



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 45

CA74/17

OPINION OF LORD ERICHT

In the cause

OMI FACILITIES LIMITED

Pursuer

against

SOHAN SINGH

Defender

**Pursuer: Sandison QC, O'Brien QC; Dentons UK and Middle East LLP
Defender: Dean of Faculty et Wilson; BTO Solicitors LLP**

5 May 2021

Introduction

[1] This is one of four related cases arising out of the business relationship between, on the one hand, Mr Rajinder Bains and his associated companies OMI Facilities Limited (“OMI Facilities”) and OMI Management Limited (“OMI Management”), and on the other hand Mr Sohan Singh and his associated company Bellhill Limited (“Bellhill”). The cases relate to the Lorne Hotel in Sauchiehall Street, Glasgow (the “Hotel”).

[2] In this action, OMI Facilities seeks payment of sums said to be outstanding under a Personal Bond dated 9 October 2010 (the “Personal Bond”). Mr Singh denies that the Personal Bond was signed on the date it bears and seeks to have the Personal Bond reduced

on the ground of fraudulent, which failing negligent, misrepresentation by Mr Bains. *Esto* the Personal Bond is not reduced, Mr Singh seeks a substitution of the interest rate in the Personal Bond by a lower rate in terms of section 140B of the Consumer Credit Act 1974. OMI Facilities also seeks payment of a sum of £35,000 advanced by it to Mr Singh in connection with a liability owed by Mr Khalid Javid.

[3] In *OMI Facilities Limited v Bellhill Limited* [2021] CSOH [46] and *OMI Management Limited v Bellhill Limited* [2021] CSOH [47] Mr Bains' associated companies seek payment of sums for services said to have been provided to Mr Singh's associated company Bellhill in respect of the running of the Hotel.

[4] In *Bellhill Limited v Rajinder Bains* [2021] CSOH [48] Bellhill seeks payment of sums said to have been misappropriated by Mr Bains during the time when Mr Bains was running the Hotel.

[5] All four cases came before me for proof at the same time, with evidence in each case being taken as evidence in the others. This was the first proof held in the Court of Session as a "blended proof". This meant that, due to coronavirus restrictions, the evidence of some witnesses was taken orally in court in the traditional manner, and the evidence of some other witnesses was taken electronically, remotely over Webex.

[6] In this opinion, which is the lead opinion for all four cases, I shall deal with general matters applicable to all four cases, such as the witnesses and the chronology of events. I shall then address in detail the arguments relating to the particular conclusions in this case. In my opinion in each of the other three cases, I shall deal with the conclusions in that particular case. There is considerable crossover between *OMI Facilities Limited v Bellhill Limited* and *OMI Management Limited v Bellhill Limited* and where there are common issues in

these two cases the lead opinion is *OMI Facilities Limited v Bellhill Limited*. All four opinions should be read together in order to give a complete view of my findings.

[7] The evidence ranged widely over the business, personal and family relationships between Mr Singh and Mr Bains over many years. I have considered and taken into account all the evidence in the case, except of course where I have upheld an objection. Rather than narrate all of the evidence, much of which was of background or collateral matters, in my opinions I will focus on the evidence pertinent to the conclusions in the four actions.

Witnesses

[8] Both sides led witnesses as to facts and expert witnesses.

[9] Mr Bains and the OMI companies led evidence as to fact from Mr Bains, Marie O'Brien, Frank Queen, Lynell Farrow, Ross Leatham, Tanveer Nabi, Khalid Javid, James Lloyd, Mark Carlin, John O'Donnell, Shafiq Muhammed, Kurshid Khokar, Charn Dass Bains, David O'Brien, David Owens, Aurelian Bratu, Zeeshan Khokar, Kenneth Pattullo, David Lamond, Karen Robertson and Jennifer Walmsley and expert evidence from Simon Cuerden. Mr Singh and Bellhill led evidence as to fact from Mr Singh, Mr Sharif, Helen Mackie, Tom Scott, Thomas Murphy, Graham Stuart and Bobby Singh, and expert evidence from Kenneth Robb. Over 16,000 pages of productions were lodged.

[10] I shall deal with issues of credibility and reliability in detail later in my opinion in respect of the particular issues. However, it would be useful at this stage to note my general observations on the three key witnesses, Mr Bains, Mr Singh and Mr Sharif, to list the other factual and expert witnesses, and to deal in general terms with witness intimidation.

Mr Bains

[11] Mr Bains, aged 51, is a director of OMI Management and OMI Facilities, and CDB Properties Limited and HC Hotel Management Limited. OMI Management was incorporated in 2010 and provides goods and services to a variety of businesses, including the hotel industry. Its clients include Hilton, InterContinental Hotels, Marriott and Sandman Hotels. OMI Facilities provides facilities management services to commercial businesses, including cleaning, maintenance and the provision of security personnel, porters, kitchen, reception, and general administrative and banqueting staff.

[12] I found Mr Bains to be a credible and reliable witness. In the witness box he came across as a satisfactory witness, albeit that on one occasion I had to give him a warning in respect of answering the questions put to him. More importantly however, when tested against other evidence in the case, his evidence was supported by and consistent with that other evidence.

Sohan Singh

[13] Mr Singh, aged 67, is the sole director and shareholder of Bellhill Limited.

[14] I find Mr Singh to be neither a credible nor a reliable witness. The fundamental problem is that Mr Singh has given on oath two contradictory accounts in relation to the Personal Bond. The first account was in an affidavit for the purposes of a 2015 Court of Session action brought against Mr Singh and Bellhill by a liquidator for reduction of a gratuitous alienation; the second is in the current proceedings. The differing accounts cannot both be true: in one or the other Mr Singh has lied to the court under oath. Mr Singh sought to explain this away by stating that his evidence in the court in the current proceedings was true, and that he had not read the affidavit before he swore it. I do not find

it credible that a person swearing an affidavit, with all the formality and importance that that procedure involves, would not read the document before signing it. Even if he did not read it, the fact remains that he has allowed a false position to be put before the court in one action or the other.

[15] Mr Singh's credibility and reliability was further undermined by his performance in the witness box. In giving his evidence, Mr Singh was evasive and repeatedly failed to answer the questions asked, to the extent that on several occasions I required to give him a warning about his repeated failures to answer the questions asked. In submissions his counsel took issue with these warnings and attempted to explain Mr Singh's performance in the witness box in terms of him not hearing the questions and having difficulty in understanding the English language sufficiently to understand all the questions. I do not accept that explanation. Interpreters were provided for various witnesses, and there would have been no difficulty in an interpreter being available for Mr Singh also, and, as is often the case, interpreting not the whole of the questions but only those which the witness asked for help with. It appeared to me that Mr Singh had a good level of English, and that his difficulties in answering particular questions were not caused by his lack of understanding the questions. I was aware that Mr Singh had hearing issues, as arrangements had been made for the court to provide him with earphones for him to link into the induction loop system when he was sitting in court listening to the evidence of other witnesses. Had it appeared to me at any time that Mr Singh was not hearing the questions or did not have sufficient English to understand them, then I would have intervened to rectify this. Indeed, had Mr Singh's counsel raised any such concern during his evidence, appropriate steps would have been taken. In his submissions, Mr Singh's counsel took particular issue with one of the warnings which I had given to Mr Singh in which I explained to Mr Singh my

concerns that he was not answering the questions put and explained that he should listen carefully to the question and answer the question, and there might be consequences if he continued to fail to do so. Counsel did so on the basis that the witness had ultimately answered the question. However this misses the point as the warning was given at the end of a passage of examination in which Mr Singh had initially failed to answer the question. In the light of the previous warnings, in my view it was appropriate for the warning to be given again, even although Mr Singh ultimately answered the question.

[16] Further difficulties with the credibility and reliability of Mr Singh arose when his evidence was tested against the other evidence before the court. I deal with this in detail in the respective opinions for the four cases.

Azhir Sharif

[17] Mr Sharif, also known as Archy, was a long-standing business associate of Mr Singh. He was the previous owner of the Hotel, and had continued to manage it after selling it to Bellhill. He was led as a witness for Bellhill and Mr Singh.

[18] I found Mr Sharif to be a wholly incredible and unreliable witness, as can be seen from the detailed consideration of his evidence below and in the opinions in the other three cases. There were material inconsistencies between his oral evidence and his written statement which he adopted as evidence in chief, and within his oral evidence.

Witness intimidation

[19] Two witnesses gave evidence about what might possibly have been witness tampering.

[20] Khaled Javid was called as a witness on behalf of Mr Bains and the OMI companies.

In his witness statement, adopted as evidence in chief, he stated that in March 2020 he received phone calls from someone called "O'Rourke" threatening that he would be subjected to bodily harm should he give evidence against Mr Singh. He had reported this to the police.

[21] Mr Sharif gave evidence that prior to 2017 Mr Bains had made a proposition that Mr Sharif should come in with Mr Bains to "fuck over" Mr Singh by giving a statement in Mr Bains favour in return for £1,000,000, and that the week before Mr Sharif gave his evidence in this proof, Mr Sharif had been told that he could still take the money and not go to court.

[22] Neither counsel sought to make anything out of this possible witness tampering. The police had been informed of one, and the other was made by Mr Sharif whom I have found to be a wholly incredible witness. Neither Mr Javid nor Mr Sharif were prevented from giving their evidence. In these circumstances I am satisfied that this and the other three cases can be determined on the basis of the evidence led.

Objections to evidence

[23] Both parties lodged lengthy Notes of Objection to various passages of evidence in witness statements which had been lodged in accordance with commercial court practice. I heard the evidence under reservation. The objections fell into three broad categories.

Alleged criminal activity on the part of Mr Bains and Mr Singh

[24] Senior Counsel for Mr Singh and Bellhill objected to evidence from Mr Bains that in July 1999 Mr Singh had been given a custodial sentence for VAT fraud but the conviction

was later overturned. Counsel's position was that Mr Singh had been convicted but the conviction had been quashed on appeal, and counsel submitted that this was collateral and had no bearing on the matters before the court (*M v HMA (No 2)* 2013 SLT 380 at para [28]ff). I uphold this objection. Conviction for VAT fraud and subsequent acquittal on appeal has no bearing on the issues to be decided in this case.

[25] Senior Counsel for Mr Bains objected to various allegations of criminal activity by Mr Bains. Mr Singh alleged that Mr Bains involved the Hotel in prostitution, drug dealing and other unspecified criminality. Mr Sharif alleged that Mr Bains was involved in people trafficking, drug dealing and prostitution. Helen Mackie, who was called as a witness by Bellhill, alleged that Mr Bains was involved in people trafficking and prostitution. I shall uphold the objection. In my opinion these allegations are collateral and have no relevance to the cases pled in the four actions before me. Moreover, given the seriousness of the allegations, I would observe that in my view the allegations that Mr Bains was involved in such criminal activity are wholly without foundation. There was no independent evidence of the allegations other than assertions by Mr Singh, Mr Sharif and Ms Mackie. Mr Singh in his witness statement and oral evidence offered no credible or reliable evidence of his allegations. Mr Sharif was a wholly incredible witness. The alleged people trafficking was no more than the sourcing of hotel staff from Romania through the Hotel's head housekeeper manager Mr Dora Bratu, who gave credible and reliable evidence that proper and legitimate recruitment processes had been used. Ms Mackie was a Human Resources professional who was a long-standing adviser to Mr Singh. She had provided services to the OMI companies until they had dispensed with her services. Her evidence was notable for the ill-will which she showed to Mr Bains and the OMI companies. She was very keen to express her view that Mr Bains was involved in drug-dealing, but this was based merely on

unsubstantiated rumour and she had never seen any evidence of it herself. She was also very keen to allege that Mr Bains was involved in prostitution, but her opinion to that effect was based solely on one occasion seeing a woman standing outside a lift in the Hotel and having a sense in her gut that the woman was a prostitute and telling Mr Bains about it who did nothing. That falls far below the standard of evidence which would be required to establish that the person managing a hotel was involved in prostitution. Given that these very serious allegations have been made against Mr Bains in public in the course of the proof, in addition to upholding the objection I state my clear opinion that Mr Bains was not involved in criminality in respect of people-trafficking, prostitution or drug-dealing.

Professional privilege

[26] Senior counsel for Mr Singh and Bellhill objected to the evidence of James Lloyd on the basis of legal professional privilege. Mr Lloyd was called as a witness by Mr Bains and the OMI companies. He had previously acted for Mr Singh and Bellhill in relation to the 2015 gratuitous alienation action. Senior counsel for Mr Bains and the OMI companies submitted that any privilege attaching to Mr Lloyd's evidence had been waived as he had given witness statements to both sides (*Scottish Lion Assurance Co Ltd v Goodrich Corporation* 2011 SC 534, *Wylie v Wylie* 1967 SLT (Notes) 9, *Whitbread Group plc v Goldapple Ltd* 2003 SLT 256). In response senior counsel for Mr Singh and Bellhill submitted that there had been no waiver as Mr Lloyd was included in the Singh/Bellhill witness lists only in response to him being first included in the Bains/OMI witness lists and in the witness box he was only asked to adopt the statement he had given to Bains/OMI. I shall uphold the objection. Mr Lloyd was called by Bains/OMI. He adopted as his evidence the written statement he had given to Bains/OMI. His evidence was heard under reservation of the objection on legal professional

privilege. He was not called by Singh/Bellhill, but merely cross-examined. He did not adopt as his evidence the written statement he had given to Singh/Bellhill. In these circumstances in my opinion there was no waiver of legal professional privilege, and he was not adduced as a witness for Singh/Bellhill in terms of sec 1 of the *Evidence (Scotland) Act 1852*. Of course, this ruling does not mean that all of Mr Lloyd's evidence is inadmissible, as the ruling applies only to matters that can properly fall within the scope of legal professional privilege.

[27] Senior Counsel for Mr Singh and Bellhill also objected to the evidence of James O'Donnell on the ground of privilege. Mr O'Donnell is sole director of Tax and Forensic Services Limited, a firm of tax and business specialists. He is not legally qualified. He started his career with HMRC and then worked for various firms of accountants and business advisers. He had advised Mr Singh in matters relating to taxation and the operation of the Hotel from around 2005-2014. Counsel submitted that the advice given by Mr O'Donnell to Mr Singh was privileged as although he was not a lawyer he was fulfilling the role of legal adviser (*Gavin v Montgomerie* (1830) 9S 213). In response Senior Counsel for Mr Bains and the OMI companies submitted that *Gavin v Montgomery* is not good law standing *Stuart v Miller* (1836) 14S 837 and that tax advice given by non-lawyers is not privileged (*R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2AC 185). I repel the objection for the reasons given by Senior Counsel for Mr Bains and the OMI companies.

Use of the hotel by organised crime figures

[28] Various witnesses gave evidence to the effect that during the time when Mr Sharif was manager of the Hotel, it was frequented by persons who were said to be well-known figures in organised crime, but these persons ceased to do so after Mr Bains took over.

Senior Counsel for Mr Singh/Bellhill objected to that evidence as being collateral. I refuse the objection. The operation and financial position of the Hotel after Mr Bains took over its operation from Mr Sharif (including improvements made by Mr Bains to the Hotel's performance such as changes in clientele) are central to a number of issues discussed in these actions.

Contract of employment/ lease of hotel to Mr Bains

[29] Senior Counsel for Mr Singh/Bellhill objected to evidence that a contract of employment which bore to show that Mr Bains was employed as General Manager of the Hotel and a lease which bore to show that Mr Bains personally leased the Hotel from 15 June 2013 were fakes. The ground of objection was that although there was an averment for Mr Bains that no genuine contract of employment exists, that was not warrant to offer to prove forgery of the contract of employment or the lease. I refuse the objection in respect of the contract of employment: OMI Management was entitled to lead evidence in support of its averment in Article 8 of Condescence in *OMI Management v Bellhill* that no genuine contract of employment exists. I uphold the objection in respect of the lease dated 15 June 2013 as neither Mr Bains nor the OMI companies refer to that particular lease in their averments.

The Lorne Hotel

[30] All four cases arise out of the business dealings of Mr Bains, Mr Singh and Mr Sharif in relation to the Lorne Hotel (the "Hotel") in Sauchiehall Street in Glasgow.

[31] Mr Bains and Mr Singh had previously had a long family friendship. Mr Singh had been a friend of Mr Bains' father Charan Das Bains, and had previously borrowed money from Mr Bains senior, which had been repaid albeit late. Mr Bains referred to Mr Singh as "uncle" a term which in the Asian community indicates deference and respect.

[32] I set out here the general history of the dealings of Mr Bains, Mr Singh and Mr Sharif and their associated companies in relation to the Hotel. Particular aspects of these dealings, which relate to particular conclusions in the four actions, are dealt with in more detail in the respective actions.

2009-2011: Hotel owned and managed by Mr Sharif

[33] On leaving school in 1986, Mr Sharif went to work for Mr Singh in Mr Singh's Bombay Blues Restaurant. Mr Sharif started as a waiter and then was manager up until 1992. Mr Sharif purchased the Hotel in 2006 and title was held in his own name.

[34] In 2008-2009, Mr Sharif experienced financial difficulties. He borrowed around £300,000 from Mr Singh. After this initial loan Mr Sharif required more funds later in 2009 and again came to Mr Singh for help. As Mr Singh had already given him money, Mr Singh introduced Mr Sharif to other persons who could assist directly in getting funds. Mr Singh introduced Mr Sharif to Khalid Javid, Abdul Sattar, Marston Financial Services and Mr Bains.

[35] Mr Javid agreed to lend Mr Sharif £100,000 provided it was repaid within 3 months and that it was guaranteed by a suitable third party. Mr Sharif proposed Mr Singh as a suitable guarantor, and Mr Javid agreed. Mr Javid is an accountant and a director of K A Javid & Company Accountants Limited. At Mr Javid's insistence, the loan was documented in a Personal Bond by Mr Sharif and Mr Singh in favour of Mr Javid's company, K A Javid & Company Accountants Limited on 20 May 2010 and was in the following terms:

"We, Azhir Sharif ...

And Sohan Singh ...

Acknowledge to have received the sum of ONE HUNDRED THOUSAND POUNDS STERLING from K A JAVID & COMPANY ACCOUNTANTS LIMITED, of [address] and do hereby bind ourselves and our executors and representatives whomsoever all jointly and severally without the necessity of discussing with them in their order to pay K A JAVID & CO or their executors or assignees the said sum of ONE HUNDRED THOUSAND POUNDS (£100,000) Sterling on 27 June Two Thousand and Ten; And we consent to registration of those present for execution.”

[36] It can be seen from the bond that although in function the transaction was a loan to Mr Sharif guaranteed by Mr Singh, the legal form which the arrangement took was a joint and several undertaking by Mr Sharif and Mr Singh to pay £100,000 on 27 June 2010.

[37] Mr Sattar, who is now deceased, entered into a personal bond which was in function a loan and guarantee. The Personal Bond was dated on 17 December 2009. It was in the following terms:

“WE MOHAMMED AZHIR SHARIF residing at [address] and SOHAN SINGH of [address], acknowledge to have received the sum of ONE HUNDRED AND SEVENTY THOUSAND POUNDS (£170,000) STERLING from ABDUL SATTAR of [address] and do hereby bind myself and my executors and representatives whomsoever all jointly and severally without the necessity of discussing with them in their order to pay to the said ABDUL SATTAR or his executors or assignees the said sum of ONE HUNDRED AND SEVENTY THOUSAND POUNDS (£170,000 STERLING) on Seventeenth day of December Two Thousand and Ten together with interest thereon at the rate of 10% per annum; And I consent to registration of these presents for execution.”

[38] There was also signed a separate bond in similar wording from Mr Singh alone, and a side letter confirming that only one sum of £170,000 was due.

[39] On 10 April 2009 Mr Sharif and Marston Financial Services Limited entered into a bond in the following terms:

“I, MOHAMMED AZHIR SHARIF, residing [address] grant me to have instantly borrowed and received from Marston Financial Services Limited, [address] the sum of TWO HUNDRED AND THIRTY THOUSAND POUNDS (£230,000) STERLING in relation to my premises known as and forming The Lorne Hotel, 901/911 and 923 Sauchiehall Street, Glasgow G3 7TF of which sum I bind and oblige myself, my

executors and representatives whomsoever all jointly and severally without the necessity of discussing them in their order to repay to the said Marston Financial Services Limited on or before 14th August, 2009: And I consent to registration for preservation and execution:"

[40] On the same day Mr Sharif signed a side letter to Marston in the following terms:

"I hereby acknowledge that in the event of the Personal Bond signed by me today in your favour not being repaid in full by the due date of 14 August, 2009 I will pay from 14 August, 2009 a penalty of ONE THOUSAND POUNDS (£1,000) STERLING per week or part of a week during the period when any sums under the Personal Bond remain outstanding."

[41] On the same day Mr Singh granted a personal guarantee to Marston in respect of the £230,000.

[42] There was also agreement that Mr Bains would lend money to Mr Sharif, guaranteed by Mr Singh. The loans were made by OMI Facilities Limited. Although in function the arrangements were loans to Mr Sharif guaranteed by Mr Singh, in form they were personal bonds by Mr Sharif and Mr Singh as principals. The initial loan by OMI Facilities was £100,000 which was paid by two cheques for £50,000, the first dated 22 January 2009 and the second dated 9 February 2009. Further sums were advanced in 2009.

[43] Two personal bonds signed by Mr Sharif in respect of the loans from OMI Facilities (the "Sharif Bonds") were both signed on 1 January 2010 by Mr Bains on behalf of OMI Facilities and by Mr Sharif and witnessed by Mr Singh.

[44] The first was in the following terms:

"I, MOHAMMED AZIR SHARIF residing at [] grant me to have borrowed as at the FIRST OF JANUARY TWO THOUSAND AND TEN and received from OMI FACILITIES LIMITED incorporated under the Companies Acts and having their registered office at [] the sum of TWO HUNDRED AND SEVENTY THREE THOUSAND FIVE HUNDRED AND THIRTY FOUR POUNDS STERLING (£273,534.00) used in the renovation of the KELVIN PARK LORNE HOTEL, GLASGOW, of which sum I bind and oblige myself, my heirs and executors and representatives whomsoever all jointly and severally without the necessity of discussing them in their order to repay to the said OMI FACILITIES LIMITED and to their successors and assignees whomsoever on the THIRTY FIRST DAY DECEMBER

TWO THOUSAND AND TEN OR PAYABLE ON DEMAND with interest on the said principal sum at a monthly rate of THREE POINT SEVEN FIVE PER CENT (3.75) from the said FIRST OF JANUARY TWO THOUSAND AND TEN to the date of payment”.

[45] The second was for the sum of £191,430 but otherwise in identical terms.

[46] The Personal Bond by Mr Singh which OMI Facilities seeks to enforce in this action (the “Personal Bond”) bears to have been signed on 9 October 2010. That document, although in form an independent obligation on the part of Mr Singh, is in function a guarantee of Mr Sharif’s borrowings from OMI Facilities Limited. I consider the Personal Bond when dealing with the first conclusion below.

[47] The Hotel opened for business in 2010. OMI Facilities provided cleaning services. The terms of the contract for these services are in dispute and are dealt with in *OMI Facilities Limited v Bellhill Limited*.

2011 to 2013: Hotel owned by Bellhill and managed by Mr Sharif

[48] Notwithstanding the substantial funding received from these parties and guaranteed by Mr Singh, Mr Sharif remained in financial difficulty. In April 2011, Mr Singh’s company Bellhill acquired the Hotel. Mr Singh’s explanation for acquiring the hotel, which I accept, was that Mr Singh had put £300,000 of his own money in it, and also guaranteed all the other loans on Mr Sharif’s behalf; when it became clear that Mr Sharif was in serious financial difficulty the only option Mr Singh had was to buy the hotel to be able to pay everyone back; Mr Singh would have become bankrupt if the hotel went under; Mr Singh had to work on the business in order to pay everyone back.

[49] Bellhill acquired the Hotel from Mr Sharif in April 2011.

[50] After purchase of the Hotel by Bellhill, OMI Facilities continued to provide services at the Hotel, and no further written contract was entered into. This is considered in further detail in *OMI Facilities Limited v Bellhill Limited*. Mr Sharif continued to act as manager of the Hotel, now on behalf of Bellhill.

Purported Leases of the Hotel during period 2011-2013

[51] During the period when the Hotel was owned by Bellhill (with Mr Singh as Bellhill's sole director and managed by Mr Sharif), attempts were made by Mr Singh and Mr Sharif to interpose leases between Bellhill and the operation of the Hotel.

[52] On 16 April 2012, Bellhill leased the Hotel to Towncrest Limited ("Towncrest") for a period of 2 years from 16 April 2012 until 15 April 2014 at a rent of £510,000 per annum. The lease (the "Towncrest Lease") was a formal legal document of 22 pages. It was signed by Mr Shafiq Muhammed as director of Towncrest and Mr Singh as director of Bellhill Limited.

[53] The Towncrest Lease was renounced on 14 June 2013. The renunciation was drafted by solicitors, Mitchells Roberton and signed by Mr Muhammed and Mr Singh with Mr Letham of Mitchells Roberton as witness on 14 June 2013.

[54] Meanwhile, however, before the renunciation of the Towncrest Lease, Bellhill had let the Hotel to Kelvingrove Associates Limited ("Kelvingrove") at the same rent of £510,000 per annum, for 2 years from 1 March 2013. The lease is in formal legal terms and of 22 pages and is signed by Mr Muhammed as director of Kelvingrove and Mr Singh as director of Bellhill (the "Kelvingrove Lease"). There was no renunciation of the Kelvingrove Lease.

[55] Towncrest entered compulsory liquidation on 5 February 2014 and was dissolved on 5 June 2015. Kelvingrove entered compulsory liquidation on 14 February 2014 and was dissolved on 16 May 2015.

[56] Mr Muhammed gave evidence that he was the former restaurant manager and assistant manager of the Hotel. He started work in the Hotel in 2010 and was there from when it opened. He first became involved with Towncrest and Kelvingrove in 2012 when Mr Singh and Mr Sharif requested that he help him by registering as the director of these companies. They initially offered to pay him £5,000 per company to become a director, and later offered £10,000 per company but he did not receive that money. Mr Singh and Mr Sharif explained to him that the Hotel was in financial trouble, and was coming under pressure from creditors and HMRC. Towncrest and Kelvingrove were to be used to pay the Hotel's bills. Mr Muhammed thought that the idea was for one of these companies to pay the employees' wages, with the other being liable for the other costs the Hotel incurred. Towncrest and Kelvingrove were created to protect the Hotel from people it owed money to. Mr Singh and Mr Sharif assured him that he would not have to do anything as a director of these companies. They would deal with the running of the companies and make all the decisions. They just wanted Mr Muhammed to register as director and in return they would "look after" him. Mr Sharif and Mr Singh took Mr Muhammed to meet Mr Singh's lawyer to sign the Towncrest Lease. After the lease was signed, he continued to manage the restaurant of the Hotel, and had no involvement with the running of the two companies. Mr Sharif dealt with the running of Towncrest and Kelvingrove and although Mr Singh did not come to the Hotel a lot, he knew everything that was going on. Mr Singh and Mr Sharif would sometimes ask Mr Muhammed to go and sign a cheque and leave it for them so that they could pay whoever they needed to pay. In Mr Muhammed's view, the reason he was asked to be director of the two companies was because Mr Singh did not want his name to appear on the company documentation. Shortly before Mr Bains took over management of the Hotel in 2013, Mr Singh took Mr Muhammed to Mr Singh's lawyer's office to renounce

the Towncrest Lease. Mr Singh told him that Mr Bains was going to be the new owner of the Hotel because a lot of money was owed to him.

[57] Mr Sharif's evidence was that after selling the Hotel to Bellhill, he worked as the manager of it from April 2011 to 15 June 2013. His role involved the day-to-day management of the Hotel, hiring and firing of employees, sales, paying all the employees, paying suppliers, dealing with PAYE and VAT and doing the accounting for the business. Towncrest was a company operated by Mr Muhammed. A year after Mr Singh had bought the Hotel Mr Sharif approached Mr Singh and asked him to sign a lease in favour of Towncrest. At that time Mr Sharif was fed up with the situation as he was being chased by a lot of suppliers and creditors from his tenure of ownership and his presence at the Hotel was giving the suppliers a negative impression due to the previous credit issues that he had had, so he suggested to Mr Singh that Mr Singh should grant the lease to Towncrest. Mr Singh agreed. Mr Muhammed was not given any financial incentive to become involved. When Towncrest went in the business situation did not change albeit Mr Muhammed was in charge, but Mr Sharif was still there assisting with the business day-to-day. Towncrest was the trading company and was liable for all of the bills and paying the staff. Mr Sharif was not aware of any issues that Towncrest or Mr Muhammed had with HMRC:

Mr Muhammed had his own bank account and VAT registration/PAYE. Towncrest paid rent to Bellhill - the rent would be taken from the credit card receipts and paid to Bellhill on a daily basis. Mr Sharif had not heard of Kelvingrove and was not aware of any lease between them and Bellhill. He had not had sight of the Towncrest Lease until cross-examination. Mr Sharif claimed that Towncrest had arisen because he and Mr Muhammed had seen an opportunity to make money in a joint venture. Mr Sharif had remained a Bellhill employee because he was overseeing the Hotel. Mr Muhammed got the

majority of the cash from Towncrest and Mr Sharif also got some because he got Mr Muhammed into Towncrest as a joint venture. Towncrest had paid rent to Bellhill: all the sums received from the Hotel from credit card terminals were paid to Bellhill. Towncrest made money because the cash from cash transactions was kept by Towncrest. Mr Sharif stated that there were reconciliations carried out by Graham Stuart, Bellhill's accountant every 6 to 8 months. However Mr Stuart gave evidence and contradicted this, saying that Bellhill had received "sporadic transfers" into its business current account with no reconciliations being carried out.

[58] Mr Singh's evidence was that he signed the Towncrest Lease at Mr Sharif's suggestion. Mr Singh was too busy with his activities as a politician and other businesses and he trusted Mr Sharif fully. Mr Singh had no recollection of the Kelvingrove Lease. He never had any dealings with Mr Muhammed and never offered any money to him to incorporate either Kelvingrove or Towncrest.

[59] I found Mr Muhammed to be a credible and reliable witness. He was straightforward. He had nothing to gain personally by giving false evidence in this case. I do not accept Mr Sharif's suggestion that Mr Muhammed was lying because of favours done by Mr Bains for Mr Muhammed in the past: the purported favour was no more than paying Mr Muhammed's salary and assisting in a proper fashion with Mr Muhammed's wife's visa application.

[60] Further, Mr Muhammed's evidence is consistent with other evidence about Mr Singh making sham arrangements by using other people to front transactions while the business remained in control of Mr Singh or his associates. Mr James O'Donnell was a tax adviser who had his own business and had previously worked for amongst others HMRC in its Fraud Investigation Service, PricewaterhouseCoopers, and BDO Stoy Hawyard LLP. He

was an adviser to Mr Singh in relation to Mr Singh's businesses. His evidence was that Mr Singh's normal business model was to utilise operating companies to trade the businesses, usually with a family member or friend recorded as a director, but controlled by Mr Singh. Mr Tanveer Nabib gave evidence that Mr Singh asked Mr Sharif to ask Mr Nabib to put his name on the lease of a fish and chip shop being opened by Mr Singh's cousin in Fort William in 2015-16 in order to save rates. The tenant of the shop was Kebabish1 Limited. Mr Singh told Mr Nabib not to worry and that he would sort it out if anything went wrong. Mr Nabib started to get letters from creditors and sheriff officers attended his house. Mr Singh failed to reimburse him.

[61] If there were genuine leases of the Hotel, I would expect that the rent would have been paid in equal monthly instalments as provided for in the lease, rather than being met by paying over on a daily basis random amounts from credit card takings which bore no relation to the rent figure specified in the lease. I would not have expected the Kelvingrove Lease to have begun until the Towncrest Lease had been terminated, and I would have expected the Towncrest Lease to be terminated before Mr Bains took over the operation of the Hotel on behalf of Bellhill.

[62] In all these circumstances I accept the evidence of Mr Muhammed. In particular, I find that Towncrest and Kelvingrove were set up by Mr Singh and Mr Sharif as sham companies, that Mr Singh and Mr Sharif dealt with the running of these companies and made all the decisions, that Mr Singh had not wanted his name to appear as connected with these companies, and that the business of the Hotel continued to be operated by Bellhill.

2012: Sequestration of Mr Sharif

[63] On 30 December 2011 East Renfrewshire Council presented a sequestration petition to Paisley Sheriff Court in respect of unpaid council tax against Mr Sharif. Mr Sharif was sequestrated on 20 February 2012. His current trustee is Mr Kenneth Pattullo, who took over on 20 January 2014, previously trustees having been his colleagues in the firm of Begbies Traynor. Shortly after the sequestration, the then trustee received a payment of just over £1.4 million which HMRC had seized in Pakistan which was the sum Mr Sharif was due to pay in VAT following the sale of the Hotel. As a result, the trustee looked into the whole circumstances surrounding the disposal of the Hotel by Mr Sharif to Mr Singh. On 13 October 2014, Mr Pattullo raised an action in the Court of Session against Mr Singh and Bellhill (the “Gratuitous Alienation Action”). That action sought to challenge the sale of the Hotel to Bellhill as gratuitous alienation and also as a fraudulent preference. Bellhill defended the action on the basis *inter alia* that £1.16 million had been deducted from the Hotel price as Mr Singh had agreed to assume liability for those sums in place of Mr Sharif and so the value of the debt Mr Singh assumed had been deducted from the consideration paid for the Hotel.

[64] Mr Patullo confirmed that a copy of the Personal Bond was lodged in the Gratuitous Alienation Action. He said that there was nothing said in the course of that action to suggest that the Personal Bond should not be taken at face value, and that the issues raised in the current action as to the interest rate in the Personal Bond and the date on which it was signed were not raised by Mr Singh in the Gratuitous Alienation Action.

[65] Mr Singh swore an affidavit in the Gratuitous Alienation Action dated 4 November 2015 (the “2015 Affidavit”). In it he stated:

“7. The money that I lent to Mr Sharif was not sufficient to enable the works to be completed and he needed more money to finish the development. I couldn't lend him anymore. I therefore introduced him to contacts of mine in the Asian business community who would be able to assist him. I introduced him to three parties.

8. The first party that I introduced Mr Sharif to Mr Rajinder Bains who was the director of OMI Facilities Limited ('OMI') and OMI Management Limited. He is the son of a very good friend of mine. On the strength of my introduction OMI agreed to lend Mr Sharif £100,000 and then a further £50,000. This was in January 2009 and February 2009. During the course of 2009 Mr Sharif asked OMI to lend him more money which it did. It lent Mr Sharif a further £237,250. OMI agreed to lend money on the basis that Mr Sharif would pay interest at the rate of 3.75% per month on the sums that he borrowed.

11. In about April/May [2010] Mr Sharif approached me to say that RBS wanted to force sale the Hotel. The Bank had appointed Graham & Sibbald to value the Hotel and put it on the market. They had only valued the Hotel at £3.5 million. He said that if the Bank did sell the Hotel then everything would collapse and that I would lose out. I then had to consider my position. Mr Sharif owed me money that I had lent to him. I had also agreed to act as a guarantor for him. I would lose a lot of money if the Hotel was sold and Archie ceased to trade. I thought that the Hotel had the potential to be a very good business. I decided that it would be in my best interests to buy the Hotel and keep the business going. That way I would have some hope of being able to recover the money that I was due from Mr Sharif.

15. The Bank was prepared to lend me £5.8 million. I had originally intended that I would provide cash for Bellhill Limited to pay an additional sum. I had difficulty in obtaining the funds and ultimately I was unable to raise all the money that was needed. I was only able to raise £300,000. At that time OMI, Marston and Mr Javid were demanding their money back from Mr Sharif. The loans that they had made to Mr Sharif were only intended to be short term loans and were made on the basis of Mr Sharif's assurances that the Hotel would be finished quickly. All three were unhappy that it was taking longer than they had agreed for the money to be repaid. None of them sent any formal written demands to either Mr Sharif or I because that is not the way that things are done in the Asian business community. Instead they contacted Mr Sharif and I to ask when their money would be repaid. Mr Sharif and I had a number of meetings with the creditors to discuss when payment could be made and to ask them to hold off until we could finalise the sale of the Hotel. I assured them that I would pay the debts in place of Mr Sharif. I spoke with Mr Sharif and we agreed that I would simply set off what was due to me from the price. I spoke with the manager at the Bank of India, Mr Strivestava about this proposal. He confirmed that provided I could evidence that Mr Sharif owed me money this would be acceptable to the Bank of India.

16. To evidence the sums that Mr Sharif owed me, he signed and delivered a Personal Bond agreeing to repay me the sum of £1.167 million..... This sum was made up of sums due to OMI Facilities Limited, Marston and Kalid Javid together

with interest that was due to that time. In return, I considered that Mr Sharif owed me an obligation to repay me the sums that I was undertaking to pay on his behalf.

17. I discussed settling the purchase in this way with my accountant Frank Paterson of PKF and my solicitor Ross Letham of Mitchells Robertson. Mr Paterson saw no difficulty with it from an accounting point of view. Mr Letham was concerned about the Bank of India. He confirmed with the Bank's solicitors, McGrigors, that the Bank was happy to proceed on this basis i.e. that I was not providing all of the balance by cash.

...

20. Following settlement of the purchase I made payments towards the three debts that I had undertaken on behalf of Mr Sharif.

21. In relation to OMI I have paid, in total, £602,994. This has been paid by Bellhill Limited by the following instalments.

- i. 10 September 2013 - £42,465
- ii. 9 October 2013 - £39,126.39
- iii. 12 November 2013 - £34,949.08
- iv. 10 December 2013 - £37,454.38
- v. 1 April 2014 - £20,000
- vi. 13 August 2014 - £60,000
- vii. 15 September 2014 - £60,000
- viii. 3 October 2014 - £60,000
- ix. 22 October 2014 - £60,000
- x. 24 March 2015 - £20,000
- xi. 24 March 2015 - £10,000
- xii. 15 April 2015 - £40,000
- xiii. 19 May 2015 - £34,000
- x. 15 July 2015 - £65,000

I have produced Bank Statements that show these payments having been made.”

[66] The action was settled in November 2015 on the basis that Mr Singh paid £250,000 over 2 years and dropped the claim he had submitted in the sequestration. Mr Pattullo explained that the reason he accepted a much lower figure than the amount sued for was that Mr Singh was threatening to self-sequester, and had he done so there would have been delay, particularly as any trustee would have to raise a gratuitous alienation action against Mr Singh to recover the Hotel, which by then had been transferred gratuitously to

members of Mr Singh's family in breach of an inhibition obtained by Mr Bains. Mr Pattullo stated that the transfer took place before a restriction of the inhibition was recorded.

[67] OMI Facilities submitted a claim of £1,374,777.66 in Mr Sharif's sequestration in respect of sums due under the Sharif Bonds and in respect of cleaning services. Mr Pattullo accepted the claim in respect of cleaning services. He rejected the claim for payments in terms of the Sharif Bonds as Mr Singh had assumed liability for Mr Sharif's debt.

[68] During the sequestration, there was an attempt to replace Mr Pattullo as trustee. Many creditors had emerged claiming that they were owed significant sums of money, and these creditors collectively approached James Lloyd of Harper Macleod to call a creditors meeting. The meeting took place on 26 September 2014. The two majority creditors, HMRC and Royal Bank of Scotland, voted to keep Mr Pattullo in office and the attempt to have him replaced as trustee was unsuccessful.

2013: Mr Bains takes over management of the Hotel

[69] There was a sharp difference between the evidence of Mr Bains and Mr Singh as to the circumstances in which Mr Bains came to be running the Hotel.

[70] Mr Bain's evidence was that at a meeting in early April 2013 it was agreed in principle between Mr Singh and Mr Bains that the shares in Bellhill would be transferred to Mr Bain's company CDB Properties Limited in settlement of the sums due by Bellhill. There was no agreement as to a non-returnable deposit. Mr Bains' companies made various payments of Bellhill's liabilities on the basis that they would be repaid if the transfer did not go ahead. Mr Bains took over the running of the Hotel in order to get a better feel for the Hotel's operations and financial position before a final agreement on the transfer was reached. In the event, the transfer was not proceeded with.

[71] Mr Singh's evidence on the other hand was that in the months prior to June 2013 he and Mr Bains had a gentleman's agreement that Mr Bains was to be given an option to buy the Hotel in three to six months. In around May/June 2013 the deal was that Mr Bains was to pay £300,000 of a non-refundable deposit, then total market value and a bit of profit. The debt on the Personal Bond was to be offset against the purchase price.

[72] These competing positions must be assessed in the light of the other evidence, which can be summarised as follows.

[73] In 2012 Mr Bains was pressing Mr Singh for payment under the Personal Bond. The Personal Bond had been registered in the Books of Council and Session, and charges were served on 21 May and 19 June 2012. An inhibition was served on 3 January 2013.

[74] In February, Mr Singh transferred property. Mr Patullo confirmed that the transfer was in breach of the inhibition, but the inhibition was later restricted. The explanation given by Mr Singh for transferring property in breach of the inhibition was that when the inhibition was served Mr Singh met with Mr Bains and told him that Mr Singh would need to transfer some of his properties for political reasons. Mr Singh elaborated on this in an affidavit he gave to the court at an earlier stage in the proceedings in this action when the court was considering a motion for inhibition on the dependence in the current action. In that affidavit Mr Singh stated that following his election as a Labour Party Councillor on Glasgow City Council in May 2012 he was advised by the Leader, Whip and Secretary of the Labour Party that it would be best if he transferred his business interests to his family because business and politics do not mix well, and on this advice he transferred his family home, restaurant and Artto Hotel on Hope Street to his wife and two other business properties to his son and daughter. Mr Singh's evidence was that he met Mr Bains after the inhibition was served and Mr Bains said to him "Uncle don't worry this is the usual, my

accountants have said to me I should raise this but whatever you want to do, do it, I will take that off". I do not accept the evidence of Mr Singh. I do not find it credible that if Mr Bains was merely going through the motions of trying to obtain payment in order to satisfy his accountant he would have needed to go so far as serving two charges and an inhibition. I do not find it credible that it is necessary to gratuitously alienate one's business and personal property, including one's family home, in order to act as a local authority councillor. In any event, Mr Singh continued to be involved in the business of the Hotel despite his election to the council.

[75] Mr Bains took further steps towards recovery of the sums due under the Personal Bond and threatened to appoint administrators to Bellhill if payment was not made by 7 June 2013. As a result, a meeting was held on 7 June 2013 at the offices of Mitchells Robertson, Mr Singh's solicitor. Those present were Mr Bains, Mr Singh, Mr Sharif, Mr Carlin (Mr Bains' solicitor) and Mr Letham (Mr Singh's solicitor). There were competing accounts of what was said at the meeting, and an objection on the grounds of legal professional privilege. However I do not need to resolve these differences or objection, as for present purposes all that matters is that the purpose of the meeting was to discuss a deal whereby Mr Bains would purchase the entire share capital of Bellhill, the consideration being the writing off of the sums due under the Personal Bond between OMI Facilities and Mr Singh. The day after the meeting, Mr Carlin drafted an option agreement for the purchase of Mr Singh's shares in Bellhill by CDB Properties Limited ("CDB"), which was one of Mr Bains' associated companies. The draft option period provided for the option to be exercised in the period between the date of signature to 31 July 2013. The consideration was to be the discharge by OMI Facilities of "a Personal Bond granted by the vendor for the sum of £670,397 with interest on 9 October 2010, which was to be attached to the option

agreement", in other words the Personal Bond which is sought to be enforced in this action. Mr Carlin emailed the draft to Mr Bains on 7 June. On 28 June, Mr Carlin emailed Mr Bains noting that he understood that Mr Bains now wanted to put a hold on the options agreement. Mr Bains' position was that he was now running the Hotel, and wanted to get a better idea of it before committing himself.

[76] In my opinion the other evidence supports the position of Mr Bains and does not support that of Mr Singh. The draft share option agreement circulated amongst solicitors was consistent with the agreement in principle as described by Mr Bains. It was not consistent with the agreement described by Mr Singh, in particular because the draft agreement did not provide for the non-returnable deposit described by Mr Singh. If an agreement had been reached between Mr Bains and Mr Singh which involved payment of the deposit, then there is no reason why it would not have been included in the solicitor's draft. In any event, no binding agreement was reached. In these circumstances I find that there was no agreement whereby Mr Bains, CDB, or either of the OMI companies were obliged to pay a non-returnable deposit of £300,000 to Bellhill or Mr Singh.

June 2013 to January 2017: Hotel owned by Bellhill and managed by Mr Bains

[77] Mr Bains took over the day-to-day management of the Hotel in June 2013. The Hotel also had a General Manager who was a different person from Mr Bains.

Financial position of the Hotel when Mr Bains took over in 2013

[78] There was a dispute between on the one side Mr Singh and Mr Sharif and on the other side Mr Bains as to the financial situation of the Hotel during the period after Mr Bains took over its management.

[79] Mr Bains' position was that Bellhill and the Hotel were in a very poor financial position and required funding from Mr Bains and the OMI companies.

[80] Mr Singh's position was that Bellhill generally had a good history of payment. Bellhill had had some minor issues at the start in part due to the fact that the company had taken over the Hotel from Mr Sharif and he was being chased by his historic creditors. Mr Sharif's position was that when he was manager the suppliers he dealt with never had any issues with payment.

[81] However, the evidence of staff working at the Hotel paints a very different picture from that of Mr Singh and Mr Sharif. I prefer the evidence of the members of staff. They were on the ground in the Hotel during the time of Mr Bains' management. They were able to give detailed evidence of particular incidents showing the poor state of Bellhill's finances and the Hotel at that time, which were supported by their colleagues' examples of similar incidents.

[82] Marie O'Brien is employed by OMI Facilities as an administration assistant and is also the company secretary. She had worked for OMI Facilities from 2000, starting as an assistant housekeeper then being promoted to area manager, then being moved to a back office role as admin assistant overseeing the running of the cleaning contracts, dealing with payroll and staff queries. In 2013, after Mr Bains moved to work in an office in the Hotel, she also moved to an office in the Hotel to work with him. She gave evidence that the Hotel staff were having to go to the shops in the morning and use their own money to buy milk and orange juice for the guests. There did not appear to be any systems in place for cash taken by the business. Mr Bains had to set up procedures to bring order to the way in which the Hotel operated. In the early days, Mr Bains would have to buy things on his personal credit cards for the Hotel and then claim the money back from what he spent. He also

introduced a petty cash procedure. He also used the OMI trade accounts to order things for the Hotel. When Mr Bains took over as manager, it was really difficult as they could not get credit from suppliers. Most suppliers insisted on payment in cash because they had had trouble getting paid by the Hotel previously. Payment in cash continued for at least 18 months before suppliers would start to provide credit facilities. Mr Bains built up a good relationship with suppliers over his time at the Hotel which meant that it was then possible to obtain goods on credit.

[83] Lynnel Farrow, whose evidence was agreed in the joint minute, was general manager of the Hotel from February 2015 until July 2015. During her time at the Hotel, suppliers were generally paid cash. As a result of the Hotel not performing well prior to Mr Bains arriving, the Hotel did not have a good reputation with trade suppliers, which is why cash had to be paid up front. Bellhill did not hold any trade accounts. Therefore if items were needed for use in the Hotel they would generally be bought by one of the OMI companies. The financial position of the Hotel started to improve under Mr Bains and he was very careful when it came to spending and keeping on top of costs. Mr Bains seemed to bail the Hotel out financially and funded everything. Miss Farrow assisted with sales, and during the time she worked at the Hotel, more attention was paid to adjusting room rates. When she was there she saw the room rate yield go from between £1,500 to £2,000 per week to between £4,000 to £10,500 per week. Covers at the restaurant also greatly increased. Stock levels were closely monitored. Overall revenue greatly improved.

[84] Aurelian Doru Bratu was head housekeeper at the Hotel from March 2010 until May 2017. He gave evidence that under Mr Sharif's management, the Hotel was unsuccessful. In his opinion this was the result of the Hotel being poorly managed. The occupancy rate was around 20%. The restaurant and bar were always very quiet. After

Bellhill took over the Hotel in April 2011, Mr Sharif was still very much present at the Hotel and still appeared to be in charge. The Hotel continued to perform poorly. The Hotel had problems obtaining credit from suppliers and so suppliers were regularly paid in cash.

Mr Bratu gave an example of one incident when a chef had to pay a supplier with his own money and be reimbursed by Mr Sharif in cash, and another example of a delivery of linen which did not arrive because Bellhill did not pay the linen providers' previous bill. After Mr Bains took over the running of the Hotel in June 2013, the performance of the Hotel significantly improved. Mr Bains paid off the Hotel debts, including employee wages. Business improved and staff were paid on time.

[85] Zeeshan Khokhar was OMI Facilities accountant. He could see from the work he carried out that Mr Bains was funding the Hotel, paying for staff, utilities, suppliers and everything in between.

[86] Shafiq Muhammed gave evidence that when the Hotel was being run by Mr Sharif there were problems with staff getting paid on time. Mr Muhammed's wages were paid by cheque which usually bounced. There were occasions when he had to purchase items to be used by the Hotel. Sometimes he would get the money back for these items and sometimes he would not. Once Mr Bains took over, wages were paid on time and over time fewer suppliers had to be paid in cash. The Hotel was generally busier and so was the restaurant.

[87] David Owens was maintenance manager at the Hotel from December 2012 to July 2015, and then property maintenance manager at the Hotel until April 2017. He gave evidence that the Hotel was unsuccessful under Mr Sharif's management. There were frequent delays with the payment of wages for staff, and as a result he was usually paid in cash which was taken from the tills and distributed by Frank Queen the then general manager. Suppliers would often come to the Hotel and ask Mr Sharif for money which was

overdue and they would often be paid in cash. During the time that Mr Sharif was in charge, Mr Owens had to use his own money to buy supplies for the maintenance work, and then ask Mr Sharif to repay him for the sums he had spent. When Mr Bains took over, things vastly improved and it was like working at a normal hotel. Mr Bains' companies, OMI Facilities and OMI Management paid wages for the housekeeping, front of house, restaurant and bar staff. The financial performance of the Hotel dramatically improved and there were far more customers through the door. The Hotel's reputation with suppliers improved and it became possible to get credit. When Mr Bains arrived at the Hotel he would typically use his own money to buy supplies for decoration and maintenance of the Hotel. Mr Bains also personally bought televisions from PC World for the Hotel and IT equipment including computers and printers.

[88] Frank Queen was the general manager of the Hotel from November 2012 to February 2015, when Lynnel Farrow took over. When he first started working at the Hotel, he thought it was owned by Mr Sharif but he quickly realised that everything had to be signed off by Mr Singh. Shortly after arriving at the Hotel, he realised that it was not performing well and was struggling financially. It had difficulty in obtaining credit from suppliers and they needed to pay in advance for supplies. Cheques would often be written to pay suppliers and these would regularly bounce. Staff would need to buy things like milk, tea and coffee for the guests at the shop across the road and be paid back. There were occasions when staff had to buy things from a hardware shop if things in the Hotel were needing repaired or had ran out of lightbulbs. The restaurant manager, Mr Muhammed, often had to buy food supplies for the kitchen which he paid for initially with his own money. There were several visits from representatives of HMRC and utility companies, who would usually ask to speak to the director behind either Kelvingrove or Towncrest. There

were issues around staff not being paid. There were incidents when Mr Queen's pay was a little late, but Mr Sharif would pay him from cash takings. When Mr Bains took over the running of the Hotel things started to change for the better. Mr Bains paid all of the suppliers who were owed money and used his companies' trade accounts to order stock for use within the Hotel. Mr Queen estimated that in his first 2 weeks at the Hotel Mr Bains must have spent close to £20,000 of his own money to get the Hotel into a normal state. Not long after Mr Bains took over the Hotel, and when Mr Bains was away on holiday, the Hotel's electricity supply was cut off for failure to pay its bills historically and Mr Queen and Mr Bains arranged to hire a generator from Aggreko to keep the Hotel open. When Mr Bains arrived at the Hotel, it was a night and day change. Both Hotel and restaurant started to do really well financially and there was a huge increase in the amount of cash coming in.

[89] Jennifer Walmsley was a senior credit controller for Nichols plc, which supplies soft drinks dispensers and draft syrups to restaurant and pub businesses. Her evidence was agreed by joint minute. She confirmed that invoices from 14 July 2014 to 14 August 2015 were paid in cash. In 2015, the Hotel was placed on a direct debit account with Nichols and no longer required to pay cash on delivery.

[90] Karen Robertson was a finance supervisor employed by Dunns Food and Drink Limited. Her evidence was agreed by joint minute. Dunns had supplied the Hotel for over 10 years. The two accounts they hold on record are Towncrest and OMI Management. Historically, the Hotel was not the best of payers. When she joined Dunns in 2010 it was drummed into her that this particular hotel did not have a good history in terms of payment and because of that it was always cash on delivery. She confirmed that invoices from 27 May 2013 to 9 March 2017 were paid in cash.

[91] David Lamond works in the finance team at McLays Limited, a commercial butcher who would supply meat to the Hotel. He confirmed that some orders were cash sales and other direct debits.

[92] Tom Scott worked as finance manager at the Hotel from when it opened originally under Mr Sharif. He left the Hotel in 2014 and returned on 7 July 2016 and had recently retired from that position. Mr Scott's evidence was that when Mr Sharif owned the Hotel it was a bit of a shambles and he did not actually do much accounting. Everything was cash based. He had no accounting software and did everything on spreadsheets and the wages were manual sheets from HMRC's website. When Mr Bains arrived, Mr Bains insisted on buying a software package. By the time Mr Bains came into the Hotel, the Hotel was a few months behind in wages, but that varied depending on the staff member. Mr Queen had not been paid for approximately 3 months.

[93] Further evidence of the poor financial state of Bellhill is that HMRC presented a petition for the winding up of Bellhill on 23 July 2013. In passing, I note that Mr Singh gave evidence that HMRC had never threatened winding up proceedings, which was clearly not true given that these proceedings were brought: this is another example of why I found Mr Singh not to be a credible or reliable witness.

Involvement of Mr Singh in the Hotel after Mr Bains took over in 2013

[94] There was also a dispute between Mr Bains and Mr Singh as to the extent to which Mr Singh was involved in the running of the Hotel during Mr Bains' management.

[95] Mr Bains' evidence was that Mr Singh discussed the business with him and gave him instructions on it. Mr Singh's evidence was that he left Mr Bains in charge of the business

and knew nothing about how it was run. There was no dispute that Mr Singh supplied Mr Bains with blank cheques.

[96] I prefer the evidence of Mr Bains on this issue. Mr Bains' evidence is consistent with Mr Singh's normal business model, which was (as shown by evidence of Mr Muhammed, Mr Nabi and Mr O'Donnell discussed and accepted by me above) to use friends or other people to front businesses while Mr Singh remained in control. Further, I do not find it credible that a businessman of Mr Singh's experience, who remained as director of Bellhill, would take no interest in the operation of Bellhill or the actions of the person running its business.

2017: Mr Bains and the OMI companies leave the Hotel

[97] The relationship between Mr Bains and Mr Singh broke down in the latter part of 2016 after Mr Bains served a charge for payment under the Personal Bond and subsequently raised court actions. On 2 May 2017, Mr Singh removed Mr Bains and the OMI companies from the Hotel.

First Conclusion: repayment of Principal Sum of £670,397 in the Personal Bond plus interest at the contractual rate of 3.75% per month from date of citation

[98] Under this conclusion, Bellhill sought repayment of the principal under the Personal Bond with interest at the contractual rate.

[99] As discussed above, functionally the Personal Bond operated as a guarantee by Mr Singh of the loans made by OMI Facilities to Mr Sharif under the Sharif Bonds. There is no dispute that loans were made, nor that they were guaranteed by Mr Singh. Mr Singh avers that Mr Bains agreed to lend Mr Sharif funds on the basis that Mr Singh agreed to act

as guarantor for Mr Sharif, and that Mr Singh agreed that he would do so. The dispute in this action is whether the particular document on which the action is founded (that is the Personal Bond) is enforceable. Mr Singh avers that no written agreement was put in place to record what had been agreed as the parties trusted each other.

[100] The Personal Bond bore to have been signed on 9 October 2010 and was in the following terms:

“I SOHAN SINGH, [address] , grant me to have borrowed as at the TENTH OCTOBER TWO THOUSAND AND TEN and received from OMI FACILITIES LIMITED incorporated under the Companies Acts and having their registered office at [address] the sum of SIX HUNDRED SEVENTY THOUSAND THREE HUNDRED AND NINETY-SEVEN POUNDS (£670,397.00) STERLING, of which sum I bind and oblige myself, my heirs and executors and representatives whomsoever all jointly and severally without the necessity of discussing them in their order to repay to the said OMI FACILITIES LIMITED and to their successors and assignees whomsoever on the NINTH DAY OCTOBER TWO THOUSAND AND ELEVEN or on demand with interest on the said principal sum at a monthly rate of THREE POINT SEVEN FIVE PER CENT (3.75) from the said TENTH OF OCTOBER TWO THOUSAND AND ELEVEN to the date of payment; And I consent to the registration hereof of these presents for preservation and execution: IN WITNESS WHEREOF these presents printed on this and the front page are signed by me SOHAN SINGH at GLASGOW on the 9th of October Two Thousand and Ten, before this witness RAJINDER BAINS DIRECTOR CDB PROPERTIES LIMITED, of [address] and by MARIE OBRIEN COMPANY SECRETARY FOR OMI FACILITIES LIMITED on the 9th October Two Thousand and Ten”.

Principal sum

[101] Mr Singh sought reduction of the Personal Bond on the ground of misrepresentation, averring that Mr Singh:

“signed the [Personal Bond] on the basis of the false assurances and misrepresentations of Mr Bains, for whose acts the pursuers are responsible, to the effect that the document was required for accounting purposes only and would not be[?] enforced. But for those false assurances and misrepresentations, which Mr Bains knew or at least ought to have known were untrue and which were accordingly fraudulent or at least negligent, the defender would not have executed the bond, which should accordingly be set aside *ope exceptionis*.”

The evidence

[102] Mr Bains' evidence was that in December 2009, OMI Facilities' accountants, Khokhar & Co, noticed the loans to Mr Sharif coming out of the company's account and Mr Khurshid Khokhar advised him that the loan should be documented. Mr Bains asked Mr Singh to get Archie to sign personal bonds in respect of the loans OMI Facilities had made to Mr Sharif. Mr Sharif agreed to sign the Sharif Bonds. One bond was in respect of a principal sum of £191,430 and the other £237,250. In each bond, the principal was repayable on 31 December 2010. Each of the bonds provided for interest at 3.75% per month from 1 January 2010 until payment. Mr Singh had originally suggested an interest rate of 5% per month but Mr Bains had thought that 3.75% would be fairer as it was comparable to interest on a credit card. The bonds were signed by Mr Bains and Mr Singh on 1 January 2010 at Artto Hotel. Mr Bains, Mr Singh and Mr Sharif were present at the meeting. Mr Singh witnessed the bonds and took no issue with the rate of interest. By August 2010, Mr Bains was getting increasingly worried about the sums which Mr Singh owed him under the Sharif Bonds. In October 2010 Mr Singh asked Mr Bains for a bond to evidence his guarantee of Mr Sharif's debt to OMI Facilities as Bank of India were willing to accept Mr Singh's liability for Mr Sharif's debt as the equivalent of a deposit by Mr Singh for the acquisition of the Hotel by Mr Singh from Mr Sharif. Mr Singh, Mr Sharif and Mr Bains met at Mr Bains' office on Tollcross Road, Glasgow on 9 October 2010. The purpose of the meeting was to have Mr Singh sign the bond he had requested. Mr Bains asked Marie O'Brien to come into work that day to sign the bond on behalf of OMI Facilities as company secretary. Mr Bains drafted a bond using the Sharif Bonds as a style. He used the same interest rate as in the Sharif Bonds. He took the total amount due by Mr Sharif and included the amount payable in interest on the Sharif Bonds from 1 January 2010 to

9 October 2010. Mr Singh, Mrs O'Brien and Mr Bains signed the draft bond. It was for a sum in the region of £692,000. Mr Sharif then arrived and checked the bond and spotted that the amount was wrong. The interest had been miscalculated. A revised calculation was agreed and a fresh bond containing the agreed figure was printed out and signed. The fresh bond was signed by Mr Singh and by Mrs O'Brien, as company secretary of OMI Facilities Limited, and Mr Bains witnessed the signatures. The fresh bond is the Personal Bond which is sought to be enforced in this action.

[103] Mr Khurshid Khokhar's evidence was that in February 2010 he was reviewing the accounts of OMI Facilities. He noticed that large amounts of money had left OMI Facilities accounts and asked Mr Bains about this. Mr Bains told him that these sums were loans to Mr Sharif. Mr Khokhar advised him that he should document the loan in order to provide himself with security. Mr Bains agreed that a personal bond should be drawn up to document the loan. Mr Khokhar understood that a personal bond was subsequently executed, although he did not personally see it.

[104] Marie O'Brien's evidence was that she vividly remembered being there when the Personal Bond was signed. It was signed at Mr Bains' office at Tollcross Road. Mr Bains had called her in advance and asked her to come to the office on Saturday 9 October 2010 to sign the bonds on behalf of OMI Facilities. She would not usually work on a Saturday. She did some work while she was there before Mr Singh and Mr Sharif arrived. A bond was signed before Mr Sharif arrived. Mr Bains called her through from her office to Mr Bains' office and she signed the bond. Mr Singh also signed it and both of their signatures were witnessed by Mr Bains. Mr Sharif subsequently arrived and noticed there was a mistake in the bond that had been signed. There was a discussion between Mr Singh, Mr Bains and Mr Sharif about what the correct figure was. Mr Bains shouted through to tell her that he

had printed off two fresh bonds, reflecting what had been discussed and that she would have to come through again to sign the corrected bonds. Mr Bains kept one of the copies of the corrected bond and Mr Singh kept the other.

[105] Mr Singh's evidence was that he accepted that he owed money to OMI Facilities because he signed the Personal Bond. He stated that he officially accepted responsibility. He signed the Personal Bond but he did not do so on 9 October 2010. He signed it after Mr Sharif, in November or December 2011, became bankrupt. He signed a bond in 2012 in the Artto Hotel and Mr Singh, Mr Sharif and Mr Bains were all present. Mr Singh did not read the bond before signing it, nor did he read it or receive a copy of the bond afterwards. Two or three days after he had signed the bond, Mr Bains contacted him to say that there was a technical fault in the bond and the wording had to be changed. Mr Singh did not know precisely what was wrong with the original bond, or how the second bond differed from the first, as Mr Bains did not explain this to him nor did he read either bond. A second meeting was called at Mr Bains' office at a pub in Tollcross. The only persons present were Mr Singh, Mr Bains and Mr Sharif. Marie O'Brien was not at either meeting. At that meeting Mr Singh signed the Personal Bond. Mr Singh signed it without looking at it. All business was based on trust. Mr Bains told him at the first meeting that Mr Bains was under pressure from his accountant to get something in writing for the company. Mr Bains said:

"Uncle, nothing is going to be called upon on you. It's only a paper exercise Uncle, trust me. I will never ask for this money from you. Trust me uncle. I have made money already from Archie on interest."

[106] The evidence given by Mr Singh in this case was contradicted by the 2015 Affidavit. In the Affidavit Mr Singh's evidence was that he was liable to OMI Facilities under the Bond, and that the sums owed by him to OMI Facilities under the Personal Bond had been

repaid in part. In his evidence in this case, Mr Singh's position was that what he had sworn in the 2015 Affidavit was a mistake but an honest mistake at the time.

[107] Mr Sharif's evidence was that he was sequestered in November/December 2011. Between January and May 2012 Mr Bains came up with an excuse to get Mr Singh to sign the Personal Bond. The excuse was that Mr Bains said that his accountant advised it was needed for tax purposes. The Personal Bond was signed in 2012. Mr Bains came to the Artto Hotel and Mr Singh signed a bond. When Mr Singh was signing the bond, Mr Bains assured him that he would never enforce the bond and that this was purely a paper exercise. No one else was present at the meeting. Marie O'Brien was not present. Her signature on the bond is not genuine and Mr Sharif suspected that the signature had been done by Mr Bains. A few days later, Mr Bains called back and said he had made a mistake in the bond. Mr Singh and Mr Sharif went to Mr Bains' office in a pub on Tollcross Road. Mr Bains produced the Personal Bond and Mr Singh signed it. Mr Singh never read the bond before signing it. Marie O'Brien was not there during the meeting. Mr Bains said:

"Uncle, it's in your interest [to sign the replacement bond]. You're going to save money. I'm only going to charge 1% per annum as I've already made my money from Archy. My accountant needs it done this way to formalise it and for tax purposes. I won't enforce it."

At the meeting in the pub, Mr Bains made it clear that he had made his money back from Mr Sharif - he had charged Mr Sharif a fortune to borrow from him and then put a claim in with the trustee appointed to deal with his sequestration. There was no discussion of what was contained in the bond. Mr Bains said to Mr Singh "Uncle I'll never use it". Mr Singh never read either of the bonds before he signed them. Mr Bains gave Mr Singh the same assurance the first time Mr Singh signed the bond: that it was just for bookkeeping purposes and that he would never use it.

[108] Mr Sharif's evidence on the Sharif Bonds was that these were genuine and granted by him but were granted after the sequestration proceedings had been raised against Mr Singh. The bonds were dated 1 January 2010 but he signed them in or around December 2011. Mr Bains approached him and asked him to sign the bonds to inflate his claim in the sequestration.

Submissions for Mr Singh

[109] In support of his plea of reduction, Senior Counsel for Mr Singh invited me to accept the evidence from Mr Singh and Mr Sharif to the effect that the Personal Bond had been signed in 2012 and not 2010, and that it had been induced by a misrepresentation by Mr Bains that he would not enforce it. It was immaterial whether the misrepresentations were made fraudulently, negligently or innocently (Walker, *The Law of Civil Remedies in Scotland* page 153), but a finding of fraudulent misrepresentation would be consistent with Mr Bains' other conduct.

Submissions for OMI Facilities

[110] Senior counsel for OMI Facilities invited me to prefer the evidence of Mr Bains and Mrs O'Brien as to the date the Personal Bond was entered into. Mr Singh's position that the Personal Bond was not to be enforceable was inconsistent with the 2015 Affidavit. Mr Singh had failed to demonstrate any misrepresentation that the bond would not be enforced, and the overwhelming weight of evidence was to the contrary.

Discussion and Decision

[111] I prefer the evidence of Mr Bains to that of Mr Singh and Mr Sharif.

[112] Mr Bains' account of the signature of the Personal Bond on 9 October 2010 was supported by Marie O'Brien, whom I find to be a credible and reliable witness. She was very clear in her recollection in that she was present and what had happened, and although an employee, had no financial interest in the Personal Bond. Mr Bains' account of the timing of when the Personal Bond was signed was supported by Mr Kokhar's evidence that in 2010 he advised Mr Bains to document the loans. Mr Singh's account was directly contradicted not only by Mrs O'Brien, but also by his own 2015 Affidavit. Mr Sharif was not a credible nor reliable witness.

[113] Accordingly, I find that the Personal Bond was signed on 9 October 2010.

[114] I further find that there was no representation by Mr Bains to Mr Singh to the effect that he would not enforce the Personal Bond. Ms O'Brien heard no such representations. Further, Mr Singh's position that there were such representations is incompatible with his acceptance in the 2015 Affidavit that sums were due under the Personal Bond and part-payment had been made under it. Also, Mr Singh's evidence that Mr Bains gave a representation that he would not enforce the Personal Bond is incompatible with Mr Singh's acceptance on record that the principal sum is owing. When this inconsistency became apparent to Mr Singh in the witness box, he changed his position to suggest that the representation was also made in 2009 at the stage when Mr Singh had agreed verbally to guarantee the original borrowing. However this seems to me to have been invented by Mr Singh in the witness box as there was no basis for this on the record or in Mr Singh's written witness statement which he adopted as his evidence in chief, and it does not square with his evidence in his witness statement that he accepts that he owes money to OMI Facilities. Further, Mr Sharif's explanation of the reason why the representation was made

makes no sense. Mr Bains had not already made his money out of Mr Sharif, as Mr Sharif had paid neither interest nor principal by 2010.

[115] Accordingly, I find that Mr Singh is liable under the Personal Bond and liable to repay the principal sum.

Interest Rate on the Personal Bond

Introduction

[116] Mr Singh's fourth plea in law was:

"Esto the Bond is not set aside, the relationship between the parties arising therefrom being unfair to the debtor in terms of s.140A of the Consumer Credit Act 1974, the Court should order in terms of s.140B thereof that any sum payable by the defender should be restricted to such aspect of the principal sum as is outstanding together with interest at the rate of 1% per annum (or such other rate as to the Court may seem appropriate) until payment."

In support of that plea in law he averred that the Personal Bond:

"is unfair within the meaning of [sec 140A], having regard to (a) the punitive interest rate contained therein; (b) the exorbitant nature of that interest rate having regard to prevailing interest rates both at the time of execution and since; (c) the undue influence exerted by Mr Bains, in whom the defender previously reposed a great deal of trust; (d) the false assurances and misrepresentations hereinbefore condescended upon; and (e) the whole circumstances in which the deed came to be signed."

Submissions for Mr Singh

[117] Counsel for Mr Singh invited the court to disapply the interest provisions in the Personal Bond using its power under section 140B of the Consumer Credit Act 1974, which failing, replace the rate of 3.75% per month with a more reasonable figure such as four per cent per annum. The interest on the Personal Bond to around the time of the proof would be over £3,000,000. The Personal Bond itself was for £670,397 of which only £387,250 represented loans actually made to Mr Sharif.

Submissions for OMI Facilities

[118] Counsel for OMI Facilities invited the court adopt the approach to section 140A in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61. Mr Singh could only succeed under section 140A if he failed on his primary position that the Personal Bond was backdated. The 3.75% monthly rate was not exorbitant or unreasonable. It had been agreed with Mr Sharif in 2009. At that stage the loan was intended to be for a period of only a few months. It was a rate selected for a short-term unsecured loan, broadly corresponding to the rates of interest charged on a credit card borrowing. Mr Sharif had little or no credit, and every lender required Mr Singh's guarantee. Other lenders to Mr Sharif lent at a high rate. Mr Singh was well aware of the interest rate, which was set out in the Sharif Bonds which Mr Singh had witnessed. There was no evidence of undue influence such as to justify reduction of the bond. There was no unfair relationship, bearing in mind that the Personal Bond may well have reflected a guarantee that had already been given some time previously.

The Law

[119] The *Consumer Credit Act 1973* provides as follows:

"140A Unfair relationships between creditors and debtors

(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement ... is unfair to the debtor because of one or more of the following –

- (a) any of the terms of the agreement ...
- (b) the way in which the creditor has exercised or enforced any of his rights under the agreement...;
- (c) any other thing done (or not done) by, or on behalf of the creditor (either before or after the making of the agreement...)

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

...

140B Powers of court in relation to unfair relationships

(1) An order under this section in accordance with a credit agreement may do one or more of the following –

...

(c) reduce or discharge any sum payable by the debtor ... by virtue of the agreement...

...

(f) alter the terms of the agreement..."

[120] Guidance on the approach which the court should take to these sections can be found in *Plevin v Paragon Personal Finance Limited*:

"Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at subparagraphs (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone." (Lord Sumption at para [10])

The evidence

[121] Mr Singh's evidence was the interest rate in the loan from OMI Facilities to Mr Sharif was 1% per annum above base rate. I do not accept his evidence on this. It is contradicted by the 2015 Affidavit in which Mr Singh states "OMI agreed to lend money on the basis that

Mr Sharif would pay interest at the rate of 3.75% per month on the sums that he borrowed”.

Mr Singh’s evidence in this case is also inconsistent with the terms of the Sharif Bonds and the Personal Bond, which are short simple documents which set out very clearly a rate of 3.75% per month. I do not accept Mr Singh’s explanation that he witnessed the Sharif Bonds and signed the Personal Bond without reading either of them. I did not find it credible that an experienced businessman involved in transactions involving large amounts of money would simply not read important legal documents.

[122] Accordingly, I find that the loans made by OMI Facilities to Mr Sharif were at an interest rate of 3.75% per month. OMI Facilities would not have entered into that loan if it had not been guaranteed by Mr Singh. The mechanism by which Mr Singh documented his guarantee of the loan was to enter into the Personal Bond. As the underlying debt to Mr Sharif was at an interest rate of 3.75% per month, it is not surprising that the Personal Bond whose function was to guarantee that underlying debt was also at that interest rate.

Discussion and Decision

[123] Mr Singh avers five factors which he says demonstrate that the relationship between OMI Facilities and Mr Singh arising out of the Personal Bond are unfair under section 140A. The first two are merely two different ways of saying the same thing: the interest rate is so high as to be unfair. There is no evidence at all for the third factor, that is undue influence exerted by Mr Bains. In any case, the lending by OMI Facilities came about because Mr Singh wanted to help Mr Sharif by introducing him to various potential lenders and then guaranteeing the resulting loans: it is difficult to see how Mr Bains could have exerted undue influence in these circumstances. The fourth factor founded upon is Mr Singh’s evidence as to misrepresentation which I have already rejected in the context of Mr Singh’s

reduction plea. The fifth factor is merely a general reference to all the circumstances of the case.

[124] The starting point for analysis of whether the relationship between OMI Facilities and Mr Singh is unfair because of the interest rate is the agreement made between OMI Facilities and Mr Sharif and set out in the Sharif Bonds. The interest rate in that agreement is 3.75% per month, which senior counsel for Mr Singh calculated as being equivalent to 45% per annum. Mr Singh was present when the Sharif Bonds were signed, and he witnessed them. He knew he was guaranteeing them, and raised no objection to the interest rate.

[125] In my opinion the relationship between Mr Sharif and OMI Facilities is not unfair on account of that interest rate. The interest rate was agreed between Mr Bains and Mr Sharif, two experienced businessmen, on a commercial transaction. Their relationship was not so one sided as to substantially limit Mr Sharif's ability to choose. Further, although the high interest rate might appear to operate harshly, in the circumstances it was justified in order to protect a legitimate interest of Mr Bains as creditor. Lending to Mr Sharif was a high risk activity. He was in financial difficulty. Lenders were not prepared to lend to him without the security of a guarantee by Mr Singh. The high risk of lending to Mr Sharif was reflected in the high interest rates charged by lenders. The £300,000 lending by Mr Singh to Mr Sharif in 2008 was at an interest rate of 1% per month. The lending by Mr Sattar which Mr Singh guaranteed under the 2009 Personal Bond referred to above was at an interest rate of 10% per annum. The lending by Marston in 2009 referred to above was on the equivalent of an annual interest rate of 22.6%, expressed as a late payment penalty of £1,000 a week. The loans by OMI Facilities to Mr Sharif were intended to be a short term loan until 31 December 2010 and it was not intended that they would have remained unpaid and accumulating interest thereafter. A high interest rate can be a useful incentive to encourage prompt

repayment of a short term loan. If Mr Sharif had thought that the interest rate would be too high, he could have sought to negotiate a lower rate or could have declined to borrow from OMI Facilities. In all these circumstances, it does not appear to me that the interest rate of 3.75% per month for a high risk short-term loan which was not secured against any heritable or other property and was entered into freely as a commercial transaction between two experienced businessmen gives rise to unfairness under section 140A.

[126] Having established that there is no unfairness in respect of the interest rate in the Sharif Bonds, the next question is whether the use of the same rate in the Personal Bond means that the relationship between OMI Facilities and Mr Singh was unfair to Mr Singh. In my opinion it was not. Although the Personal Bond was expressed in the form of an independent obligation by Mr Singh, its function was to act as a guarantee for the loans to Mr Sharif. The guarantee in the form of the Personal Bond was a freely negotiated commercial transaction between two very experienced businessmen. It did not introduce a new interest rate but merely incorporated the rate which Mr Singh had agreed to guarantee. Mr Singh accepted in the Gratuitous Alienation Action that the rate was 3.75% per month and did not seek to challenge it as unfair. The relationship between Mr Singh and Mr Bains was not so one-sided as to limit Mr Singh's ability to choose, and he could have chosen not to guarantee Mr Sharif's borrowing. If Mr Singh had paid the amount he was due to pay to OMI Facilities under the Personal Bond promptly when repayment came due in November 2011 rather than delaying payment for some 9 years, then the amount of accumulated interest which he required to pay would have been much less. The large amount of interest which has now accumulated is not harsh, but merely reflects the fact that Mr Singh failed to repay the capital in a short term high interest loan when it became due.

[127] For these reasons I find that the relationship between the creditor and the debtor arising out of the Personal Bond is not unfair to the debtor, Mr Singh. I shall repel Mr Singh's fourth plea in law.

Second and Third conclusions: interest under the Personal Bond at the contractual rate of 3.75% per month to the date of citation, calculated at either £334,797.32 (Second Conclusion) or alternatively £1,759,792.12 (Third conclusion)

[128] The first conclusion is for payment of the principal sum, with interest at the contractual rate from the date of citation. The summons provides two alternative ways to deal with the interest which had accrued on the Personal Bond prior to the date of citation. The first, which is in the second conclusion, calculates the interest under deduction of various payments made towards the Personal Bond. The alternative, which is in the third conclusion arises if these payments were not in fact made towards the Personal Bond, but were made in satisfaction of contractual payments dealt with in the other actions.

[129] I accept the evidence of Mr Singh as set out in the 2015 Affidavit that the payments were made towards the Personal Bond. Senior Counsel for OMI Facilities indicated in submissions that there was an error in the calculation of the figure of £334,797.32 stated in the second conclusion. I shall put the case out by order for discussion of what the correct figure should be, and thereafter grant decree terms of the second conclusion in the amount of the correct figure.

Fourth Conclusion: repayment of £35,000 paid in June 2013 to settle Mr Singh's debt to Mr Javid

[130] Under this conclusion OMI Facilities seeks repayment of £35,000 which it paid to Harper Macleod in June 2013 to settle a sum that Mr Singh owed to Khalid Javid. Senior Counsel for Mr Singh quite properly accepted that no defence was made out to this claim. Accordingly I shall grant decree in terms of conclusion four.

Order

[131] I shall uphold OMI Facilities' second, fourth and fifth pleas-in-law, and repel Mr Singh's third, fourth and fifth pleas-in-law and grant decree in terms of the first and fourth conclusions and put the case out by order for discussion of the correct figure to be included in the second conclusion. I reserve all questions of expenses in the meantime.