OUTER HOUSE, COURT OF SESSION

[2018] CSOH 24

P258/16

OPINION OF LORD BANNATYNE

In the cause

THOMAS CAMPBELL MACLENNAN and ALEXANDER IAIN FRASER as joint liquidators

of CS PROPERTIES (SALES) LIMITED

Noters

for

an order under section 212 of the Insolvency Act 1986

Noter: Lord Davidson of Glen Clova QC, Massaro; BBM Solicitors
Respondents: Party

20 March 2018

Introduction

[1] I heard a proof which proceeded in terms of section 212 of the Insolvency Act 1986 ("the 1986 Act").

[2] Section 212(1) of the 1986 Act sets out the circumstances in which the provision is applicable and provides:

"**Summary remedy against delinquent directors, liquidators, etc**

(1) This section applies if in the course of the winding up of a company it appears that a person who—

(a) is or has been an officer of the company,

(b) has acted as liquidator [...] or administrative receiver of the company, or

(c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company,

has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company."

[3] Section 212(3) sets out the court's powers if section 212(1) is applicable and provides:

"(3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—

(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or

(b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just."

The law applicable to section 212 of the 1986 Act

[4] The provision was discussed in detail by Lord Penrose in *Ross* v *Davy* 1996 SCLR 369 at page 379. Lord Penrose noted that the provision does not provide a distinct remedy against directors, but provides the court with a procedure to enable it to investigate and to provide a remedy in a case where there has been some wrongful act by the director or other officer either of the nature of misfeasance, or of the nature of breach of trust in a wide sense. It covers the whole range of directors' duties, including negligence (*Cohen* v *Selby* [2002] BCC 82 per Chadwick LJ, with whom the other judges agreed, at paragraph [20]). As such, section 212 is a summary procedure which gives the court considerable discretion as to how to proceed (*Liquidators of Glasgow City Bank* v *Mackinnon* (1882) 9 R 535 per Lord President Inglis at

page 564, under reference to section 165 of the Companies Act 1862 which was in similar terms to section 212 of the 1986 Act and is reproduced at page 535 of the case report).

[5] If the court considers that compensation ought to be ordered under section 212(3) of the 1986 Act, there ought to be a causal connection between the sum ordered and the company's loss (*Cohen* v *Selby*, paragraph [20]).

The issues

[6] (1) Whether the respondents by arranging for the leases and licence (as hereinafter defined) to be granted breached any of the fiduciary duties set out in sections 171, 172 and 175 of the Companies Act 2006 (the "2006 Act").

[7] (2) Whether the respondents by arranging for the leases and licence (as hereinafter defined) to be granted breached their non-fiduciary duties in terms of section 174 of the 2006 Act?

[8] (3) Whether in doing so they caused the company loss and if so the quantum thereof?

Remedies sought

[9] The noters sought the following remedies if the court held that the respondents had breached the above duties. If the respondents had breached duties but not breached fiduciary duties, the court can award damages. By analogy to a leases case, in *HMV Fields Properties Limited* v *Skirt 'N' Slack Centre of London Limited* 1986 SC 114, Lord Clyde held that he was entitled to award a landlord payment of a sum equivalent to rent for the period of unlawful occupation based on the rent payable prior to the period of unlawful occupation. If the court finds that the respondents have breached their fiduciary duties it can either award damages or alternatively count, reckoning and payment, requiring the fiduciary to account for the gain he

or she has received as a consequence of the breach of duty. This was for example, one of the remedies sought in *Commonwealth Oil and Gas Co Ltd* v *Baxter* 2010 SC 156. The court has substantial discretion on how to regulate the proceedings. The usual course would be to make a finding on liability and order the production of accounts, which failing the production of satisfactory accounts, every reasonable presumption would then operate against the respondents (see: *Smith* v *Barclay* 1962 SC 1 per Lord Justice Clerk Thomson at page 9).

Agreed background

The company

[10] CS Properties Sales Limited (in liquidation) ("the Company") was incorporated as a limited liability company on 21 May 2003. The first respondent (Mr Kumar Soni) and Ajay Chopra were appointed directors on that date. Mr Chopra was also appointed as the Company secretary on that date. The second respondent (Mr Ajay Soni) was appointed as a director on 23 May 2005. The respondents and Mr Chopra served as directors continuously from the date of their appointment until the current date. There have been no other directors appointed since 22 May 2005.

[11] The Company has issued share capital of 100 Ordinary Shares. The respondents each own 25% of the shares. Mr Ajay Chopra owns the remaining 50% of the shares. The shareholding has not changed since 2004.

[12] The first and second respondents are brothers. Mr Chopra is the first respondent's brother-in-law.

The administration

[13] Bank of Scotland Plc ("the Bank") was the holder of a qualifying floating charge over the Company's property and undertaking. It placed the Company into administration on 14 May 2012. Thomas Campbell Maclennan and Kenneth Robert Craig were appointed as the joint administrators on that date. Kenneth Robert Craig was replaced by Alexander lain Fraser as one of the joint administrators by order of the court on 1 August 2013.

[14] The joint administrators prepared a statement of proposals dated 17 July 2012. The statement of proposals was issued to all known creditors of the Company, including the respondents.

[15] The first respondent provided the joint administrators with a statement of affairs dated 26 October 2012.

[16] The second respondent provided the joint administrators with a statement of affairs dated 26 October 2012.

[17] Mr Ajay Chopra provided the joint administrators with a statement of affairs dated 25 January 2013.

[18] The administration was extended by order of the court on four occasions:

a. From 13 May 2013 until 13 May 2014;

b. From 14 May 2014 until 13 November 2014;

c. From 14 November 2014 until 13 May 2015; and

d. From 14 May 2015 and ended on 29 June 2015.

[19] The joint administrators issued progress reports during the administration to all known creditors, including the respondents.

The liquidation

[20] The company exited administration into creditors voluntary liquidation on 29 June 2015. The noters thereafter became the joint liquidators and have been in that office since 29 June 2015.

[21] The joint liquidators issued progress reports during the liquidation to all known creditors including the respondents.

AFMS

[22] Allied Fleet Management Services Limited (in liquidation) ("AFMS") was incorporated as a limited liability company on 1 March 1994. Ms Tripta Kumari Soni was appointed as a director on that date. Ms Rashmi Soni was appointed as the company secretary on that date.

[23] The Company has issued share capital of two Ordinary Shares. Ms Tripta Kumari Soni and Ms Rashmi Soni each own one share. The shareholding has not changed since 1994.

[24] Ms Tripta Kumari Soni is the respondents' mother. She was born in October 1941. Ms Rashmi Soni is the first respondent's wife.

[25] AFMS went into creditors voluntary liquidation on 23 September 2014, Mr Robert Keyes and Mr Ashok Bhardwaj were appointed the joint liquidators on that date. Mr Keyes resigned as liquidator on 5 September 2016.

[26] The joint administrators lodged a claim in the liquidation of AFMS on the Company's behalf in the amount of £138,816.34. CBRE lodged a claim in the liquidation of AFMS on the Company's behalf in the amount of £161,367.17.

[27] The company's accountant and AFMS's accountant was at all material times. Mr Bhupinderpal Singh of JSP Accountants Limited ("JSP").

The heritable property

[28] As at the date of administration, the Company was the owner of the following heritable properties:

Property Name (where applicable)	**Property Address**
Festival Court	Premises at 198, 199 and 200 Festival Court, Brand Street, Glasgow
Ascot House	119 Crawford Street, London, W1U 6BJ
Allied House	17 Crawford Street, London, W1H 1PF
n/a	162 Gloucester Place, London, NW1 6DT
n/a	22 Wilton Place, London, SW1X 8RL

[29] Festival Court was leased to the Secretary of State at the date of administration and was used as the Scottish Immigration Centre. There were three leases relating to that property. The first, in respect of the two storey office building comprising 198 Festival Court, was dated 17 and 23 June 2004. It was due to terminate on 24 May 2019. The second, in respect of the two storey office building comprising 199 Festival Court, was dated 10 March and 9 April 2003. It was due to terminate on 6 February 2018. The third, in respect of the two storey office building comprising 200 Festival Court, was dated 20 and 26 November 2001. It was due to terminate on 5 November 2016.

[30] Ascot House comprised one commercial premises on the ground and lower ground floor, and four residential flats.

a. The commercial premises was leased to the Kyrgyz Republic for use as its Embassy at the date of administration. The lease is dated 8 August 2008. It was due to terminate on 20 October 2008, but the parties continued to operate the lease in the same terms.

b. Flat 1 – 3 were let to independent third parties at the date of administration. Productions 63/10, 63/11 and 63/12 are true and accurate copies of the leases in place as at the date of administration.

c. Flat 4 is one of the leased properties referred to in the note.

[31] Allied House compromised one commercial premises on the ground floor, and four residential flats. Flat 2 was let out to an independent third party at the date of administration. Flats 17A, 1 and 3 are leased properties referred to in the note. The commercial property is considered under the heading "The licenced property" below.

[32] 162 Gloucester Place comprised five flats. As at the date of administration, it was being traded as an aparthotel. All of the flats are leased properties referred to in the note.

[33] 22 Wilton Place comprised a mid-terrace town house. The property was let to a third party company at the date of administration.

The leased properties

[34] Nine properties comprise the "Leased Properties". Those properties are:

Property	Production
Flat 4, Ascot House, 119 Crawford Street	63/1
Basement, 17A Crawford Street	63/2
Flat 1, 17 Crawford Street	63/3
Flat 3, 17 Crawford Street	63/4
Flat A, 162 Gloucester Place	63/5
Flat 1, 162 Gloucester Place	63/6
Flat 2, 162 Gloucester Place	63/7
Flat 3, 162 Gloucester Place	63/8
Flat 4, 162 Gloucester Place	63/9

[35] AFMS was in possession of the said Leased Properties from the date of administration to 31 July 2014.

The licenced property

[36] Ground floor, 17 Crawford Street, (the "Licenced Property") which is a commercial property forming part of Allied House, was let by the Company to the respondents by lease dated 16 March 2007. The lease ended on 15 March 2012.

[37] The Company was represented by Wright, Johnston & Mackenzie solicitors in respect of the granting of the lease referred to in the preceding paragraph to the respondents.

[38] The first respondent remained in possession of the said Licenced Property when it was sold by the joint administrators.

The Bank

[39] The Bank provided funding to the Company. At the date of administration, it was the Company's only secured creditor.

[40] The Company was referred to the Bank's Business Support Unit in May 2010. This referral was as a result of the Company defaulting on its obligations to the Bank.

[41] The Bank had legal charges over the Company's properties located in England. The charges held by the Bank were as follows:

Property	Charge Date	Production
Ascot House, 119 Crawford Street	8 December 2006	63/88
Allied House, 17 Crawford Street	16 March 2007 Replaced by charge dated 22 February 2011	63/89 63/90
162 Gloucester Place	7 March 2007	63/87

[42] The Company entered into an Interest Rate Swap Agreement with the Bank on 4 November 2009.

Allied Self Drive

[43] The respondents trade as partners, using the trading name "Allied Self Drive". There are no other partners comprising the partnership. The partnership has its place of business in London.

[44] AFMS entered into a Booking Agency Agreement with the respondents trading as Allied Self Drive.

[45] AFMS entered into an Agency Management Agreement with the respondents.

The sale of the properties and the court actions

[46] GVA Grimley was appointed by the Bank prior to the Company going into administration to value the Company's property portfolio. After the Company went into administration, the joint administrators engaged GVA Grimley to manage the Company's properties and to market them for sale.

[47] The joint administrators replaced GVA Grimley with CBRE. The Bank appointed CBRE as the fixed charge receiver over its English properties on 4 June 2013.

[48] The property at Wilton Place was sold in December 2013. The property at Festival Court was sold in January 2014.

[49] CBRE served notices on AFMS on 20 June 2013 purporting to terminate each of the leases in respect of the Leased Properties on 3 January 2014 in accordance with the provisions of a break clause in those leases.

[50] CBRE raised three actions in the Central London County Court in England, on behalf of the Company, against AFMS.

[51] The Company obtained vacant possession of the "Leased Properties" referred to in the note on 31 July 2014. The Leased Properties were sold thereafter. The last of the Company's heritable properties was sold on 19 December 2014.

Evidence

[52] On behalf of the noters I heard from the following witnesses:

[53] First Callum Carmichael. Mr Carmichael is a chartered accountant and was the principal person who had dealt with the affairs of the company on behalf of the joint administrators and joint liquidators. He spoke to his witness statement (JB216).

[54] At the outset of the administration his understanding was that the Company leased its properties to third parties on a mixture of residential and commercial leases, however, he was also aware that the respondents had been occupying the ground floor office of the property at 17 Crawford Street (the licenced property). The rent in terms of the lease of the licenced property he understood to be £36,000 per annum. He later discovered that the lease had been replaced by a licence to occupy commencing 22 March 2012 which had a rental fee of £12,000 per annum. He described this as a significant decrease in rental income for the Company and he was subsequently advised by his agents that this was below the market rate.

[55] At the first meeting with the directors of the Company in 2012 Mr Carmichael met the first respondent, Ajay Chopra and Ms Bradley, a banking consultant. At this meeting the first respondent advised that a company AFMS was involved with a number of the Company's properties. He understood at that point that AFMS was assisting as an agent to bring in third party lets as reference was made to the properties being let as serviced apartments. No detail

was provided and there was no mention of direct leases to AFMS. No detail was given as to the directors of AFMS and nothing was said which immediately gave cause for concern. It was only at a later date that he found out about the leases of the Leased Properties in favour of AFMS.

[56] Mr Carmichael had contact with JSP. He described them as being cooperative to a point but it took a lot of time to get information. In addition the respondents were very slow to provide accounting records for the Company.

[57] Eventually the books and records which the noters received appeared to be complete for a two year period, namely: 2010 to 2012 but it is a statutory requirement on the directors to hold accounting information for a period of six years. The accounting records did not include any management accounts, such as monthly rental information detailing what rent was being provided to the company for what properties prior to the date of administration.

[58] In around June 2012 he became aware that AFMS claimed to have tenancies in respect to the Leased Properties.

[59] Thereafter in or around October 2012, Ajay Chopra told him that the first respondent had just prior to his initial meeting with the directors in May 2012, informed him that he had put in place leases in favour of AFMS which were not there previously. Ajay Chopra told him that the leases had been created by the first respondent to frustrate the administration process. These were leases of the Leased Properties.

[60] On 29 January 2013, GVA advised him on the non-payment of rent by AFMS to the company in respect to the Leased Properties. It was at this stage that these leases became an issue because there were substantial amounts of money which were not being paid to the Company.

[61] When non-payment of rent became an issue, he was informed that the first respondent/AFMS were claiming that they had acquired moveable assets for the Leased Properties which were alleged to be of significant value. As a result of this, the first respondent was asked to provide evidence of acquisition, in particular, as the accounts of AFMS showed no substantial purchases of such assets which were allegedly loaned to the Company. Despite numerous requests for information this was not forthcoming. The first respondent said that he wanted to offset the sums spent on those moveable assets against the rent due to the Company.

[62] The noters at this point sought legal advice relative to recovery of rent arrears and the securing of vacant possession of the Company's properties. Legal proceedings in England were raised. The Bank appointed CBRE as the fixed charge receivers over the properties in England as at 4 June 2013. They also sought to recover rent arrears in respect of 17 Crawford Street, 119 Crawford Street and 162 Gloucester Place, decree was obtained and subsequently demand notices were served on AFMS with an expiry of 9 September 2014, following which the directors of AFMS resolved to put AFMS into creditors voluntary liquidation. Unpaid rent due under the leases was, at this point £312,000. This can be broken down into £174,000 and £138,000.

[63] Vacant possession of all of the properties was eventually obtained on 31 July 2014 by CBRE.

[64] Mr Carmichael in addition gave certain evidence regarding the liquidation of AFMS at paragraphs 42-44 of his witness statement.

> "42 A creditors' meeting for AFMS was held on 17 September 2014 to consider the directors' resolution to wind that company up. Claims in the liquidation were lodged by ourselves in respect of rent arrears under the GVA management period totalling £138k whilst CBRE lodged a claim totalling £174k (Productions 138 and 139 of the Noters' (Ninth Inventory of Productions) CS Properties was represented at the meeting by Paul Ellison of KRE Corporate Recovery LLP.

AFMS proposed the appointment of an insolvency practitioner, Mr Ashok Bhardwaj, as the liquidator. The meeting was held at his office at 47/49 Green Lane, Northwood, Middlesex, HA6 3AE. We did not know Mr Bhardwaj and preferred the appointment of an independent liquidator which is why we nominated KRE.

43. We were confident of having KRE appointed because, as we understood it, CS Properties was the largest creditor and its claim outweighed any other creditors. The Company submitted two claims in the liquidation of AFMS – both for unpaid rent. The two claims related to the non-payment of rent/mesne profits. The first claim related to the period when GVA were appointed agents with the second claim relating to the period covered by CBRE as noted above. I understood that Kumar Soni was present at the meeting and he recommended that Mr Bhardwaj reject the majority of CS Properties' claims (therefore reducing its vote). I refer to Production 133 of the Noters' Ninth Inventory of Productions which is an email exchange between Ashok Bhardwaj and Paul Ellison dated 22 September 2014, which confirms that Mr Bhardwaj did so. We were extremely surprised by this. Mr Bhardwaj was nominally appointed by AFMS as its liquidator, however the meeting was adjourned at the request of KRE. Following protracted correspondence with Mr Bhardwaj, it was agreed that Paul Ellison's colleague, Rob Keyes, would also be appointed as joint liquidator. Mr Keyes' appointment was limited to investigating the affairs of AFMS in connection with the claim by CS Properties.

44. Mr Keyes was specifically instructed by us to investigate the validity of the Leases, to identify what payments may have been made or received by AFMS, and to investigate the claim that AFMS purchased the chattels for the Company. I understand that KRE were unable to make any substantive progress, because the records of AFMS were held by JSP Accountants. I refer to Production 67 of the Noters' Eighth Inventory of Productions which is the initial report which I received from KRE dated 17 October 2014."

[65] Mr Carmichael also dealt with the position of Mr Singh of JPS at paragraph 45 of his statement:

"I have considerable concern about Mr Singh's relationship with Mr Kumar Soni. As I have already mentioned, Mr Singh was instructed to prepare the Company's accounts for the years 2010 – 2011 and 2011 – 2012. (Productions 70 and 71 of the Noters' Eighth Inventory of Productions). When he did so, the accounts disregarded the Judgment obtained by CBRE and showed debts due by the Company to AFMS, notwithstanding the leases. In the related party transactions note addendum to the Draft accounts to 2011 and 2012 state that AFMS was a creditor of CS Properties in the amount of £149,295 and £397,224 respectively. This was completely at odds with what we understood the position to be and the position as set out in the accounts of Allied Fleet Management Services for the period to 31 March 2011 and 31 March 2012 (Production 128 and 129 of the Noters' Ninth Inventory of Productions) which denote no debtor

balance due by the company or substantial assets owned which could be applied in offset. No management accounts were provided.

We sought to recover additional documents relating to preparation of the 2011 & 2012 accounts and in particular the detailed breakdown of the balances narrated within the balance sheet from various third parties including JSP Accountants and the Respondents, by way of a Specification of Documents , I refer to Productions 99 and 100 of the Noters' Eighth Inventory of Productions which contain the responses received from those parties.

I believe that gross rent should have been paid directly to CS Properties but the new accounts seemed to suggest that funds were due to AFMS and then remitted to CS Properties after deduction costs such as the interposed booking and management agreements. Ajay Chopra has refused to sign those accounts and has signed an affidavit to the effect that he considers them to be inaccurate. These accounts are also inconsistent with the statements of affairs provided by Kumar and Ajay Soni which I refer to earlier in my statement. The Statement of Affairs include only a small balance of £15,642 due to AFMS in respect of rent allegedly paid in advance. Furthermore the accounts to 31 March 2011 and 2012 for AFMS lodged at Companies House are incompatible with the position presented in the revised CS Properties' accounts prepared by JSP Accountants. When the accounts were prepared, I also requested copies of underlying information including nominal ledgers and journals as this would have provided details of transactions underpinning the accounts. Whilst other back up documentation was provided in Productions 99 & 100 (referred to above), the electronic nominal ledgers or access to their system was never provided."

[66] Looking at the Agency Management Agreement and Booking Agency Agreement Mr Carmichael said: I only became aware of these once AFMS was in liquidation. Where the company owned the Leased Properties and the directors had historically rented them directly to tenants there was no accounting or commercial rationale to interpose a third party to locate tenants when that party was in effect the same person or persons.

[67] Lastly Mr Carmichael in his evidence turned to look at the consequences of the leases to the company and said this in his statement:

"48. The liquidators have been told by Ajay Chopra that the Leases are shams and were not granted in 2010 as they bear to be. Whether that is the case is of course for the Court to determine, but the available evidence supports Ajay Chopra's assertion. In addition to the comments made by Ajay Chopra, the following factors are also relevant: (i) rent was not paid by AFMS to the Company for the period from 14 May 2012 to 31 August 2014, aside from £66,801.74 as set out at above; (ii) arguments were made by Kumar Soni

> regarding offset of rent in respect of chattels; (iii) there were ongoing issues around vacating the premises and the fact that they were being difficult and obstructive; (iv) after AFMS were ordered to pay outstanding rent to the Company, AFMS went into liquidation; (v) information was provided by Paul Ellison in relation to the management of AFMS, its trading activities including the unnecessarily complex trading relationships with the company and the flow of funds to Kumar Soni who was a defacto director; (vi) the accounts produced by JSP Accountants suggested a balance due to AFMS which was at odds with the position as we understood it and in direct contrast to the AFMS accounts lodged at Companies House for the period ended 31 March 2011 (lodged 18 July 2012) and 31 March 2012 (lodged 1 November 2012) (Productions 70 and 71 of the Noters' Eighth Inventory of Productions); and (vii) the presence of a connected party as a tenant which was detrimental to the investment value of the properties and our ability to provide vacant possession to potential purchasers. Ultimately, I would question why you would pay the rental receipts to a third party when the rent should go directly to the Company. The main reason would be to divert the funds for the benefit of Kumar Soni and Ajay Soni given their connection to AFMS. The other reason for this arrangement would be to fundamentally frustrate the marketing and sale process for the investment properties.
>
> 49. Nonetheless, what is clear is that AFMS enjoyed use of the Leased Properties between the date of administration and 31 July 2014. From the date of administration until 31 July 2014, the Company received only £66,801.74 in rent in respect of the Leased Properties (through its agents GVA and CBRE). This is set out in the schedules lodged as Productions 122 and 123 of the Noters' Ninth Inventory of Productions. During this time AFMS ingathered an estimated £930,816 of income which was not accounted for to ourselves or our agents."

[68] Before taking action against the respondents in respect of the loss to the company, he wanted to have an independent forensic accounting expert consider the papers and form a view. The noters therefore appointed Gordon Christie to calculate the loss to the company and he referred to his report which he had seen. He advised that essentially Gordon Christie confirmed what he understood to be the position and gave him the basis for raising this action. Mr Christie quantified the claim against the respondents. He had seen the statement of loss produced by Mr Christie. It was an analysis of rent received over a four year period which resulted in a net loss to the company of £997,607.74 over the period AFMS were in control. Mr Christie, he noted had since revised the statement of loss to take account of the

rent received by GVA and CBRE which reduced the loss to £930,816. It was his position that this was the correct figure.

[69] Mr Carmichael was cross-examined at some length by Mr Kumar Soni. However, he did not depart to any material extent from the evidence contained in his statement and what he had said in court in evidence in chief.

[70] Mr Gordon Christie, who according to his CV was a chartered accountant with considerable experience in the area in which he was giving expert evidence spoke to his report and statement (JB213).

[71] A number of points were put to Mr Christie in cross-examination challenging the conclusions of his report on a number of bases. He did not depart to any extent from the conclusions which he had reached in his report.

[72] Paul Ellison confirmed the terms of his statement (JB207). He carried out work on behalf of the joint liquidator of AFMS, namely Rob Keyes.

[73] He advised that at the creditors meeting of AFMS the creditors listed on the directors statement of affairs for AFMS were as follows:

> "HMRC?
> Allied Properties £74,213
> Crags and Co £31,380
> CS Properties £138,816
> CS Properties £161,367
> JSP Accountants £14,400
> TK Laundry £5,820
> Waterfords Solicitors £75,000."

[74] He commented that all of the creditors other than the company and HMRC were either connected to the Soni family or their advisors. Aaron Soni, a cousin of the respondents was a

partner in Waterfords. He advised that despite requests he was never able to establish precisely what work was done by Aaron Soni or his firm.

[75] At the creditors meeting the company's claim of £138,816 was rejected and the claim for £161,367 was disputed. There was an attempt by the first respondent to have Ashok Bhardwaj appointed liquidator of AFMS. The noters wished to have Mr Keyes appointed in order to have a full investigation of the lease position between AFMS and the Company and were prepared to fund this. Eventually Mr Bhardwaj and Mr Keyes were appointed joint liquidators. It was his position that the reason the first respondent did not want Mr Keyes to be appointed as joint liquidator was that he did not want an investigation into the company's affairs and assumed, wrongly, that Mr Bhardwaj would not carry this out.

[76] His opinion was that Kumar Soni was a shadow director of AFMS. He found him not particularly cooperative.

[77] As regards his investigation this focused on examining where the rental income received by AFMS from the serviced apartments owned by the Company (the Leased Properties) had gone.

[78] Upon reviewing bank statements, he noted that there was an extraordinary amount of personal expenditure being put through AFMS's bank account. The conclusion of his initial investigation was that AFMS appeared to have paid personal expenditure for the first respondent in excess of £200,000. In addition to that the first respondent had submitted personal expenses claims totalling £28,017 which had been paid by the company but were entirely unrelated to the business.

[79] Mr Ellison in his statement at paragraph 13 detailed these expenses and certain other payments made by AFMS as follows:

> "I have been passed a copy of Production 16 of the Noters' First Inventory of Productions which is a letter from KRE Corporate Recovery to Kumar Soni dated

> 11 December 2014. I can confirm that I have seen this letter before as I wrote it. The purpose of this letter was to set out the various categories of payments which did not look like company payments. This was sent at an early stage of the liquidation, after I had conducted my initial investigations. In this letter I asked Kumar Soni to explain the various payments which had been made. I noted that the sum of £82,204.50 had been paid to HSBC, however the company didn't bank with HSBC. A further £13,623.57 of sundry payments had been made which related to, for example, holidays and repairs to a Bentley (which was not a company car). There was an additional £21,490.65 of payments relating to school fees. There was also the sum of £64,416.21 which was paid to Allied Properties and Allied Self Drive and finally a further £43,748.84 paid to TK Laundry. All of the above were extracted from the company's bank statements. At this stage, it looked as if over £200,000 worth of personal expenditure relating to Kumar Soni had been paid without any explanation. I could not see what the defence to this could be."

[80] He referred to a letter from DBP Law (JB159) of 2 February 2015. This firm at that time acted for the respondents. In this they essentially accepted that the sum of £155,137.30 related to personal expenditure, however the explanation given was that these payments were made on account of the first respondent's entitlement to commission in respect of the Management Agency Agreement and Booking Agency Agreement. In addition they maintained that the payments to TK Laundry and Allied Properties/Allied Self Drive were connected with the affairs of AFMS.

[81] It was also explained that TK Laundry was Tripta Soni's business. He said that he was unable to find any company records for TK Laundry and as such assumed that it operated as a sole trader business. He understood however, that there were no separate business premises. In his opinion, around £44,000 worth of laundry over a 12 month period, was a lot of laundry to be done by a lady who was aged 73 years from her home. There was also very little in the way of formal invoicing. They were just slips of papers with time periods handwritten on them.

[82] He then turned to look at the Booking Agency Agreement and Management Agency Agreement and said this in his statement regarding these:

"Management and Booking Fees

19. I have been passed copies of Productions 13 and 14 of the Noters' First Inventory of Productions which are a Booking Agency Agreement and a Management Agency Agreement. I have seen these documents before. I understand that the Booking Agency Agreement purported to entitle Allied Self Drive ('ASD') (which was a partnership between Ajay Soni and Kumar Soni) to receive 25% of gross rental income received from lettings concluded by ASD. I understand that in the majority of cases, independent agents were engaged to find a tenant for AFMS. Various invoices from the agents were located in the company records. The agent would then call ASD with the details and pass the deposit to ASD, who would pass it on to AFMS. I understand that AFMS would pay the independent agent 10-15% of the rental income for finding the tenant as evidenced by invoices within the records of AFMS. I understand that Kumar Soni's position is that ASD was also entitled to an additional 25% for concluding the deal as set out in the Booking Agency Agreement.

20. I understood that ASD were not involved in actually finding a tenant. They simply took the deposit from the independent agent and passed it on to AFMS. Having searched the internet I could find no website for ASD advertising for tenants. I recall that the explanation given for this arrangement was that AFMS didn't have credit card facilities but that ASD could accept credit card payments and for that, they received 25% of the gross rental income for doing it. Not all deals involved independent agents of course, because people would come back if they had stayed at the apartments previously. I understood that Kumar Soni's position is that ASD would nevertheless be entitled to 25% of rental income because they concluded the deal, even if the tenants went via independent agents. My understanding is that ASD and AFMS were operated from the same office and if somebody were to pick up the phone and say 'Allied Self Drive' for example and then book the tenant in, then that would be enough to entitle ASD to 25% commission.

21. Notwithstanding the above, I understand that the entire rental income from the properties went to AFMS. I understand that Kumar Soni's explanation is that Allied Self Drive is owed these sums, which were never deducted from the rental income received by AFMS. I can't see that ASD did very much to earn this commission, other than pass funds over to AFMS, and even this could have been avoided if AFMS had its own credit card facility. Furthermore, invoices were never raised in respect of these services and it was never put through the accounts of AFMS as far as I could see. The accounts for 2014 appeared to include these charges.

The only filed accounts were abbreviated accounts as at 31 March 2012. Draft accounts were not provided to Bhadwaj however the directors questionnaire included the details below. Subsequently, we received revised accounts to March 2014 as below:

	Revised	**Draft**	
	2014 £'000	2014 £'000	2013 £'000
Turnover	518	474	468
Cost of Sales	(267) 45%	(376) 79%	(373) 79%
Gross Profit	251	98	95
Overheads	(295)	(38)	(6)
Net Loss *I* Profit	(44)	36	57

JSP Accountants were requested to analyse the cost of sales and overheads in order to identify whether the 50% management and booking fees has been charged, however, this information was not forthcoming it is not possible to determine from the accounts whether these charges were ever applied, however, in 2013 and 2014 the cost of sales is 79% which could equate to rents payable to the management and booking fees and rents paid to CS Properties, however, other overheads are only £6,000 and £38,000 respectively and, therefore, could not include the 10-15% agents fees and all other overheads. For example, the laundry alone was £44,000 in 2014. I could only conclude due to the failure to provide me with information that was readily available, that the booking and management fees were not included in the above accounts.

In my opinion, this commission arrangement was a sham and simply used as a mechanism to try to mop up (and cancel out) anything that was owed by Kumar Soni to AFMS. The personal expenditure put through the company's accounts all appeared to relate to Kumar Soni and not Ajay Soni.

22. I understand that the Agency Management Agreement entitled Kumar and Ajay Soni to 25% of rental income as a management fee. I understand from enquiries to unrelated estate agents, that the standard rate in the serviced apartment industry is 10-12%. This would ordinarily cover checking people in and out of the properties and dealing with any queries, breakages etc. I queried why the commission entitlement was 25% given that industry norm and I recall that DPB Law said that their clients went the extra mile by picking guests up at the airport. I have seen no evidence of that. I have also seen no invoices rendered in respect of this management fee.

23. In my opinion, the Booking Agency Agreement was a sham and the fee under the Management Agency Agreement was excessive. I considered the business model of the company in order to understand the effect that these agreements would have on the profitability of the company. I understood from the Joint Liquidators of CS Properties that around 31% of the rental income received from the serviced apartments was payable to CS Properties under the leases in favour of AFMS. In addition to that, there would be a fee of around 12% to the independent agent for finding a tenant; a further 25% in relation to the booking fee and a further 25% in relation to the management fee. No VAT was being paid, however it was established following enquiries to both HMRC and tax

advisers that VAT should have been paid, I understand that the rate would be somewhere between 15-20% depending on the length of the stay (with an average of 17%). The result of this is that when the rent due to CS Properties is added to the various other payments due, the total is 110% of the gross rental income. The following table illustrates this calculation:

Cost	**% of Gross Rent**
Agent's Fee (to independent third party)	12
Management Fee (under agreement)	25
Booking Fee (under agreement)	25
Rental due to CS Properties	31
VAT	17
TOTAL	**110%**

On top of this there would be utilities, cleaning costs, sky TV, rates, council tax etc. The result would be that the business would be running at a gross loss before these overheads were considered. I concluded that if the Booking and Management Agency Agreements were bona fide, AFMS could not have been a viable business. It also seemed to me that as the management and booking agreements were both entered into by family members, and my belief that Kumar Soni was a shadow director, there was a clear conflict of interest, and breach of fiduciary duty."

[83] Finally he dealt with his relationship with JSP Accountants and said this:

"Dealings with JSP Accountants

25. There were considerable delays in receiving books and records for the company from JSP Accountants. Furthermore, l was unable to see any reference to the commission under the Management Agency Agreement or Booking Agency Agreement in the statutory accounts filed for prior years and I don't see how it could have been reflected in those accounts as there wasn't any figures large enough. JSP Accountants never provided the more detailed accounting information that we required. Whether the agreements were real or not, they certainly weren't operated as I would expect in terms of invoices being raised and amounts being paid. We asked JSP Accountants for the reconciliation of the interaction between the management agreements and the drawings from Kumar Soni and we never got that."

[84] He described how at one point JSP had sought to have Mr Keyes removed as the joint liquidator of AFMS. It was his position that the motive behind them seeking to have Mr Keyes removed as joint liquidator was to stop the inquiry into their accounts as they had produced very little information to him. Another point to note he said was that the request

for the meeting to hear the motion to remove Mr Keyes came from Teacher Stern, the solicitors then acting for the first respondent. They had not been acting for JSP. He recalled that they said that they had made the request for "the sake of convenience" but he thought that it demonstrated clearly that it was the first respondent who was behind seeking to have Mr Keyes removed as a liquidator.

[85] Mr Ellison was cross-examined by Mr Kumar Soni, however, he did not depart from the evidence which was contained in his statement and which he had given in court in examination in chief and added nothing of significance thereto.

[86] I turn now to the evidence of Mr Ajay Chopra. He spoke to an affidavit lodged on his behalf. In particular the following was contained in his affidavit:

> "3. Shortly prior to the Administration, my accountant (my brother Mr Vishal Chopra) ('VS'), noticed that various sums had been transferred from the Company's account to the accounts of Mr Kumar Soni ('KS') and certain of his associated persons. It appeared that these transfers had all been instructed by KS. I was not aware of any reason which would entitle the payees to receive payment from the Company. KS is also a director of the Company. He was most involved in the day to day running of the Company, whereas my role was more passive. VS investigated the payments made by the Company to KS and his associated parties further and I noticed that certain payments had in particular been directed to Allied Fleet Management Services Limited ('AFMS') – a company controlled by KS. Again, I was not aware of any legitimate basis for those transfers. A Schedule of all the payments to KS and his associated parties in the weeks before the administration is attached and signed by me.
>
> 4. I questioned KS about the transfers and it was only then that I became aware he had arranged for various properties owned by the Company to be leased to AFMS a company which, as noted, he had control. I am aware that the AFMS is now also in liquidation.
>
> 5. KS explained to me that he had set up these leases shortly before the Administration and deliberately backdated them. I therefore understood that the sums being transferred to AFMS and KS represented backdated rental payments from the tenants occupying the properties. Pauline Bradley, who assisted me with corporate matters witnessed this conversation which took place on 19th April 2012 and I can provide contact details for her.
>
> 6. I was not aware of the leases being in existence until I had this conversation with KS. They were shams. There were no meetings of directors or

shareholders of the Company to approve the leases, nor did the bank consent to the leases being granted. My understanding is that they constituted substantial property transactions for the purposes of Section 190 of the Companies Act 2006 and that regime was flagrantly ignored by KS.

...

8. KS said to me that the reason for the leases being set up and backdated was the impending administration and to ensure that the properties which were the subject of the AFMS leases were beyond the control of the Company's bank. During early 2012, I was convinced that the administration was not going to happen, however KS must have been more cynical. I believe that KS wanted to maximise the money he was receiving and get the benefit of the rental income on the properties. I think that he saw the crash coming and wanted to be in control of the income coming from the ultimate tenants. He was able to do this by putting in place the sham leases between the company and AFMS.

9. I believe that the leases were a deliberate attempt by KS to thwart the interests of the secured creditor (the bank) once the Company entered Administration. This aim was obviously not achieved and there will now be an adverse impact on the unsecured creditors because of the loss of the sums diverted to AFMS unlawfully as well as the considerable costs which have been incurred in order to regularise matters. KS diverted rental income which was due to be paid to the Company in Administration in breach of his duties as a director.

10. Any suggestion that rental payments otherwise due to the Company could be offset against chattels (moveable property) allegedly owned by AFMS (in respect of which the Company was obtaining benefit), is incorrect in my view. My understanding was that the Company in fact owned all of the chattels in the properties. There was nothing, to my knowledge, which was owned by AFMS. I understand that when KS purchased anything for the properties using his Amex card, he was reimbursed.

11. It is necessary to have booking agreements in place in order to attempt (tempt) tenants into the properties and I was aware that they were used in this case. This is commonplace in London, therefore it did not surprise me. I was only aware, however, of around 8% being deducted from rental income to be paid to booking agencies. I was not aware of, nor would I expect anything like, 25% of rental income to be paid in booking fees which is what occurred here. I was also not aware that there were any booking or management agreements in place which paid sums to AFMS, Allied Self Drive Ltd or any other companies owned or controlled by KS."

[87] He also spoke to a statement (JB215). The conclusion of his statement was this:

"41. In my opinion, the 'leases' put into play by Mr Soni with AFMS coupled with the financial burden imposed on the Company by the uncommercial servicing

> arrangements caused the Company significant prejudice. The 'leases' were an encumbrance on the title and affected marketability. The excessive margins earned by AFMS significantly increased the Company's debt exposure. The considerable cost required to unravel matters have also been prejudicial to the company. A better outcome for all stakeholders would have been achieved had Kumar Soni complied with his duties as a director of the Company."

[88] Finally in the course of his evidence he described Mr Singh of JSP Accountants as being "in cahoots completely with Kumar" and Mr Kumar Soni as being "not an honest person at all".

[89] He was cross-examined by Mr Kumar Soni but did not depart from the positions he had adopted in his affidavit, statement and in court in examination in chief.

[90] Mr Ian Lapworth had been an associate director of Lloyds Banking Corporation (who had taken over from the Bank) in their business support unit. He adopted his statement (JB210) he had been the companies relationship manager.

He in particular advised that:

> "I was not aware of any leases being in place between the Company and AFMS or there being any intermediary in place between the Company and the end tenant. It was shortly after the Administration on 14 May 2012 that I became aware of the leases between the company and AFMS over the properties."

[91] It was his position that the Bank had never consented to the leases to AFMS or the licence to occupy 17 Crawford Street. In terms of the bank's conditions the Company required to obtain the consent of the bank to any such lease or licence.

[92] Pauline Bradley is a qualified lawyer although she has spent most of her career in banking and finance. She spoke to an affidavit JB202 and a witness statement production 146.

[93] She had known Mr Chopra for about 13 to 14 years. She was asked by him to assist the Company in relation to difficulties it was experiencing with the Bank. She said that the Bank explained to her that in relation to the London properties in particular, the first respondent

had let properties without the Bank's consent notwithstanding that he had been clearly instructed by the Bank to market them for sale. In particular, the Bank was frustrated at the failure to sell Wilton Place, which she recalled was the most valuable asset in the London portfolio. They believed the reason for that failure was that the first respondent had let the property (without their knowledge) and that had adversely affected the chances of a sale.

[94] She thereafter set out her dealings with the first respondent, in her witness statement, as follows:

> "12. On 21st May 2012, Ajay Chopra asked me to attend a meeting in Glasgow with the Administrators. I believe this was the first meeting since their appointment and my role was really to offer support to Ajay Chopra at this meeting and to provide the Administrators with any information they might need from the period of my involvement. When I arrived at Mr Chopra's offices, Kumar Soni was already there. I recall that we only had a short time (maybe 30-40 minutes) before the Administrators arrived. Mr Soni was anxious to discuss the leasehold structure and had brought with him several lever arch files with documents he indicated were the current leases. Up until that point I had always assumed the leases were between CS Properties and the various tenants and presumed this would have been a condition of their loan agreement with the Bank, as that would be the norm. However, what Mr Soni seemed to be outlining that morning was quite different. As I understood it, he was saying that he had already or would be putting in place a revised leasehold structure that in effect allowed Allied Fleet Management Services ('AFMS'), a Company I believed to be controlled by Mr. Soni to collect the rent from the tenants as opposed to CS Properties. I understood that AFMS was not linked to CS Properties and therefore sat outside the Banks security.
>
> 13. It seemed to me from the reaction of Mr Chopra that this was also the first time this had been explained to him. He seemed shocked and bewildered. Mr Soni explained the leasehold restructure to both myself and Mr Chopra at the same time, which also led me to believe that Mr Chopra was not previously aware of this arrangement. Kumar Soni indicated it was something that would help alleviate their financial situation. For my part, I struggled to understand how Mr Soni thought he could get away with this. At one point Mr Soni left the room and I clearly outlined to Mr Chopra what this proposal meant. I wanted to be absolutely sure he understood it. I also bluntly explained to Mr Chopra how this would be viewed by both the Bank and the Administrators and the likely reputational risk that this would bring. Mr Chopra is a well-liked and respected member of the business community in Scotland and he was extremely distressed at the whole turn of events. It was a very difficult situation for him also due to the family ties to Mr Soni.

14. I suggested that Mr Chopra speak to Mr Soni and insist he unravelled the intermediate leases and immediately reinstate CS Properties as the direct landlord. If Mr Soni refused then I advised Mr Chopra to wash his hands of the whole situation and make it clear he would have nothing to do with it. When Mr Soni returned, I recall Mr Chopra telling him that he and I had grave concerns about what Mr Soni had done. It was made clear to Mr Soni that he would need to remove AFMS from the leasehold structure and reinstate the Company. Mr Soni appeared disappointed but didn't try to dissuade either myself or Ajay Chopra from our position. If anything, I thought he was accepting of it and I recall Mr Soni making a comment about how he knew the tenants and that it might be possible to do something ...

17. Although I cannot comment on the extent of the Bank's knowledge of AFMS being in the leasehold structure in this case, as a former Banker I was confident the Bank would not have consented to an arrangement that replaced the landlord (their borrower) with a 3rd party who I understood sat outside their security group. The result of these leases being put in place was that AFMS now controlled the rental income whereas CS Properties, who had the repayment obligations to the Bank now had to rely on AFMS remitting sufficient income to the Company to allow it to meet it's loan interest obligations. Crucially, this restructure also meant that the leases - now between AFMS and the various tenants - sat outside the reach of the administrators and Mr Soni himself made that point ...

18. I recall Mr Soni implying that this revised structure was a positive thing and would allow them access to some cash flow. By this comment, I took Mr Soni to mean that the lease arrangement would provide a means to access some cash that would otherwise have gone to the Administrators. I recall that he made some comments around him and his family being owed money for work carried out. He said that his mother had done laundry and that other people (I do not recall who) had carried out maintenance services. I was not party to the detail but was under the impression that Mr Soni may have sought to justify removal of funds from the Company with reference to that work which is alleged to have been carried out.

...

20. I understand that the Respondents have said at Answer 10 of the court pleadings that it was agreed that the rental income would continue to be paid to the Company in order to avoid a default under the SWAP agreement and that the Company would have an interest free loan to AFMS. I was not aware of this arrangement but it doesn't make sense to me in that it doesn't explain why CS Properties would agree to diverting the rents to a 3rd party in the first place. If there is a commercial logic to this, it's not clear to me what it is.

21. My recollection is that on 21st May 2012, I became aware for the first time of a proposal to put in place intermediate leases in favour of AFMS. It was difficult to get a clear answer from Kumar Soni on what the exact state of play was on

> that day. On balance it came across to me as a proposal. He was disappointed that it was rejected but seemed co-operative in offering to speak to the tenants to put back in place the original leases. That is what I believed would be the final outcome of this. It's not clear to me for how long the 'new' leases had been in existence or if they had taken effect, but I formed the view that they were very recent. I had several reasons for this. The first was that if it had been a long running arrangement; the Company and or the Bank would have noticed that the rents were being diverted and that they were receiving an amount that was less than previous. Secondly, the files Kumar brought with him that day were impeccable. All pristine papers in lever arch files. They looked to me 'hot off the press' and finally, his offer to go back to the tenants also gave me the impression this was recent."

[95] Ms Bradley went on to describe a meeting she was asked by Mr Chopra to have with the first respondent. The purpose of the meeting was to see if a settlement could be reached between Mr Chopra and the first respondent in respect to various legal disputes between them.

[96] She attended a meeting with the first respondent and another person in London. This other person she later became aware was a Mr Aaron Soni, the first respondent's cousin who was also a solicitor. He was introduced to Miss Bradley as a cousin of the first respondent but she was not advised that he was a solicitor and nor was she advised as to what capacity he was attending the meeting.

[97] She was shown an attendance note believed to have been prepared by Mr Aaron Soni on Waterfords legal notepaper.

[98] The third last paragraph thereof was in the following terms:

> "At first it was not clear what the meeting was about or what she wanted, however it became apparent that she was aware of the dispute between the parties although she tried to distance herself from it. She stated that with an aim to move matters forward, a payment of £200,000 from Kumar to Ajay Chopra could result in Mr Chopra being fully cooperative in connection with the administration process, implying if the payment was not made he could make life difficult for Kumar."

[99] She was asked if that represented any kind of truth and said no. She accepted that she had suggested a settlement and that the figure mentioned was £200,000. The first respondent she said had later phoned to reject the offer. She was asked if she had made a threat or implied any form of threat and she totally denied this. She said this:

> "It was inconceivable that I would be involved in trying to blackmail someone. It would put at risk my reputation, my livelihood and my business."

[100] She was cross-examined by Mr Kumar Soni but did not to any material extent depart from her evidence in chief or add anything of significance.

[101] Thomas Maclennan was the next witness and spoke to his statement (JB214).

[102] He commented as follows on the leases by the company to AFMS:

> "17. I have been undertaking insolvency work for over 36 years and as an appointment taking Insolvency Practitioner for over 26 years. It was clear to me that in a property company with in excess of £18M of secured lending over properties and where the income from these properties was required to service those debts, that agreement to lease these properties to a connected party, thereby effectively removing the majority of the income available for servicing from the company was not something that would ever have been consented to by a secured lender nor was it justifiable as being in the interests of the company for directors to do so."

[103] Turning to the points made by the respondents regarding the justification for the leases to AFMS, namely: giving a "guaranteed income flow" (see answer 7), he said this, it was not a credible explanation in that:

> "a) The company had operated under its existing lending arrangements for some time, successfully generating a higher income than under these leases.
>
> b) There was no discussion of these leases with the secured lender or pressure to take such action.
>
> c) AFMS did not in fact even pay the reduced sum under these leases, raising various spurious objections to doing so. After successful Court judgements in the sum of £312,000 of unpaid rent under the leases over a period in excess of 2 years being obtained against AFMS, AFMS was placed in Liquidation."

[104] As regards the position of the respondents that the leases had been put in place in 2010, he observed that up to 2012 the company got income from the leases without any effect from the "existence" of the AFMS leases and in addition the company continued to pay administrative expenses.

[105] Having regard to the foregoing circumstances he said this:

> "20. In all these circumstances, I formed the view that we would instruct an expert witness report in relation to the matters which appeared to us to have operated to the detriment of the creditors of the company with a view to pursuing Kumar and Ajay Soni for these funds, AFMS having been the conduit for removal of these funds from the company and steps having been taken to place it into Liquidation once Court judgement for part of the funds had been obtained."

[106] Lastly he made certain comments regarding the actings of Mr Bhardwaj at the creditors meeting of AFMS. He noted that the principal creditors of AFMS were the fixed charge receiver and the company. The chairman of such a meeting is a director of the company and that person decides on admission of claims. However, he advised that given the circumstances of the fixed charge receiver's and the company's claims he would not in the position of Mr Bhardwaj have accepted appointment as a liquidator where these claims were not accepted.

[107] Mr Maclennan was cross-examined by Mr Kumar Soni, however, he did not depart from his evidence in chief to any material extent and added nothing of any significance.

[108] On behalf of the respondents I heard from the following witnesses.

[109] First Mr Kumar Soni.

[110] As his evidence in chief he adopted his statement (JB212).

[111] For ease I have produced as appendix 1 the entire statement.

[112] In cross-examination he accepted that he had let premises without the Bank's consent. However, his position was that at the material time he was not aware that in order to do this he required the Bank's consent.

[113] His position was that Mr Chopra was lying about his knowledge of the leases with AFMS and when he said that the leases had been backdated.

[114] His position regarding Ms Bradley's evidence in respect to backdating was that she was mistaken rather than that she was lying about this matter as Mr Chopra was.

[115] He accepted that the licence relative to the Crawford Street property was again granted without the consent of the bank. He said that he did not think that the bank would be concerned by the reduction in income from £36,000 per annum to £12,000 per annum. His position was that £12,000 per annum was in fact the market rent.

[116] He denied that the dates on the leases to AFMS were false.

[117] He said that the witnesses to the leases were Mr Hockley, his hairdresser and a Mr Paul Sanford who worked for him and his brother as a driver. Mr Sanford had returned to New Zealand and would not be giving evidence. Mr Hockley, would be giving evidence. He had acted as a witness because he regularly popped into the respondents office which was close to his hairdressing salon.

[118] He was asked about the Booking Agency Agreement and the Agency Management Agreement and denied there were fabrications. He was asked why 4 October 2010 the date when these agreements were entered into was the same date as the leases to AFMS and said that this was simply a coincidence. He denied that any money had been diverted from the company. He denied that he had failed to provide the joint liquidators with information.

[119] He said that Mr Carmichael and Mr Ellison were both incorrect when they said they did not believe the dates of leases.

[120] He admitted to being a shadow director of AFMS.

[121] He described all the money which was taken out to meet his personal expenditure as being money which he and his brother were owed.

[122] He said that he had sent the booking and agency agreements to Mr Singh in 2010.

[123] He had not realised that there was any conflict of interest in his entering into leases with AFMS.

[124] He advised that the idea that the Company could not operate serviced apartments without breaching the conditions of the lending agreement with the Bank had come from Mr Chopra's accountant. This was the reason for the leases to AFMS, it could operate serviced apartments.

[125] In respect to the meeting with Ms Bradley and Mr Chopra at the start of the administration his position was that Ms Bradley was mistaken in her evidence.

[126] As regards the meeting in London with Ms Bradley he said this: "I think blackmail if you wish." That was his understanding of what was being put forward by Ms Bradley.

[127] He accepted that although Waterfords Solicitors were aware of this allegation, he did not instruct them to complain to the liquidator about this blackmail attempt.

[128] In respect of Mr Singh he accepted he was (1) his personal accountant, (2) his brother's personal accountant, (3) his wife and parents personal accountant, (4) the accountant for his various companies, (5) the accountant for his partnerships.

[129] When asked if Mr Singh had lent money to him and to the second respondent he said that he thought Mr Singh's wife had lent him money. He also accepted that Mr Singh had paid lawyer's fees which he owed to Teacher Stern. He thought he had paid £25,000 to £30,000 but accepted it could be as much as £52,000. He denied Mr Singh had sought to

manipulate the position regarding AFMS to the respondents benefit. He said that Mr Singh had suggested Mr Bhardwaj as the liquidator of AFMS.

[130] He was asked if he agreed that the leases to AFMS were not reflected in the 2010/2011 accounts of AFMS and he said he had not looked.

[131] He accepted that he had told Mr Bhardwaj not to accept the Company's claim in the liquidation of AFMS and Mr Bhardwaj had accepted his position. He accepted Mr Bhardwaj at this time was aware that he was not a director of AFMS.

[132] He said he could not remember if it was at his initiative that an attempt was made to remove Mr Keyes. He accepted he had spoken to Teacher Stern about the way Mr Keyes was conducting his enquiries.

[133] He insisted that his mother had provided £180,000 worth of chattels to AFMS and this should be set against any sum owed. He accepted that he had been unable to produce any documentation in relation to the value of the chattels but said he had produced photographs.

[134] Later in his evidence Mr Soni's position became that the bank had impliedly consented to the leases to AFMS. This was a position which he later sought to develop in his submissions.

[135] It was put to him towards the end of his cross-examination that the issue in this case came down to a simple question: whether the court believed him or Mr Chopra and he answered "I agree".

[136] In conclusion he said Mr Chopra is a liar, Ms Bradley is mistaken. The administrators did not know their job and Mr Ellison equally did not know his job.

[137] Mr Ajay Soni adopted his witness statement (JB211). The statement broadly said that everything in his brother's statement was correct and added little to that. In his oral evidence

it was his position that he had dealt with the practical side of the business and had had no involvement in the financial side of it.

[138] In cross-examination he said that his position was that Mr Chopra was a liar and everything his brother had said in court was the truth. His position was that Ms Bradley was mistaken.

[139] Mr Ashok Bhardwaj adopted his witness statement (no JB206). This in short dealt with various formal stages relative to the liquidation of AFMS. He said that he had found the respondents to be cooperative and helpful throughout his dealings with them. He accepted Mr Ellison had requested that the respondents pay money into the liquidation.

[140] In cross-examination he accepted that a few days prior to the creditors meeting of AFMS he had met the respondents, their mother, Mr Kumar Soni and Mr Singh. He understood that they wished to put the company into liquidation as there was a claim by a creditor of approximately £100,000. He advised that the first respondent said there was a judgment/or order against the company in the sum of about £100,000. He accepted that by the time of the creditors meeting it was clear that the first respondent was a shadow director of AFMS. So far as the rejection of creditors' claims at the meeting he advised that he was guided by the shadow director, namely: the first respondent who was speaking on behalf of his mother. The shadow director said "didn't want him to accept claims". He accepted what claims were accepted at the meeting would have an effect on who could vote at the meeting. He accepted that the first respondent objected to a joint liquidation but he had thought there should be a joint liquidation. In addition he accepted he had arranged a meeting at which it was being sought to remove Mr Keyes as joint liquidator. According to him it was Mr Singh who had instigated this process. He believed at the time that he was bound to convene a meeting where that had been requested by Mr Singh. As far as he was concerned no reason

was put forward why Mr Keyes should be removed. However, he said this about the reason for the request to remove Mr Keyes: "My understanding Ellison was investigating the affairs rigorously and that was the reason JSP wanted him removed."

[141] Lastly, he accepted he had appointed the first respondent as his proxy at a creditors meeting of the Company.

[142] Mr Bhupinderpal Singh spoke to his statement (JB209) which was in fairly short terms.

[143] It made certain criticisms of Mr Christie's report between paragraphs 3 and 7. It was his broad position in his statement that the report was factually incorrect and misleading. In oral evidence he went further and said the report was distorted. He described the report in this way: It was "prepared for reason and prepared with bias".

[144] In evidence he dismissed any criticism made regarding his integrity and professionalism.

[145] He accepted that his wife had loaned £25,000 to the respondents and that he had paid Teacher Stern's fees.

[146] In the course of his cross-examination he described Mr Christie as following: "a direction". The implication appeared to be that someone had sought to have him distort his analysis and conclusions and that he had been prepared to do this.

[147] He denied that he had failed to provide information to the joint liquidators and joint administrators and Mr Ellison. He denied he had been dilatory in providing such information. He accepted that he carried out work for a lot entities connected to the respondents.

[148] In the course of his cross-examination it was his position that he had grave concerns about the actings of Mr Carmichael and said that he believed Mr Carmichael had acted in a manner which he should not have done.

[149] He accepted that he had sought to have Mr Keyes removed. The reason for that being he was charging fees and there was no need for these fees.

[150] I also heard evidence on behalf of the respondents from a Ms Grant, Mr Hockley, Ms Goard and Ms Lewariowicz. I do not require to set their evidence out for reasons I will give later in this opinion.

Submissions for the noters

[151] The noters primary motion was this: to grant decree against the respondents, jointly and severally, in the sum craved in the prayer to the note, with interest at 4% per annum from the date of citation. In the alternative the noters moved the court to grant an order requiring the respondents to lodge an account of their intromissions with the company's assets through AFMS in order to assess the extent to which they had benefited from their breach of fiduciary duty.

[152] The noters submissions commenced by their laying out the duties of the respondents which they contended were relevant for present purposes in establishing wrongful conduct in terms of section 212 of the 1986 Act. The duties were these:

a. Section 171 of the 2006 Act requires a director to act in accordance with the Company's constitution and only to exercise powers for the purpose that they were conferred.

b. Section 172 of the 2006 Act requires directors to act in such a way that they consider, in good faith, is likely to promote the success of the company for the benefit of its members as a whole and not for any collateral purpose. The duty was summarised by Parker J in *Regentcrest plc (In Liquidation)* v *Cohen* [2001] BCC 494 at paragraph [120] and was considered in detail by Lord Glennie in

Dryburgh v *Scotts Media Tax Ltd (In Liquidation)* [2011] CSOH 147 at paragraphs [87] - [91]. As explained by Lord Glennie at paragraph [91]:

> "Where the power conferred on the director has been exercised for a proper purpose, the question is whether the director honestly believed that his act or omission was in the interests of the company. If so, it does not matter that, viewed objectively, it can be shown not to have been. On the other hand, where a power conferred on a director is used for a collateral purpose, it does not matter whether the director honestly believed that in exercising the power as he did he was acting in the interests of the company - if the power has been exercised for an improper purpose, its exercise will be set aside."

c. Section 174 requires the directors to exercise reasonable care, skill and diligence. That is defined in section 174(2) both as the care, skill and diligence to be expected of the director in relation to that particular company, and separately to be expected of a director of a company more generally. It is not a fiduciary duty (section 178(2) of the 2006 Act). There are three elements to the duty. "Care" means carefulness, "skill" denotes ability, and "diligence" requires a director to apply himself consciously to the affairs of the company and to the matter in hand (Mortimore QC (ed), *Company Directors: Duties, Liabilities and Remedies* (3rd edn, 2017), paragraph 14.12). The degree of care, skill and diligence required has both a subjective and objective element (section 174(2)). First, section 174 imposes an objective, minimum standard: in managing the Company's affairs the respondents were obliged to exercise the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions. Secondly, section 174 imposes a subjective standard: in managing the Company's affairs, the respondents were required to use the general knowledge, skill and experience that they actually had. The subjective test only adds to the objective test if a director has a greater

level of skill than would otherwise be required. The court will not second guess commercial decisions taken by directors (*Howard Smith Ltd* v *Ampol Petroleum Ltd* [1974] AC 821 per Lord Wilberforce (with whom the other Lords of Appeal in Ordinary agreed) at p 832E).

d. Section 175 of the 2006 Act requires a director to avoid a situation where his own interests directly or indirectly conflict, or may conflict, with the company. The law was explained by the Inner House in *Commonwealth Oil and Gas Co Ltd* v *Baxter* 2010 SC 156, particularly in the opinion of Lord President (Hamilton) at paragraphs [2] - [4] and Lord Nimmo Smith at paragraphs [71] – [82]. If there is such a conflict, whether the deal is nonetheless 'fair' is irrelevant.

e. Section 177 of the 2006 Act requires directors to declare an interest which they have in any proposed transaction.

[153] The duties in sections 172 and 175 are fiduciary duties. The duty in section 174 is not (reference is made to section 178 of the 2006 Act). It may be that more than one duty is breached in a given case (section 179 of the 2006 Act). The meaning of the phrase 'breach of fiduciary duty' has recently been considered by the Inner House in *MacRoberts LLP* v *McCrindle Group Ltd* [2016] PNLR 28. At paragraph [46] and [51], Lord Brodie (with whom the other two judges agreed) emphasised that the core of an allegation of a breach of fiduciary duty is a disloyal action on the part of a fiduciary.

[154] An important aspect of a directors' fiduciary duties is that directors must also have regard to the interests of creditors (*Bilta (UK) Ltd (in liquidation) and others* v *Nazir and others (No 2)* [2016] AC 1, in particular to the Judgement of Lord Toulson and Lord Hodge at paragraphs [123] - [127)) once a company is bordering on insolvency, by which what is meant

is that it is unable to pay its debts as they fall due. As explained in *Mortimore*, paragraph 12.63:

> "[The interests of the creditors] are, quite simply, to be paid, in full, and on time. It follows that their interests will or may be adversely affected if anything occurs that will or may compromise the company's ability to discharge its debts when it is supposed to or, in other words, prejudice the creditors' entitlement and expectation to be paid. Such a statement is not to be interpreted literally, however, for to require directors to take into account the interests of creditors when there is a mere possibility that they will be affected would be likely to act as an unwelcome fetter on enterprise... what is required is a real risk of prejudice such that the inquiry becomes: whether, having regard to the financial position of the company, there is a real and not remote risk of prejudice to the company's ability to pay its creditors on time if a certain course of action is taken."

[155] At paragraph 12.97:

> "Where the directors conclude that the company has temporary financial difficulties but that creditors' interests are nevertheless at risk, they should keep the position under review. Before committing the company to a particular transaction, they should satisfy themselves that it is appropriate to enter into it having regard to the effect it will have on the Company's solvency, the value to be derived from it, the benefits that will accrue to the company's business, and any potential prejudice to creditors' interests generally that may ensure. Generally in such cases, it will be important to be able to demonstrate proper consideration of professional advice or other evidence as to valuation."

[156] Lastly Lord Davidson turned to the issue of shadow directorship. It is a matter of admission that the first respondent is a shadow director· in AFMS. A shadow director' is defined by section 251 of the 2006 Act as someone in accordance with whose directions or instructions the directors of the company are accustomed to act. Section 170(5) of the 2006 Act provides that shadow directors are subject to the same duties to a company as any other director. In *Secretary of State for Trade and Industry* v *Deverell* [2001] Ch 340, the Court of Appeal in England and Wales gave some useful guidance about the interpretation of the equivalent provision in section 22 of the Company Directors Disqualification Act 1986 per Merritt LJ (with whom the other Judges agreed) at paragraphs [35) - [36]. In particular, what

is necessary is to establish that the person has a real influence in the company's corporate affairs, and it is not necessary for the person to 'lurk' in the shadows - it is possible to be a shadow director in the open.

[157] As was foreshadowed in the way that the evidence developed it was the position advanced by Lord Davidson that the case principally turned on the credibility and reliability of the various witnesses led by parties.

[158] His general position was that the witnesses led on behalf of the noters should all be accepted by the court as having given credible and reliable evidence. Lord Davidson advanced detailed reasons in respect to each witness for his position. These reasons were as follows:

a. Mr Thomas Campbell Maclennan and Mr Callum Carmichael both gave evidence about their work in the administration and liquidation of the Company. Mr Carmichael managed the day to day work involved, and Mr Maclennan spoke to the high level decisions he took. Both are experienced chartered accountants and insolvency practitioners. Mr Carmichael has, in particular, provided a detailed statement covering the issues in this case which demonstrates his command of the detail. Both presented their evidence in a straightforward way and he submitted that the court can have confidence in how they have managed the administration and liquidation and in the evidence they have given.

b. Mr Gordon Christie gave expert evidence on the Noters' behalf. His CV (JB 8/173, p 2,315 - 2,317) demonstrates his experience and expertise. The purpose of involving him is set out in the remit given to him by the noters at Appendix 1 to his report (JB 8/173, p 2,309 - 2,314). In particular, they sought

an independent check on their conclusions (p 2,314) and assistance with quantifying their claim. He submitted that the court can have confidence in Mr Christie's independence, expertise and conclusions. He was confident and robust whilst being cross examined, and was able to deal with whatever the respondents sought to put to him.

c. Mr Ajay Chopra, he submitted, came across as honest and straightforward. He is clearly upset and angry about how he has been treated by the first respondent. His account of events in the witness box was consistent with his affidavit and witness statement, although he was cautious not to say anything that might be wrong (as evident from how he sought to distinguish between how certain he could be as between Gloucester Place and Crawford St about when the leases were put in place, although he was clear that he did not approve of the arrangement created by the respondents whenever created). Importantly, his evidence about how the leases came into being is corroborated by Ms Pauline Bradley.

d. Ms Pauline Bradley is an independent witness of fact, and to that extent he submitted that particular importance and weight can be attached to her evidence. She came across as careful, cautious and professional. She is a solicitor. Her account of how the leases came to be created is corroborated by Mr Chopra's account. She was clearly distressed by the unfounded allegations the respondents put to her.

e. Mr Paul Ellison is also an experienced insolvency practitioner and chartered accountant. He submitted that as with Mr Maclennan and Mr Carmichael, the

court can have confidence in his evidence as an honest assessment of what he found while acting on behalf of Mr Keyes.

f. Mr Ian Lapworth gave evidence in a straightforward manner. He has no personal interest in the case and he submitted came across as honest and reliable.

[159] So far as the respondents' witnesses were concerned Lord Davidson's submission was this: the respondents, Mr Singh and Mr Bhardwaj should not be treated by the court as being credible and reliable. In respect to the credibility and reliability of Graeme Hockley, Ms Rachel Grant, Ms Goard and Ms Lewariowicz, the latter two witnesses evidence was agreed in terms of the joint minute it was his position that he took no issue as regards to their credibility and reliability, however, their evidence was not relevant to any of the issues before the court.

[160] As regards the four witnesses for the respondents whose credibility and reliability he challenged he again made detailed submissions in support of that general position and these were as follows:

a. He submitted that the first respondent came across as manipulative and cannot be trusted. If the court accepts the evidence of Mr Chopra and Ms Bradley, the first respondent was the creator of a fraudulent scheme for his benefit and the benefit of his brother and has since done everything he can to cover his tracks. He is someone who accuses professionals of lacking professionalism: he accuses Mr Maclennan, Mr Carmichael and Mr Ellison of bias. He shamefully accuses Ms Bradley and Mr Chopra of blackmail. Mr Maclennan, Mr Carmichael, Mr Ellison, Mr Lapworth, Ms Bradley and Mr Chopra all have concerns about his honesty. On several occasions the court had to tell him to

quote accurately things that witnesses had said: for example, he put to Ms Bradley that Mr Chopra had conceded the Gloucester Place leases were dated from 2010 when he had done nothing of the sort. When Mr Chopra gave evidence about meeting a colleague of Mr Maclennan's and Mr Carmichael's at a Partick Thistle football match, the first respondent twisted that answer so as to allege to Mr Maclennan that his colleague had been "entertained" by Mr Chopra (something which the court noted its concern over). When giving his own evidence, it was obvious that he had memorised a script, but it is submitted that extreme caution ought to be exercised before accepting anything he has said.

b. The second respondent purported to be someone who knew very little about anything. He was initially truculent in his answers until the court made its disapproval clear. It is submitted that his position is not credible: he must remember attending meetings and signing documents such as leases or agreements which he purported not to know anything about. He has sat through the evidence, but yet purported not to understand or recollect the details of what was said by others. His position appears to be that he was happy to benefit financially from what was a profitable business together with his brother without knowing anything at all about how it was administered. He submitted that his evidence cannot be relied upon: he is merely his brother's instrument. Nonetheless he was willing to take the benefits of, and share in the creation of the scheme arranged by his brother, and therefore shares the consequences.

c. Mr Bhardwaj's evidence, insofar as it conflicts with what was said by the Noter's witnesses, ought to be disregarded. He operated as a facilitator for certain of the first respondent's actions, for example by appointing him as his proxy to attend the Company's creditor's meeting (on Mr MacLennan's evidence and something which Mr Bhardwaj did not deny), something which he accepted would be unethical (and is surprising when he had been copied into correspondence from Mr Ellison expressing concern about the first respondent's conduct), or through giving his witness statement by noting that the first respondent has cooperated with the liquidation when Mr Ellison had explained he had not. He did not ask questions of JSP Accountants when they sought to remove Mr Keyes as joint liquidator of AFMS, notwithstanding in his evidence he accepted the motive for removal was because Mr Ellison had been investigating Mr Soni's affairs "rigorously". He seemed remarkably uninquisitive about the facts of the AFMS liquidation.

d. He submitted that Mr Singh should be found to be an incredible witness, and that his lack of essential professionalism ought to be of considerable concern to the court. He appears to have actively assisted the first respondent in his scheme. His financial affairs are bound up with the first respondent's, he attempted to remove Mr Keyes from AFMS, and on the evidence of Mr Maclennan, Mr Carmichael and Mr Ellison sought to obstruct their work. Concern has been expressed about Mr Singh's professionalism by Mr Maclennan, Mr Carmichael, Mr Ellison, Mr Christie, and Mr Chopra.

[161] Lord Davidson then submitted that it flowed from holding the noters' witnesses credible and reliable and rejecting the above witnesses on behalf of the respondents that the court was entitled to make the following findings in fact:

a. Shortly before the Company went into administration, the first respondent arranged for 9 leases to be granted by the Company in favour of AFMS. The leases are those noted at paragraph 36 of the Joint Minute (JB 2/8 - 2/16). Those leases were not granted in 2010 as they bear to be but were granted in the early part of 2012. The leases are, therefore, "shams". The second respondent knew of, and at the very least acquiesced in (if not actively participated in) this arrangement - he was the signatory on behalf of AFMS.

b. The purpose of the leases being granted was to divert money from the administration to the respondents and other members of their family.

c. The purpose of the licence to occupy being granted (JB 3/20) was to enable the respondents to remain in occupation of Ground Floor, 17 Crawford St and to prevent the property being used by the noters for the benefit of the creditors as a whole.

d. The leases and licence were not granted with the consent or knowledge of Mr Chopra.

e. The respondents have in fact personally benefitted from this diversion. One of the ways in which they did so was through the Booking Agency Agreement and Agency Management Agreement. Reference is made to paragraphs 46 - 48 of the Joint Minute.

f. The Company has, as a consequence of the leases and Licence, been wrongfully deprived of use of the Leased Properties for the period 14 May 2012 (date of administration) to 31 July 2014 (date when possession was recovered as noted at paragraph 54 of the Joint Minute).

[162] He went on to submit that in light of making such findings the court would in addition be entitled to make the following findings of what he described as mixed fact and law:

a. The first respondent is a shadow director of AFMS (admitted);

b. The first respondent and the second respondent breached their fiduciary duties to the Company in arranging for the leases and licence to be granted. Specifically, they breached the duties in sections 171, 172 and 175 of the 2006 Act.

c. The first and second respondent also breached their non-fiduciary duties to the Company in arranging for the leases and licence to be granted. Specifically, they breached the duty in section 174 of the 2006 Act.

d. The first and second respondent, in doing so, caused the Company loss.

[163] Lord Davidson then turned to make specific submissions in respect to the issues at the core of the case and first made submissions with respect to the question: were the leases shams?

[164] He submitted that this court has heard direct, conflicting evidence presented for the noters and respondents. He submitted that the evidence led by the noters ought to be preferred, and that the respondents (and those giving evidence on their behalf) ought to be found not to be credible or reliable.

[165] First, the court has heard direct evidence both from Ajay Chopra and Pauline Bradley about when the leases where put in place by Kumar Soni. Their accounts are essentially consistent with each other.

[166] Mr Chopra gave evidence about this in his witness statement (paragraphs 15 - 24) and his affidavit (paragraphs 4 - 9). He repeated this evidence in the witness box. He did not shy from answering the first respondent's questions to him directly by noting that the first respondent had backdated the leases. He could say that was the case for sure in respect of the leases at Crawford Street, and he simply did not know when the leases for Gloucester Place were granted.

[167] Ms Bradley also gave direct evidence about this in her witness statement (paragraphs 12 - 15) and affidavit (paragraphs 6 - 11). She also repeated this evidence in the witness box. It is submitted that Ms Bradley's evidence is particularly useful, because she is an independent witness. She was involved in negotiating on the company's behalf but has no pecuniary interest in the outcome of this litigation. She clearly attaches considerable importance to acting professionally and in protecting her good name and reputation. She spoke cogently about how concerned she was at the meeting on 21 May 2012 when she first found out about the leases, both for the consequences for the directors but also for her own reputation should she be seen to have been involved in something such as this.

[168] There was a shameful attempt to discredit and smear Ms Bradley by the first respondent. It is submitted that the allegations of blackmail made against Ms Bradley (insofar as ultimately put by him to her) are wholly without foundation and defamatory. They ought to be roundly rejected by the court. There were two allegations: the first in a letter from Mr Soni's former solicitors, Teacher Stern (JB 147) (Ms Bradley explained that she had been told by the liquidator's agents that the letter referred to her because that had been made clear

in open court by the first respondent and he accepts this), and the second in a memo purporting to be from Waterfords Solicitors (JB 7/158). The first respondent distanced himself from the letter, but not the memo. It is notable that the author of the memo was not led in evidence, and the first respondent himself offered no primary evidence about the meeting to which the memo relates. Ms Bradley, who was visibly upset by the accusation, said in response to the memo (in examination in chief):

> "It is inconceivable that I would ever be involved in something like that at any level, let alone for someone that I have hardly spoken to recently. It is inconceivable that I would put at risk my livelihood, professional reputation and career. I can't emphasise enough how disappointed - that is not the right word - I did something to try and reach a compromise for two people who would end up burning up what cash was left in the company. At best this allegation is bizarre and at worse disgraceful."

[169] In cross examination, when the memo was put to her, she told the first respondent that it was "absolutely and categorically denied, was untrue and that he must know that". It is submitted that this attempt to smear Ms Bradley is to the first respondent's considerable discredit, and ought to be treated seriously by the court when considering what weight, if any, it can attach to anything the first respondent has said.

[170] It is notable when considering the first respondent's credibility, that most of the other witnesses who spoke to their experiences of him considered that he was not trustworthy. Mr Ajay Chopra was perhaps the clearest of all, noting that he placed great importance in trusting family members but felt utterly betrayed by the first respondent. Separately, it is notable that the independent professionals who dealt with the first respondent found him to be untrustworthy. Mr Lapworth gave evidence that the first respondent made allegations of meetings and alleged consent on the part of the Bank "which obviously had not happened", and failed to provide documents such as leases despite being asked. The Bank had lost trust in the first respondent because he had agreed to sell Wilton Place and then behind the Bank's

back had a tenant installed - something which both Mr Lapworth and Ms Bradley spoke to. The first respondent sought to slip out of this by claiming he was letting the property to help the Company. Mr Carmichael and Mr Ellison gave evidence that he would promise to provide documents but not deliver, and indeed both had formed the view that Mr Soni had created "sham" documents to frustrate the winding up of the Company and AFMS respectively.

[171] Finally, the available circumstantial evidence points to the leases as not having been in place in 2010 as contended for by the respondents.

a. All of the income from the leases continued to go to the Company rather than AFMS. As Mr Maclennan noted in his oral evidence, applying the mantra of "follow the cash" there was nothing to indicate that the leases were in place prior to administration. Indeed it is conceded by the respondents that the income from the leases continued to be paid to the Company until the date of administration.

b. Invoices were rendered to the Company, which are inconsistent with the leases being in place. Examples are at JB 3/57 and JB 3/64 (which is an invoice from AFMS to the Company, wholly inconsistent with the leases). Reference is made to the report of Mr Christie, at paragraphs 2.30 - 2.46.

c. The Bank was not made aware of the leases, as made clear by Mr Lapworth.

d. The directors' statement of affairs (including those of the respondents) (JB 4/91, 4/92 and 5/98 respectively) did not include liabilities to AFMS of the scale asserted by the respondents, as noted by Mr Christie at paragraph 2.12 of his report.

e. The accounts lodged for AFMS prior to it going into liquidation show no significant balance due from the Company up to the year ending 31 March 2012 (JB 3/65 and 5/97). Reference is made to paragraphs 2.68 - 2.72 of Mr Christie's report.

f. Draft accounts prepared by JSP Accountants (JB 3/60) do not disclose the substantial sums claimed to be due to AFMS. Reference is made to paragraph 19 of Mr Maclennan's statement.

g. Mr Hockley was careful not to perjure himself and did not remember the dates of the leases.

[172] He submitted that no weight should be placed on the evidence of Mr Singh of JSP Accountants, or any of the documents he has produced, as the evidence is clear that he does not act independently from Mr Kumar Soni. Mr Ajay Chopra described them as being "in cahoots", and as "crooks basically". He explained that he was unable to get hold of Mr Singh to discuss the company's accounts and that Mr Singh would only discuss them with the first respondent. Mr Maclennan (paragraph 19) and Mr Carmichael (paragraph 4) both gave evidence in their witness statements of their experience of JSP Accountants, and repeated their concerns in oral evidence. Mr Maclennan, for example, noted in oral evidence that Mr Singh's conduct was "far from normal", "quite unique" and that, in his view, Mr Singh had not met the requirements of his profession to act ethically and independently. Mr Ellison expressed concerns about access to information from Mr Singh in the context of the winding up of AFMS (paragraphs 25 - 26 of his witness statement), and that JSP had attempted to remove Mr Keyes from office. Of particular concern is that Mr Singh appears to have disregarded court judgements or orders (which the first respondent asserts makes a difference) (JB 5/121, 5/122

and 5/124, each of which have been certified under section 6 of the Civil Evidence (Scotland) Act 1988 and which are spoken to by Mr Carmichael at paragraph 37 of his statement) in favour of Mr Soni's position. Mr Christie described Mr Singh's written calculations as "blatantly wrong" in his oral evidence, either showing a "lack of understanding" or evidence of a "shoddy approach".

[173] Turning to the issue of the purpose for which the two leases were granted Lord Davidson submitted that the court had heard clear evidence about this. Ms Bradley explained in her oral evidence that at the meeting on 21 May 2012 the first respondent explained that the purpose of the leases was to enable him to get a return for himself and his family for debts which he claimed the Company was due to him. Mr Maclennan noted that the leases amounted to an "unusually blatant attempt to divest" money from the company to a level that he had not seen before in his 36 years of practice.

[174] The first respondent gave a competing purpose for the leases: he alleged that it was because the Bank's lending requirements forced the Company to do that. Lord Davidson submitted that this is nonsense, even aside from the fact that it contradicts the evidence of Mr Chopra and Ms Bradley. The first respondent has not established that there was any such requirement imposed by the Bank. It is notable that he did not put this to Mr Lapworth. The document that he put to other witnesses, JB 3/49, purports to be unsigned heads of terms. No evidence has been led as to the terms and conditions actually imposed by the Bank on the Company. In any event, even if these heads of terms did reflect the contractual terms between the Bank and the Company, the terms do not bear the interpretation contended for by the first respondent. This is borne out by the fact that the first respondent accepts that Mr Lapworth was made aware that the Company was operating self-service apartments, was not told about the involvement of AFMS, and did not raise any objection to that. As explained cogently by

Ms Bradley, the consequence of the leases was to put the income from the Leased Properties outwith the Bank's security. It is notable that the second respondent was unable to explain clearly the purpose of the leases.

[175] The leases were not, in any event, in the Company's interest on any view. Mr Christie illustrates the difference between the income going to the Company in 2009 - 10 with that after 2009 - 10 if the leases were in fact in place at paragraph 2.21 of his report: the diversion of income had the leases been in place for 2010 - 12 (and therefore the likely diversion for 2012 - 14) is stark.

[176] The next issue related to the licence to occupy and in respect to that issue he submitted:

[177] The consequence of the new Licence to Occupy (JB 3/20) was that the sums payable by the respondents reduced from £36,000 per annum under the lease (JB 2/7) to £1,000 per month (inclusive of VAT).

[178] The first respondent was well aware that when the lease was granted to him in 2007, the Company instructed a solicitor (Wright, Johnston and Mackenzie) to prepare the lease and full information was given to the Bank (JB 3/35). It is notable that, at the time of the grant of the licence, he chose not to involve a solicitor.

[179] It is a condition of the charges granted by the Company that the Bank grant consent to any lease or licence. It is not plausible that the first respondent did not know this was required. Reference is made to clause 5 of the Conditions at 63/17 4 (Supp Bundle, tab 1) which Mr Lapworth confirmed were the conditions applicable to the loans.

[180] The third issue related to the actings of the respondents with respect to Mr Chopra and he submitted that Mr Chopra is clear that he did not consent to the leases being granted. His evidence on this is corroborated by Ms Bradley's evidence, who speaks to his shock when he

saw the leases for the first time (albeit he recollected that the first respondent had mentioned something about this in April 2012).

[181] In terms of the Company's Articles of Association, all directors ought to be involved in that decision. The Articles of Association were agreed in paragraph 8 of the Joint Minute (JB 3/22). It incorporates the relevant edition of Table A. Regulation 70 of Table A requires the directors to act as a body. Regulation 85 of Table A requires disclosure of a director's interests in any transaction and otherwise Regulation 94 prohibits a director being concerned in such a transaction.

[182] The fourth issue, was the question of personal benefit to the respondents. He made the following submissions:

[183] The first respondent accepted under cross examination that he is a shadow director of AFMS. That was, in any event, the view of Mr Ellison (paragraph 9 of his witness statement and confirmed in his oral evidence).

[184] It is clear that the respondents have extracted substantial sums of money from AFMS. They purport to be able to do so through the Booking Agency Agreement and Agency Management Agreement. Mr Ellison considers the Booking Agency Agreement to be a sham and the Management Agency Agreement to be excessive (paragraph 23 of his witness statement). He notes at paragraph 23 the consequences for AFMS of it entering into the Agreements. He notes that there is no evidence of anything actually being done under the Booking Agency Agreement (paragraphs 19 and 20), casting substantial doubt on the respondents' assertion that they required to find tenants. It is notable that these Agreements are not referred to in the AFMS' accounts for 2010 - 12.

[185] There is evidence that the income into AFMS was used to substantially benefit the respondents and the first respondent in particular. As noted by Mr Ellison at paragraphs 12 –

18 of his statement, payments were made to a personal bank account of the first respondent, and payments were made for his Bentley, holidays and school fees amongst other things. Payments were also made to the second respondent and to "TK Laundry". Detail is given in JB 7/152, 7/155 and 7/157. Notwithstanding the existence of the Agreements, Mr Ellison estimates that the first respondent has extracted more than £100,000 from AFMS for personal expenditure for the period that he considered. He only considered the period March 2013 - April 2014 because that was the only period he was provided with records for (paragraph 30 of his statement). Mr Ellison's oral evidence is that he was "astounded".

[186] As explained by Mr Chopra, it is clear that the first respondent has (one way or another) been "taking money right, left and centre".

[187] In short: the consequence of the leases was to divert income from the Company to AFMS, which in turn flowed to the respondents in vast amounts. The noters are unable to calculate with any precision the sums that ultimately made their way to the respondents.

[188] The fifth issue was had there been any breaches of duties on the part of the respondents?

[189] Lord Davidson submitted that it is clear if the evidence led by the Noters is accepted that there has been a breach of fiduciary duties by the respondents.

a. The leases and licence were granted for an "improper purpose" contrary to section 172;

b. The leases and licence were not granted in the best interests of the Company contrary to section 172;

c. The grant of the leases and licence was a clear conflict of interest, contrary to section 174.

[190] It is submitted that in any event there are also breaches of non-fiduciary duties. In particular:

a. The leases and licence were granted contrary to the Company's governance because Mr Chopra was not involved in the decision process, contrary to section 171 of the 2006 Act.

b. The leases and licence were not granted using reasonable skill, care and diligence, contrary to section 174.

[191] Finally there was the issue of loss and he submitted the Company has suffered loss as a consequence of the respondents' breaches of duty. The respondents reasonably estimate that loss, as per the Statement of Loss lodged on their behalf and prepared by Mr Christie (JB 9/17 and as summarised at paragraphs 5.1 - 5.5 of his witness statement), in the sum of £930,816. Mr Christie noted that, even had the Leases been genuine and not in breach of duty (which is denied), the Company has still suffered loss of at least £328,175 (paragraph 5.5 of his witness statement).

[192] There is a dispute over how much rent was collected after the Company went into administration. Mr Carmichael's evidence is that rent was collected by GVA and CBRE on the administrators' behalf (paragraph 49 of his witness statement), and that the sums they collected are documented in JB 5/118 and 7/156 amounting to a total of £66,802. He submitted that no credible evidence that the court can rely upon has been led by the respondents which would cast doubt on this figure. He made reference to Mr Christie's' witness statement at paragraphs 4.39 - 4.44 in respect of this matter.

[193] He submitted that the court ought to give no consideration to any question about ownership of what was referred to as "chattels". The respondents have led no positive evidence about this. The noters were clear that at no time has any evidence of ownership

actually been produced to them, and in any event the accounts for AFMS do not show chattels being purchased by that company (as the respondents asserted in correspondence).

[194] Otherwise, Mr Christie was clear in his oral evidence that he has considered the documents produced by the respondents and that nothing he has seen has changed his opinion of the loss calculation. It is submitted that the court ought to have confidence in Mr Christie's experience and professionalism and can rely upon his expert opinion in quantifying the loss to the Company in circumstances where full information is not available to quantify the actual loss. He made reference to his detailed calculation, as explained in his report and witness statement.

[195] The respondents have argued that the Company did not in fact suffer a loss because the properties sold for more than their initial valuations. Lord Davidson submitted that any such consequence is collateral to the wrong committed by the respondents, and that the Company is entitled to be compensated for being deprived of its use of the properties between 2012 and 2014 (as noted in the summary of the law in *McGregor on Damages* (20th edn, 2017) at paragraphs 9.133 - 9.152, particularly at paragraphs 9.139 - 9.152 and under reference to *Koch Marine Inc* v *d'Amica Societa di Navigatione, The Elena d'Amico* [1980] 1 Lloyd's Rep 75).

[196] Accordingly for the foregoing reasons he submitted that the court should grant the noters primary motion.

[197] If the court were not with him with respect to his primary submission then he briefly elaborated on his alternative position. He submitted that the court should instead seek to assess loss based on the gain to the respondents. It is recognised that, applying the normal procedure of a count, reckoning and payment, the respondents ought to be given an opportunity to provide an account before finally assessing quantum (albeit such an account ought not to be prepared by JSP Accountants). Standing the respondents' position that their

entitlement from AFMS was calculated with reference to each client in the Leased Properties, and indeed that AFMS' only assets were the Leased Properties (because the first respondent's evidence was that the Company lost its "tools of trade" when the leases ended) it ought to be relatively straightforward to trace the benefit they have obtained from the breach of fiduciary duty. The noters' primary position, however, remains that the sum concluded for is a proper assessment of the Company's loss.

The reply on behalf of the respondents

[198] Their position in respect to the core question of whether the leases were shams, was this: they were not shams and were in fact entered into in 2010. It was the respondents' position that there was no loss to the company post administration. Simply put, there was an arrangement in place to which all three directors consented (including therefore Mr Chopra) that leases were required to ensure that the Company complied with the Bank's Lending terms dated August 2010. There was a proper purpose for the granting of the leases.

[199] In development of the above positions which the respondents adopted it was argued that due to cash flow or income issues the Company had and mainly as a direct result of the flooding that took place at Wilton Place, there was a need for further monies to be ploughed into the Company to ensure that the interest and swap payments were kept up-to-date and maintained. Therefore, in addition to the passive income which was the market rent all of the active income that was generated by AFMS was to be ploughed into the company to ensure all repayments were made.

[200] On the expiry of the swap agreement, passive income continued to be paid to the company as per the leases and the active income remained with AFMS.

[201] As a result of the leases the three properties in London resulted in an excess of £4 million being achieved by way of sale proceeds. This resulted in the bank being paid in full and the personal guarantee of Ajay Chopra and the first respondent not being applicable. He submitted that there was no loss to the company post administration. The allegations being made that any duties of a director were breached cannot be true as the first respondent informed the administrators of his role in AFMS right from the outset. He was cooperative and assisted the administration process as opposed to disrupting it as alleged.

[202] The noters in taking these proceedings have relied on one of the directors, (Mr Chopra). They have not been independent in their enquiries and have been led by Ajay Chopra who clearly is biased. His evidence cannot be relied upon due to the contradictions that he has made both within his statement and when giving oral evidence. When questioned by the noters' counsel it came to light that he had to be led away from his original answer. Ajay Chopra simply cannot be believed, his motive being to obtain a portion of the active income after the swap had expired.

[203] He submitted that there has been a misconception as to where the active income was generated from. The noters have not understood as to how that income was generated and the work that the respondents had to do to generate that income. After the swap had expired, it was always agreed that AFMS would pay the passive income under the leases and retain the active income.

[204] There is no legal basis for AFMS to continue to pay the Company the active income particularly as the Company had been placed into administration.

[205] These submissions in summary provide evidence on the balance of probabilities that the leases were in existence in 2010, and furthermore that there was no loss to the Company

post administration as alleged by the noters in this case. Also, that there was no misfeasance by the respondents as directors.

[206] It is the respondents view that there was a misconception/misunderstanding that related to how the business operated prior to administration. The respondents have now been able to display the fact that there was active and passive income, and quite simply put both active and passive income was ploughed into the business pre-administration and this was for the benefit of the swap payments that were due. Once those swap payments had expired, the active income reverted back to AFMS. The company at this stage was in administration and the respondents had no obligation in law to provide the active income to the Company that was in administration. To do so would have resulted in effectively loaning monies to a company in administration, which would be nonsensical.

[207] The respondents acted appropriately and in a way that was required for a director whose company had been placed in administration.

[208] The family breakdown in this case has not assisted anyone and left perhaps what could have been called a successful business in tatters. In saying that, the swap that was imposed was unreasonable and the noters in their approach to this case have been led astray by Mr Chopra, and as a result any monies that may have been available to the creditors have been eaten up by costs of these proceedings and the costs of the administration process. The Bank has been repaid in full, and it is submitted that these leases that were in existence, in fact, benefitted the company in the administration and the sale of the properties resulted in more than £4m being achieved for the Bank and the administrators to then use for these proceedings and their costs. The respondents, it is submitted acted in good faith and not with any intentions to divert monies for their own benefit. The work that they undertook was labour intensive and needed to be done in order for the market rent to be paid to the

Company pre-and-post administration. AFMS took the risk of being responsible for the rents whether they received bookings or not. The work undertaken by AFMS was not just a phone call here and there, it involved hours of work during the day together with unsociable hours that the respondents had no alternative in. Employing others to undertake this work would not have been economical.

[209] There was no loss incurred as a result of the respondents actions, and the real motive behind these proceedings was Mr Chopra wanting some of the active income post administration and when this was not forthcoming a dispute arose which resulted in these proceedings. It would not be equitable or fair in any way for the respondents to be punished for their actions. Both respondents' pension funds and active income have disappeared, resulting in the family being in dire financial circumstances.

[210] The respondents' role in the Company pre-and-post administration was done with the interest of the Company being foremost. He submitted that the noters are unable to prove on the balance of probabilities that the respondents have behaved in such a way as alleged in these proceedings.

[211] In elaboration of the above it was submitted that post-administration, the administrators and/or their agents received market rent under the leases that were in existence. Any other income which was active income was then retained by AFMS. Prior to the swap expiring there was an agreement that all income whether it be passive or active would be ploughed into the company in order to ensure that the swap payments were met. Once the swap payments ended the rent paid to the administrator and/or their agents was the market rent as per the leases.

[212] Their position was that the two of them had done all of the work in relation to AFMS. In particular they had arranged all the bookings in relation to the serviced apartments: they

had dealt with all of the cleaning of the serviced apartments; they dealt with the clients who occupied the serviced apartments: they had dealt with all repairs etcetera to the serviced apartments; they had picked up clients who required chauffeuring in relation to the serviced apartments. Thus it was their position that through their work AFMS had made what they described as the active income. Their position was they were entitled to retain that and that they had taken out the active income from AFMS by way of the various personal payments etcetera which has been alluded to in the evidence of certain of the witnesses on behalf of the noters.

[213] It was in addition their position that their mother had carried out all of the laundry work in relation to the serviced apartments and they were entitled to recover the cost of that work.

[214] Beyond that it was argued that they had provided or their family had provided various chattels in respect to certain of the properties in particular Wilton Place and these were of very significant value and that the value of these chattels should be set against any claim being made by the noters.

[215] Finally it was their position that the value of the properties had increased during the course of the administration/liquidation and that the increase in value should be set off against any claim by the noters.

[216] Various points were made in their written submissions in respect to the evidence given by the noters' witnesses. I believe the intention in making these points was to attack the credibility and reliability of these witnesses, generally to undermine their evidence and finally to highlight points which it was their position supported aspects of their case. These points are fully set out at pages 2 to 6 of the respondents written submissions.

[217] So far as the respondents' evidence and that of Mr Bhardwaj and Mr Singh I was asked to hold that this was credible and reliable evidence. Various points were made between pages 7 and 9 of the written submissions in particular it was argued that Mr Chopra's evidence was lies; Ms Bradley's evidence was mistaken and the various professional witnesses evidence should not be accepted.

[218] The respondents in addition lodged a lengthy document which was described as a skeleton argument in support of what was said to be a new tenancy deemed to be created between the Bank and AFMS as the tenant.

[219] The respondents position as advanced in this skeleton argument was in summary this:

> "the bank was aware pre and post-administration of the existence of the tenancy agreements/licence, and the demand or acceptance of rent to any forfeiture claim amounts to a clear constitution of waiver. As a result, a new tenancy is deemed to be created between the bank and the tenant. The new tenancy mirrors the existing tenancy save that the new landlord is replaced by the bank, its agents or the administrators. It is submitted that the new tenancy agreements and existing tenancy agreements in place prior to the administration are valid and therefore no right of forfeiture can take place and these proceedings should be stayed/dismissed."

[220] Then towards the end of the skeleton argument, in the conclusion section the following is argued:

> "if AFMS Limited as alleged did not pay its rent as per the leases, (for the avoidance of doubt this is not accepted), then any claim the noters have over non-payment of rent is between the noters and AFMS Limited and not the respondents."

[221] As I understood it, the respondents argument was that on the basis of the application of the law of waiver, the noters were not entitled to the remedies which they sought.

Reply by the noters to the wavier argument

[222] Lord Davidson's reply was short and pointed.

[223] First the respondents had no pleadings whatsoever, which allowed them to advance the argument.

[224] Secondly, waiver in any express sense was never put to the noters' witnesses.

[225] Thirdly, the argument put forward on behalf of the respondents ignores that the basis of the noters' case is fraud. There was nothing in the evidence to suggest that the noters or anyone on their behalf, from the point at which they understood that the leases were shams, had abandoned their right to treat them as fraudulent. There was nothing in the actings of Mr Carmichael or Mr Maclennan to suggest that.

[226] Fourthly, so far as Lord Davidson could understand the position being advanced by the respondents it was being suggested that the abandonment of right had been by the Bank. This entirely missed the point. The noters were not agents of the Bank.

[227] Fifthly, in any event there was nothing in the evidence to suggest that the Bank knew the leases were fraudulent and thereafter waived any rights which they had.

[228] It was his position that waiver had no application in the circumstances of this case.

Discussion

[229] As regards the legal framework in terms of which I have to consider this case I am satisfied that Lord Davidson has fully and fairly set this out in the course of his submissions. I have accordingly considered the case within that framework.

[230] I agree with Lord Davidson that this case primarily turned on the credibility and reliability of the witnesses whom he identified. I accordingly turn to consider that question.

[231] First as regards the evidence of Mr Graeme Hockley, Ms Rachel Grant, Ms Goard and Ms Lewariowicz, as Lord Davidson submitted, their evidence is not relevant to the issues before the court. In particular I observe Mr Graeme Hockley who was led on behalf of the

respondents in respect to the witnessing of the leases, was not able to give any evidence in respect to the central issue regarding the leases, namely: when they were signed.

[232] I next turn to look at the various witnesses led on behalf of the noters.

[233] As regards Mr Carmichael and Mr MacLennan, Lord Davidson looked at their evidence together, I also believe that approach is appropriate, given the roles that they were performing in respect to the administration and liquidation of the Company.

[234] I have absolutely no doubt that these witnesses are credible and reliable. Both their evidence itself and the way that they gave their evidence clearly leads me to that conclusion. I formed the clear impression that these are highly competent professional people who complied with all of the duties which were incumbent upon them, given their respective roles in the administration and liquidation of the Company.

[235] There was nothing in their evidence or in the evidence from any other source which I accepted from which I could draw the conclusion, contended for by the respondents, that Mr Carmichael and Mr MacLennan had acted improperly in the way that they had carried out their duties in respect of the Company. It was clear that what underlay the position of the respondents and Mr Singh was that Mr Carmichael and Mr MacLennan had acted improperly. This allegation I found to be entirely without foundation. In my view they acted at all times entirely properly. In particular I entirely reject the suggestion made on behalf of the respondents that in the performance of their duties they had not acted independently and there was some impropriety in respect to the form of instructions which they had given to Mr Christie. It appeared to me that the instructions given by them to Mr Christie were entirely proper.

[236] Their evidence was clear and straightforward. They were at no point caught out in their evidence in any significant way. I have no difficulty in holding that I could have

confidence in how they had manged the administration and liquidation and in the evidence which they gave.

[237] As regards Mr Ellison, I believe I am entitled to have confidence in his evidence. He clearly acted properly and professionally in relation to his duties regarding AFMS. He again was an entirely straightforward witness. There was no basis in the evidence, which I accepted, which could form a basis for not accepting his evidence.

[238] Turning to Mr Chopra I have no difficulty in accepting him as a credible and reliable witness. As with previous witnesses he gave his evidence in a straightforward manner. I formed a favourable impression of him. He came over as being genuinely upset and very annoyed by the actings of the first respondent. He appeared genuinely taken aback by the way the first respondent had conducted himself. His evidence had the ring of truth about it. In respect to his evidence, critically it was supported by the evidence of Ms Bradley, whose evidence for reasons I will elaborate upon I find wholly convincing. At no point was he caught out when giving his evidence. The material parts of his evidence appeared to have remained the same throughout the long history of this case. I could identify no reason why I should not accept the material parts of his evidence.

[239] Ms Bradley, importantly was an independent witness to fact. She was a witness who was clearly very upset by the allegations made about her by the first respondent. I believe that upset to be entirely genuine. In her case her annoyance related to the allegation made by the first respondent that she had attempted to blackmail him. I was in no doubt she had not acted in the manner alleged by the first respondent. The reasons she advanced in the course of her evidence as to why she would not have acted in the way alleged by the first respondent seem to me to carry considerable force. She supported Mr Chopra's version of events regarding his knowledge of the leases and why and when they came to be created by the first

respondent. Overall I find her a most impressive witness. I find her entirely credible. As regards her reliability her memory of events was clear and consistent and I have no difficulty accepting her as a reliable witness. I accept her evidence in its entirety.

[240] Mr Gordon Christie, I find to be a very impressive witness. He clearly understands the duties of an expert witness. In particular it is clear he acted independently in preparing his report. The suggestion that he reached a conclusion which was not a proper one, in the sense that the conclusion he arrived at he had been directed to arrive at by Mr Maclennan and Mr Carmichael I roundly reject. It is apparent from the terms of his report and from the way in which he gave his evidence that he would never have contemplated doing such a thing. He prepared an independent report and I believe that I can rely on the terms of his report.

[241] His report is fully and carefully prepared. His findings are fully reasoned and supported. He impressed me as being meticulous in the way he approached his work. He answered questions carefully. There was nothing in respect to the questions he was asked which he did not deal with. Not one of the questions he was asked in cross-examination did he fail to deal with and none of the questions caused him to shift from his position as expressed in his reports and statement. I accept his evidence in its entirety as being credible and reliable. I accordingly accept the conclusions which he reached as regards the loss suffered by the Company.

[242] Mr Iain Lapworth I can deal with very quickly I without difficulty find him to be a credible and reliable witness.

[243] I now turn to the respondents' witnesses.

[244] The first respondent I find to be a wholly unimpressive witness. In that I have accepted the evidence of Mr Chopra and Ms Bradley it follows, as argued by Lord Davidson, that the first respondent was the creator of a fraudulent scheme for his benefit and the benefit

of his brother and has since done everything he can to cover his tracks. I agree with Lord Davidson's characterisation of him as being someone who is manipulative and cannot be trusted.

[245] Again as submitted by Lord Davidson he was prepared to make all sorts of allegations as regards professional people such as Mr Maclellan, Mr Carmichael, Mr Ellison and Ms Bradley. When these allegations are examined none of them I consider has any substance. When one sought to check his evidence against the evidence of any witness, I was prepared to hold as credible and reliable, he was shown not to be credible and reliable. He produced no documentary evidence upon which he could rely in support of the respondents' position. In respect to certain issues he produced no documentary evidence where the court would have expected there to be such evidence. His whole actings seem to be directed to this end: to improperly divert money from the Company and by doing so benefit himself and his brother. He seems to have been prepared to go to considerable lengths to thwart the administration and liquidation of the Company and to prevent Mr Ellison and Mr Keyes fully investigating the relationship of AFMS and the Company. The reasons for those actings being his wish to cover up the improper diversion of money from the Company to him and his brother.

[246] The further matters referred to by Lord Davidson in the course of his submissions in respect of this witness add significant material which supports the view I have reached regarding this witness's honesty. I believe for the forgoing reasons that his evidence should not be accepted in respect to any disputed issue. He was a wholly unsatisfactory witness.

[247] The second respondent was as unimpressive and unsatisfactory as his brother. I reject his evidence in its entirety. He produced a witness statement which amounted to little more than him saying:

> "I adopt his [the first respondent's] statement in its entirety.

...

I did not have any involvement in the financial side of the company."

[248] I believe it was appropriate for Lord Davidson to describe him at least initially as a truculent witness. The court was required to intervene in order to seek to have him answer questions properly.

[249] I observe that his evidence was riddled with "can't remember", "don't know", "don't recall" and "can't comment".

[250] I simply do not believe when he gave answers of the above type that he was properly answering the questions being put to him by Lord Davidson. It seems to me that he was doing no more than seeking to hide behind answers of that type.

[251] All of what Lord Davidson submitted relative to this witness was well founded.

[252] In re-examination he was asked a single question by the first respondent which was this: "How good are your reading and writing skills?" And he answered: "Rubbish".

[253] I suspect that this was intended to show why he had answered the questions in cross-examination by largely saying "don't know" or similar. However, I noted that throughout the hearing he had taken notes of the evidence, it was him who was in charge on behalf of the respondents of the voluminous copy productions in the case, it was him when a particular production was referred to found that production for his brother and it was clear that he was often directing his brother to particular parts of a production or directing his brother to another production, which he believed his brother should refer to. These were not the actings of someone who was "rubbish" in relation to his reading and writing skills. He did not seem to have any reading or writing difficulties when carrying out these various tasks.

[254] I was not prepared to accept any of his evidence as credible and reliable.

[255] In respect to Mr Bhardwaj I accept the submissions made by Lord Davidson regarding his evidence.

[256] Lastly I turn to the evidence of Mr Singh. For the reasons advanced by Lord Davidson I am not willing to accept him as a credible and reliable witness. Each of the detailed submissions made by Lord Davidson regarding the credibility and reliability of this witness I consider well founded. When taken together they wholly undermine his evidence. He was a wholly unimpressive witness. When giving oral evidence I do not believe he was seeking to assist the court. In cross-examination he frequently answered questions: "I can't recall"; "can't remember"; "can't say"; "no comment" and "not aware". It appears to me that he simply did not wish to answer questions properly put to him by Lord Davidson.

[257] I now turn to the questions posed by Lord Davidson in the course of his submissions. The first of these was this: were the leases of the Leased Properties a sham? I have no difficulty in answering that question in the affirmative for the following reasons.

[258] I accept the evidence of Mr Chopra and Ms Bradley in respect to this central issue. I reject the evidence of the respondents and Mr Singh regarding this issue. Accordingly the direct evidence overwhelmingly supported the conclusion that the leases were a sham and had been backdated.

[259] In addition the circumstantial evidence advanced by Lord Davidson strongly pointed to the leases as not having been in place in 2010 as contended for by the respondents. Each of the seven points he set out in support of his submission regarding the circumstantial evidence is of considerable force. When taken together they very significantly support the position that the leases are shams.

[260] In respect to Mr Singh's evidence regarding this issue further detailed submissions were advanced by Lord Davidson. Once more I consider these submissions are well-founded

having regard to the evidence which was led and go further to undermine the credibility of Mr Singh. They provide further significant material as to why his evidence should not be accepted.

[261] The evidence regarding the purpose of the leases, which I heard, clearly supported the leases being a sham. The evidence adduced on this issue from Ms Bradley and Mr MacLennan was compelling. As regards the competing reason for the leases put forward by the first respondent, it made no sense. The document he founded upon does not bear the construction for which he contends. In any event it was clear from the evidence of Mr Lapworth that the Bank would not have been concerned by the Company operating serviced apartments.

[262] With respect to the licence to occupy I accept all of the points made by Lord Davidson. Equally I accept all of the points made by Lord Davidson regarding Mr Chopra not having consented to the leases and the points he advances regarding the articles of association of the Company. It is clear that Mr Chopra did not consent to the leases.

[263] Turning to the issue of personal benefit to the respondents. On the basis of the evidence relied on by Lord Davidson it is clear that the respondents have personally benefitted. I have no difficulty in accepting Mr Ellison's and Mr Chopra's evidence in respect of this aspect of the case. There is when all the evidence is looked at a compelling case that the respondents personally benefitted.

[264] The second respondent produced certain documents to try and support the level of charges under the Management Agency Agreement. These documents were put to certain witnesses. No one from the companies whose level of charging was set out in these documents was led to speak to these documents and to the particular circumstances in which

that level of charges was applied. In absence of any such evidence I was not prepared to accept this evidence and preferred the evidence of Mr Ellison and Mr Chopra on this issue.

[265] The final question is loss. I have already stated that I am prepared to accept the evidence of Mr Christie and in particular his estimate of loss. There was no independent expert evidence put forward on behalf of the respondents challenging the terms of the report and the evidence of Mr Christie. The only evidence put forward which in any way challenged his report and his conclusions came from the respondents themselves and Mr Singh. For the reasons I have already set out in detail I am not prepared to accept any of this evidence.

[266] I agree with Lord Davidson that Mr Carmichael should be accepted as to the amount of rent which was collected by the company post-administration. There is no reason why I should not accept Mr Carmichael's position regarding this. I have already made clear my views regarding his credibility and reliability. I have also made clear my views regarding the credibility and reliability of the respondents and Mr Singh. There was thus no credible and reliable evidence led which could cast any doubt on the figure spoken to by Mr Carmichael.

[267] The issue of the chattels I answer in favour of the noters. The only evidence presented to the court to the effect that the chattels had significant value and that the chattels had been provided by the respondents and/or their family came from the respondents themselves and to a limited extent from Mr Singh. I am not prepared to accept their evidence in respect to these issues. I accept the evidence led on behalf of the noters that no evidence was presented to them regarding the chattels and in addition and crucially the accounts for AFMS do not support the position of the respondents.

[268] So far as the figures for laundry I do not accept these figures. I do not accept the evidence of the respondents regarding this issue for the reasons put forward in the course of the evidence led on behalf of the noters.

[269] The final issue regarding loss is the respondents contention that the Company suffered no loss as the properties sold for more than their initial valuation. This argument is misconceived. It is nothing to the point that they sold for more than their initial valuation. It is an irrelevant consideration. Such a consequence as argued by Lord Davidson is collateral to the wrongs committed by the respondents.

[270] In respect to the various points made in the noters' written submissions, which I have not to this point dealt with. I would say this: as regards the various points made by the respondents in their written submissions at pages 2 to 6 regarding the various witnesses led on behalf of the noters which it was contended undermined their credibility and reliability, or in some other way undermined their evidence or supported the case being advanced by the respondents I am satisfied that not one of these points undermined in any way these witnesses' credibility and reliability. Nor did they undermine these witnesses' evidence on any of the critical issues in the case or in any way support the respondents' position. Nothing in these points causes me to depart from any of the views which I have formed regarding the credibility and reliability of these witnesses and the effect of their evidence in respect to the issues in the case.

[271] I also considered the points made regarding the respondents' witnesses in the written submissions. Nothing set out there caused me to alter the views I have reached regarding the credibility and reliability of the respondents or Mr Singh. Nothing said there in any sense supported the credibility and reliability of these witnesses or in any way undermined the noter's case.

[272] I finally turn to look at the waiver argument advanced on the respondents' behalf.

[273] There is no merit in this argument. Specifically there is no evidence of any abandonment of a right by the noters.

[274] I have held that the leases were fraudulently created thus the leases are a nullity and cannot form a basis for a waiver argument.

[275] There was nothing in the evidence to suggest Mr MacLennan or Mr Carmichael had abandoned their right to challenge the validity of the leases once they had discovered they were shams.

[276] In addition the argument is directed against the Bank. The noters are not agents of the Bank.

[277] The skeleton argument does not on being read look as though it was initially prepared for the purpose of these proceedings but rather appears to have been prepared for the purpose of separate English proceedings involving the Bank. It appears to have no more than a section added at the end to try and focus the matter in respect of this case. The argument, however, is entirely misconceived for the reasons I have set out.

[278] Lastly it is noteworthy that the argument is not supported by any pleadings and nor was it put to Mr Maclellan or Mr Carmichael. I have no difficulty in entirely rejecting this argument.

Conclusion

[279] In the course of his submissions Lord Davidson suggested that certain findings in fact and mixed findings of fact and law could be made and against the background of the findings which I have made above I turn to consider these specific submissions.

[280] Lord Davidson urged upon the court that it should make six specific findings in fact. I consider that on the basis of the above conclusions I have reached I am entitled to make each of these findings in fact. Each of these findings in fact flows directly from the conclusions which I have reached about the evidence as above set out in detail.

[281] There is only one of these findings in fact upon which I would wish further to comment and that relates to finding in fact 1 in respect to the second respondent. I believe that on the evidence it is correct to hold that the second respondent knew of, and at the very least, acquiesced, if not actively participated in the granting of the leases from the Company to AFMS.

[282] For the reasons I have above stated I do not accept his position that he knew nothing about the Company's and AFMS's business and therefore the actings of the first respondent with respect to these entities. On no sensible view could that be the correct position. The first respondent on the evidence clearly took a greater part in the business side of the Company and AFMS but the second respondent must have known what was happening regarding the affairs of these entities and in particular the affairs of the Company.

[283] It is of particular significance in relation to the sham leases that he was the signatory on behalf of AFMS. In these circumstances he must have known that in respect to the core aspect of the case that what was happening was a fraud. He must have known that these documents were being backdated.

[284] On the evidence it is clear that he benefitted from the diversion of funds from the Company again showing that he had knowledge of these matters.

[285] Turning to the findings of mixed fact and law I am persuaded that it is appropriate to make each of these findings. In respect to the specific duties the noters argue were breached by the respondents, first in respect to fiduciary duties it is clear that the granting of the leases could not be described as a director acting in good faith, in a manner which is likely to promote the success of the company for the benefit of its members as a whole. Rather such actings are clearly acting in a manner which would not benefit the members as a whole. In particular it takes no account of the interest of Mr Chopra. Equally the granting of the licence

reducing the income to the Company obtained from the licenced property from £30,000 per annum to £12,000 per annum cannot be said to promote the success of the Company and be for the benefit of its members as a whole. The leases and licence were clearly in addition granted for an improper purpose. There is a clear breach of section 172 of the 2006 Act.

[286] In relation to both of the above actings the respondents were clearly acting in a situation where their own interests conflicted with the interests of the Company in breach of section 175 of the 2006 Act.

[287] There is also I believe for the reasons which I have above stated a breach of section 171 of the 2006 Act.

[288] Second as regards to the non-fiduciary duty in terms of section 174 of the 2006 Act both the granting of the leases and the granting of the licence are clearly breaches of this section. These actings are not the actings of a director acting with reasonable care, skill and diligence.

[289] Finally as regards section 177 of the 2006 Act the evidence is clear that the respondents failed to declare their interest in the leases and licence as they were obliged to do.

[290] I now turn to the issue of loss. The evidence is overwhelming that there is a causal connection between the above actings, the breaches of the duties, and a loss to the Company.

[291] As regards the quantum of that loss I have for the reasons I have above stated accepted the evidence of Mr Christie and the evidence regarding quantum of loss that he spoke to in the course of his evidence. Lastly I rejected for the reasons I have earlier set out the arguments advanced by the respondents in which they sought to mitigate the figure of loss.

Decision

[292] For the above reasons I grant the noters' primary motion and award to the noters the sum craved.

[293] The noters also sought interest at the rate of 4% per annum from the date of citation. I believe the interest figure craved is a reasonable one in all the circumstances and I grant interest on that basis. I was not addressed in respect to the issues of expenses and I reserve my decision regarding that issue.

Appendix 1

IN THE SUPREME COMMERCIAL COURTS EDINBURGH CASE NO. P258/16

BETWEEN:

THOMAS CAMPBELL MACLENNAN AND ALEXANDER JAIN FRASER,

THE JOINT LIQUIDATORS OF CS PROPERTIES SALES LIMITED (IN LIQUIDATION)

Pursuer /Petitioner

and

KUMAR SONI & AJAY SONI

Defender/Respondent

WITNESS STATEMENT OF KUMAR SONI

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1. I, Kumar Soni make this statement in support of the proceedings where I am the defender/respondent.

2. It is argued by the Administrators that my brother and I did not act in the best interests of CS Properties Ltd (CSP) by issuing the AST's to AFMS Ltd. This is not accepted.

3. Without issuing these AST's to AFMS Ltd and loans from AFMS Ltd CSP would have defaulted on its interest and swap payment obligations to the bank in 2010/11.

4. In 2010 Wilton Place a residential 5-story house in London's Belgravia, one of the properties within the portfolio which produced a gross income of £312,000 per annum flooded and was rendered non-income producing for circa 12 months. This for the company had a devastating effect on the cash flow. As directors we had to find a way of covering this shortfall to ensure the company did not default on its obligations to the Bank.

5. It was decided by the 3 directors, to ensure the company did not default on its financial obligations to the Bank, some of the London apartments should be operated as serviced apartments. With an aim to generate more income from the same properties to ensure interest and swap payments could be met. My brother and I were already operating serviced apartments through AFMS Ltd.

A serviced apartment is a fully furnished apartment available for short-term or long-term stay, providing hotel like amenities such as room service, a fitness centre, a laundry room and a reception room.

6. The bank's terms of lending (as per the fifth inventory of productions 68/34/2 under the heading **Financial Covenants: Rental income to Bank Interest> 110%**, to be tested quarterly against rental Schedules) would not allow the company to operate such apartments as the bank required a guaranteed income flow, such is the nature of the serviced apartment business, there is no guarantee or stability of income due to the variable occupancy rates. Therefore, we required a third party to guarantee the rent based on AST's, thus complying with the bank's terms of lending. The directors decided to issue AST's based on above market rent to AFMS Ltd, thus guaranteeing the rent and meeting the bank's lending obligations.

7. If the properties were not as operated serviced apartments they would have been individually let as AST's at market rent as was the case for many years previous to 2010. Therefore, by AFMS Ltd guaranteeing as a minimum, above the market rent under the AST's to CS Properties Sales Limited there was no loss to CS Properties Sales Limited. The company benefitted from the increased rental income generated by AFMS Ltd (as all the income generated from the serviced apartment business by AFMS Ltd went directly to CS Properties Sales Ltd from 2010 to June 2012, thus allowing the company to meet its interest and SWAP obligations, the SWAP expired in June 2012). As per the Noters banking specialist Andrew Mackenzie's email dated 7 October 2014 (fifth inventory of productions 68/52), once the SWAP expired the company's annual interest would have been reduced by circa £300,00 per annum, thus the company no longer required all the income which was being generated by AFMS Ltd through its serviced apartment business to pay its interest obligations. From June 2012, AFMS Ltd paid the company as per the AST's.

8. It was agreed amongst the directors that all income generated by AFMS Ltd by operating such apartments will be loaned to CSP to ensure the company complied with its interest obligations and in turn CSP would meet the operating costs.

9. If it was not for AFMS Ltd loaning the money to CSP the company would not have been able to meet its interest obligations and would have been in default.

10. In year ending May 2011, via the AST's, AFMS Ltd loaned the company £149,295 and a further £247,928 was loaned to the company via the same AST's in year ending May 2012, a total of £397,233 was loaned to the company in order for it to meet its interest obligations. This is evidenced by Christie's report dated May 2016 section 2, page 9, paragraph 2.18, (fifth inventory of productions 68/57). In his report dated May 2016, section 2, paragraph 2.22 page 10, (fifth inventory of productions 68/58), Mr Christie suggests the gross

income being received by AFMS Ltd from the Gloucester Place apartments of £264,318 is excessive compared to the above market rent of £84,500 being paid to CSP under the AST's by AFMS Ltd. If AFMS Ltd simply paid CSP under the AST's it would have paid £84,500 per annum in rent. It would then be responsible for all the operating costs (as per Gordon Christie's report section 2 paragraph 2.33 page 12 fifth inventory of productions 68/59) at £46,281 per annum, (this figure is flawed as Christie fails to take into account commission paid to third parties for the introduction of clients), plus a management fee of 30% (fifth inventory of productions 68/49) based on a gross income of £264,318 at £79,295, thus giving AFMS Ltd a gross profit of £54,242.

11. The operation of the serviced apartment business involved my brother and I being responsible for the promotion of the apartments to potential tenants. A website was set up to facilitate this we provided a 24-hour reception service. We provided staff to deal with bookings made by telephone and over the internet. We picked up and dropped off guests at the apartments and from their transport, including airports and train stations. We provided a London office including the infrastructure to operate such an office. We showed potential guests around the apartments prior to bookings, dealt with the check in/ check out procedure for guests. We dealt with customer contact, including complaints, managed all necessary IT systems. All the services were provided continuously and without break throughout the year. We attended quarterly meetings with the Serviced Apartment Bookers Association (the industry governing body) to promote the leased properties. We checked the properties and appliances on a daily basis for defects, we arranged for engineers to rectify defects, we were responsible for the replacement of all linen, towels, toiletries, kitchen appliances, dining ware and for the provision of broadband and television services. We provided a 24-hour call out service for guests requiring assistance, we arranged for the attendance of window cleaners, we arranged for heating faults to be resolved, we arranged for daily maid services, we arranged for general refurbishment and maintenance, including the engagement of tradesmen and the purchase of material. These services were provided continuously and without break throughout the year.

12. Therefore, I maintain these AST's and this model was in the best interest of the company. Not having the benefit of our services/labour (mine and my brother's) and the benefit of the loans from AFMS Ltd would have been devastating for the company and the directors. The company's loan repayments could not have been met as there was insufficient income from the AST's.

13. The rent in the AST's between AFMS Ltd and CSP was set above market rent as is evidenced by the lease issued by the Fixed Charged Receivers agent (fifth inventory of productions 68/37/3).

14. For the administrators and my understanding Ajay Chopra a fellow director to suggest in any way that myself or my brother acted to the detriment of the

company and not in the company's best interests is not accepted and untrue in fact it was the contrary.

15. The company was set up in 2003. The company would purchase properties renovate, resell and let them on commercial leases or individual assured short hold tenancies. During the lifetime of the company there was only one property purchased in Scotland, all of the other properties were purchased in London. My brother and I worked in London and the third director namely Ajay Chopra resided and worked in Scotland. Ajay Chopra only had any real involvement in the Scottish property which from my recollection was purchased for£4.5 million and then let to the immigration service on a full and repairing and insuring lease. As a result of the lease the building was managed by Shepherd Estates and therefore there was little or no involvement from any of the directors in the day-to-day operations of the building.

16. This was in stark contrast in respect of the London properties. London properties were identified by myself, they were normally properties in need of extensive renovation. The aim would be to renovate the properties and either retain them within the company's portfolio or sell them for a profit. All of the properties were managed, renovated and marketed either by myself or with the assistance of my brother. All of the work was done by either myself or my brother, this would involve the physical work of obtaining materials, designing as well as physically renovating the properties wherever possible to save the company money. Wherever professionals were required they were sort out by my brother and at the cheapest cost to ensure the greatest gain for the company. Examples being that I would negotiate with architects as clearly on some projects planning permission was required and negotiations had to be had with the local authorities. Ajay Chopra's involvement in these projects were nil, it is accepted that he assisted with the finances in terms of negotiating with the assistance of myself and my brother with financial institutions. He did not want to get involved in the day-to-day work and was happy for my brother and I to get our hands dirty. He was not willing to assist partly due to the distances involved and mainly to due to his lack of knowledge and contacts within the building trade.

17. My brother and I have always acted in the best interest of the company. Between 2004 and 2005 my brother and I transferred to the company at cost some residential properties which we owned in London, namely Flat 4, 9, Upper Montague Street, London Wl, Flats 10 and 12 Bryanston Mansions, York Street, London, Wl. The cost of the properties was £355,000, £640,000 and £607,500 respectively, and were subsequently sold by the company for £745,000, £1.150m and £1,050m respectively (fifth inventory of productions 68/62}, all the profits circa £1,342,500 was kept within the company for further investments, my brother and I did not personally benefit from our endeavours, effectively my brother and I gave away our profits of over £1.3m to the company.

18. In March 2007, my brother and I sold a building we owed namely, 17, Crawford Street, London Wl to the company. The Bank of Scotland valuation (fifth inventory of productions 68/32) valued our building at £2m. My brother and I sold the building to the company for £1.6m {fifth inventory of productions 68/33 cash statement prepared by Wright Johnston & Mackenzie Solicitors re the purchase of 17 Crawford Street) to ensure we increased the value of the company's balance sheet. Again, this was to the personal detriment of my brother and I, but to the benefit of the company. With the property transfers alone, my brother and I gave away £1,742,500 of our personal profits to the company, plus all of our director's loans.

19. Whenever there were any cash-flow issues in the company, the Soni family provided the funding to the company to ensure it met its interest and swap obligations. The fifth inventory of productions 68/48 shows a small sample of the funding provided by the Soni family to the company showing we lent the company £206,500 to cover cash-flow issues, again this was to the personal detriment to my brother and I, but to the benefit of the company.

20. I believe it's important to understand the difference between **Passive Income**, that is, earnings an individual derives from a rental property, limited partnership or other enterprise in which he/she is not materially involved. AST's are seen as passive income. **Active Income,** is income from which services have been performed, serviced apartments are seen as active income.

21. The Noters argue the company should have received all the active income generated by AFMS Ltd through its serviced apartment business post June 2012. They argue the company effectively should have continued to receive the same income as pre-June 2012, however, for the company to receive the active income, the company would require a team to perform the services. This could have been achieved if my brother and I continued to provide our services/labour to the company for free. We do not believe we were legally obliged. The Noters could have engaged a team to perform the services, this would have meant the Noters had no guarantee of the passive income, a new team would have had to start from scratch as they would not have had the client base of AFMS Ltd, the new team would have charged a minimum management fee of 30% of gross income plus all the other incidental charges as outlined in the fee structure from Hamptons and Savills (fifth inventory of productions 68/49).

22. In his report Gordon Christie has cast doubt over the Soni family's directors loan position, section 3 pages 20-22 inclusive (fifth inventory of productions 68/60), which appears to be based on an excel spreadsheet provided by Ajay Chopra. We have provided full vouching of our director's loan position in the fourth inventory of productions 68/26 and 68/27, by providing copies of cheques, bank statements etc, this does not include all of our director's loan

position as we do not have access to all of our cheques and bank statements due to the time period involved, the vouching shows £356,226.98 for A.Soni and £661,629.04 for K.Soni. The Noters required copies of our cheques etc as the minimum level of vouching they would accept, (fifth inventory of productions 68/61). I am assuming the same applied to Mr Ajay Chopra, and not simply as Christie's report suggests, they are relying on a colourful spreadsheet.

23. The relationship between Mr Ajay Chopra and my brother and I broke down as Mr Chopra demanded a third share of the active income post June 2012, without providing any assistance, we refused. I believe these proceedings are somewhat unfair bearing in mind no statements have been taken from me and there's been little communication in terms of the administrators obtaining the clear facts from me, in fact they have been biased I believe towards myself and my brother and seem to have been liaising with Mr Ajay Chopra who has fuelled much of this litigation. The relationship between my brother and I and Mr Ajay Chopra has ended and this is largely due to the fact that monies have not been paid to him which he was clearly not entitled to.

24. In conclusion I would like to say that my brother and I did not act to the detriment of the company pre-or post-administration. Great efforts were made by my brother and I to obtain refinancing to avoid the administration, however due to the financial crisis at that time, the financial markets were in intensive care, it was impossible to obtain favourable lending. I reiterate the fact that my brother and I did everything in our capacity to ensure that no late payments were made to the bank in respect of interest or swap payments. This has been confirmed by the bank. Furthermore, the bank was paid in full and a surplus of funds were available which has diminished as a result of this litigation which as mentioned above I feel has been unfairly taken and is without merit. The administration process has resulted in the surplus funds being eaten up by the administrators and leaving nothing for the creditors. The hard-earned work over many years has come to nothing and left myself and my brother without any future pension pot which was one of the main aims of the company when it was set up.

25. I declare that the evidence contained in this witness statement is true to the best of my knowledge and belief.

Signed

11th December 2017