

Neutral Citation Number:[2024] EWHC 1189 (Ch)

Case No: BL 2021-000873

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**PROPERTY TRUSTS AND PROBATE LIST (ChD)**

Rolls Buildings  
Fetter Lane  
London EC4A 1NL

17 May 2024

**BEFORE:**

**MR NICHOLAS THOMPSELL**  
sitting as a Deputy Judge of the High Court

-----  
**BETWEEN:**

**(1) SUNIL GUPTA**  
**(2) SUNIL GUPTA M.D. LLC. d/b/a Retina**  
**Speciality Institute (a Delaware Limited Liability company)**

**Claimants**

**and**

**(1) OLGUN HALIL SHAH**  
**(2) LEX FOUNDATION LIMITED (Company No. 11718673)**  
**(3) NUREL HALIL SHAH**  
**(4) KADIR HALIL SHAH**  
**(5) KEREM HALIL SHAH**  
**(6) MELTEM HALIL SHAH**

**Defendants**

-----  
**Mr Marc Glover** (instructed by **Spencer West LLP**) appeared on behalf of the Claimants.

The First to Third Defendants did not appear and were not represented.

**Mr Arnold Ayoo** appeared for the Fourth Defendant, instructed by **Croft Solicitors**.

The Fifth Defendant appeared as a litigant in person.

**Mr Reza Choudhury** appeared for the Sixth Defendant, having been instructed by direct access.

Hearing Date: 26 April 2024

-----  
**JUDGMENT**  
-----

THE DEPUTY JUDGE:

## 1. BACKGROUND

1. The hearing today forms part of proceedings relating to claims made by the Claimants relating to money sent by them for receipt by the Second Defendant (which I will also refer to as "**Lex**") and controlled by the First Defendant (whom I shall also sometimes refer to as "**Mr Shah**"). The Claimants have also made claims against the Third Defendant (whom I shall sometimes refer to as "**Mrs Shah**"), who is Mr Shah's wife, and against the Fourth to Sixth Defendants, who are the adult children of Mr and Mrs Shah. For convenience, and meaning no disrespect, I will also refer sometimes refer to the Fourth to Sixth Defendants, by their first names, Kadir, Karem and Meltem.
2. Summary judgment was given against Mr Shah and Lex by Sir Anthony Mann in *Gupta & another v Shah & others* [2023] EWHC 540 (Ch) (which I will refer to as the "**Principal Mann Judgment**"). Proprietary claims were also upheld against Mrs Shah and against Kadir, Karem and Meltem. However, the summary judgment did not dispose entirely of the claims against those parties and various further claims remain outstanding, defined in the Principal Mann Judgment and in this judgment as the "**Continuing Claims**".
3. The Claimants have sought an order debarring the Defendants from defending the Continuing Claims and for judgment to be entered against all the Defendants. This application was made by means of an application notice dated 21 February 2024. I will call this the "**Debarring Application**". It has been made on the grounds of various alleged failures by the Defendants to comply with court orders.
4. Directions were given for the hearing of the Debarring Application by Sir Anthony Mann on 23 February 2024. The directions provided for the Claimants to particularise their allegations within 3 days; allowed the Defendants 14 days to serve any evidence in response and for the Claimants to have seven days to respond; and for the application to be heard as soon as practicable after 9 April 2024 and before 1 May 2024. On 5 March 2024, the Claimants obtained an order varying their time for response allowing them until 11 March 2024.
5. This application was originally listed to be heard on the date of the hearing to which this judgment relates - 26 April 2024. However, on 23 April 2024, I made an order for the hearing of the Debarring Application to be adjourned (the "**Adjournment Order**").
6. The Adjournment Order was made pursuant to an application notice made by Mr Shah on 1 March 2024. Mr Shah's application (which I shall refer to as the "**Adjournment Application**") was first brought to my attention on the afternoon of Monday 22 April March 2024 following an email being sent to the court that day by Mrs Shah. This email was forwarded to me, whilst I was hearing another matter. I had had no chance to read in for this hearing at that stage.
7. The reasons why I considered it was appropriate to make the Adjournment Order were as follows. I understood Mr and Mrs Shah (and indeed all the Defendants) to be litigants in person. If Mr Shah was unable to attend the hearing, he would be entirely unrepresented. Mrs Shah had enclosed a letter from a hospital in Istanbul which

outlined the treatment that Mr Shah was having for cancer and confirmed that he was in isolation and would be prevented from attending any legal proceedings for a period of two months from the date of the letter. This seemed to me to be good grounds for him not being able to attend the hearing. I was also informed, from an attached email from Mr Shah that the Claimants had recently also filed an application for an extension of time. In these circumstances, without any wider knowledge of the case, and seeing that the hearing was of some importance since it would debar the Defendants from advancing their defence, I considered that it was appropriate to grant the extension of time for filing evidence in reply and adjournment, requested.

8. I further considered that I should proceed with making the order forthwith, without asking the Claimants for any comments. This decision was made in view of the short time before the hearing was due to take place and having regard to the facts as I understood them. These included that Mr Shah (and I surmised possibly also Mrs Shah) would need to know whether to make travel or other arrangements for the hearing; that the Claimants were also asking for some extension of time; and assuming that the Claimants had been aware of Mr Shah's 1 March application and had not to date filed any objection to it.
9. The Claimants by an application dated 24 April 2024 have applied to set aside my order. I will refer to this as the "**Adjournment Set-Aside Application**".
10. The other matter that was listed to be dealt with at this hearing was an application by the Fourth and Sixth Defendants (Kadir and Meltem) dated 30 December 2021 for the Claimants' claims against them to be struck out and for summary judgment to be given in their favour. I will refer to this as the "**Reverse Summary Judgment Application**". Despite the application having been made more than two years earlier, this application was listed to be considered only very shortly before the date of the hearing.
11. In summary then, the matters potentially to be dealt with at the hearing were:
  - i) the Claimants' Adjournment Set-Aside Application;
  - ii) if that was granted, to hear substantively Mr Shah's Adjournment Application;
  - iii) if that was not granted to hear the Debarring Application; and
  - iv) the Reverse Summary Judgment Application.

## 2. THE CIRCUMSTANCES OF THE HEARING

12. At this hearing:
  - i) the Claimants were represented by Mr Marc Glover;
  - ii) the First to Third Defendants were not present or represented;
  - iii) the Fourth Defendant (Kadir) was represented by Mr Arnold Ayoo;
  - iv) the Fifth Defendant (Kerem) was not represented and appeared as a litigant in person; and

- v) the Sixth Defendant (Meltem) was represented by Mr Reza Choudhury, although Mr Choudhury had been instructed only to deal with the issues concerning the Reverse Summary Judgment Application.
13. Both Mr Ayoo and Mr Choudhury had been appointed only earlier in the week, and I must commend them for their ability to get up to speed with proceedings so as to be able to provide the court with valuable assistance.
14. The first point that I needed to consider was whether the hearing should proceed at all in the absence of the First to Third Defendants. This was a matter within the court's discretion under its general powers of management in CPR rule 3.1, and specifically under CPR rule 23.11. In the current case, for the same reasons that I have accepted that I should grant the Adjournment Set-Aside Application as I set out below, I considered that I should proceed to consider the various applications.
15. However, I considered that I should act as if CPR rule 39.3 applies – that is I would proceed with the hearing in the absence of the party but if I find against any parties who are not represented and not present, I will make provision for those parties to be able to apply to set aside any order I make against them, but on the basis that the court may grant the application only if it considers that that party:
- i) has acted promptly when he found out that the court had made an order against him;
  - ii) had a good reason for not attending the hearing; and
  - iii) had a reasonable prospect of success at the hearing.

This will be in addition to any ability of the party to ask for permission to appeal.

16. It is doubtful whether CPR rule 39.3 strictly applies in this case. CPR rule 39.3, makes special provision for the court to proceed with the trial in the absence of a party. The word "trial" is not defined in this rule. As is noted in the commentary to the White Book, there is some doubt what is meant by "trial" in this context. In *Howard v Stanton* [2011] EWCA Civ 1481, the term was held not to apply to a hearing relating to permission to appeal and the appeal. However, it was considered that the court's general case management powers anyway cover the point.
17. In view of the decision in *Howard v Stanton*, it seems to me that CPR rule 39.3 probably does not strictly apply to the matters to be considered at the hearing. Nevertheless, it seems to me that I should apply the principle embodied in CPR rule 39.3 in this case and I will order accordingly.
18. The principle in rule CPR 39.3 is that where there is a trial where a person is not present or represented, that person should have a special ability to challenge a judgment made against that person. In my view this principle is one for the court to consider also when it is exercising its discretion in other circumstances where the court is making a judgment that might have a very substantial effect in bringing an action to a conclusion against an absent party, such as a hearing where it is proposed that summary judgment is given or in proceedings to debar that person from continuing with its defence or claim. It may be noted that a similar principle applies under a CPR rule 3.3(5) where a

court makes an order of its own initiative without hearing the parties or giving them an opportunity to make representations. Under Practice Direction 20 3A, paragraph 11.2, where a court deals with an application without a hearing (in accordance with CPR rule 23.8) the rule in CPR rule 3.3(5) is to be applied there also.

19. In *Levy v Ellis-Carr and others* [2012] EWHC 63 (Ch) ("*Levy*") it was noted that the availability of a remedy under CPR rule 39.3 provides an answer to any objection against proceeding in the absence of a defendant based on Article 6 of the European Convention on Human Rights. This appears to me to provide another good reason for making similar provision in this case.

### 3. THE ADJOURNMENT AND THE ADJOURNMENT SET ASIDE APPLICATIONS

20. As they were inextricably linked, I considered the Adjournment and the Adjournment Set Aside Applications together.

#### *The Adjournment Set-Aside Application*

21. By their Adjournment Set-Aside Application dated 24 April 2024, the Claimants have applied to set aside the Adjournment Order. As I have already mentioned, under CPR rule 3.3(5) where the court has made an order without hearing the other side a party affected by the order may apply to have it set aside.
22. Whilst under CPR rule 23.7, an application should normally be served on the other parties at least three days before the court is to hear the application, a failure to do so does not prevent the court from hearing the application (see the commentary in relation to that rule in the White Book), and in all the circumstances I considered that I should proceed to hear the Adjournment Set-Aside Application despite this rule not being complied with. The relevant circumstances included that the Claimants served their notice at the very first opportunity available to them; that the central question - whether a hearing should be held on the Debarment Application - had been a live matter since 1 March 2024, and that a failure to hear the Adjournment Set-Aside Application would be tantamount to refusing the application, since it would no longer be possible to hear the Debarring Application on the date set for it.
23. Since making the Adjournment Order I have now become aware of various matters I was not aware of when the order was made. These include the following matters.
24. First, I was not aware that the Claimants had already on 15 March 2024 made representations for this to be dismissed. It appears that Mr and Mrs Shah were aware of this, but Mrs Shah in her email to the court made no mention of it and I had been left with the impression from her email that the Adjournment Application had not been dealt with by the court or the Claimants, so that I should progress this as soon as possible.
25. Secondly, I was not aware that there was a history of prevarication on the part of the Defendants, who had on various occasions sought adjournments, often at a late stage. This is evident from paragraphs 4 and 99 of the Mann Principal Judgment and paragraph 4 of the judgment of Sir Anthony Mann (determined on paper) dated 13 November 2023.

26. Finally, and importantly, I was not aware that the case against Mr Shah and Lex has, effectively already been concluded. They have already been found liable in respect of the entirety of the Claimant's claim. They were not required (in contrast to the Third to Sixth Defendants) to file and serve evidence in response to the Debarring Application, and this is because, whilst they are technically named as parties, the Application is not aimed at them since they are not the subjects of the Continuing Claims. The requirement for them to be present during the hearing of the Debarring Application is therefore questionable.
27. Had I been aware of the full circumstances of the case at the time Mr Shah's application was put to me, I would not have made the Adjournment Order.
28. I have considered whether, having regard to the fact that I did make the order, it would now be unjust for me to reverse the order at the hearing and to hear the Debarring Application. I have received representations from Mr and Mrs Shah as set out above, and I have heard from the parties who were present or represented at the hearing, on this point.
29. I think it is important to note that the Defendant parties would have been aware of my Adjournment Order at the earliest on Tuesday 23 April 2024, and by 24 April it was clear that the Claimants were seeking to set aside my order. I had on 24<sup>th</sup> April asked the court to email the Defendants to make it clear that I would hear that application on 26<sup>th</sup> April, and that they should be prepared that that application might be granted and that I might then proceed to hear the Debarring Application. At most, therefore, the Defendants would have lost one or a little over one day from their preparations as a result of the Adjournment Order being made. The email from the court to the Defendants had warned the Defendants that they should make arrangements to be represented at the hearing, which might include appointing counsel or requesting remote attendance.
30. As regards the Fourth to Sixth Defendants, they have been able to be present or represented at the hearing and they pronounced themselves to be neutral on the question whether I should grant the Adjournment Set-Aside Application.
31. Mr and Mrs Shah, however, wrote citing various reasons why I should not grant the Adjournment Set-Aside Application. In a document entitled "Note to Judge" Mrs Shah explained that she was a litigant in person and unable to engage a legal representative. She was residing in the cancer ward in Istanbul where her husband was being treated. Both of them were being isolated due to Mr Shah's compromised immune system. She made complaints of the way that the Claimants had been conducting the litigation and alleged that the Claimants had made falsehoods when supporting the Adjournment Set-Aside Application. Having considered the alleged falsehoods mentioned, to the extent that there is any element of misdescription at all in the statements complained of, I do not consider that any incorrect statement is substantiated as being a deliberate falsehood or is of any great relevance to the question whether I should proceed. I consider that the case law that Mrs Shah quoted in support of her argument was not relevant.
32. Mr and Mrs Shah also sent a letter dated 25<sup>th</sup> April, but this added little to these points.

33. Having considered these arguments, I considered that I should set aside the Adjournment Order and should consider the question of adjournment as put forward in the Adjournment Application on its own merits.
34. On the Monday following the hearing Mr Shah also produced a 27-page Witness Statement. For the most part the content of this was irrelevant. Much of it seemed to be seeking to reargue the case against Mr Shah that had already been determined by the Principal Mann Judgment. As this was provided after the hearing, and the Claimants have had no chance to respond to it, I am going to ignore it except to mention two points.
35. The first is that I think it may be helpful for me to explain that the principal potentially relevant point made in that Witness Statement does not affect my decision. This was Mr Shah's argument that where there are multiple defendants and an application is made against one defendant the other defendants have been allowed by the courts to submit evidence or to make applications. Just because the courts may routinely permit such a defendant to participate in a hearing does not mean that the court has to adjourn a hearing if that defendant is not able to attend, even if the court is persuaded that that defendant was unable to take part for a good reason.
36. The second is to note that the fact that Mr Shah was able to produce this detailed statement may be considered some vindication of the finding that I made during the hearing that there was no reason to believe that Mr Shah was in fact incapable of participating in the hearing.

#### *The Adjournment Application*

37. Having set aside the Adjournment Order, it was necessary to consider the Adjournment Application itself. The original reason given for the Adjournment Application was that Mr Shah was unable to attend because he was receiving treatment for cancer.
38. It is clear from the case law that a litigant who seeks an adjournment on the basis that they are unable to attend must demonstrate this to the court – see for example the dicta of Gibson LJ noted in *Teinaz v London Borough of Wandsworth* [2002] EWCA Civ 1040:

"the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment."
39. The point has been amplified in many cases including by Mr Justice Norris in *Levy*, in my own decision in *Van Zuylen v Whiston-Dew & Anor* [2021] EWHC 2219 (Ch); and in *FCA v Avacade* [2020] EWHC 26. This last case also drew attention to the court's need to consider the application in context, including having regard to whether adjournment might threaten an established trial date.
40. The proposition that Mr Shah was unable to participate in the hearing was supported by medical evidence. This evidence was in my view sufficient to demonstrate that he could not physically attend a hearing in the United Kingdom. However, as I found during the hearing, the medical evidence did not substantiate that he is unable to deal with matters

in this litigation. In fact, during his treatment for cancer, Mr Shah has shown himself able to act in relation to the litigation by filing various applications and submissions.

41. Neither does the medical evidence substantiate that he would not have been able to have attended the hearing remotely. I understand that at least one defendant appeared remotely at an earlier hearing, and he should have been aware of that option. On a later perusal of the bundles prepared for trial I see that Mr Shah, in an application filed on 4 January 2024 seeking permission to appeal the Principal Mann Judgment and Sir Antony Mann's order of 31 March 2023, asked the court for leave to attend future hearings via video link. It was open to Mr and Mrs Shah to make such an application in the current case.
42. Just as importantly, I do not consider that the attendance of Mr Shah was important in relation to the matters to be heard. In particular, the court had already found against Mr Shah, and against Lex in respect of the full amount claimed against them and they were not the subject of the Continuing Claims. Therefore, they could have little personal interest in the Debarring Application. Given that Mr Shah would not be affected in any material way by the Debarring Application, there was no reason to adjourn the hearing of that application because of any inability on his part to attend.
43. In summary on this point, the original reason put forward in support of the Adjournment Application was Mr Shah's inability to attend a hearing of the Debarring Application. Since there is no evidence that he could not have appeared remotely, and, as a person against which there were no Continuing Claims against which he had any defence that could be debarred, he would not be affected by the matter, it seemed to me that the original reasons supporting the Adjournment Application were not substantiated.
44. At a very late stage, a further reason for an adjournment was put forward relating to the alleged inability of Mrs Shah to be able to attend as she had to remain in hospital to look after Mr Shah, and while she was doing so, she had to remain in isolation. This point was received by the court only on the morning of the hearing and no evidence has been put forward to support it.
45. Furthermore, even if this had all been substantiated, there was no suggestion that Mrs Shah would have been unable to attend the hearing remotely. There was no suggestion that she was unwell and unable to deal with a hearing. She too would have been aware of the possibility of participating in a hearing via a video link, and an email from the court had more recently pointed out this possibility.
46. Having regard to all of these points, and the case law referred to above regarding the absence of a party at a hearing, I determined that I should not grant the Adjournment Application and should proceed to hear the Debarring Application.
47. I did so having regard to the overriding objective set out in CPR rule 1.1 requiring the courts to deal with cases justly and at proportionate cost, which I considered pointed against a further adjournment which would inevitably give rise to further costs.
48. This decision was made against the background of these proceedings, which has included various points where Mr and Mrs Shah have sought to delay proceedings. I also took into account the court's previous findings of dishonesty on the part of Mr

Shah and evidence that Mr Shah had threatened to use "arduous legal manoeuvrings" to impede the Claimants' ability to prosecute their case. It was also relevant that there was a real risk that adjourning the issues raised by the Debarring Application to the trial date would threaten the ability for the trial to proceed on that date. Finally, it was relevant that three of the four Defendants that might be affected by a debarring order were present and/or represented in court and were not objecting to the hearing proceeding.

#### **4. THE REVERSE SUMMARY JUDGMENT APPLICATION**

49. Before considering the Debarring Application, I considered whether I should first hear the Reverse Summary Judgment Application. It seemed to me that there was good argument for this in that this application might be found to have merit, but might never be heard, or might only be heard under difficulties, if the Debarring Application was heard and a debarring order was made.
50. However, having heard from the parties, I decided that the court and the parties were not in a position to hear that application today. I have already mentioned that it was listed for consideration at this hearing at a very late date. Neither the Claimants nor the court (which saw the Sixth Defendant's skeleton argument only on the date of the hearing) had had any proper opportunity to prepare for it.
51. Furthermore, the Claimants put forward an informal application that the Reverse Summary Judgment Application should be struck out as an abuse of the court's processes on the basis that it had not been pursued in any way in a period of well over two years and the Claimants had assumed that it was not being pursued.
52. I agreed that it would not be possible to have a fair hearing of the Summary Judgment Application on this occasion and accordingly I will order that this application, and the Claimants' application that it should be struck out as an abuse of process should be heard at a later date.
53. However, to deal with the points made at [50.] above, I said that if I were to find against any of the Defendants in relation to the Debarring Application, any order made in respect of this should operate so as not to prejudice the hearing of the Reverse Summary Judgment Application, if such were to progress notwithstanding the Claimants' application for this to be struck out as an abuse of process. I will order accordingly.

#### **5. THE DEBARRING APPLICATION**

54. The Debarring Application has been made on the grounds that the Defendants have failed to comply with orders that were made against them. The Claimants characterise these failures as failures in relation to fundamental trial directions.
55. Overall, the complaint is that the Defendants have failed to provide disclosure and/or explained their defence by way of witness statements and as such caused prejudice to the Claimants, preventing a fair trial and justice being done. The Claimants have also alleged failures to make payments ordered by the court.

56. I do not think, however, in considering the Debarring Application one can look at the Defendants as if they were a single person so that the failures of any one of them will affect all of them. Also, in judging the effect of any failure we need to consider what remaining case there is that would be debarred by the Claimants' proposed order. It is convenient, therefore, first to consider what are the Continuing Claims.

## 6. THE CONTINUING CLAIMS

### *Continuing Claims against Mr Shah and Lex*

57. As I have already mentioned, the Claimants have already succeeded in full in their claim against the First and Second Defendants. That being the case, there are no further defences to debar against these Defendants.

### *The Continuing Claims against Mrs Shah*

58. As regard the Third Defendant, Mrs Shah, the Claimants have already succeeded in a proprietary claim against her and the court has found that she had received around \$9.9 million in round terms into her account at Lloyds Bank and a further sum of £250,000. The claims continuing against her relate to a possible further proprietary claim to the extent that she is found to be holding any further monies that derive from monies advanced by the Claimants, as well as a case for knowing receipt and dishonest assistance to Mr Shah in relation to the breaches of trust and appropriation of the Claimants' funds that the court has found against him. The Claimants also plead that pre-remittance representations (alleged to be misrepresentations) made by Mr Shah and/or Lex can be attributed to Mrs Shah.
59. Mrs Shah's defence originally had three principal limbs. The first was that Dr Gupta's money had had unlawful origins and that that was a bar to it being returned. This defence was struck out by Sir Anthony Mann. The second was that when she received and dealt with the money, she did so honestly believing that it was her husband's own money to deal with when it was paid. The third, associated with the second, was that she had understood "at all material times" that Dr Gupta had exchanged his interest in his invested monies for an interest in a large sum held in a Citibank "Treasury Account", leaving Mr Shah to deal with the monies that he was holding in his account in Barclays as he saw fit.
60. In the Principal Judgment, Sir Anthony Mann considered that the Claimants had not yet done enough to convince the court that Mrs Shah was a conspirator at the outset and therefore the case against her should go to trial, however it was clear he had doubts about her defence. He said:

"It is plain that at a trial Mrs Shah will have much to deal with."

### *The Continuing Claims against the Fourth to Sixth Defendants*

61. As regards Fourth to Sixth Defendants, the Claimants have already succeeded in demonstrating that amounts received by each of them of £100,000 derived from the Claimants' funds and the Claimants have received those funds back. Sir Anthony Mann did not consider that the case had yet been made out that a further £10,000 given to each of them also derived from the Claimants' funds. These monies have been paid into

court pending that point being resolved. Each of these Defendants have, pleaded that they are ready and willing to relinquish these amounts without any admission of liability, but only if the remainder of the claims being made against them are withdrawn.

62. The outstanding claims made against these Defendants, however, are not limited to this £10,000. The Claimants plead that pre-remittance representations made by Mr Shah and/or Lex can be attributed to these Defendants (as well as to Mr and Mrs Shah and Lex) or in the alternative that they are vicariously liable for them. They claim also that these Defendants were co-conspirators of the First Defendant. It is also alleged against them that they are involved in an unlawful means conspiracy and a conspiracy to injure. These claims are denied.
63. These Defendants also have sought by way of defence to plead that the Claimants' money had an unlawful origin and that this was a bar to its being returned. Again, this defence was struck out by Sir Anthony Mann. Otherwise, their defence in each case is essentially that they honestly believed that the monies that they received were generous gifts from their parents derived from the legitimate business of their father and that they have had no participation in any breach of trust or fraud against the Claimants or representations made to them.
64. As regards these Defendants there is no evidence, as yet, that any of them received any monies that might be derived from the Claimants in excess of the £110,000 each that they acknowledge receiving.
65. As regards participation in any fraud it may be relevant that only one of them (Kerem) was a *de jure* director of Lex, and then (according to the Companies House Records) only in a period starting on 23 April 2021, two days after Mr Shah had transferred to his own account with Barclays the last of the balance of the monies derived from the Claimants that he was purportedly holding on behalf of Lex. Notice was originally given to Companies House of the termination of Kerem's directorship on 17 June 2022, stating that the directorship had terminated on 10 January 2022, but this was later corrected (or purportedly corrected) by a filing on 6 July 2023, apparently signed by Mrs Shah, which purported to correct the date of the termination of his directorship to 21 July 2021.
66. The Claimants rely on them all being involved in the Lex business, although when I pressed Mr Glover on this point it appears that he based this on a statement in the so-called "teaser" document that Lex was a family business. I find it difficult to see how this follows from that statement. A business can be a family business without all members of the family being part of it. A further reason given was that they were all residing in the same small flat, although this might also be a matter for evidence. Mr Shah has made statements that Meltem has been living in New Zealand for some 10 years.
67. I make the above comments not because I am seeking to prejudge the trial or the hearing of the Reverse Summary Judgment Application. That application will need to be judged on its merits and should not be affected by anything I say in this judgment. Rather, I make these comments because I consider that the nature and strength of the case against each of the Defendants is important to the background of the

reasonableness of their explanations as to their actions in response to the orders made against them.

## **7. THE BREACHES RELIED ON BY THE CLAIMANT**

68. In deciding whether to debar any of the individual Defendants from pursuing his or her defence one should look at the alleged defaults of that particular Defendant.
69. By an order of Sir Anthony Mann dated 23 February 2023, the Claimants were ordered to serve on the Defendants (except for the First and Second Defendants) a schedule particularising the defaults of those Defendants upon which the Debarring Application is based.
70. I summarise below the defaults alleged against each Defendant; the comments made by each relevant Defendant in his or her respective witness statement in relation to these allegations; and my view as to the extent to which the Claimants have made out their case against that Defendant.
71. I will start with the arguments made on behalf of the Fourth Defendant as it was the Fourth Defendant that had the most developed case in response to the allegations made by the Claimants, as none of the other Defendants were represented by counsel in respect of these allegations.

### ***The allegations against the Fourth Defendant (Kadir)***

72. In his Third Witness Statement, Kadir responded to the allegations made against him of non-compliance with court orders (in summary) as follows:

#### *Alleged breaches of Sir Anthony Mann's order of 31 March 2023*

73. As against the allegation that he had not made disclosure in accordance with this order (that is to say disclosure of all documents which it is reasonable to suppose may contain information which enables a party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences), Kadir said that he thought that he had already made disclosure under the Bacon Order (see below) and had nothing more to disclose, and also that the order was currently subject to an appeal in the Court of Appeal.
74. As against the allegation that he had not served a witness statement as required by this order, he said that he had already applied for the claim against him to be struck out, but nonetheless he had already submitted to the court witness statements on which he intended to rely in relation to any issues or facts to be decided trial.

#### *Alleged breaches of Sir Anthony Mann's order of 13 November 2023*

75. As against the accusations that he had not paid amounts on account of costs (separate amounts of £40,000 and £4000), Kadir noted that the order was under appeal and that in any case these amounts have been paid by the Fifth Defendant. He also stated that he considered that the Claimants were not entitled to seek the costs of pursuing the claim as he had offered settlement at the beginning of his involvement.

*Alleged breaches of the order of Bacon J of 8 September 2021 (the "Bacon Order")*

76. As against the accusations that his compliance with the limited disclosure obligations under this order amounted to only "purported compliance", he said that disclosure was made within the time allowed by the court. I think it is accepted by the Claimants that there was compliance in substance, although the Claimants had, through correspondence, alleged non-compliance in relation to some points of detail, such as in relation to emails and text messages not being provided in their native format.

*Discussion of the alleged breaches*

77. Mr Ayoo has outlined Kadir's case now that Kadir had received legal advice. Mr Ayoo submits that there was no real failure particularised or proven in relation to the Bacon Order and the costs orders have been satisfied (albeit out of time). However, failures are admitted in relation to the failure to produce disclosure and witness statements in accordance with Sir Anthony Mann's order of 13 November 2023. These, he argues, were honest mistakes by a litigant in person, suddenly left without the benefit of representation (which previously had been on a joint basis with the rest of his family) whilst suffering from mental health difficulties and that these failures, however, need to be considered in their context.
78. In relation to the failure to provide disclosure in accordance with the 13 November 2023 order, it is noteworthy that there had already been (in Mr Ayoo's words) "*extensive, wide-ranging disclosure orders made*". These included Kadir's compliance with the Bacon Order, and his providing a witness statement in compliance with an order of 20 August 2021 by ICC Judge Jones which set out information concerning the £100,000 and £10,000 received by the children and the \$9.9 million received by Mrs Shah and the remainder of the fund, as well as requiring provision of all Kadir's assets over £5000. As a result, Kadir considered that he had already explained what he what he knew and had provided what information he had in relation to his assets. In view of this context, Mr Ayoo argues, it is easy to see how a litigant in person could think he had already disclosed everything that could be relevant to the claim. Kadir remains "fairly confident" that no other document exists which goes beyond that already disclosed.
79. Accordingly, Kadir effectively applies for relief from sanctions. Whilst he (or at least Mr Ayoo on his behalf) accepts that the breach was serious and significant there was what Mr Ayoo described as an "*honest (if not "good")*" reason for it".
80. As to the consequences of the breach, Mr Ayoo suggests that this need not hold up the scheduled date for trial as Kadir offers to make good any deficiency in what has been disclosed already within 21 days, and would even be prepared to give an undertaking not in his witness statement for trial to raise any new points. This point, however, was hotly disputed by Mr Glover on behalf of the Claimants, who considered that disclosure in particular if done properly might take 2 to 4 months, and there would need to be followed by the preparation of witness statements responding to what had come out of the disclosure.
81. In my assessment, Mr Glover was being unduly pessimistic in relation to how difficult it would be for Kadir (and indeed all of the Fourth to Sixth Defendants) to make

disclosure, at least if their stated case as to the extent of their involvement with the business of her father and of Lex, is as they say it is.

82. As regards his failure to file witness evidence, Kadir's case is that the witness statement dated 23 December 2021 that he made in pursuance of a strikeout application sets out everything that he would propose saying in a witness statement for trial. He said there that he knew nothing about the events relevant to the proceedings and had no role in the Lex Foundation – having never been a *de jure* or *de facto* or shadow director. Further, he had no knowledge of his father's business dealings and had explained his understanding of the source of the money that had been transferred to him.
83. Mr Ayoo argues that in seeking a Debarring Order, the Claimants were acting disproportionately. If the Claimants were unhappy concerning Kadir's compliance with orders, the proportionate response was to seek an unless order and to do so not long after they had discovered the alleged failure to comply with an order. In fact, they had waited years or months, collecting up their complaints before issuing the Debarring Application.
84. Mr Glover for the Claimants has explained the delay on the basis that the Claimants did not wish to incur legal fees while they were waiting for the Defendants' application for permission to appeal to be heard. In fact, they issued the Debarring Application just a day or two before it was established that permission to appeal would be denied.
85. Mr Ayoo referred me to the case of *Byers & Ors v Samba Financial Group* [2020] EWHC 853 (Ch) ("*Byers*") where Fancourt J made the following comments (at [120] and [122] to [123]):

"120. An order striking out a defence and debarring a defendant from defending (or striking out a claim) is the ultimate sanction that the court can impose for a breach of its order that does not amount to a contempt of court. It therefore must be a sanction of last resort and is likely only to be imposed for a serious and deliberate breach. The sanction must be necessary and proportionate in the circumstances. Lord Clarke said in *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 WLR 2004 at [61], giving the judgment of the Supreme Court that: "the test in every case must be what is just and proportionate", and he emphasised the draconian nature of the strike out sanction and the flexibility of remedies available to the court to fashion a proportionate remedy. Rix LJ similarly emphasised in *Aktas v Adepta* [2010] EWCA Civ 1170; [2011] QB 894 at [92] the flexible remedies that the court had at its disposal to make the sanction fit the breach. If a breach, though serious, is excusable, an order striking out a party's case and debarring it from proceeding further may well be disproportionate, at least if another sanction is sufficient to achieve the ends of justice notwithstanding the breach."

...

"122. There was an interesting argument at the Bar as to whether a full debarring order is a "normal" or "usual" response of the court to serious non-compliance with its orders. The Claimants relied on *Caven-Atack v Church of Scientology Religious Education College Inc* (unrep, 31.10.94, C.A.), cited in Matthews and Malek on Disclosure (5th ed., 2016), the dicta

of Christopher Clarke J in *JSC BTA Bank v Ablyazov (No.3)* [2010] EWHC 2219 (QB); [2011] 1 All ER (Comm) 1093 at [38] and the dicta of Soole J in *Michael v Phillips* [2017] EWHC 1084 (QB) in support of that proposition. I do not consider that those decisions establish that under the Civil Procedure Rules an order striking out the whole of a claim or defence, as the case may be, is the standard or expected order in the case of a serious breach of a court's order. In many cases of serious breach such an order may be the only effective and proportionate sanction, but – at least where the breach is not contumacious – it would be surprising if there were a standard approach under the flexible approach mandated by the Civil Procedure Rules.

123. I prefer the approach described by Lord Clarke and Rix LJ to which I have referred. The court must have regard to the circumstances of the individual case and do what is necessary and proportionate to mark the seriousness of the breach of its order in a way that is consistent with the interests of justice and the overriding objective. The seriousness of the breach, the extent if at all to which it is excusable and the consequences of the breach will be very important factors, but the overriding criterion is the requirement for the sanction to be proportionate and just."

86. Fancourt J also thought it relevant to consider the extent to which the breaches were deliberate, and whether a full debaring order (striking out the entirety of the defence) would be proportionate and just and whether the issues could fairly be tried without the defendant's disclosure.
87. Having regard to all of these matters, my view is that it would be disproportionate at this stage to make a Debaring Order against Kadir. The Claimants could have acted much earlier and have asked for an "unless" order which would have allowed Kadir to understand what complaints will be made against him and an opportunity to correct them. If this had been done in a timely manner, there would have been an opportunity for these matters to be corrected without any threat to the trial timetable. The excuse, that the Claimants were waiting for the result of the application for permission to appeal does not excuse them any more than it excuses the Defendants, some or all of whom may have considered this a reason not to progress complying with their obligations in relation to the litigation.
88. In my view the proportionate response, and the one that best accords with the overriding objective, would be not to accept the debaring order sought by the Claimants but instead to make an "unless order" against Kadir for reasons I will expand upon below.

***The allegations against the Sixth Defendant (Meltem)***

89. In her Third Witness Statement, Meltem responded to the allegations made against her of non-compliance with court orders (in summary) as follows:

*Alleged breaches of Sir Anthony Mann's order of 31 March 2023*

90. As against the allegation that she had not made disclosure in accordance with this order, she says she has nothing to disclose.

91. As against the allegation that she had not served a witness statement as required by this order, she says that she never received that order.

*Alleged breaches of Sir Anthony Mann's order of 13 November 2023*

92. As against the accusations that she had not paid amounts on account of costs (separate amounts of £40,000 and £4000), she notes that the order is under appeal but that in any case these amounts have been paid by the Fifth Defendant.

*Alleged breaches of the Bacon Order*

93. As against the accusations that her compliance with limited disclosure obligations under this order amounted to only "purported compliance", she said that disclosure was made within the time allowed by the court. I think it is accepted by the Claimants that there was compliance in substance although, as with Kadir, the Claimants had in correspondence objected to some points of detail (such as in relation to emails and text messages not being provided in their native format).

*Discussion of the alleged breaches*

94. Essentially then, the case for a Debarring Order against Meltem is very similar to that against Kadir. Beyond unparticularised alleged breaches of the Bacon Order, it rests on her alleged failure to provide disclosure and to produce witness statements, in accordance with Sir Anthony Mann's order of 31 March 2023.
95. As regards her defence against this order, Mr Choudhury, had not been instructed in relation to this matter but did feel able to confirm that what was said concerning the application against Kadir would apply to her also.
96. I agree that she has the benefit of a defence very similar to that of Kadir. There are some small differences. She does not claim the same mental health difficulties that Kadir claims. On the other hand, she claims that she did not receive all the paperwork from the courts. This does seem to be the case, although this may be partially her own fault having not provided a new address for service after the solicitors initially representing the whole family had come off the record.
97. As with Kadir, I consider that the proportionate response, and one that best accords with the overriding objective, would be not to accept the debarring order sought by the Claimants against Meltem but instead to make an "unless order" against her for reasons I will expand upon below.

***The allegations against the Fifth Defendant (Kerem)***

98. In his Witness Statement, Kerem responded to the allegations made against him of non-compliance with court orders (in summary) as follows:

*Alleged breaches of Sir Anthony Mann's order of 31 March 2023*

99. As against the allegation that Kerem had not made disclosure in accordance with Sir Anthony Mann's order of 31 March 2023, Kerem says he has nothing further to disclose beyond the information he had already provided given that, in his contention, the nature of the claim relates to actions taken over a specific time period.

100. As against the allegation that he had not served a witness statement as required by this order, he says the following. He had already submitted witness statements and understood that he did not need to provide more and may rely on these previous statements. He considered it a burden to provide any more without access to qualified legal advice. Also, at the time, he incorrectly recalled filing a second witness statement which made further submissions especially redundant. He did not see how this absence would be prejudicial to the Claimants at trial, as the Claimants will already have seen the previous witness statements, communications, and defence, addressing the Continuing Claims.

*Alleged breaches of Sir Anthony Mann's order of 13 November 2023*

101. As against the accusations that, as a director of Lex, Kerem was in default by failing to procure that Lex paid the Claimants the sum of £1,750,000 he makes the point that he was no longer a director of Lex at this point.
102. As against the accusation he had not paid amounts on account of costs (separate amounts of £40,000 and £4000), Kerem notes that these amounts have now been paid and explains the delay in paying them, which he attributes to various matters including the fact that his bank account was frozen.

*Alleged breaches of the Bacon Order*

103. As against the accusations that his compliance with limited disclosure obligations under this order amounted to only "purported compliance", Kerem says that disclosure was made within the time allowed by the court. Again, I think it is accepted by the Claimants that there was compliance in substance although the Claimants had complaints about some points of detail – which have not been particularised by the Claimants for the purposes of their application.

*Alleged breaches of the order of Snowden J of 28 May 2021 (the "Snowden Order")*

104. It is alleged that Kerem breached the above order by assisting in or permitting Mr Shah and Lex to breach the terms of the Snowden Order preventing the disposal of the Fund. Kerem's response to this was that he was unaware of the order of 28 May 2021 and did nothing to assist his father or Lex to breach the terms of the Snowden Order. This latter accusation is one of the points for the Claimants to establish at trial and it is not appropriate that I take it as fact at present.
105. It is alleged further that Kerem, as a director of Lex also failed to ensure that Lex complied with the provision of information and documents. In response to this, Kerem again avers that he was not aware of the Snowden Order or of the dispute at the time and that he had no responsibilities within Lex relating to this. Again, this seems to me to be a matter that the Claimants would need to establish at trial and it is not appropriate that I take this as fact in relation to the Debarring Application.

*Discussion of the alleged breaches*

106. Essentially then, the case for a Debarring Order against Kerem is very similar to that against Kadir and Meltem. Beyond unparticularised alleged breaches of the Bacon Order, it rests principally on the failure to provide disclosure and to produce witness

statements, in accordance with Sir Anthony Mann's order of 31 March 2023. In addition, some points are made against him in his capacity as a director of Lex for failing to see that Lex complied with orders made against it, but these points are at present unproven.

107. Kerem considered that what had been said by Mr Ayoo concerning the application against Kadir would apply to him also.
108. I agree that he has the benefit of the defence very similar to that of Kadir and Meltem, except that he does not claim the same mental health difficulties that Kadir claims and he does not have the same excuse as Meltem that he did not receive all the paperwork from the courts. A further point of difference is that as he had been a director of Lex (albeit well after the point that the Claimants' money had been unlawfully transferred away into Mr Shah's Barclays account) it is slightly more likely that he might have papers that had not yet been disclosed and that he might usefully have more things to say in a witness statement about his involvement in Lex.
109. As with Kadir and Meltem, I consider that the proportionate response, and one that best accords with the overriding objective, would be not to accept the Debarring Order sought by the Claimants against Kerem but instead to make an "unless order" against him for reasons I will expand upon below.

***The allegations against the Third Defendant (Mrs Shah)***

110. In her Fifth Witness Statement, Mrs Shah responded to the allegations made against her of non-compliance with court orders (in summary) as follows:

*Alleged breaches of Sir Anthony Mann's order of 31 March 2023*

111. As against the allegation that Mrs Shah had not made disclosure in accordance with this order, she says there is nothing to disclose. Given the nature of the Continuing Claims against her, and the defences that she has put forward I find this incredible and also that it was incredible that she could have believed this.
112. As against the allegation that she had not served a witness statement as required by this order, she says that she had filed and served her witness statements. I take this to be a reference to the witness statements previously submitted by her. Against the background that Mrs Shah, still has a great deal more to explain than may be the case in relation to the Fourth to Sixth Defendants (at least if their stated defence holds true), it seems to me highly unlikely that the previous witness statements made by her would contain her evidence-in chief at trial. Certainly, Sir Anthony Mann thought that she would have a great deal to explain.

*Alleged breaches of Sir Anthony Mann's order of 13 November 2023*

113. As against the accusations that she had not paid amounts on account of costs (in the sum of £980,000), Mrs Shah states that the order in question is currently under appeal in the Court of Appeal and that her reasons are given in her witness statement supporting that appeal.
114. The first contention, I think was not strictly correct since what was before the Court of Appeal was an application for permission to bring an appeal, rather than the appeal

itself. In any case, if Mrs Shah considered that to be a reason not to pay amounts she had been ordered to pay, her proper recourse was to make an application for a stay of that order at the appropriate time, not merely to ignore it. In any case the application for permission to appeal has been denied and since that point can no longer be cited as a continuing reason not to pay.

115. It has not been clear to me which witness statement Mrs Shah was referring to as her witness statement supporting an application for appeal. I have not been able to find this in the bundles. If she was trying to draw my attention to the merits of the appeal, that is now otiose as permission to appeal has not been granted.

*Alleged breaches of the order of the Bacon Order*

116. As against the accusations that the Defendants, including her (but excluding the Fourth to Sixth Defendants, where the Claimants acknowledged "purported compliance"), had failed to provide disclosure by 6 October 2021, Mrs Shah said that disclosure was made within the time allowed by the court and in evidence of that referred to letters written to her by her solicitors at that time (Mackrell) and their letter to solicitors Portner, who were representing the Claimants at the time.
117. Her Second Witness Statement, however, suggests something other than full compliance with the Bacon Order. In general, rather than making disclosure, she cross-refers to information the Claimants have already had from other sources. However, she does aver that the Claimants have had all relevant material except and in the very few instances where they do not, she (and Lex) have either provided the information in that witness statement or confirmed that they cannot provide it.

*Alleged breaches of the order of ICCJ Jones of 20 August 2021*

118. It is alleged that Mrs Shah has failed to provide the information ordered to be provided as regards the current location of the £2.04 million and the persons or entities to whom it was transferred and instead provided false evidence. Against this, Mrs Shah denies providing false evidence and says that the explanations in her First and Second Witness Statements dealt with this and were true.
119. This, if the matter goes to trial would be a matter for evidence, and whilst there may be inconsistencies in what Mrs Shah has said about this over the period of litigation, the court is not yet in position to judge the falsity of her evidence and I do not think I should base an order against her on this.

*Alleged breaches of the order of ICCJ Jones of 5 August 2021*

120. It is alleged that Mrs Shah has failed to provide information about what has happened to an identified sum of \$9.9 million and two payments out of it of £1,020,000 each, and instead provided false evidence. Mrs Shah claims that this information had been provided because the Claimants already had her Lloyds bank statements and she had given a full explanation in her First Witness Statement.

*Alleged breaches of the Snowden Order*

121. It is alleged that Mrs Shah breached the above order by assisting in or permitting Mr Shah and Lex to breach the terms of the Snowden Order preventing the disposal of the

Fund. Mrs Shah responds to this, citing her First Witness Statement, that she was unaware of the order of 28 May 2021 and that it was her genuine belief as a director of the Lex Foundation that her husband had exchanged the money provided by the Claimants for an interest in a large fund maintained with Citibank. Again, if the matter goes to trial would be a matter for evidence and I do not think I should base an order against her on this.

122. It is further alleged that Mrs Shah used parts of the funds transferred to her Lloyds bank account to pay Mr Shah's legal fees and that she provided false Notices to his legal representatives. Mrs Shah denies this and claims that the matter was comprehensively addressed in her First Witness Statement. Again, I see this as a matter requiring further evidence.
123. It is alleged further that Mrs Shah, as a director of Lex also failed to ensure that Lex complied with the provision of information and documents. Mrs Shah denies that there was any further information to provide beyond that which she provided in her Third Witness Statement.

*Discussion of the alleged breaches*

124. In my view, the case for a Debarring Order against Mrs Shah is much stronger than that made against her children.
125. In relation to her children, on the current state of the court's knowledge, it remains entirely possible that they did in fact know nothing of the business that was being conducted by their father and by Lex (although the reverse is also true). Kerem might, having been a director, might be expected to know more but he was not a director at the time of the principal events complained of.
126. Whilst in relation to the alleged breaches of Sir Anthony Mann's order of 31 March 2023, her case is similar to that of her children – that she has nothing more to disclose – that proposition is far less likely to be true in relation to her than in relation to her children and her failure to comply is much less understandable or excusable than that of her children.
127. Mrs Shah has already been found to have taken an active role in the movement of the monies that derive from the Claimants. She has put forward explanations to explain what she was doing with the money but has not provided the disclosure that would support this or prove the opposite. It is inconceivable that she did not have information that was relevant to those defences, for example correspondence with the lawyers to whom she sent money, and information concerning the proposed appointment of security guards. She claims to have had knowledge about the Citibank arrangements but has not produced any evidence or explanation as to the extent of this.
128. Further, she was a director of Lex throughout the period and, if Lex was involved in the various multibillion pound transactions that have been claimed by the First Defendant, it seems unlikely that she would know nothing about any of this nor have any papers relating to Lex. If she did not, a disclosure that she, having properly undertaken a disclosure exercise, had nothing to disclose would itself be significant.

129. It is also relevant that Sir Anthony Mann had found serious doubts about her honesty and that she would at trial have much to deal with. The fact that she has seen fit to fail to provide proper disclosure required by Anthony Mann's order of 31 March 2023 or to provide a witness statement, does in her case amount to a very serious failure to comply with the court's order and there is no apparent excuse for this.
130. As Mrs Shah clearly handled a substantial amount of what was the Claimants' money, it is clear that disclosure by her is particularly important to allow the Claimants and the court to build up a picture of what happened to the Claimants' money. Also because of her active involvement in handling money that is known to have derived from the Claimants, disclosure evidence from her as to where that money ended up will be important to the Claimants' ability to trace or follow that money. Further, as she was a director and one of only two members of Lex (a company limited by guarantee), and according to her own case, had knowledge of purported arrangements to exchange or transfer the Claimants' money into a Citibank Treasury account, it is understandable that the Claimants believe that she would need to make a further witness statement and would be likely to have or have access to further documents to be disclosed.
131. As regards compliance with the Bacon Order, her case again is similar to that of her children, in that she has averred that the Claimants have been provided with everything that she could have provided under the order. However, the disclosure that she did make (even if one accepts her Second and Third Witness Statements as being correct) does seem to fall short of that required by the order.
132. As to her compliance with the Snowden Order, whether the answers that she has given operate as an adequate response to the accusations made, will depend on evidence.
133. Finally, unlike her children, Mrs Shah has outstanding against her a significant order for her to make a payment on account of costs (in the sum of £980,000). The only answer given to this was that the matter was under appeal. That would not of itself justify failing to make the payment, and in any case permission for appeal has been refused since 22 February 2024.
134. For these reasons, and the further reasons I explain below, I consider that I should make a debarring order against Mrs Shah.

***The allegations against the First and Second Defendant (Mr Shah and Lex)***

135. Mr Shah and Lex have not offered any witness statement specifically in relation to the itemised allegations of non-compliance. These allegations were (in summary) as follows:

*Alleged breaches of Sir Anthony Mann's order of 31 March 2023*

136. It is alleged that they have made no disclosure by list on 30 June 2023 or thereafter.
137. It is alleged that the First Defendant failed, as required by paragraphs 40 of the order (for the purposes of the Continuing Claims) and paragraph 53 of the order (for the purposes of the inquiry that he is required to answer) to make specific disclosure provision of information in relation to trust monies by 28 April 2023 and that that failure has continued to date.

138. It is alleged that the First Defendant and Lex have failed to serve on every other party a witness statement of the oral evidence which they intend to rely in relation to any issues of fact decided trial 29 September 2023 and that this failure has continued to date.

*Alleged breaches of Sir Anthony Mann's order of 13 November 2023*

139. It is alleged that the First Defendant and Lex have failed to pay the sum of £1,750,000 on account of the costs against them in the March Order and costs of an application in the amount of £12,500.

*Alleged breaches of the Bacon Order*

140. It is alleged that the Defendants (other than the Fourth to Sixth Defendants where partial compliance is admitted), including the First Defendant and Lex have failed to provide disclosure by 6 October 2021 or thereafter.

*Alleged breaches of the order of ICCJ Jones of 20 August 2021*

141. It is alleged that the First Defendant has failed to pay into court an identified sum of £2.04 million or any part of it which remains in its possession.
142. Further, the First Defendant has failed to provide the information ordered to be provided as regards the current location of the £2.04 million and the persons or entities to whom it is transferred and instead provided false evidence.

*Alleged breaches of the order of ICCJ Jones of 5 August 2021*

143. It is alleged that the First Defendant has failed to provide information about what has happened to an identified sum of around \$9.9 million and two payments out of it of £1,020,000 each, and instead provided false evidence.

*Alleged breaches of the Snowden Order*

144. It is alleged that the First Defendant breached the above order by transferring a sum of around US\$9.9 million, and a further £250,000 in breach of the order of Snowden J.

*Discussion of the alleged breaches*

145. In my view, the case for a Debarring Order against Mr Shah and Lex, were it relevant, is even stronger than that against Mrs Shah. I should be cautious in reaching that conclusion, however, as these Defendants were not asked to provide witness statements answering these accusations.
146. However, the point in relation to these Defendants is that a Debarring Order would not be relevant against them, since the Debarring Order is directed towards the Defendants' respective defences against the Continuing Claims and there are no Continuing Claims directed at these two Defendants.
147. Mr Glover has sought to persuade me that I should in any case make a Debarring Order against these Defendants on some sort of a precautionary principle, but I do not think that this is appropriate. It would seem a nonsense for the court to debar a defence where there is no claim and no relevant defence.

148. Accordingly, I will decline the invitation to make a Debarring Order against these Defendants, not because I have reached a conclusion that the grounds for a Debarring Order are not present, but rather because there is no defence remaining to debar.

## 7. CONCLUSION

149. I have determined that it was appropriate to hear the Debarring Application notwithstanding the non-attendance of Mr and Mrs Shah.

150. As regards the Debarring Application, I have, determined that the application should fail on its merits against each of the Fourth to Sixth Defendants, and should not be made against the First or Second Defendants because it would have no meaning as against those Defendants. However, I have determined that the application should succeed as against the Third Defendant.

151. I said I would explain further my reasoning.

152. I consider I should follow the approach advocated by Fancourt J as explained at paragraph 123 of his decision in *Byers*. I should have regard to the circumstances of the individual case and do what is necessary and proportionate to mark the seriousness of the breach of its order in a way that is consistent with the interests of justice and the overriding objective. The seriousness of the breach, the extent if at all to which it is excusable and the consequences of the breach will be very important factors, but the overriding criterion is the requirement for the sanction to be proportionate and just. In addition, I will follow Fancourt J in considering the extent to which the breaches were deliberate, and whether a full debarring order (striking out the entirety of the defence) would be proportionate.

153. In the case of each of the Fourth to Sixth Defendants, whilst the breaches are admittedly serious, given the nature of the case made against each of them, I do not consider that they are at the highest level of seriousness, since I cannot assume that their stated defences will fail, and if they do not fail, it may well be the case that there is very little further to disclose or explain in a witness statement.

154. Secondly, I consider in relation to these Defendants that the breaches were to a certain extent excusable, given that I think it more likely than not that these Defendants did not at the relevant times really grasp the nature of the wider case against them, and were focused instead on explaining their receipt of the £110,000, which they considered they had already done. On a balance of probabilities, I do not think these breaches were deliberate.

155. Thirdly, I do not consider that it would be proportionate and just to strike out their defences in the circumstances. This would be so even if a strong case had been made against them in relation to the Continuing Claims, and certainly is true given the case that has been established against them so far.

156. Fourthly, I consider that a more proportionate remedy for the Claimants would be to obtain an "unless order" against these Defendants. This would strike a more proportionate remedy to ensure the Claimants' right to be able to proceed to a fair trial. I consider this could be ordered on terms that would not affect the trial timetable,

although if in the light of my judgment the parties consider that there should be some slippage in the trial timetable, I would entertain their representations.

157. In the case of the Third Defendant, in my view the position is different. In my view her breaches are at a very high level of seriousness. She has failed to meet substantial costs orders against her and has provided no cogent excuse for this failure. She has failed to make the disclosure required by Sir Anthony Mann where it is obvious that she would have matters to disclose beyond those she has already disclosed. She has a strong case to answer, having been intimately involved in the flow of funds and as a director and member of Lex throughout its life and she has failed to provide a witness statement addressing all aspects of that case.
158. Secondly, I consider in relation to the Third Defendant, there is little or no excuse for these breaches. In my view the breaches were deliberate. She knew that she has a substantial case to answer, having been told by Sir Anthony Mann that she will have "much to deal with", and yet has done almost nothing to explain her involvement beyond the explanations given prior to the Principal Mann Judgment. Whilst one must have every sympathy for the position that she is seen as a carer for her husband during what sounds to be very difficult treatment for his cancer, there is no suggestion that she has been unable to perform her duties under the orders made against her.
159. Thirdly, I consider that the disclosure that Mrs Shah would need to make is far more extensive than that that her children are likely to have to make. In her case I would expect that dealing with this disclosure, and witness statements following disclosure, would add months to the time needed before a fair trial could commence.
160. Given the obvious vital importance of receiving proper disclosure and a proper witness statement from Mrs Shah, and her substantial, continuing failure, without excuse, to comply with multiple orders of the court I consider that it would be proportionate and just to debar her from pursuing her defence.
161. I have considered whether it would be a more proportionate remedy for the Claimants to obtain an "unless order" against her also but I do not think this would be proportionate in her case. Where her chances of establishing a defence based on ignorance have been found in the Principal Mann Judgment to be only marginally more than fanciful, I consider that her failure to take the opportunities given to her to establish her case are most likely motivated by a desire to keep kicking the can down the road. She has had ample opportunity to provide information that might support the defence that she has put forward, and instead has joined her husband in taking every opportunity to seek to delay proceedings. In all the circumstances, I consider that, in her case, it is appropriate that she should be debarred from continuing with a defence that she seems to have little interest in substantiating. I will order accordingly.
162. However, in making such an order I will include the two caveats that I have already mentioned. First, as she has not been present at this hearing, I will offer her the same accommodation that would be afforded to a defendant who was not present at a trial where the trial resulted in an order being made against him or her. In other words, I will act as if CPR rule 39.5 applied to this ruling (whether or not it strictly does). Accordingly, In accordance with my previous comments, I will make provision for Mrs Shah to be able to apply to set aside the order I propose making against her, but on the basis that the court may grant the application only if it considers that:

- i) she has acted promptly when he found out that the court had made an order against her;
  - ii) she had a good reason for not attending the hearing; and
  - iii) she had a reasonable prospect of success at the hearing.
163. Secondly, as I have heard the Debarring Application before I have heard the Reverse Summary Judgment Application, and I do not think that the justice of the case should depend on what order applications are heard, I will provide in my order that the Third Defendant shall not be prejudiced in participating in any hearing relating to the Reverse Summary Judgment Application (including any application for it to be struck out as an abuse of process).
164. An early hearing should be listed, before me, at the earliest opportunity after the handing down of this judgment to consider any consequential matters arising out of this judgment. These will include (without limitation):
- i) the form of the order to be made, including timetabling in relation to the "unless order";
  - ii) any revised directions as to the trial date or matters to be dealt with before trial; and
  - iii) any representations as to costs.
165. I would hope that before that date the parties could agree or substantially agree a form of order that reflects this judgment for me to consider. The first draft of this should be provided by the Claimants' legal advisers.
166. If possible, at the same hearing the court would hear the Reverse Summary Judgment Application, and the Claimants' application for this to be struck out as an abuse of process, assuming that the Claimants wish to proceed with this. If they do, the Claimants should make a formal application in this regard.