Neutral Citation Number: [2020] EWHC 2880 (Ch)

Case No: CR-2019-007334

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26/10/2020

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between:

ARIES GNH (OPERATIONS) LIMITED	**Petitioner**
- and -	
ROBSON ASSET MANAGEMENT MANCO LIMITED	**Respondent**

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- -

MATTHEW MCGHEE (instructed by **BROWNE JACOBSON LLP**) for the **PETITIONER**
ADAM CHICHESTER-CLARK (instructed by **COOKE, YOUNG & KEIDAN LLP**) for the **RESPONDENT**

Hearing dates: 16 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

CICCJ Briggs:

1. The subject of the matter before the court is the Great Northern Hotel situated at Kings Cross, London. The hotel building was constructed in 1854. It was fully renovated and restored in 2013. The individual behind the restoration and subsequent trading of the hotel is Jeremy Robson. He was the sole director of the company that operated the hotel known as Aries Great Northern Hotel OpCo ("GNH OpCo"). Mr Robson resigned as a director in June 2019. He was and remains a director of the respondent company which carries his name ("RAM").

2. RAM provided management services to GNH OpCo. The provision of services was governed by an agreement known as the Main Management Agreement ("MMA") dated 19 July 2011.

3. GNH OpCo wrote to RAM on 11 July 2019 seeking an explanation for expenses incurred and payment of £216,672 by 17 July 2019. Solicitors acting for RAM responded that "no amounts are due by RAM to the Companies. Our client also notes that the Companies owe RAM significant sums". Three months passed. In October 2019 a letter of demand was sent on behalf of GNH OpCo: "Our client's books and records including its financial statements as at 31 March 2018, show that our client is owed the sum of £828,188.89…The Debt is also included in the financial statements of RAM Manco as at 31 March 2018. Both our client's financial statements and the financial statements of RAM Manco were signed by Jeremy Robson…".

4. The non-payment of the alleged debt led to the presentation of a winding up petition, the focus of this hearing. The petition claims that RAM cannot pay its debts as they fall due. RAM opposes the making of a winding up order on the basis that it should not have to pay the petition debt as it has a cross-claim for a sum equal to or exceeding the debt. The cross-claim stems from a contractual right to fees pursuant to the MMA. The fees claimed are calculated as a percentage of the operating profits of GNH OpCo, known as "incentive fees".

The background

5. I take the factual background from the witness statements provided by Mr Robson on behalf of RAM, Mr Nowacki on behalf of the petitioner, the year-end financial

statements and other contemporaneous documents. GNH OpCo leases the property housing the hotel business from Aries GNH PropCo and both are a subsidiary of a parent company based in Luxembourg known as "TopCo". TopCo is also the holding company of a hotel accommodation development project in Les 3 Vallées, France known as the "Courchevel project". The Courchevel project is substantially owned by Mr Robson. Although the Courchevel project is not directly related to this matter Mr Robson raises it several times in his evidence.

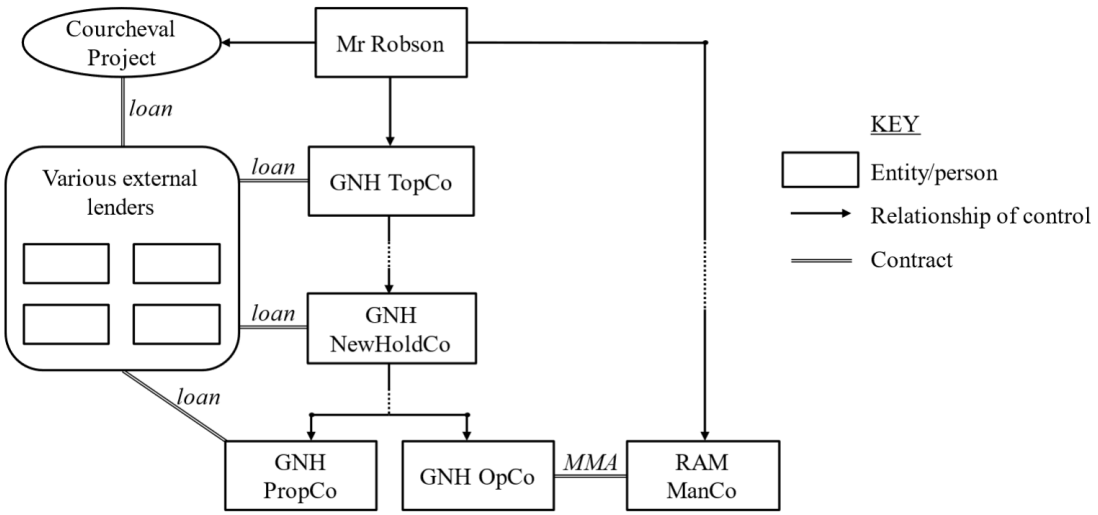
6. The Great Northern Hotel business was subject to various finance agreements.

7. In January 2018, the Great Northern Hotel business refinanced by way of a "Senior" loan facility of £35m and a "Mezzanine" loan facility of £17.5m, which included a number of pledges including a share pledge of the shares in TopCo (Aries GNH New Holdco SAR). Mr Robson explains (and his counsel summarises) that the Mezzanine Facility was provided pursuant to an agreement between Aries GNH New HoldCo SARL as Borrower (and indirect owner of the Petitioner) and the Original Lender, Tecref SARL. The Senior Facility was provided pursuant to an intercreditor agreement dated 15 January 2018 made between (among others) Aries GNH Limited Partnership (direct owner of GNH) as Borrower and Obligors' agent, Hermes Real Estate Senior Debt Fund SARL as Original Lender and Sanne Fiduciary Services Ltd as "the Common Security Agent" ("Sanne").

8. At the same time, a "Subordination Agreement" was executed pursuant to which the debts of the various companies I have mentioned (and Mr Robson's other interests) were subordinated to the debts owed to the Great Northern Hotel's senior creditors and mezzanine creditors. An important document in this matter is an Intercreditor Agreement dated 26 January 2018. The parties to that agreement included Sanne Fiduciary Services Limited as Senior Agent and Common Security Agent, Hermes Real Estate Senior Debt Fund S.A.R.L as Senior Lender, Hermes Investment Management Limited as Senior Arranger, Aries GNH Holdings S.A.R.L, Aries GNH New Holdco S.A.R.L, Aries IHC S.A.R.L, Aries GNH Limited Partnership acting through its general partners Aries GNH (GP) Limited, the Mezzanine Security Agent, Mezzanine Lender and the named debtors.

9. There is one other document that needs to be introduced: the Duty of Care Deed also dated 26 January 2018 (the "Deed"). Mr Nowacki describes the Deed as governing "the payment of any management fees or other sums that may have been due between GNH OpCo and RAM Manco". By the Deed RAM undertook to owe a duty of care to Sanne to perform its obligations under the MMA, and subordinate to Sanne any right that it had to receive or recover sums due from GNH OpCo. I shall return to the Intercreditor Agreement and Deed in more detail later.

10. Mr McGhee of counsel has produced the following diagram to demonstrate what Mr Robson describes (in his second witness statement) as a "complex, inter-weaved arrangement".



11. Among the various external lenders identified in the diagram, was a real estate lending fund managed by Tyndaris LLP which provided GNH OpCo, TopCo and the Courchevel project with mezzanine finance. The finance was secured over assets of the companies including shares held by Mr Robson. In or around March 2019 Intriva Capital Advisors LLP ("Intriva"), a private equity fund, replaced Tyndaris LLP as lender. The evidence is that the loans were cross-defaulted and cross-collateralised.

12. On 20 June 2019, three months after the acquisition of the mezzanine finance by Intriva two significant events took place. First, Mr Robson's position as director of GNH OpCo was terminated. Mr Nowacki and three limited companies were subsequently appointed directors.

13. Secondly, Sanne as Common Security Agent served a Termination Notice on RAM certifying a "Mezzanine Acquisition Event" had occurred under the Deed terminating the MMA: "For the purposes of and in accordance with Clause 6.4 (Termination by the Common Security Agent on a Mezzanine Acquisition Event) of the Management Company Duty of Care Deed, we hereby certify that a Mezzanine Acquisition Event has occurred and that the Management Agreement shall immediately terminate without further notice and that no fees shall be payable to the Management Company, other than for services performed by the Management Company pursuant to the Management Agreement and any out of pocket expenses incurred in relation to such services up until the date hereof." The Mezzanine Acquisition Event is defined as "the date on which a Mezzanine Acquisition Instruction takes effect in accordance with clause 4.10(m) (Acquisition) of the Intercreditor Agreement."

Legal principles to be applied

14. As with many insolvency cases in the High Court, only part of the case will be determined by reference to pure insolvency procedure, namely the applicable test. The major issue and exercise to be undertaken by the court concerns the interpretation of the documentation I have introduced earlier.

15. Although GNH OpCo is not a judgment creditor, it is not disputed that it is a creditor, entitled to present the petition: *Mann v Goldstein* [1968] 1 W.L.R. 1091. There is no substantial dispute as to the debt: *Re A Company (No.012209 of 1991)* [1992] 1 W.L.R. 351. In this matter the petition (and notion of a winding up order being made) is resisted on the ground of a cross-claim. There is no dispute that the legal burden of proof rests with RAM to demonstrate a cross-claim that is equal to or greater than the petition debt. The evidential burden is discharged on the balance of probabilities: *Orion Media Marketing Limited v Media Brook Limited* [2002] 1 BCLC 184. In *Wilson and Sharp Investments Ltd v Harbour View Developments* [2015] EWCA Civ 1030, Lady Justice Gloster, giving the lead judgment, said that the fact that a petition debt is not disputed does not prevent the debtor raising a cross-claim in a defence to a winding up petition: *Re Bayoil SA* [1999] 1 WLR 147. She used different language to describe the threshold test namely, asking whether the Respondent had "serious and genuine cross claim which exceed the sum alleged to be outstanding".

16. Although no case-law was cited during argument to support the principles of construction, I infer from the lack of disagreement in arguments presented over half a day that the principles are common ground. The starting point perhaps is *Investors Compensation Scheme v West Bromwich BS* [1998] 1 WLR 896 where Lord Hoffmann set out five principles. Some of those principles have now received further judicial attention: *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; *Marks and Spencer plc v. BNP Paribas* [2015] UKSC 72 and *Wood v Capita Insurance Service Limited* [2017] UKSC 24.

17. In *Arnold v Britton* Lord Neuberger explained that subjective intentions were to be disregarded (paragraph 15) and that the relevant factual matrix is to be confined to the circumstances that were known or reasonably available to parties to the contract at the time the contract was made (paragraph 20). Interpretation requires the court to focus on the language of the provision (paragraph 17). The natural meaning of the words can only be departed from where the language is ambiguous whereupon the court will take account of the context to provide a meaning that reflects what a reasonable person would conclude the parties to have meant having regard to the actual and presumed knowledge (paragraph 18). However, where the document under consideration is one that has been professionally drafted, having a complex and sophisticated nature, more often than not, it will be interpreted by textual analysis. If there are rival meanings the court may give weight to the implications of each construction and properly reach a view as to which interpretation is more consistent with business common sense: *Wood v Capita Insurance Services Limited* (paragraphs 10-13). In a recent case concerning standard forms, Sir Geoffrey Vos C provided the following clarity: "I would emphasise that the process of interpretation required here is a unitary exercise. It starts with the words and relevant context, and moves to an iterative process checking each suggested interpretation against the provisions of the contract and its commercial consequences. The court must consider the contract as a whole and give more or less weight to elements of the wider context in reaching its view as to its objective meaning.": *Re Lamesa Investments Limited* [2020] EWCA Civ 821, at paragraph 22. These are the principles I shall apply.

The debt

18. The stance the parties have taken in respect of the debt can be stated in a few short paragraphs. The petition states: "On the basis that there has been no payment of the Debt by the Company, which the Petitioner has been demanding for over 3 months, and the Company has not provided any evidence as to why it states that the Debt is not due or any evidence of any sums it alleges are due to the Company from the Petitioner, the Company is unable to pay its debts as they fall due."

19. RAM admits (i) that RAM was obliged to settle that debt demanded, and (ii) does not dispute the quantum of the debt on the face of the petition. In his third witness statement Mr Robson states: "The RPA related debt owed by Ram Manco to GNH OpCo is acknowledged and not disputed by me".

Cross Claim

20. RAM relies on the MMA, executed on 19 July 2011, as providing a contractual basis for the cross-claim. Article 1 states: "[GNH OpCo…] intend to refurbish a hotel located at King's Cross to be known as the Great Northern Hotel" and "engages [RAM] as its exclusive agent to operate the Hotel…". Article 3 is primarily concerned with the period prior to opening. In that period RAM agreed not to incur any pre-opening expenses unless first agreed by GNH OpCo. Article 4 governs the operation responsibilities, after the hotel opened, and the provision of authority to RAM to act as operating agent with RAM agreeing to "operate and provide such services as are normally provided by operators of hotels of comparable class and standing…". Article 5 concerns the provision of business plans and operating budgets, and Article 6 deals with operating expenses incurred by RAM. Approval from GNH OpCo for payment of these expenses is required by the Article 6. By Article 8 it was agreed that GNH OpCo may sell, dispose of, sublet, charge or otherwise grant security over the hotel provided "that this Agreement is assigned to any such purchaser, acquirer or lessee (such that the agreement once assigned shall bind any such purchaser, acquirer or lessee in respect of all the liabilities, responsibilities, and obligations to ManCo that are articulated in this agreement) or continues in force notwithstanding such charge or security details RAM's obligations". Article 9 gives RAM authority to open a bank account in the name of GNH OpCo. Articles 10 and 11 provide for obligations for books, records and the building, as well as maintenance of a reserve fund. Article 12 authorises RAM to spend funds for necessary repairs and maintenance and Article 13

requires it to (i) "provide and maintain or procure such adequate insurances to cover its insurable interests and liabilities" and (ii) "keep and maintain adequate insurances to cover its own assets and legal liabilities and responsibilities". Article 14 makes payable certain fees to RAM:

> "During each Fiscal Year after the Opening Date (and for a fraction of any partial Fiscal Year), ManCo will be paid a fee ("Basic Fee") at the rate of three percent (3%) per annum of the annual Gross Operating Revenue, payable monthly on the same day as monthly financial statements are produced in accordance with Section 10.2. In the event of there being insufficient funds available for payment of the Basic Fee, the Owner shall promptly provide sufficient working capital for the same to be paid, and without prejudice to any claim for breach pending payment, any outstanding Basic Fees will accrue interest as from the due date at the interest Rate."

21. By the same Article 14 a reconciliation was to take place at the end of each financial year: "At the end of each Fiscal Year following the annual audit an adjustment will be made, if necessary, so that the Basic Fee will equal three percent (3%) of Gross Operating Revenue for the Fiscal Year covered by the audit, and any sums due by either ManCo or Owner shall be paid within fifteen (15) days after the audited accounts have been signed".

22. Article 14.2 introduces an incentive fee so that RAM was to be paid "at the rate of eight percent (8%) of the Adjusted Gross Operating Profit in each Accounting Period, payable monthly…". If GNH OpCo had insufficient funds to pay the incentive fee, the liability to pay would attract interest. At the end of each "fiscal year…all sums due by either [RAM] or [GNH OpCo] shall be paid within fifteen days after the audited accounts have been signed" unless there was insufficient cash in the hotel to pay the incentive fee. In that instance "the amount of the incentive fee in excess of the available cash shall not be paid but shall accrue, together with interest at the Deferral Interest Rate … and be paid thereafter…". Any sums due in respect of the incentive fee that were outstanding for seven years or more were not recoverable by RAM.

23. Article 16 details termination rights and Article 17, damage by fire and force majeure.

24. Pursuant to Article 14 of the MMA Mr Robson claims that unpaid incentive fees equal or exceed the petition debt. In his first witness statement he explains: "All expenses incurred by [RAM] in regard to this related entities arrangement were

processed and approved by the Financial Director to this company and to GNH OpCo, and, further, these expenses were subject to external independent audit by Crowe." He explains that the companies operated a set-off arrangement so that "no cash moved between GNH OpCo and [RAM] in connection with the re-imbursement of those expenses incurred by [RAM] but funded by GNH OpCo, and any balance of funding not reimbursed to GNH OpCo was treated as a debt between related parties (such being disclosed formally in [RAM's] audited accounts in the form of a Related Parties Note). The intention was that future management fees due under the terms of the MMA would be used to offset this related parties debt." He explains that the "accrued but uncollected past incentive fees due for payment amount to £6l0k+VAT. Intriva are fully aware of these fees and that this liability exists. In extensive formal disclosures made to Intriva during the first quarter of 2019, at a time when they were gathering comprehensive information in relation to the GNH business, the estimate for these fees was confirmed to them in writing on 10 May 2019."

25. In his third witness statement Mr Robson says that the deferred incentive fee due from GNH OpCo is in excess of £1,000,000. Although Mr McGhee raises a query about the difference in the sum claimed now, and the sum originally asserted as due, stating that the claim for the extra £400,000 is mere assertion, I do not take GNH OpCo (the petitioning creditor) as taking any particular points on the quantum as specified by Mr Robson. It was said that Mr Robson provided no reasons for the increase. The reasons were explained by Mr Chichester-Clark in submissions. The extra sums relate to a three year period not previously calculated. The increase of the sum occupied a very small amount of court time and was not vigorously contested. The vast majority of the court's time was occupied by the argument that there is no serious and genuine cross claim as the liability to pay the incentive fees no longer exists: it has been released.

The Release

26. Mr Nowacki explains in his witness statement:

> "…whether or not there was an offset arrangement, it is not relevant to the Petition given that, as a result of the refinancing of the GNH business in January 2018 (see below), the Common Security Agent in respect of various loan facilities has given notice pursuant to the Duty of Care Deed to confirm that no management services fees under the MMA any other sums, are payable by GNH OpCo to RAM Manco. This results from the

> termination of the MMA pursuant to a termination notice dated 20 June 2019 ("Termination Notice") which Mr Robson now accepts in Robson 2 was a valid termination as a result of the continuing event of default under the Mezzanine Facility."

27. Having said that the senior facility and mezzanine finance was provided to support the business he explains: "As a condition precedent of the Loan Facilities, [RAM], as the management company under the MMA, was required to enter into the Duty of Care Deed…[which] ultimately governs the payment of any fees under the MMA." This is borne out by the Deed itself.

28. Mr McGhee on behalf of the petitioning creditor submits that the language of the Deed is not ambiguous, that a plain reading of the language leads to a conclusion that there has been a release. The Deed provides that all "fees, monies or liabilities now or in the future due, incurred or owing to [RAM] by [GNH OpCo] including (but not limited to) under the [MMA]" were defined as Subordinated Manco Liabilities. This definition is wide and captures the incentive fees claimed by RAM. Sanne certified that a "Mezzanine Acquisition Event" occurred and served a notice dated 20 January 2020. The effect of the notice was to terminate the MMA and release the "Subordinated Manco Liabilities".

29. Mr Chichester-Clark asserts that the terms of the Release Notice implicitly, if not expressly, suggest that the Company would be paid its incentive fees. He argues, however that this a secondary issue because the main issue is even more fundamental: it had to be served within a specific time frame. A failure to serve within the time frame rendered the Release Notice invalid for want of authority. To put it another way, Sanne only had a power to act in accordance with the Intercompany Agreement which has to be read together with the Deed.

30. At the hearing all other arguments dropped away, including an argument on service of the notice, referred to in evidence. As these arguments were not advanced, there is no need to deal with them. I turn to the Deed.

The Deed

31. Contextually, the refinancing in 2018 required a suite of documents where the parties to those documents mostly overlapped. A reasonable observer would conclude that

the purpose was secure the lenders' position. In this regard Sanne was a party to: (i) the Subordination Agreement; (ii) The Intercreditor Agreement; and the (iii) Deed. The suite of documents included releases in the event that the Mezzanine Lender decided to acquire the shares of the GNH Group through an enforcement action.

32. A "Mezzanine Acquisition Event" is defined as "the date on which a Mezzanine Acquisition Instruction takes effect in accordance with clause 4.10(m) (Acquisition) of the Intercreditor Agreement.

33. The definition of "subordinated Manco Liabilities" has two prongs: the management company fee and all other fees, monies and liabilities incurred or owing to the management company by GNH OpCo. Any sums owed pursuant to the MMA fall within the definition. A specific provision (clause 1.2) provides that "the principles of construction contained in clause 1.2 (construction) of the Relevant Facility Agreement apply equally to the construction of this deed, except that references to the Relevant Facility Agreement will be construed as references to this deed." The "Relevant Facility Agreement" has not been included in the electronic bundle before the court, but no submission has been made that the "principles" would make a difference to the outcome of this case.

34. The Deed is expressed to be binding upon "and enure for the benefit of, each party hereto and its…permitted successors". It expressly incorporates the provisions of the "Relevant Party Facility Agreement". The Deed refers to the Intercreditor Agreement at various different places and clause 22.3 provides:

> "The subordination effected by and the application of recoveries under this Deed are at all times prior to the Secured Party Discharge Date subject to the terms of the Intercreditor Agreement. In the event of any conflict between the terms of this Deed and the terms of the Intercreditor Agreement, the terms of the Intercreditor Agreement shall prevail."

35. By clause 22.7 the benefit of the Deed is said to be held by Sanne "…on trust for the Secured Parties under and in accordance with the Intercreditor Agreement."

36. By its operative provisions RAM provided acknowledgments and undertakings to Sanne, including the provision of information, maintenance of insurance, an undertaking to comply with the terms of the MMA in good faith, and exercise skill and care in performing its obligations. Other matters include amendments to the

MMA, termination, and subordination clauses. The termination clause restricted the ability of RAM to terminate the MMA but if Sanne as common security agent:

> "…certifies in writing to the Management Company that a Mezzanine Acquisition Event has occurred, the Common Security Agent may elect in writing to the Management Company to terminate the Management Agreement in which case the Management Agreement shall immediately terminate without further notice and the Opco and the Management Company hereby irrevocably consent and agree to that election."

37. The effect of termination pursuant to a Mezzanine Acquisition Event is set out in clause 6.5:

> "Upon termination of the Management Agreement pursuant to … 6.4 (Termination by the Common Security Agent on a Mezzanine Acquisition Event), there shall be no fee payable to the Management Company by an Obligor, other than (subject at all times to clause 12.4 (Release of Subordinated Manco Liabilities)) for services performed and any out of pocket expenses incurred in relation to such services up until the date of termination of the Management Agreement."

38. Whereas out of pocket expenses need no elaboration, there is no definition of "services performed". Reference must be made to the MMA. The subordination clause provides among other things (i) that RAM would not (prior to the Final Discharge Date) claim from GNH OpCo any sums except those due under the MMA and (ii) by clause 12.4, authorisation for Sanne to serve a notice to release the Subordinated Manco Liabilities:

> "Notwithstanding any other provision of this deed, [Sanne] is irrevocably authorised by the Management Company and the Opco to, at any time following the occurrence of … a Mezzanine Acquisition Event, irrevocably and unconditionally release the Subordinated Manco Liabilities."

39. I have set out the meaning of a "Mezzanine Acquisition Event". Allied to the "Event" is an instruction. A "Mezzanine Acquisition Instruction" is defined as meaning the date on which a Mezzanine Acquisition Instruction took effect in accordance with clause 4.10(m) (Acquisition) of the Intercreditor Agreement".

40. Clause 4.10(m) of the Intercreditor Agreement provides:

> "…[Sanne] (acting on the instructions of the Majority Mezzanine Creditors) may, during the period commencing on the date of the Acquisition Notice and ending on the Acquisition Longstop Date, instruct [Sanne] to take any of the actions available to it under the Management Company Duty of Care Deed (including the release of any Subordinated Manco Liabilities) as may be necessary in order to terminate the appointment of the Management Company (and release the Subordinated Manco Liabilities), provided that any such instruction shall only be given to [Sanne] on terms such that the related termination and, as appropriate, release of Subordinated Manco Liabilities shall only take effect:
>
> (i) simultaneously with or following completion of the Acquisition (and subject to completion of the Acquisition); and
>
> (ii) simultaneously with the appointment of the Proposed Management Company within the timeframe provided for in paragraph (d) above."

41. Clause 4.10(d) of the Intercreditor Agreement provides a time restriction:

> "As soon as commercially practicable and in any event no later than 20 Business Days after the date of the Acquisition, the Mezzanine Lenders will replace the then current Management Company with the Proposed Management Company approved by the Majority Senior Lenders in the manner specified pursuant to paragraph (b) above."

42. There is no definition of the term "release".

Construction of the Deed

43. I turn to the construction exercise. There is no evidence from Mr Nowacki regarding the wider context in which the Deed was entered into. He refers in his evidence to the recitals in the Deed only. It is known that prior to the financing package RAM and GNH OpCo were in common ownership. It can be inferred that the requirement for the basic fee to be paid regularly was a commercial necessity and differed from the incentive fee. This is bolstered by a provision that places a time limit on recovery of the incentive fee after which RAM has no claim. That does not mean that the payment was of a discretionary nature. The obligation was to pay but the obligation was time limited.

44. Mr Robson refers to the execution of the refinancing package and the interconnection between the Deed, the Subordination Agreement and Intercreditor Agreement. The context in which the Deed was entered can thus be seen from the perspective of a third party entering into a partly closed business seeking to protect itself. One way of doing this is to enable the lender a period to consider if it wishes to introduce a new

managing agent: to terminate the relationship between the managing agent and the hotel business. The Deed achieves this by permitting termination following a Mezzanine Acquisition Event. Termination of the MMA would come at a price if there were outstanding fees owing to RAM, particularly if there was no cash in GNH OpCo. In those circumstances the lenders would have to provide more money to GNH OpCo to pay for a liability and be exposed to accounting risks associated with common ownership dealings. One solution to the issue may have been to permit an arbitrator to assess the liability but the lenders had the upper hand in the negotiation. Entering the Deed was a condition precedent to obtaining the financing package.

45. On the other hand, if the release provision could be triggered at "any time" RAM would be placed in an invidious position. As Mr Chichester-Clark submitted, RAM would be providing services not knowing when the rug would be pulled from under its feet, not knowing if it would be paid. A termination would simply wipe out all debts owed between GNH OpCo and RAM.

46. Starting with the recitals and words used in the Deed the definition of "Subordinated Manco Liabilities" takes under its wing "all fees, monies and liabilities now or in the future due, incurred or owing" to RAM by GNH OpCo "including…" those due under the MMA as at January 2018 or since the Deed was executed. The term "including" is expressly defined as meaning "without limitation".

47. Clause 12.1 of the Deed prevents RAM from making a "demand" or "claim" or otherwise seeking to "recover" including "by way of set-off" except pursuant to the MMA or where the "Debt Document" permits or Sanne consents. The words used in clause 12.1 concern the period prior to the Final Discharge Date. Clause 12.4 by contrast uses the word "release". The language is inconsistent with the words used in the same clause intended to prevent RAM from recovering sums owed save in excepted circumstances. It is open to an objective observer to conclude that a "release" is not the same as preventing RAM from being able to receive or recover by demand or action.

48. The suite of documents has the character of sophistication and complexity. In my judgment the provisions under consideration may successfully be interpreted by textual analysis. The difference between the words used are explained by having

regard to (i) the timing event, one intended to last the duration of the relationship, where claims are confined to the contractual relationship, the other at the end of the relationship where all liabilities could be released on notice and (ii) the acceptance by the parties, expressed in the text, that there may be an overhang liability that could be released.

49. Moving to an iterative process and checking the suggested interpretation with the provisions of the Deed read in the context of refinancing and the Intercreditor Agreement executed on the same day, Clause 12.4 is to be read as extensive abatement releasing GNH OpCo from all liabilities including those arising under the MMA. It contrasts with the earlier provision because it is dealing with a different situation. In my judgment the different situation gave rise to different commercial considerations and the drafting aligns with commercial common sense. I disagree with Mr Chichester-Clark that the result should be viewed through the lens of what the draftsman could have written to make clear the intention. In my judgment the interpretation exercise is not assisted by suggesting that different language could have been used. That is nearly always the case. The right approach is a unitary exercise involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.

50. The next issue concerns the ability to serve the Termination Notice. The ability of GNH OpCo to obtain a release at "any time" following a Mezzanine Acquisition Event is startling. To understand the particular words the Deed and Intercreditor Agreement have, in my judgment, to be read together as (i) they were executed at the same time and (ii) the agreements have a symbiotic relationship. In respect of that relationship by clause 4.10(m) of the Intercreditor Agreement the mezzanine creditors are given a power to instruct Sanne "to take any of the actions available to it under the Management Company Duty of Care Deed" subject to conditions, and clause 12.4 of the Deed provides authorisation to Sanne to release the Subordinated Manco Liabilities.

51. Contextually, Sanne served a Termination Notice under clause 4.10(m) of the Intercreditor Agreement and clause 6.4 of the Duty of Care Deed in Mid-June 2019.

Late evidence shows that "Kew Green Group Limited" was appointed as the "Proposed Management Company" in place of RAM.

52. In accordance with clause 4.10(m) of the Intercreditor Agreement the "Majority Mezzanine Creditors" were entitled to provide instructions to Sanne (following (a) completion of the Acquisition and (b) the appointment of the "Proposed Management Company") to "take any actions available to it under the Deed to terminate the appointment of RAM and release the Subordinated Manco Liabilities". The trigger date for the direction to be given was the date of the Acquisition Notice namely, 20 June 2019. The sequence of events accords with common sense since GNH OpCo would not want to have two managing agents in place at the same time and a short time frame would be required to provide certainty, orchestrating the appointment of the proposed management company at the same time as termination of services provided by RAM. The date of the "Acquisition Notice" and the date of the "Acquisition Longstop" were readily ascertainable. The time between the two was purposely short.

53. Mr McGhee argues that the only instrument that matters is the Deed as that provides the inter-parties obligations. If Mr McGhee is correct, and only the Deed need be considered, the Release Notice could have been served at "any time". As a matter of fact, the Release Notice was served about 6 months after the "Longstop Date", and after Mr Robson had served RAM's defence to the petition.

54. In my judgment the language of the Deed permits service at "any time". On the other hand, the short time frame stated in the Intercreditor Agreement is unambiguous: it limits by time the ability of GNH OpCo to obtain a release of the Subordinated Manco Liabilities. In my judgment to have no regard to the Intercreditor Agreement would be to undervalue its importance and the symbiotic relationship between it and the Deed. When read together and interpreting what the parties meant through the eyes of a reasonable reader the meaning most obviously to be gleaned from the language of the provisions is that "any time" does not mean "any time at all". It means "any time" within the precincts of the Deed and Intercreditor Agreement. There is a restriction to "any time" by first, the proviso in clause 12.4 of the Deed (any time after the occurrence of one of the two named events) and second, by clause 4.10(m) of the Intercreditor Agreement. I note that the authorisation provided to

Sanne to trigger a release is given "notwithstanding any other provision in this deed", but the Intercompany Agreement is not mentioned.

55. Moving to an iterative process checking each suggested interpretation against the provisions of the various agreements I have regard to the priority given to other agreements where conflict arises on certain issues: clause 14.5 of the Deed and clause 22.3 of the Intercreditor Agreement demonstrate the interconnection between the suite of documents. I find:

    i) The first seven words of clause 12.4 do not limit the interpretation to the Deed only;

    ii) The common security agent is authorised by GNH OpCo and RAM and the authorisation cannot be revoked;

    iii) The common security agent is irrevocably authorised to obtain a release of the Subordinated Manco Liabilities;

    iv) Although the words "any time" are used there is a time restriction namely, not before the occurrence of one of the events described; and

    v) An objective interpretation taking account of context leads to the conclusion that "any time" means any time permitted by the Intercreditor Agreement after one of the events described.

56. Taking those matters together the Majority Mezzanine Creditors were permitted to instruct the Common Security Agent "during the period" provided in the Intercreditor Agreement provided that the instruction was given "on terms that the related termination and…release… shall only take effect" if subparagraphs (i) and (ii) of clause 4.10(m) were satisfied. This was the basis upon which RAM agreed to provide irrevocable authorisation to Sanne. The parties to the Deed should be able to expect that the power provided to Sanne would only be used in accordance with the specific terms under which their irrevocable authorisation was given.

57. Although not strictly necessary, I turn, as part of the iterative process of interpretation, to consider the commercial consequences of the competing constructions. In my judgment the commerciality of the rival readings also firmly favours RAM's interpretation. The restriction of authorisation to the time frame provided by the Intercreditor Agreement provided certainty and certainty makes commercial common sense.

Conclusion

58. The Deed and Intercreditor Agreement should be read together. When read together, interpreting what the parties meant through the eyes of a reasonable reader the meaning most obviously to be gleaned from the language of the provisions is that "any time" does not mean "any time at all". It means "any time" within the precincts of the Deed and Intercreditor Agreement. No argument has been advanced that such a finding will not lead to a conclusion that the Termination Notice was ineffective to release all debts due under the MMA. It follows that there has been no release of the liabilities under the MMA and there is a genuine and serious crossclaim. Mr Robson first calculated the crossclaim at £610,000 based on the financial statements of GNH OpCo. Since the presentation of the petition the sum has increased. The explanation is that RAM is entitled to an incentive fee extending back 7 years. There has been no serious argument as to the sums calculated. In my judgment there is sufficient evidence for RAM to discharge the evidential burden of proof and conclude that the cross claim is equal to or exceeds the petition debt.

59. The petition shall stand dismissed.

60. I invite the parties to agree an order.