



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 46

CA76/17

OPINION OF LORD ERICHT

In the cause

OMI FACILITIES LIMITED

Pursuer

against

BELLHILL LIMITED

Defender

Pursuer: Sandison QC, O'Brien QC; Dentons UK and Middle East LLP

Defender: Dean of Faculty, 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 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.

[3] In *OMI Facilities Limited v Singh* (2021 CSOH []) OMI Facilities seeks payment of sums said to be outstanding under a Personal Bond dated 9 October 2010 (the “Personal Bond”). 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.

[4] The opinions in all four cases should be read together in order to give a complete view of my findings.

[5] This case and *OMI Management Limited v Bellhill Limited* both relate to services said to be provided by Mr Bains’ companies to Bellhill Limited. OMI Facilities trades as a supplier of cleaning and other services to hotels. OMI Management trades as a supplier of management and other services to hotels. There is considerable crossover between this action and *OMI Management Limited v Bellhill Limited*. Similar issues apply to both, the difference being whether the service in question was supplied by OMI Facilities or OMI Management. Where there are common issues, I shall deal with them in detail in this opinion, and then apply my decision in the opinion for *OMI Management Limited v Bellhill Limited*.

First conclusion: room cleaning and other services between 1 June 2011 and 30 November 2016 in the sum of £1,493,671.46

[6] In terms of the first conclusion, OMI Facilities seeks payment of £1,493,671.46 together with interest at the contractual rate. The principal sum is the total under various invoices which are produced and listed in Appendix 1 to the summons. The invoices are addressed to Bellhill. They narrate what the services were being charged for: for example,

the invoice dated 30 November 2014 states “Cleaning of rooms in November 2014. Supply of labour/reception/night porters/kitchen porters/late maids”.

Submissions on behalf of OMI Facilities

[7] Senior counsel for OMI Facilities submitted that the services referred to in the invoices were provided under a contract dated 15 June 2010 (“the 2010 Contract”). He further submitted that when Bellhill acquired the Hotel in April 2011 OMI Facilities continued to provide services on the same basis that had previously been agreed under the 2010 Contract. The contract had been novated (*MRS Distribution Limited v DS Smith (UK) Limited* 2004 SLT 631, *WJ Harte Construction Limited v Scottish Homes* 1992 SC 99). The rates set out under the 2010 Contract were increased by agreement between Mr Bains and Mr Singh. *Esto* no contract price was agreed, then the price would fall to be determined on a *quantum meruit* basis (*McBryde, The Law of Contract in Scotland (3rd Edition)* paragraph 9-45). Certain payments which had been made by Bellhill were payments under the Personal Bond, not payment of the invoices.

Submissions on behalf of Bellhill

[8] Senior counsel for Bellhill submitted that there was no contract between the parties, and the figures used were exaggerated. The 2010 Contract was signed in 2012 for the purposes of allowing Mr Bains to make a false claim in Mr Sharif’s sequestration. The room cleaning rate in the 2010 Contract of £7.25 plus VAT was inflated, as standard rates at that time were £5.20 to £5.80. There were problems with invoice sequencing.

[9] He further submitted that in the absence of any contract, any claim would have to be on a *quantum meruit* basis. Mr Robb, Bellhill's expert, had calculated that in a 2 month period, only 13.7% of the net sums invoiced were represented by net wages paid to staff.

[10] Counsel further submitted that in any event, there had been payments made of at least £1,425,000 by Bellhill to the two OMI companies.

[11] He further submitted that in any event OMI Facilities had no title to sue for wages costs borne by OMI Management.

Facts

[12] There was a dispute on the facts as to whether OMI Facilities had entered into the 2010 Contract and a previous contract in 2009.

[13] The first contract in dispute was a contract between OMI Facilities and Mr Sharif dated 15 August 2009 ("the 2009 Contract"). The 2009 Contract bore to be signed by Mr Sharif as owner of the Lorne Hotel and Mr Bains as director of OMI Facilities on 15 August 2009, and to be witnessed by Marie O'Brien on that date. A copy of the 2009 Contract was produced. The term of the contract was 1 year from 1 September 2009. The contract provided for OMI Facilities to clean rooms, corridors, stairways, reception, public areas, offices and public toilets and to deal with laundry. Room service was charged at £3.50 per room; public areas and restrooms at £8.25 per hour; linen management and control at £7.95 per hour; and supervision at £2,300 per month. There was also a standard charge of £7.95 per person per hour for additional duties.

[14] The second contract in dispute is the 2010 Contract. A copy was produced. The 2010 Contract was to take effect from 1 July 2010. The pricing structure in the 2010 Contract differed from the 2009 Contract. The services to be provided were the same. The contract

was to run for 5 years. The room service rate was increased to £7.25 plus VAT per room, but there was to be no separate charge for public areas, restrooms, linen management and control or supervision. As before, there was a standard charge of £7.95 per person per hour for additional duties. The 2010 Contract provides for interest at the rate of 1% per month.

[15] Mr Bains gave evidence that on 13 July 2009, he received an email from Martin Lawrence the then general manager of the Hotel who asked him to provide initial cleaning services at the Hotel. A contract was prepared for the initial clean, but was not signed. Shortly thereafter, Mr Bains prepared the 2009 Contract which was signed on 15 August 2009. In June 2010, the then new general manager of the Hotel, James O'Shea, renegotiated the contract, resulting in the room rate being substantially varied in June 2010. A lower rate was applied which worked in favour of the Hotel. This was given effect to by the 2010 Contract.

[16] Marie O'Brien was an administration assistant employed OMI Facilities, and the company secretary of OMI Facilities. She gave evidence that the 2010 Contract was signed because the rate previously agreed in the 2009 Contract was not working because the Hotel was not busy enough. In the 2009 Contract there was a separate charge for the cleaning of rooms, public areas, linen and supervision. That meant that if the Hotel sold only 10 rooms, the charges for public areas, linen and supervision still had to be paid. A meeting took place between Mr Bains, Mr O'Shea and herself to discuss the situation. Mr O'Shea managed to haggle Mr Bains down to a room rate at £7.25 per room which was lower than what Mr Bains wanted. The contract was signed in the Victoria Lounge at the Lorne Hotel and Mr Sharif, Mr Bains and herself were in attendance. She confirmed that the signatures on both the 2009 and 2010 Contracts were hers.

[17] Mr Sharif's position was to the effect that the 2009 Contract and the 2010 Contract were forgeries, and that his signature on both documents had been forged. In his witness statement, which he adopted as his evidence, Mr Sharif stated that when he was the owner of the Hotel he did not engage any company to do the cleaning. His manager, Martin Lawrence, engaged OMI Facilities with his blessing. Mr Lawrence may have signed something with OMI Facilities but Mr Sharif never did. The 2009 Contract purported to have been signed by him and the signature did look somewhat like his. He had severe doubts that he signed the contract. He thought that it had been fabricated to put in a claim in his sequestration. He had not had sight of the 2010 Contract before. The signature which purported to be his looked like his signature but was also a fake. Marie O'Brien's signature on the contract was not genuine. He suspected that the document had been signed by Mr Bains. However, in his oral evidence he changed his position. On cross-examination his position was that he did in fact sign the 2009 and 2010 Contracts but did so in 2012. He confirmed that the signature was his. His evidence in his witness statement to the effect that his signature had been forged was a misunderstanding which had arisen because the statement was taken by an inexperienced second year solicitor.

[18] I prefer the evidence of Mr Bains and Miss O'Brien. Mr Bains' account is supported by the email from Mr Lawrence, which was produced. The existence of the 2010 Contract is supported by invoices from OMI Facilities to Bellhill, at the rates set out in the 2010 Contract, having been paid by Bellhill by cheque on 29 June 2012, 7 August 2012, 10 September 2012 and 12 February 2013. The receipted invoices were produced. Given that there was no dispute that OMI Facilities provided services to the Hotel during Mr Sharif's period of ownership and after the sale of the Hotel to Bellhill, it is not surprising that OMI Facilities would have had a contract.

[19] I find Mr Sharif's evidence to be wholly incredible and unsatisfactory. I do not accept that his abandonment of his original position that his signature was a fake can be blamed on the solicitor who took the statement. Mr Sharif had an opportunity to correct this statement before signing it, and also an opportunity to correct it in the witness box when asked to adopt it: he did neither. His new position, that he had signed a fake contract in order that Mr Bains might make a false claim in Mr Sharif's sequestration would, if it were true, be a further blow to Mr Sharif's credibility as it would form an admission that Mr Sharif had perpetrated a fraud on his own trustee on bankruptcy. Although I have found that the new position is not true, the very fact that Mr Sharif was willing to come into the witness box and falsely admit to such a fraud is a further indictment on his probity and credibility.

[20] Accordingly, I find as a matter of fact that the 2010 Contract was entered into. However, that only gets OMI Facilities so far as the 2010 Contract was for the supply of services to Mr Sharif, and not to Bellhill. OMI Facilities' position was that the 2010 Contract was novated to Bellhill.

[21] Mr Bains gave evidence that when Bellhill acquired the Hotel, OMI Facilities continued to provide the cleaning services to the Hotel. No fresh contract was entered into but the arrangement continued on the same rates previously agreed with Mr Sharif. This was discussed between Mr Bains and Mr Singh. They agreed that there was no need for a fresh contract. Mr Singh knew that it was OMI Facilities that was cleaning the Hotel and did not have an issue with it. Over time, there was an agreement that the rate increased to £8.25 per hour being charged for individuals carrying out additional duties such as night staff, kitchen porters and receptionists.

[22] Mr Singh's evidence in his witness statement was that he knew nothing about these matters: there was never such a discussion and he never agreed to any rate variation. On cross-examination Mr Singh changed his position and agreed that he knew that OMI Facilities were still providing the cleaning services for the Hotel, but never expected that the services would have to be paid for.

[23] I prefer the evidence of Mr Bains. Mr Singh's change of position does nothing for his credibility as a witness. I find neither his original nor his changed position to be credible. I do not find it credible that Mr Singh would not have known that these services were being provided to the Hotel by OMI Facilities after Bellhill acquired the Hotel. I do not find it credible that Mr Singh, as an experienced businessman and director of a company which owned a large hotel, would have expected the Hotel to have been cleaned free of charge. As the sole director of Bellhill, Mr Singh must have known that someone must have been cleaning and staffing it and must have known that Bellhill had in 2012 and 2013 paid by cheque the four OMI Facilities invoices referred to above.

Discussion and Decision

[24] Novation can be inferred from facts and circumstances (*MRS Distribution Limited v DS Smith (UK) Limited*). To establish novation, all that it is necessary to do is to prove that the parties have reached a consensus which transfers certain rights and responsibilities under the contract from a party to the contract to a third party (*W J Harte Construction Limited v Scottish Homes*). Where, as in this case, there is a transfer of a business as a going concern, the commercial reality of the transaction has to be taken account and, as Lord Drummond Young said in *MRS Distribution Limited v DS Smith (UK) Limited*:

“it will often be very easy in such cases to infer from the conduct of the parties after the sale of the business that contracts with suppliers or customers have been subject to delegation.”

[25] The circumstances of the current case are that after the transfer of the Hotel as a going concern to Mr Singh by Mr Sharif, OMI Facilities continued to supply the services to the Hotel under the 2010 Contract, and Mr Singh and Bellhill were aware that this was being done. Accordingly, in my opinion, it can readily be inferred from the conduct of the parties that the 2010 Contract was novated to Bellhill.

[26] I do not agree with the submission made on behalf of Bellhill that the figures used for the price of the services were exaggerated and inflated. I note that there was conflicting evidence as to whether the rates in the 2010 agreement represented market rates. Mr Bains' position was that the rates were similar to those which he charged for other hotels, and he provided invoices to a hotel in Aberdeen to vouch this. Mr Sharif claimed that the rates in the 2010 Contract were too high and he would not have paid them: I do not accept that as the receipted invoices show that payment was made at these rates by Bellhill during the time when Mr Sharif was running the Hotel under Bellhill's ownership. Mr Singh's position was that the rates were too high compared with the rates he paid for the Artto Hotel, but on cross-examination he conceded that the Artto was not a comparable hotel. Thom Murphy (who was the general manager of the Hotel from July 2015 to March 2020) claimed that in his experience the market rates would be lower at £5.30 to £5.80 per room but provided no vouching for this. There was on the other hand vouching before the court which demonstrated that the rates in the 2010 Contract were in line with market rates: the rate of £8.25 per hour is similar to that of £8.00 per hour which is shown on an invoice dated 17 July 2017 to Bellhill from Unifique Cleaning Services, who took over the cleaning of the Hotel from OMI Facilities. Further, I do not accept the evidence of Bellhill's expert

accountant, Mr Robb, that the rates were an overcharge. Mr Robb came to that conclusion on the basis that the rates showed a significant profit mark-up as OMI Facilities had charged £1.3 million while incurring wage costs of only £0.6 million. I agree with OMI Facilities' expert Mr Cuerden that Mr Robb's analysis does not take into account OMI Management employees who were involved in supplying these services and has not identified all the costs incurred in providing the services.

[27] Senior counsel for Bellhill placed considerable emphasis on the fact that the numbering sequence of certain of the invoices did not correspond with the chronological sequence. I do not find that the fact that certain invoices were numbered out of order outweighed the overwhelming evidence that the invoices for which payment was sought under this conclusion were due under the novated 2010 Contract. I accept the evidence of Marie O'Brien that the numbering sequence of the invoices would have been altered by the use of different versions of accounting software. In any event, there was clear evidence from OMI Facilities' witnesses, Marie O'Brien, Mr Queen, Miss Farrow and Mr Bratu, and from Bellhill's witnesses, Mr Murphy and Mr Scott, that there was a procedure in place whereby the number of rooms cleaned was confirmed by the Hotel's general manager and invoices were issued accordingly.

[28] I do not accept the submission made by senior counsel for Bellhill in respect of this conclusion, that OMI Facilities has no title to sue for wage costs borne by OMI Management. OMI Facilities is not suing for wage costs: it is suing for payments due under the novated 2010 Contract. It makes no difference who the employer of the staff is: payments would still be due under the contract whether the staff used by OMI Facilities to fulfil the contract were directly employed by OMI Facilities, OMI Management, or indeed an independent sub-contractor.

[29] Senior counsel for Bellhill submitted that in any event there had already been payments of at least £1,425,000 by Bellhill to the two OMI companies. However, in my opinion this is irrelevant to the sums sought in this action as, for the reasons I have set out in *OMI Facilities v Singh*, these payments were payments towards the Personal Bond.

[30] I find that, subject to the discussion of the general defences below, Bellhill is liable to pay the principal and contractual interest sought under this first conclusion.

Second conclusion: room cleaning and other services between December 2016 and May 2017 November 2016 in the sum of £169,837.73

[31] In terms of this conclusion OMI Facilities seeks payment in respect of invoices for services provided under the 2010 Contract for December 2016 to May 2017, together with interest at the contractual rate. The only difference between the sums sought under this conclusion and the sums sought under the first conclusion is that instead of original invoices the court had before it invoices which were reissued following May 2017.

[32] Mr Bains' evidence, which I accept, was that when he was removed from the Hotel in May 2017, he was denied access to the office that he used. Although certain items were later returned, these did not include the invoices relating to this conclusion, and when computers were returned under a court order the accounting software had been deleted. It had accordingly been necessary to create new invoices to replace those that had been lost.

[33] There was no dispute that OMI Facilities had been providing its usual services to Bellhill in the period from December 2016 to May 2017. The same arguments apply in relation to this period as in relation to the period covered under the first conclusion. As I have found that the invoices under the first conclusion were due under the 2010 Contract, then it follows that the invoices under the second conclusion are due also.

[34] I find that, subject to the discussion of the general defences below, Bellhill is liable to pay the principal and contractual interest sought under this second conclusion.

Third conclusion: goods and services supplied to the Lorne Hotel by third parties and paid for by OMI Facilities mainly in the period 2013-2015 in the sum of £334,749.45

[35] The sums sought to be recovered under this heading relate to expenditure by OMI Facilities for the purposes of the business of Bellhill at the Lorne Hotel mainly in the period from 2013 to 2015. The invoices for the items supplied, or bank statements showing the payments, were produced and were listed in a schedule to the summons, totalling the sum concluded for. The invoices and bank statements were reviewed by the pursuer's expert Mr Cuerden for the purposes of this action. Mr Cuerden identified and stripped out any clerical mistakes, so that the only sums set out in the schedule and sought under this conclusion were the sums that he had verified in relation to OMI Facilities. Mr Robb had not been instructed to form a view on the sums sought in this action.

The facts

[36] Mr Bains' evidence was that when he took over the running of the Hotel, Bellhill had a poor credit record and could not get trade accounts set up with key suppliers. OMI Facilities used its own accounts to obtain a variety of items needed to allow the Hotel to continue to trade. These items included an electric booking management system, computers, a washing machine, furniture, linen, stationery, paint, crockery, staff uniforms and electricity. Those were all paid for by OMI Facilities and the cost of each item was subsequently recharged to Bellhill. Mr Bains did not add any premium on the costs facilities incurred on behalf of Bellhill, and Bellhill benefited from the trade prices the OMI

companies had with their suppliers. In August 2013, the electricity to the Hotel was disconnected by EDF Energy as the Hotel had arrears in excess of £43,000. Frank Queen, the general manager, phoned Mr Bains when Mr Bains was on holiday in Spain. Mr Bains contacted EDF to make a substantial payment to account of £20,000 on his personal credit card, however EDF insisted on the full balance. Mr Bains and Mr Queen took emergency steps to have the power reconnected. Mr Queen made enquiries with Aggreko, who required immediate payment of £5,000 to release a generator. Mr Bains instructed Mr Queen to take £5,000 in cash from the Hotel to put in his bank so he could make a card payment that day to Aggreko to secure the generator. Mr Bains eventually caught up with Mr Singh to tell him what was happening. Mr Singh arranged to have a tour group which was due to arrive at the Hotel to be fed at Mr Singh's Bombay Blues Restaurant to give time for the generator to be set up and the power restored.

[37] Mr Singh's evidence was that Bellhill generally had a good history of payment. Bellhill had had some minor issues at the start due to taking over the Hotel from Mr Sharif who was being chased by historic creditors. Mr Singh knew nothing about the electricity and generator issue.

[38] I accept the evidence of Mr Bains for the following reasons.

Evidence from suppliers

[39] Firstly, Mr Bains' evidence was supported by independent witnesses who had supplied goods to the Hotel.

[40] Jennifer Walmsley was senior credit controller at Nichols plc. Her evidence was agreed by joint minute. Her evidence was that Nichols supplies soft drink dispensers and draft syrups to restaurant and pub business. Nichols had supplied the Hotel since 2013. She

provided copy invoices from 14 July 2014 to 14 August 2015 which all stated “cash on delivery” on them. She confirmed that they 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.

[41] Karen Robertson was a Finance Supervisor for Dunns Food and Drink Limited. Her evidence was agreed by joint minute. Her evidence was that Dunns had supplied the Hotel since prior to her joining the company in 2010. Her understanding of the Hotel was that historically they were not the best of payers. When she joined Dunns it was drummed into her that because the Hotel did not have a good history in terms of payment it was always cash on delivery. She provided invoices from 2013 to 2017. The invoices all stated “cash invoice” and she confirmed that they were all paid in cash.

[42] David Lamond was company accountant of McLays Limited who supplied the Lorne Hotel with butcher meat from April 2010. His evidence was agreed by joint minute. He provided an invoice history for the Hotel from 2013 to 2017. He confirmed that some orders were settled in cash and some were paid for by direct debit.

Evidence from those working at the hotel

[43] Secondly Mr Bains’ evidence was also supported by witnesses who had worked in the Hotel at the relevant time.

[44] Marie O’Brien gave evidence that when Mr Bains started at the Hotel, the vast majority of suppliers were paid in cash. It was really difficult as they could not get credit from any suppliers: most of them insisted on paying in cash because they had trouble getting paid by the Hotel previously. The only supplier who was willing to deliver on credit to the Hotel was Alliance and that was only because the goods were ordered under OMI’s

account. Alliance would provide the goods and invoice OMI Facilities or OMI Management direct. Trade suppliers had to be paid in cash for at least 18 months before other 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 he was then able to order goods without having to pay cash up front. He also paid to put the Hotel on websites which raised the profile of the Hotel and started to get more customers through the door.

[45] Lynnel Farrow was employed as a general manager of the Lorne Hotel from February to July 2015. Her evidence was agreed by joint minute. Her evidence was that 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 for goods it ordered. She remembered that Brakes, food supplier was paid about £6,000 a week in cash. There were also cash payments to a Halal meat supplier and M&J Seafood, a seafood supplier. She thought there were only two suppliers who were not paid in cash. One of these was Waverley Vintners who supplied alcohol to the Hotel. They did not insist on upfront cash payments but she thought the Hotel's trade account was guaranteed with one of Mr Bains' personal credit cards. She believed there was a similar arrangement with direct debit payments to Tchibo, the tea and coffee supplier. If a delivery was expected, she would have the cash for payment ready in the safe. She would generally speak to the delivery driver, check the amount on the invoice and adjust the amount payable, retrieve the money from the safe and pay the delivery driver. She was aware that the OMI companies paid for everything at the Hotel. 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. OMI then invoiced Bellhill for the cost of such items. She would often be asked to sign off

on what was contained within the invoices to evidence that the items charged to Bellhill were in fact for Bellhill.

[46] Aurelian Doru Bratu was head housekeeper at the Hotel from March 2010 until May 2017. During that time OMI Facilities provided the housekeeping services. He also recruited housekeeping staff for OMI Facilities. He began working at the Hotel in March 2010, when it was owned and operated by Mr Sharif. Under Mr Sharif's management, the Hotel was unsuccessful and the staff frequently complained they had not been paid. After the change of ownership to Bellhill in April 2011, the Hotel continued to perform poorly. The Hotel had problems obtaining credit from suppliers. As a result suppliers were regularly paid in cash. When Mr Bains took over in June 2013, he provided staff and goods to the Hotel through his companies OMI Management and OMI Facilities. Bellhill could not get credit from suppliers. Various everyday items were purchased by the OMI companies for the Hotel so that the Hotel would not have to keep paying cash for items delivered. His understanding was that there was an arrangement whereby OMI would invoice Bellhill for these items, but he was not involved in that process.

[47] Zeeshan Khokhar was an accountant and a partner in Khokhar McAdam Limited. Mr Bains and the two OMI companies were clients of his firm. In around 2013, Mr Bains asked him to act as a kind of credit control function for the Hotel. His staff would deal with the sales ledger and chasing up invoices. Through the work that his firm carried out at the Hotel, he could see that Mr Bains was funding the Hotel. Mr Bains paid for staff, utilities, suppliers and everything in between. This was all documented in invoices which the OMI companies raised and issued to Bellhill on a monthly basis. There would be vouching for the costs behind each invoice. His firm saw the invoices quarterly as copies would be

provided along with the OMI companies' VAT return. The firm needed to see the issued invoices as they would need to be listed as debts in the accounts of the OMI companies.

[48] Shafiq Muhammed was the former restaurant manager and assistant manager of the Lorne Hotel. He started work in the Hotel in 2010. During the time when the Hotel was being run by Mr Sharif, there were occasions when Mr Muhammed had to purchase items to be used by the Hotel. Sometimes he would get the money back for these items, sometimes he would not. He was aware that other members of staff also had to use their own money to purchase items for the Hotel. Mr Bains joined the Hotel in June 2013 and the Hotel was much better run under him. If the Hotel needed any supplies or goods, one of the OMI companies would provide it. Mr Bains also made sure that everyone who was owed money was paid. Mr Muhammed received 2 months of wage arrears when Mr Bains took over. Once Mr Bains took over, wages were paid on time and, over time, fewer suppliers had to be paid in cash.

[49] David Owens was maintenance manager of the Hotel from December 2012 until July 2015, and then property maintenance manager from July 2015 until April 2017. His evidence was that when Mr Sharif was managing the Hotel, it was unsuccessful. There were frequently delays with the payment of wages for staff and Mr Owens was usually paid in cash taken from the till. Suppliers would often be paid in cash by Mr Sharif. Cheques issued to suppliers would frequently bounce and when that happened the supplier would come in and would be paid out of the tills in cash. Mr Owens often had to use his own money to buy supplies for the maintenance work needed in the Hotel from a local store, and would then ask Mr Sharif to repay him. He had to buy these supplies himself as the Hotel had a bad reputation with creditors and could not get credit. When Mr Bains took over the management of the Hotel, Mr Bains would typically use his own money to buy supplies for

the decoration and maintenance of the Hotel. If Mr Owens needed to buy supplies, he no longer had to use his own money as Mr Bains would fund the purchases. Mr Owens remembered Mr Bains personally buying televisions from PC World for the Hotel. Mr Bains regularly bought things like paint for the decoration of the Hotel. He also bought IT equipment for the Hotel including desktop computers, USB's, HDMI cables, printers and EPOS machines. Mr Owens would go and pick up these goods on Mr Bains behalf from the supplier. In addition to items Mr Bains paid for personally or were paid for using petty cash, Mr Bains also ordered various items for the Hotel through his own OMI companies. Those companies were able to obtain credit from trade suppliers and, as such, some things the Hotel needed were ordered on OMI's trade account. Where that happened, an invoice would be prepared and issued to Bellhill. Mr Bains did not mark-up the goods supplied from OMI to the Hotel. It was not done for profits: OMI simply recharged the cost it had incurred to Bellhill.

[50] Frank Queen was a hotel manager by trade with over 30 years' experience. He started working at the Hotel in November 2012, when Mr Sharif was managing the Hotel. Mr Queen's role was general manager. Shortly after arriving at the Hotel he realised it was not performing well and was struggling financially. The Hotel had difficulty obtaining credit from suppliers. The credit history of the Hotel was so bad that supplies had to be paid for in advance. Cheques written to pay suppliers would regularly bounce. The staff would need to buy things like milk, tea and coffee for the guests and hardware items, and Mr Muhammed often had to buy food supplies for the kitchen from his own money. When Mr Bains took over the running of the Hotel things quickly started to change for the better. He paid all of the suppliers who were owed money and used his companies' trade accounts to order stock for use within the Hotel. They went from having to pay in advance for

supplies, to paying cash on delivery to then being given 90 day payment terms because of the OMI companies' good credit history and ability to pay for supplies. Shortly after Mr Bains came to the Hotel Mr Bains went to Spain on holiday with his family. The utility company that supplied electricity to the Hotel attended at the Hotel with the police and cut-off the electricity supply due to non-payment of bills. Mr Queen phoned Mr Bains while Mr Bains was on holiday and between them they arranged to hire a generator from Aggreko to try and keep the Hotel open. Mr Queen paid the deposit for the generator of £5,000 on his personal credit card and Mr Bains reimbursed him when he returned from holiday.

Invoicing procedures

[51] Thirdly, further support is given to Mr Bains' position by evidence about the way in which the invoices were authorised and issued. That procedure provided a system of checks and balances to ensure that only items properly incurred by OMI Facilities on behalf of Bellhill would be recharged to Bellhill.

[52] Mr Bains' evidence on the invoicing procedure was that Miss O'Brien would issue invoices in respect of staff costs and sundry costs at the end of each month. She would review each invoice received from trade suppliers and allocate OMI's share to the OMI companies and Bellhill's share to it. A copy of the relevant vouching would be enclosed with each invoice.

[53] Miss O'Brien gave evidence that at the point Mr Bains took over the Hotel, he told her that the OMI companies would be paying the Hotel's bills. He instructed her to ensure that invoices were created for everything either of the OMI companies paid for on behalf of Bellhill. These invoices had to be issued in addition to the usual invoices for housekeeping services. To keep herself right she invoiced any housekeeping and staff costs under facilities

and any goods and supplies under OMI Management. Initially, she would typically send OMI's invoices to the Hotel by post. After she moved her office into the Hotel in late 2013, she would generally issue invoices to Bellhill by handing them to Mr Scott. She would always ensure that a copy of the supplier invoice or receipt for purchases was provided along with the invoice as vouching to prove that an item had been purchased on behalf of Bellhill. The general managers were authorised to order things on OMI's accounts. She would carry out a reconciliation of the statements from OMI suppliers at the end of the month, identify what items had been ordered for OMI and what for Bellhill and charge the items ordered for Bellhill to Bellhill. No mark-up was applied. Recharges were invoiced to Bellhill very regularly, at least every month and sometimes every week. The types of goods supplied varied but it was standard items needed to run the Hotel. Due to a misunderstanding with Mr Bains, initially she added 20% management/consultancy fee on to the recharged invoices, when Mr Bains had simply meant her to add 20% VAT. This applied to invoices issued between July 2013 to March 2015, and when the error was discovered, the invoices were redone. Because these invoices were redone in a batch, the numbers ran sequentially.

[54] Lynnel Farrow said that there were discussions almost daily of what items were to be charged to what company and she would often be asked to sign off on what was contained within the invoices to evidence that the items charged to Bellhill were in fact for it.

[55] Mr Queen's evidence was that Mr Bains wanted everything to be done properly and did not want to authorise by himself the supplies that had been ordered for the Hotel on the OMI account. Mr Bains was always very clear that the general manager of the Hotel had to order items it needed. When Bellhill received an invoice from OMI, Mr Queen would compare what was ordered from suppliers with the delivery note that came with the

supplies to the Hotel, and would then ensure that Bellhill was only charged for the items it ordered on OMI's account.

[56] Thomas Scott was led as a witness for Bellhill. He had worked as the finance manager at the Lorne Hotel from when it opened originally under Mr Sharif until July 2014, and then he returned on 7 July 2016 and had recently retired. In cross-examination he confirmed that, in respect of invoices to Bellhill where one of the OMI companies had paid for the services, Miss O'Brien presented him with the invoice with the vouching attached. All such invoices presented to him in the period until he left in 2016 were properly vouched with a copy invoice.

[57] Thomas Murphy was led as a witness for the defence. He was general manager of the Hotel from July 2015 until March 2020. On cross-examination, he confirmed that, in respect of purchases, he would check the invoices for the Hotel, verify them and pass them on for payment.

Contemporaneous documentation

[58] Finally, Mr Bains' evidence is supported by contemporaneous documentation. For example, in relation to the generator incident, there are produced various emails from Aggreko, documentation with Glasgow City Council about a permit for locating the generator on the street at the Hotel, and the Aggreko invoices. Another example was that in relation to the purchase of a washing machine from PC World, a customer order confirmation dated 23 June 2013 was produced naming the client as Mr Bains and the delivery address as the Lorne Hotel.

Submissions

[59] Senior counsel for OMI Facilities submitted that in the circumstances of the case, there was an implied contract between OMI Facilities and Bellhill that Bellhill would remunerate OMI Facilities for the supplies that were ordered at its request. These supplies were authorised by Bellhill's general manager from time to time, and the arrangement proceeded on the footing that OMI Facilities would recover the cost. There was no evidence of any intention to donate the value of the supplies purchased. *Esto* there was no contractual basis for the invoices, they represented expenditure incurred by OMI Facilities for the benefit of Bellhill, and from which Bellhill had the benefit and were recoverable on the ground of unjust enrichment.

[60] Bellhill's position on record was that there was no reason for OMI Facilities to have ordered supplies in its own name which were required by Bellhill and there was no reason for OMI Facilities to have made payments for supplies required by Bellhill. *Esto* the pursuer paid for supplies to the Hotel, that was unnecessary and was arranged by Mr Bains, and if it was necessary it was made necessary by large cash sums taken from the Hotel by Mr Bains. Bellhill could not have impliedly contracted with the OMI Facilities since it was unaware of the OMI Facilities' activity. Bellhill had no knowledge of OMI Facilities' actions since the whole management of the Hotel was entrusted to Mr Bains, who was solely responsible for incurring expenditure on behalf of the defender and for making payments from it. Senior counsel for Bellhill drew attention to certain invoice numbers being out of sequence.

Discussion and decision

[61] I find as a matter of fact that OMI Facilities purchased the items listed in Appendix 1 to the summons on behalf of Bellhill and recharged these to Bellhill at cost. I reject as being

utterly without foundation Bellhill's position that there was no reason for OMI Facilities to have ordered supplies in its own name for Bellhill. There is overwhelming evidence that Bellhill was unable to obtain supplies on credit, that OMI Facilities paid for these supplies, and that each individual invoice for recharge was vouched and verified before being paid.

[62] I also reject Bellhill's position on record that Bellhill could not have impliedly contracted with OMI Facilities since it was unaware of OMI Facilities' activity. I do not find it credible that Bellhill was unaware of OMI Facilities' activity. Bellhill was the owner of a large hotel which required to be staffed and supplied with food, drink and other materials for its operations. Bellhill must have been aware that OMI Facilities was involved in these activities. Further, Bellhill's position is incompatible with its averment that Mr Bains was solely responsible for incurring expenditure on behalf of Bellhill and for making payments from it. What that averment amounts to is a concession on the part of Bellhill that Mr Bains was entitled to enter into contracts on behalf of Bellhill. I find that that is precisely what he has done in respect of the matters for which payment is sought under this conclusion.

Mr Bains has, on behalf of Bellhill, impliedly contracted with OMI Facilities to obtain goods on behalf of Bellhill and recharged them at cost.

[63] I find that, subject to the discussion of the general defences below, Bellhill is liable to pay the principal and interest sought under this third conclusion.

Conclusion four: payments by OMI Facilities allow Hotel staff wages to be paid in

2013-14, totalling £152,624.51

[64] In terms of this conclusion, OMI Facilities seeks to recover four sums paid by OMI Facilities on behalf of Bellhill to Towncrest Limited ("Towncrest") in 2013 and 2014 to pay

the wages of staff nominally employed by Towncrest who were working in the Hotel for Bellhill.

[65] The invoices for the four sums bore to be “wages for Lorne Staff on behalf of Bellhill Limited” or similar wording. The invoices were for £40,000 dated 31 March 2014 in respect of February/January 2014 wages; £42,000 dated 31 March 2014 in respect of March 2014 wages; £38,500 dated 31 March 2014 in respect of August 2013 wages; and £42,000 dated 31 March 2014 in respect of February 2014 wages.

[66] Mr Bains’ evidence was that because Towncrest did not trade, it had no way of paying the Hotel staff. That resulted in OMI Facilities having to lend Towncrest money to pay the Hotel staff on these four occasions, and OMI Management having to lend money to pay the Hotel staff as referred to in *OMI Management v Bellhill*.

[67] OMI Facilities’ expert Mr Cuerden identified the four sums by reference to the payment narrative included in OMI Facilities bank statement. He identified four advances paid to Towncrest to allow Hotel staff wages to be paid. However, in his opinion the amount shown on three of the four invoices was not the amount which should have been charged. In his view the 31 March 2014 invoice should have been not £40,000 but £34,427.57, the 31 March 2014 invoice not £42,000 but £40,221.66, and the 31 March 2014 invoice not £42,000 but £39,475.28. In his view, having made these adjustments, the total sum advanced was £152,624.51, which is the amount being sought under conclusion 4.

Submissions on behalf of OMI Facilities

[68] OMI Facilities pled that Bellhill impliedly contracted with OMI Facilities that it would reimburse these outlays if the anticipated share transfer did not materialise. *Esto* there was no such contract, OMI Facilities having met the cost of staff supplied to the Hotel

to Bellhill's benefit in contemplation of the share transfer, and that having failed to materialise, Bellhill was liable to make recompense. Bellhill in any event obtained a benefit by the permission of staff in circumstances where its retention of that benefit would represent an unjustified enrichment of it at the expense of OMI Facilities. The value of the benefit enjoyed by the defender was the cost of the provision of staff, all of which cost would otherwise have fallen on Bellhill. Senior counsel for OMI Facilities submitted that Towncrest was a mere front for Bellhill, which continued to operate the Hotel, and which derived the real benefit from these payments.

Submissions on behalf of Bellhill

[69] Bellhill pled that Bellhill did not have knowledge of OMI Facilities' actions since the whole management of the Hotel was entrusted to Mr Bains. Bellhill could not have impliedly contracted with the pursuer since Bellhill was unaware of OMI Facilities' activities. Mr Bains was solely responsible for incurring expenditure on behalf of Bellhill and making payments from it. *Esto* any sums were advanced by the pursuer to Towncrest, liability for repayment would lie with Towncrest. Senior counsel submitted that if the wages were paid on behalf of Towncrest, recovery would lie against Towncrest rather than Bellhill. The invoices appear to have been issued by OMI Management rather than OMI Facilities.

Discussion and decision

[70] I accept the evidence of Mr Bains that as Towncrest did not trade it had no means of paying the staff. This is consistent with my finding in *OMI Facilities v Singh* that Towncrest was set up by Mr Singh and Mr Sharif as a sham company, and that the business of the

Hotel continued to be operated by Bellhill. I find that OMI Facilities funded the payment of Hotel staff on behalf of Bellhill by making payment to Towncrest. That is consistent with the general pattern (shown also in relation to sums sought under previous conclusions) whereby OMI Facilities made payments to third parties on behalf of Bellhill in order that the Hotel might continue to function. Standing Bellhill's concession on record that Mr Bains was responsible for incurring expenditure on behalf of Bellhill, in my opinion Mr Bains (through his company OMI Facilities), could incur on behalf of Bellhill the expending of sums to Towncrest for payment of the Hotel's staff costs. In my opinion, that is what has happened in relation to the sums sought under conclusion four. I find that the wages payments were paid by OMI Facilities to Towncrest on behalf of Bellhill. As they were paid on behalf of Bellhill, they are recoverable from Bellhill and not Towncrest. The fact that the invoices bear to be in the name of OMI Management makes no difference as what matters is the underlying liability and not the name on the invoice: I accept the evidence of Mr Cuerden as to the liability of OMI Facilities based on his examination of bank statements. I also accept Mr Cuerden's evidence as to what the correct amounts are. I accept Mr Bains' evidence that these sums fell to be repaid if his purchase of the shares in Bellhill did not go ahead.

[71] I find that, subject to the discussion of the general defences below, Bellhill is liable to pay the principal and interest sought under this fourth conclusion.

Conclusion five: three payments made to Hotel staff in 2013 totalling £1,329.88

[72] Under this conclusion OMI Facilities seeks to recover payments of wages made to staff at the Hotel in respect of wages due to them by Towncrest. The payments were £154.75 to Munir Ashad, £800 to S Muhammed and £375.13 to S Batth.

[73] Mr Bains gave evidence that on 10 July 2013 OMI Facilities had to make payments to members of staff as Towncrest could not make these payments. The payments were £154.74 to Munir Ashad, £800 to S Muhammed and £375.13 to S Batth.

[74] Mr Cuerden identified the payments by reference to the payment narrative included in OMI Facilities bank account.

[75] Parties' positions on these wages payments made direct to individuals were, *mutatis mutandis*, the same as their positions on the wages payments made to Towncrest dealt with in relation to conclusion four above. It follows that I should come to the same decision, and for the same reasons, as I did on conclusion four. I find that the wages payments under conclusion four were made to the employees by OMI Facilities on behalf of Bellhill.

[76] I find that, subject to the discussion of the general defences below, Bellhill is liable to pay the principal and interest sought under this fifth conclusion.

Conclusion six: loan of £25,000 to Bellhill in July 2013 to allow it to continue trading

[77] Under this conclusion Bellhill seeks repayment of a sum paid by OMI Facilities to Bellhill on or about 13 July 2013. Although the figure in the conclusion was £25,000, senior counsel for OMI Facilities accepted that on the basis of the evidence it should be £21,000. While there is no dispute that the payment was made, parties dispute whether it is repayable. OMI Facilities maintain that it was a repayable loan. Bellhill maintains that it was part of a non-returnable deposit of £300,000 in respect of an option to buy the shares in Bellhill.

[78] Mr Bains' evidence was that when he arrived at the Hotel in June 2013, it had no working capital. The day he took over, Bellhill had only £4.91 in its accounts and needed money to continue to trade. But for that cash injection, Bellhill would have been unable to

continue to trade as it was also in arrears with the Bank of India, staff and suppliers. It was in Mr Bains' interests to turn the fortunes of the Hotel around, given it was the mechanism by which he hoped to recover the substantial amounts of money owed to the OMI companies when the share transfer took place.

[79] I find that this sum is a repayable loan. Mr Bains' explanation of why the payment was made is a credible one taking into account the evidence which I refer to elsewhere in this opinion as to the poor financial state that Bellhill was in when he took it over in 2013, and as to how Mr Bains and the OMI companies gave financial support to Bellhill at that time to enable Bellhill and the Hotel to continue to operate. I reject Bellhill's position that the payment was part of a non-returnable deposit under the option because I have found in *OMI Facilities v Singh* that there was no agreement whereby such a non-returnable deposit was to be paid.

[80] I find that, subject to the discussion of the general defences below, Bellhill is liable to pay the sum of £21,000 and interest sought under this sixth conclusion.

General defences

[81] It would normally follow from the foregoing that I would grant decree in favour of *OMI Facilities*. I now turn to the two general defences by reason of which Bellhill says I should not do so: abuse of process and personal bar.

Abuse of process

[82] Bellhill's third plea in law was that the action, being fundamentally dishonest and an abuse of process, should be dismissed.

[83] Senior counsel for Bellhill referred to Bellhill's averments that the purported invoices were inflated; the sequence of the initial invoices was in reverse order; VAT in excess of £400,000 was reclaimed but not accounted for by OMI companies; Mr Bains took monthly payments purportedly for staff wages and there was an attempt to recover these wages twice; and that there was no evidence that payments were made to individuals employed by OMI Management and engaged on Bellhill's business. He submitted that to found a claim on a false narrative of facts supported by fabricated documents was an abuse of process (*Shetland Sea Farms Limited v Assuranceforeningen Skuld* 2004 SLT 30; extra-judicial speech by Lord Reed in 2012 entitled *Lies, damned lies: Abuse of Process and the dishonest litigant*).

[84] Senior counsel for OMI Management submitted that there was no substance in this line of defence. It had no basis in fact: the claims made against Bellhill were well-founded. Secondly the defence had no merit in law: where claims are well-founded the correct disposal is to grant decree for the sum due (*Summers v Fairclough Homes Limited* [2012] UKSC 26 2012 1 WLR 2004; *Grubb v Finlay* [2018] CSIH 29, 2018 SLT 463).

[85] In my opinion, this case is an unusual one in that dismissal for abuse of process is sought before, rather than after, proof. Where, as here, a court finds in favour of a pursuer both in fact and in law, the scope for dismissal for abuse of process after proof is extremely limited. There may be situations in which, notwithstanding the pursuer's success in proving its case, it might be appropriate to dismiss the case as an abuse of process. However these situations will be extreme situations, such as where a party uses a court process for the commission of a crime or a civil wrong. The current case is nowhere near such an extreme scenario.

[86] If there has been any abuse of process it has been by Mr Singh. There can be no clearer example of abusing the processes of the court than to swear one thing on oath in an affidavit for a court action, and to swear the opposite on oath in a different court action.

[87] I shall repel OMI Facilities' third plea in law.

Personal bar

[88] Bellhill's ninth plea in law was that the pursuer was personally barred from pursuing any sum from before 24 February 2015. The basis of the plea was that payment of certain monies had been accepted by OMI Facilities as being in full and final settlement.

[89] The foundation of the plea is a letter from James Lloyd of Harper Macleod LLP to Bank of India dated 24 February 2015 which states:

"I act on behalf of OMI Facilities Limited. I am instructed to advise that my client has received the sum of £788,000 from Bellhill Limited (for whom I also act) in full satisfaction of any and all liabilities that Bellhill Limited owes to my client".

[90] The key words of that letter are "in full satisfaction of any and all liabilities that Bellhill Limited owes to my client".

[91] In my opinion the plea fails for two reasons.

[92] The first is that the evidence before me does not satisfy the test for personal bar set out in *Gatty v Maclaine*:

"Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time" (1921 SC (HL)1, 7).

As there was no evidence before me that the 24 February letter, which was addressed to Bank of India, had been seen by Bellhill, it cannot be said that the letter justified a belief on the part of Bellhill. There was no evidence at all before me that Bellhill had acted on the

letter, nor that it had been prejudiced by doing so. There was no evidence before me that OMI Management had by that letter justified Bellhill in believing that payment had been made in full and final satisfaction of all liabilities.

[93] The second reason is that Bellhill had received a different letter which did not include the wording as to full and final satisfaction of all liabilities, and the letter to Bank of India had included these words in error.

[94] Mr Bains' evidence was that in 2015 Mr Singh contacted him to tell him that Bank of India needed a letter confirming the sums that had been paid to OMI from Bellhill.

Mr Singh prepared a draft letter which he sent to Mr Bains for review. Mr Bains was not happy with Mr Singh's draft as it confirmed that Facilities had received payment "towards its debts". He gave a letter to Mr Singh dated 20 February 2015 on OMI Facilities letterhead. The letter was not addressed to anyone but was just a general confirmatory statement on OMI Facilities letterhead. It stated:

"I Rajinder Bains Director of Omi Facilities Limited hereby confirm Bellhill Limited of the above address has paid OMI Facilities the sum of £788,000".

Mr Bains emailed to Mr Lloyd a draft letter using the wording of 20 February, to be sent as a letter from Harper MacLeod to Bank of India. Mr Lloyd redrafted the letter to include the wording as to full and final settlement. Mr Lloyd emailed his draft to Mr Bains on 24 February asking Mr Bains to confirm that what he had said was correct and he was happy for Mr Lloyd to issue it. Mr Bains did not read the letter as he assumed that it would have been in the same wording as the draft he had sent to Mr Lloyd, and replied "That's fine".

[95] I accept the evidence of Mr Bains on this matter. The letters of 20 and 24 February and emails were produced. Although initially in his oral evidence Mr Lloyd stated that the text of the final letter was consistent with Mr Bains' instructions and draft letter sent by

Mr Bains to him, he subsequently checked and realised that in fact Mr Bains' draft letter was in the terms of the 20 February letter (except unheaded). Mr Bains' evidence was not contradicted by Mr Singh.

[96] In these circumstances, if Bellhill relied on anything at all, it can only have relied on the letter it actually received, which did not bear to be in full and final settlement and therefore could not found personal bar.

Order

[97] I shall uphold OMI Facilities' second plea of law, and repel Bellhill's third, fourth, sixth, seventh, eighth and ninth pleas in law. I shall grant decree in terms of the first, second, third, fourth and fifth conclusions in the sums and interest concluded for. I shall grant decree in terms of the sixth conclusion in the sum of £21,000 plus interest as concluded for. I reserve all questions of expenses in the meantime.