall refer to the distinction between Nicholls LJ's "normal" and "exceptional" cases as the "*Bell* distinction". In response Habib suggested that the *Bell* distinction turned on whether the parties were in close and continuing proximity. Habib added a second point, that Aziz clearly considered that he was under a continuing obligation – otherwise he would not have continually made the promises that the judge found he did. I am not persuaded by this second point, however. The promises by Aziz described in the March 2017 judgment are, to mind, more likely to be promises made by Aziz because he knew that Habib had given him a temporary extension of time, and Aziz wished to ensure that the extension was continued.

97. Habib's first point is not so easily resolved. It is not necessary for me to resolve it in the present case: my conclusion in section C3.7 above has the consequence that Aziz's appeal against the judge's finding on limitation necessarily fails. I consider that issues as to the application of the *Bell* distinction are best resolved in a case where they are determinative, and where the judge at first instance has made appropriate findings on the contractual relationship in question after hearing argument on the *Bell* distinction. Accordingly I make no finding on this aspect of the present case.

C3.10 Statutory limitation: conclusion

98. For the reasons given above, I conclude that Aziz fails in his challenge to the judge's conclusion that the breach of Aziz's duty to allot Habib's shares did not occur before a short time after the 3 June 2009 meeting. It necessarily follows that Aziz's appeal on the question of the limitation fails. As explained in section C3.9 above, it is unnecessary for Habib to succeed upon the alternative ground identified by the judge of a continuing obligation to allot the shares. For the reasons given in section C3.9 above, I consider that it is undesirable for me to make any finding on Aziz's challenge to that alternative conclusion.

D. The laches ground

D1 The laches ground: introduction

99. As noted in section A3 above, without prejudice to Aziz's primary contention that there had been no promise to allot shares to Habib, Aziz asserted that Habib was barred by his own laches from maintaining any claim for specific performance. The particulars of laches identified by Aziz are also set out in section A3 above. They comprised paragraphs (1) to (6). In summary:

(1) within a reasonable time and a "short while" after Icon College Ltd was incorporated in September 2003, by early 2004 Habib knew of the existence of all matters pleaded in the particulars of claim;

(2) Habib admitted (in his Employment Tribunal claim) that he had raised the issue of "his shares" in meetings with Aziz in March 2006 and March 2008, and that he had an argument in that regard with Aziz in April 2009 during which Aziz allegedly told him that he could go to the courts to resolve the dispute.

(3) In his complaint to the Employment Tribunal in October 2010, Habib had referred to taking legal advice in relation to his alleged share in Icon College Ltd.

(4) Icon College Ltd's Employment Tribunal response in November 2010 denied that there was an agreement that Habib would be a shareholder in Icon college Ltd or Icon Technology Ltd.

(5) the Employment Tribunal claim was resolved on 5 May 2014, but nothing further was heard from Habib in respect of the present claim until three weeks before commencement of this action.

(6) Aziz had expended time and effort in "growing the business" of Icon College Ltd since September 2003. Three examples were given. The first concerned Aziz's working long days at the college. The second and third concerned "personal and professional risk" which Aziz "took on… to establish the business as a going concern."

100. Habib responded to these particulars in his amended reply dated 27 September 2016 (see section A4 above). In summary:

(1) As to particular (1) Habib said that he made no complaint about anything that Aziz did in September 2003 or in 2004. Habib added that:

> almost six years later, on 3 June 2009, the parties were in discussions…about their respective contributions. As of 3 June 2009, [Aziz] had still not intimated in any way to [Habib] that he did not consider himself bound by the agreement reached in September 2003, rather the contrary.

(2) as to particular (2), Habib said that in April 2009 Aziz had not repudiated the agreement reached in September 2003. Habib said that his cause of action accrued only upon breach of the September 2003 agreement. His primary case was that such breach did not occur until May 2015. By way of secondary case, Habib said that even on 3 June 2009 Aziz had not committed a repudiatory breach. If Icon College Ltd's response in the Employment Tribunal were taken as a repudiation of the September 2003 agreement, then Habib's cause of action accrued no earlier than 19 September 2010.

(3) particular (3) was admitted, "so far as it goes".

(4) particular (4) received a response which is not material for present purposes.

(5) particular (5) received a response which is not relied on for present purposes.

(6) As to particular (6), Habib admitted that since September 2003 Aziz had expended time and effort growing the business of Icon College Ltd. Habib added that he had also done so until Aziz wrongfully excluded him from the business. Aziz was put to proof of the examples given in particular (6).

101. As will be seen, however, the submissions went well beyond the matters canvassed in Aziz's particulars of laches and the response in Habib's amended reply. I deal with those submissions in sections D4 and D5 below.

D2 Laches: the judgment below

102. Laches were dealt with in the March 2017 judgment. The relevant passages are found at paragraphs 61 to 65:

> 61. I come therefore to the question of laches. Laches is established when two conditions are fulfilled. There must be an unreasonable delay in the commencement or prosecution of proceedings for specific performance, and, secondly, in all the circumstances the consequences of delay must render the grant of relief unjust. Aldous LJ in the Court of Appeal in *Frawley v Neil* [2000] CP Rep 20 stated: '*The more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right'*. This statement was approved in two subsequent Court of Appeal decisions: *Patel v Smith* [2005] EWCA Civ 157 and *Re Loftus* [2007] 1 WLR 591. This investigation is necessarily fact specific.
>
> 62. Mr Graham submitted that Habib delayed unreasonably in not making his claim, and that in any event the prejudice to Aziz is manifest. Aziz took on personal debt; Icon College took on a loan (secured by debenture) of £80,000, and, most significantly, Icon College came close to collapse in 2012 due to legislative changes which significantly affected the overseas student market. Aziz and Dr Nabi created, it is said, an entirely new business model which, as a result of their hard work, has proved to be successful. The claim relates to shares in a small trading company, the value of which is volatile as it depends to a large extent on factors outside its control. A number of cases were cited. It seems to me, however, bearing mind the test set out above, that these cases do no more than illustrate the principle that each case turns on its own facts.
>
> 63. Mr Khan submits that specific performance is the appropriate remedy and that the defence of laches is not made out. He points first

> to the fact that Aziz does not come to the court with 'clean hands'. The Employment Tribunal found that Habib had been wrongfully dismissed on the basis of fabricated allegations. He did not leave the college of his own volition. The litigation in the Tribunal took some three and a half years. Habib had made it clear before and during the proceedings that he intended to pursue his claim in relation to the shareholding issue. Attempts have been made since that date to resolve this issue.
>
> 64. It is true, of course, that the college has continued to grow, but this has been very much to Aziz's advantage. And while the college suffered a serious setback in 2012, it did no more than many businesses do by adapting to changing regulatory circumstances. The essential model remains the same. The principal has not changed. The courses may have increased, but the disciplines are broadly similar. The trading name, reputation and good will are all the same, and in each case, have been built on the hard work of all three co-founders.
>
> 65. I agree with these submissions. The conduct of Aziz in the Employment tribunal, together with the fact that he was aware of the claim in relation to the share both before and after those proceedings, are highly relevant factors. This is not a case where it can be said that Habib stood back to see 'which way the wind blew'.

D3 Laches: grounds of appeal & grant of permission

103. Aziz's initial grounds of appeal were filed on 3 August 2017. Laches were dealt with in paragraphs 2 to 5 of the initial grounds of appeal. Those paragraphs were unaffected by changes in the amended grounds of appeal. In summary:

(1) paragraphs 2 and 3 of the grounds of appeal asserted that the judge ignored legal principles relied on in Aziz's February 2017 skeleton;

(2) in particular, the judge had ignored case law where it had been held to be inequitable that a claimant should stand by, thereby avoiding exposure to risk, while the defendant has undertaken the work and risk involved in running a business;

(3) paragraphs 2 and 3 added that the judge had erred in law when applying relevant principles to Habib's pleaded case;

(4) paragraph 4 asserted that "the trading business changed fundamentally as a result of the change in student immigration rules", and identified five features of that change, which for ease of reference I set out below as (a) to (e):

(a) this was an existential threat to Icon College;

(b) it caused devastation in the sector;

(c) the market for immigrant students collapsed;

(d) it was impossible to run the college business in the same way;

(e) there had to be a switch from foreign students to home students, and a switch to funding via the UK Student Loan Company.

(5) paragraph 4 added:

> In those circumstances, if C had been pursuing a one third shareholding, it would have been logical for D1 and Dr Nabi to start the new business via a new company.

(6) paragraph 5 made two further complaints about the March 2017 judgment. For ease of reference I set them out below as grounds of appeal 5(a) and 5(b):

5(a) The learned judge wrongly stated that the reputation and goodwill of D2 after its survival of the existential threat from the loss of all overseas students remained the same. They did not. D2 had an entirely new customer base, based in the UK rather than the sub-continent, and funded in an entirely different way (via Student Loans). A business's relationship with its customers is central to its goodwill; D2's goodwill could not have been the same after re-starting with an entirely new customer base.

5(b) The learned judge also wrongly or irrelevantly claimed that the business was built on the hard work of the three co-founders: what C had done for the original business was irrelevant to the point, and C had nothing to do with the rebuilding of the business.

104. As noted in section A5 above, on 7 December 2017 Spencer J gave a reserved judgment on permission to appeal. When granting permission to appeal in respect of laches, the judgment said at paragraph 93:

> 93. The legal argument in relation to limitation is closely entwined with the legal issues raised in the grounds of appeal in respect of the judge's conclusion that the claim for equitable relief was not barred by laches. In my judgment the issues are so closely entwined that I should grant permission on the laches ground as well. Had it stood alone the position might have been different. If, however, the court were to conclude at the full appeal that there is merit in the limitation argument barring the common law claim for contractual damages for failing to allot shares to Habib, that might also have an important bearing on whether the judge's conclusion in relation to laches could properly stand.

105. No complaint was made in the grounds of appeal as regards the following passages in paragraph 65 of the March 2017 judgment:

(1) the second sentence, identifying Aziz's conduct in the Employment Tribunal as a "highly relevant" factor, and (in the first sentence) agreeing with Habib's submission that Aziz had not come to the court "with clean hands", and that the Employment Tribunal found that Icon College Ltd had put forward fabricated allegations;

(2) the second sentence, identifying as a "highly relevant" factor, the fact that Aziz was aware of the claim in relation to Habib's share both before and after the Employment Tribunal proceedings, and (in the first sentence) agreeing with Habib's submission that before and during the Employment Tribunal proceedings Habib had made it clear that he intended to pursue his claim in relation to the shareholding issue;

(3) the third sentence, concluding that this was not a case where it could be said that Habib stood back to see "which way the wind blew";

(4) the first sentence, agreeing with other submissions made by Habib and recorded in paragraph 63 of the March 2017 judgment;

(a) that Habib had not left Icon College Ltd of his volition;

(b) that the litigation in the employment tribunal took some three and a half years; and

(c) that attempts had been made since the Employment Tribunal proceedings to resolve the shareholding issue.

D4 Laches: proposed reamendment to the grounds of appeal

106. On 27 April 2018 Aziz applied for permission to reamend his grounds of appeal. The reamendment would have added a new paragraph 3A:

> 3A. In the circumstances of this claim, equity under its doctrine of laches requires at least as much promptitude in the pursuit of the claim insofar as it may not be governed by s.5 Limitation Act 1980 as s.5 would have required had it been applicable.

107. I refuse permission to reamend in this regard. My reason is that in the light of my conclusion in section C above, the proposed reamendment cannot assist Aziz. The position is that in the circumstances of the present case Habib has brought his claim for specific performance with such promptitude as s.5 would have required had it been applicable.

108. Habib advanced numerous other grounds for objecting to the proposed reamendment. It is unnecessary to examine those other grounds, and I consider it undesirable to do so.

D5 Laches: examination of Aziz's complaints

109. Aziz criticised the judge's citation from *Frawley v Neil* in paragraph 61 of the March 2017 judgment. The passage cited by the judge, submitted Aziz, was no more than a general summary of the underlying principle, which was not intended to render superfluous reference to guidance given in earlier cases about specific factors that the court should take into account in its application of the defence of laches. Aziz went so far as to say that the judge's approach was tantamount to a reversion to equity depending on the length of the judge's foot. In support of this submission, Aziz referred to the sentence in Aldous LJ's judgment which followed the passage cited by the judge:

> No doubt the circumstances which gave rise to a particular result in decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its own facts applying the broad approach.

110. I reject this criticism. The judge was right to conclude in paragraph 61 of the March 2017 judgment that the investigation "is necessarily fact specific". She was also right to say in paragraph 62 of the March 2017 judgment that the citation of cases to her, bearing in mind the passage she had cited from *Frawley v Neil*, did no more than illustrate the principle that each case turns on its own facts. Of course if a party contends that a particular decision sets out not just an observation on the facts of a particular case but a specific principle which falls to be applied, then it is open to that party to cite the case for that purpose. But in the context of laches, it is highly unlikely that any such principle will on its own mandate the answer in other cases.

111. The evaluation required by the broad principles of laches does not depend upon the length of the judge's foot, for it is open to review if the judge has taken into account an irrelevant factor or has left a relevant factor out of account.

112. It was then said by Aziz that the courts had invariably required the prompt pursuit of claims to trading businesses, where it has been held to be inequitable that a claimant should standby, therefore avoiding exposure to risk, while the defendant has undertaken the work and risk involved in running the business. This submission is in my view misconceived. Both below and on appeal Aziz sought to analyse a series of cases with a view to demonstrating that they mandate a particular outcome where certain criteria were met. This is exactly the kind of over-specific approach which is inimical to the broad judgment required in the context of laches. Moreover, the judge expressly considered whether Habib had "stood by": see the points that she made in paragraph 65 of the March 2017 judgment. What happened was that Habib was dismissed by Aziz. As noted by the judge earlier in the March 2017 judgment, Aziz in the Employment Tribunal proceedings misstated the position by asserting that there was no question of share distribution to discuss. Moreover, while the Employment Tribunal initially accepted Icon College Ltd's claim that Habib misappropriated student fees, after a review hearing the tribunal in November 2013 found that Icon College Ltd had adduced evidence from a witness who later resiled from that evidence, "which had been written under pressure". At the same time as coping with

all these difficulties, Habib was stoutly maintaining his entitlement to a one third shareholding.

113. It is convenient to deal here with a further point asserted by Aziz, that mere assertion of a claim unaccompanied by any act to give effect to it cannot avail to keep alive a right which would otherwise be precluded. In the context of laches the right to specific performance may be precluded, but only if there has been unreasonable delay in the commencement or prosecution of proceedings for specific performance. Aziz asserted that Habib could not prioritise his pursuit of the Employment Tribunal proceedings and leave over his claim for specific performance of Aziz's obligation to allocate his shares. To my mind, that must depend on what was reasonable in all the circumstances. Habib had been dismissed by the actions of Aziz. When Habib complained about this in the Employment Tribunal he had to cope with machinations that relied upon misstatements and fabricated evidence. In these circumstances the course taken by Habib of concentrating on the Employment Tribunal proceedings, while explicitly maintaining his claim to his shareholding, might well be thought to be not only reasonable but also entirely understandable.

114. I add that it is not necessary for me to decide whether the principle of "clean hands" applies to those who seek to rely on laches. In the present case Aziz's machinations were a major factor in the delay, and thus went directly to the question of unreasonableness on the part of Habib in relation to that delay.

115. In oral submissions at the hearing before me, there was then an attempt by Aziz to rely upon a claim that prejudice arose to Aziz because of an imbalance in financial contributions. If this were to be said it should have been pleaded. However, it does not arise in circumstances where, as is my conclusion in the present case, the judge was fully entitled to find that the particular circumstances of the present case did not involve unreasonable delay on the part of Habib.

116. The same is true in relation to the pleaded claim of prejudice in the grounds of appeal asserting that the trading business had changed fundamentally. It is accordingly unnecessary to examine the criticisms by Aziz of what the judge said in that regard.

117. I turn to the last of the contentions made by Aziz on the question of laches. This was that, even if other criticisms of the March 2017 judgment failed, the overall conclusion of the judge on laches was perverse. When considering what weight to give to relevant factors, however, this contention fails to take account of the judge's criticisms of Aziz's conduct. In particular the judge relied on the conduct of Aziz in the course of the Employment Tribunal proceedings. That conduct in my view amply warranted the judge's evaluation.

118. For the reasons given above, I take the view that Aziz's appeal on the question of laches is without foundation.

E. Conclusion

119. For the reasons given above I dismiss this appeal. I mention, for the sake of completeness, that there were two alternative submissions advanced by Habib to cater for the possibility that my conclusions might have been different.

120. In a respondent's notice dated 2 March 2018 Habib sought to appeal from the judge's order on a contingent basis. The contingency would arise if I were to determine on Aziz's appeal:

> (i) that the judge was wrong in her decision on limitation and (ii) that by reason of the effect of s.5 of Limitation Act 1980, laches is a bar to an award of damages in lieu of specific performance and in consequence (iii) it is determined on the appellant's appeal to set aside the existing award of damages or part of it….

121. Habib's respondent's notice envisaged an argument that, if that contingency had arisen, then the judge's decision to refuse specific performance would have been wrong. In the event, however, none of the elements in this suggested contingency has arisen. Accordingly I say no more about this proposed contingent ground of appeal.

122. Habib's respondent's notice also sought to uphold the judge's order at paragraph 5.2 on the basis that, if it was not the reason adopted by the judge, Habib was nonetheless entitled to damages in respect of "dividends and disguised distributions" on the grounds that by directing those payments Aziz was wilfully damaging the subject matter of a specifically enforceable contract. Here, too, as I have concluded that the limitation ground of appeal fails, there is no need for me to deal with this proposed additional ground. It is in my view undesirable to do so, and I say no more about it.