IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *ONE Lodging Holdings LLC v. American Hotel Income Properties REIT (GP) Inc.,* 2024 BCSC 1573

Date: 20240801
Docket: S244766
Registry: Vancouver

Between:

ONE Lodging Holdings LLC, ONE Lodging Management, LLC, ONE FL Fort Myers HIE Management LLC, ONE CT Milford GHI Management LLC, ONE FL Jacksonville FI Management LLC, ONE FL Ocala CY Management LLC, ONE MD Hanover 7021 Management LLC, ONE TN Chattanooga TPS Management LLC, ONE FL Tampa East SBS Management LLC, One MD Hanover 7544 Management LLC, ONE TX West Medical SI Management LLC, ONE FL Ocala RI Management LLC, ONE NJ Neptune 230 Management LLC, ONE NJ Mount Laurel 1001 Management LLC, ONE TN Chattanooga RI Management LLC, ONE MD Baltimore 4980 Management LLC, ONE MD Hanover 7035 Management LLC, ONE NJ Egg Harbor 3022 Management LLC, ONE NJ Dover HW Management LLC, ONE PA Allentown HW Management LLC, ONE PA Bethlehem HW Management LLC, ONE TX West Medical HI Management LLC, ONE FL Sarasota HIE Management LLC, ONE MO Nevada HIE Management LLC, ONE IL Mattoon HIE Management LLC, ONE IL South Jacksonville HIE Management LLC, ONE KS Emporia HIE Management LLC, ONE IA Dubuque HIE Management LLC, ONE OK Chickasha HIE Management LLC, ONE OK Bethany HIE Management LLC, ONE MD Baltimore GHI Management LLC, ONE NC Statesville Management LLC, ONE OK Chickasha Management LLC, ONE MD Hanover HI Management LLC, ONE FL Titusville FI Management LLC, ONE FL Ocoee FI Management LLC, ONE FL Ocala FI Management LLC, ONE TX Airport FI Management LLC, ONE OH Columbus ES Management LLC, ONE OH Cleveland ES Management LLC, One KY Covington ES Management LLC, ONE NJ Wall 1302 Management LLC, ONE NC Statesville CY Management LLC, ONE FL Tampa North CY Management LLC, TREST Management, LLC, TRED Management, LLC, TRV Harrisonburg South Management LLC, TRV Emporia Management LLC, TRNC Asheboro Management LLC, TRV South Hill Management LLC, TRG Kingsland Management LLC, TRNC Asheboro Fair Management LLC, and Bellstar Hotels & Resorts, Ltd.

Plaintiffs

And:

American Hotel Income Properties REIT (GP) Inc., American Hotel Income Properties REIT LP, AHIP MD Baltimore 8477 Enterprises LLC, AHIP MD Baltimore 8225 Enterprises LLC, AHIP NJ Egg Harbour 3008 Enterprises LLC,

AHIP PA Pittsburgh 1006 Enterprises LLC, AHIP TX Midland 1505 Enterprises LLC, AHIP MN Woodbury 205 Enterprises LLC, AHIP TX San Angelo 2545 Enterprises LLC, AHIP FL Fort Myers Enterprises LLC, AHIP MI Portage Enterprises LLC, AHIP TX San Angelo 2569 Enterprises LLC, AHIP TX Midland 1401 Enterprises LLC, AHIP TX Houston Enterprises LLC, AHIP TX Corpus Christi Enterprises LLC, AHIP CT Milford Enterprises LLC, AHIP PA Pittsburgh 1004 Enterprises LLC, AHIP MN Woodbury 185 Enterprises LLC, AHIP ND Bismarck Enterprises LLC, AHIP FI Jacksonville Enterprises LLC, AHIP FL Melbourne Enterprises LLC, AHIP FL Ocala 3712 Enterprises LLC, AHIP MD Hanover 7021 Enterprises LLC, AHIP TN Chattanooga 7010 Enterprises LLC, AHIP FL Tampa 3624 Enterprises LLC, AHIP MD Hanover 7544 Enterprises LLC, AHIP TX Amarillo 6915 Enterprises LLC, AHIP FL Ocala 3610 Enterprises LLC, AHIP NJ Neptune Enterprises LLC, AHIP NJ Mount Laurel Enterprises LLC, AHIP TN Chattanooga 2340 Enterprises LLC, AHIP MD Baltimore 4980 Enterprises LLC, AHIP MD Hanover 7035 Enterprises LLC, AHIP NJ Egg Harbour 3022 Enterprises LLC, AHIP NJ Dover Enterprises LLC, AHIP PA Allentown Enterprises LLC, AHIP PA Bethlehem Enterprises LLC, AHIP TX Amarillo 8231 Enterprises LLC, AHIP FL Sarasota Enterprises LLC, AHIP MO Nevada Enterprises LLC, AHIP IL Mattoon Enterprises LLC, AHIP IL Jacksonville Enterprises LLC, AHIP KS Emporia Enterprises LLC, AHIP IA Dubuque Enterprises LLC, AHIP OK Chickasha 2610 Enterprises LLC, AHIP OK Bethany Enterprises LLC, AHIP MD Baltimore 5015 Enterprises LLC, AHIP NC Statesville 1508 Enterprises LLC, AHIP OK Chickasha 3004 Enterprises LLC, AHIP MD Hanover 7027 Enterprises LLC, AHIP FL Titusville Enterprises LLC, AHIP FL Ocoee Enterprises LLC, AHIP FL Ocala 4101 Enterprises LLC, AHIP TX Amarillo Airport Enterprises LLC, AHIP OH Columbus Enterprises LLC, AHIP OH Cleveland Enterprises LLC, AHIP KY Covington Enterprises LLC, AHIP NJ Wall Enterprises LLC, AHIP NC Statesville 1530 Enterprises LLC, AHIP FL Tampa 13575 Enterprises LLC, AHIP AZ EST Enterprises LLC, AHIP TX ESD Enterprises LLC, AHIP VA Harrisonburg II Enterprises LLC, AHIP VA Emporia Enterprises LLC, AHIP NC Asheboro Enterprises LLC, AHIP VA South Hill Enterprises LLC, AHIP GA Kingsland Enterprises LLC, AHIP NC Asheboro II Enterprises LLC, and AHIP NY Bellport Enterprises LLC

Defendants

Before: The Honourable Justice Matthews

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs: D. Brown
A.L. Crimeni

Counsel for the Defendants:	S. McEachern H. Parsons H. Mehrabi
Place and Date of Hearing:	Vancouver, B.C. July 31 and August 1, 2024
Place and Date of Judgment:	Vancouver, B.C. August 1, 2024

Overview

[1] The plaintiffs are dozens of entities that provide hotel management services. The defendants are dozens of entities that own hotel properties and have retained the plaintiffs to manage those properties pursuant to a series of agreements, one of which is called the master agreement.

[2] These cross applications arise out of disputes over the master agreement, including whether it contains an agreement to arbitrate the disputes that have arisen. The defendants seek to stay this action, which was commenced by the plaintiffs, in favour of arbitration pursuant to s. 8 of the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233. The plaintiffs seek interlocutory relief prohibiting the defendants from proceeding with the arbitration process pursuant to Rule 10-4 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009; s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c.253; or pursuant to the inherent jurisdiction of the Court.

[3] I will refer to the plaintiffs collectively as "ONE Lodging.". I will refer to the defendants collectively as "AHIP," which is an acronym for American Hotel Income Properties.

[4] At the outset of the hearings of these applications, I advised the parties that if I needed to reserve on either or both of the applications, my reasons would not be available before October 2024, which is approximately three months from now. ONE Lodging asserted that there were immediate time pressures, including August 12, and sought immediate interim relief pending my reasons. The immediate interim relief is to enjoin AHIP from proceeding with a dispute resolution process, which AHIP has purported to trigger, and which has a timeframe that would see the parties make their submissions by August 12 and the dispute resolution concluded 15 days later and so by the end of August 2024.

[5] I have determined I must reserve on AHIP's stay application and on ONE Lodging's interlocutory relief application. The immediate question is whether I should grant the immediate interim relief enjoining the dispute resolution process that AHIP has triggered pending my reasons on these applications.

[6] I delivered these reasons orally. I have edited the transcript without changing the substance.

Background

[7] There is a master agreement between some of the plaintiffs and some of the defendants and several subsidiary agreements that pertain to the hotel management services that the plaintiffs provide to the defendants. For the purposes of these reasons, I will be primarily referring to the master agreement.

[8] AHIP issued a notice of default to ONE Lodging under the master agreement which includes the assertion that as a result of ONE Lodging's defaults, the master agreement must be terminated and the defaults cured through a payment by ONE Lodging to AHIP in excess of $17 million USD. AHIP asserts that the issues raised in the notice of default are to be addressed through a mandatory arbitration agreement that AHIP asserts is provided for in clause 11 of the master agreement. ONE Lodging disputes that clause 11 contains an agreement to arbitrate.

[9] Clause 11 has the heading "Dispute Resolution". Because of the heading and the dispute over what the clause is, I will refer to it as a dispute resolution clause and/or clause 11. I add that the purpose of these reasons is not to interpret Clause 11 and in any event its heading is not determinative.

[10] ONE Lodging commenced this action to address and resolve the alleged defaults and the issues that AHIP raises. ONE Lodging seeks an injunction prohibiting AHIP from proceeding with the clause 11 dispute resolution process. It has also brought an application for interlocutory injunctive relief. Subsequent to ONE Lodging commencing this action and bringing its application for interlocutory relief, AHIP brought an application seeking a stay of this action on the basis that the subject matter of the action is also the subject matter of an agreement to arbitrate, found in clause 11 of the master agreement.

[11] The issues to be determined on this immediate interim relief issue fall out of the *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994

CanLII 117 three-part test that applies to interim injunctions. The three parts to the test are the merits threshold, irreparable harm, and balance of convenience.

[12] In addition, there is a preliminary issue as to whether I have jurisdiction to grant immediate interim relief in the context of this dispute and also given that no notice of application has been filed seeking it on precisely the terms that it is now sought.

Jurisdiction

[13] AHIP's position is that I do not have jurisdiction to provide any interim relief, or at least I cannot determine whether I have jurisdiction, until I decide whether to issue the stay it seeks. That is because the general rule for stay applications under s. 8 of the *International Commercial Arbitration Act* is that if the parties have agreed to arbitrate an issue and that issue in dispute is covered by that agreement to arbitrate, and the party opposing the stay does not assert or establish that the arbitration agreement is void, inoperable, or incapable of being performed, the court must stay the proceeding in favour of arbitration and leave any issues about the arbitrator's jurisdiction to be determined by the arbitrator: *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117 at para. 21; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 at para. 84.

[14] That test and its component parts has been the subject of considerable submissions during the hearings of these applications, including the standard governing some of its component parts. There is no dispute that the burden to show that an issue in the proceeding before the court is covered by an agreement to arbitrate is the standard of an arguable case. The parties dispute whether the arguable-case standard also governs the burden to establish whether there is an arbitration agreement or whether I must decide that at the higher usual standard on civil matters, that is, the balance of probabilities.

[15] Leaving aside that question, which remains to be resolved on the stay application, there is no doubt that the cases and legal principles referred to in *Clayworth* and *Dell Computer*, and the many cases that have considered those

decisions, governs the stay. However, I am not persuaded that the Court is therefore bereft of jurisdiction until the stay has been decided. That is because in this case a matter that is hotly contested is whether there is an agreement to arbitrate. Part of that dispute is because clause 11 provides for an independent expert to address issues that arise under the contract and provides that the independent expert shall act as an expert and not as an arbitrator. I heard evidence and submissions and was referred to case law on this sub-issue and several other arguments as to why clause 11 is or is not an agreement to arbitrate. It is a matter on which I must reserve.

[16] For that reason, I am not persuaded that this is a case where there clearly is an agreement to arbitrate, or I can at this point proceed on the basis that there is an agreement to arbitrate, which then moves the case into the court considering whether the issue is arguably covered by the arbitration agreement and the other issues that must be considered and which engage the competence confidence principle, in which the court is not to assume that it is better placed to determine the arbitrator's jurisdiction.

[17] Even if there is an arbitration agreement and therefore the *International Commercial Arbitration Act* is engaged, s. 9 of that act provides a court with jurisdiction to make orders before or during arbitral proceedings to provide an interim measure of protection.

[18] The master agreement includes a clause which has also been the subject of significant submissions. That is clause 13.2. It is headed "Governing Law" and it reads as follows:

> This Agreement shall be governed by and construed and enforced in accordance with the laws of the Province of British Columbia, which shall be deemed to be the proper law hereof, and the courts of British Columbia shall have exclusive jurisdiction in connection with all matters under this Agreement, and the interpretation and enforceability hereof.

[19] On the stay application and on the injunction application, ONE Lodging relies on this clause as providing the court with general jurisdiction to address matters that arise under the master agreement and subscribes a more limited role to clause 11.

AHIP takes the opposite position. It asserts that clause 13.2 is subject to clause 11, which provides for all disputes to be resolved through the process set out in that clause. AHIP further submits that the residual role for clause 13.2 is to support the comprehensive dispute resolution provided for in clause 11. AHIP cites as examples of things that could be done under clause 13.2 as Mareva injunctions or enforcement proceedings.

[20] Again, that is an issue that I heard submissions on and one which I will consider while these matters are under reserve. At this point, regardless of the extent of jurisdiction that clause 13.2 provides, and even if it only has limited residual jurisdiction to support dispute resolution provided for in clause 11, I am satisfied that would extend to deciding these issues, which obviously must be decided pursuant to the law of this province. Therefore clause 13.2 must at least provide the jurisdiction to decide whether immediate interim relief is appropriate in order to permit the court to decide the issues in a way that is not moot.

[21] The issue of potential mootness arises because of the timeframes set out in the clause 11 dispute resolution process. In the circumstances where the Court has to reserve, as I have decided I must, my determination on AHIP's stay application, the stay application will be moot unless the Court also grants immediate interim relief pending the Court's decisions. That is because the timeframes are such that by August 12, the parties are required to make their submissions to the independent expert described in clause 11 and 15 days later, i.e. by the end of August, the independent expert is to render a decision.

[22] In circumstances where the court's determination on a matter will be rendered moot by matters that are proceeding rapidly, the court does have jurisdiction to grant immediate interim relief. This approach was adopted by Justice Saunders of the Court of Appeal in *Lax Kw'alaams Indian Band v. Minister of Sustainable Resource Mgmt.*, 2004 BCCA 311.

[23] I have determined I have that jurisdiction and that I have it from the sources that I have already identified. ONE Lodging asserts that the jurisdiction also arises

from the inherent jurisdiction of the Court to control its own process and to ensure that its orders are effective, and it relies on the decision of the Supreme Court of Canada in *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495, 1996 CanLII 215 at para. 5.

[24] Given the sources of jurisdiction that I have concluded apply here, I do not need to resort to inherent jurisdiction, but if I am wrong about the sources of jurisdiction that I have concluded apply, then in my view this would be an appropriate circumstance in which to invoke the inherent jurisdiction of the Court.

[25] With regard to the lack of a notice of application specifically seeking immediate interim relief pending the Court's decision, ONE Lodging explains that it commenced this proceeding and filed its notice of application for injunctive relief. It was subsequent to that application being delivered that AHIP sought a stay.

[26] ONE Lodging also sought short leave for its application for injunctive relief, and as I understand, the parties then appeared before Associate Judge Dick, who made an order that essentially permitted AHIP's application to tag along with the short leave application, if I can put it that way. ONE Lodging's counsel has made a submission that it brought its application for injunctive relief on the presumption that a short order decision could be granted and did not anticipate being in a position where the relief it sought might be thwarted by a lengthy period of reserve past the time at which the clause 11 process would have completed.

[27] It may not have been feasible, or as I described during the hearing, perhaps it was fantastical that it would be thought a decision could be made on the whole of these applications as they have jointly been presented within a period of time that would have avoided the outcome being moot due to the clause 11 process. I understand that matters were moving very quickly, and ONE Lodging was taking the steps it thought were appropriate to put itself in the position to obtain that relief.

[28] In any event, the material in the notice of application that was filed, the evidence of the short leave, and the fact that the arguments on the notice of application for injunctive relief and this request for immediate interim relief overlap to a great extent. While I understand that counsel for AHIP has had to contend with this request for immediate interim relief with no notice, that is not prejudice in the traditional sense and it is created by the circumstances, because as I have said, the matter will otherwise be moot. If there is prejudice to AHIP, it does not outweigh the prejudice to ONE Lodging of not considering whether immediate interim relief is appropriate. I am persuaded that there is no prejudice to AHIP that should prevent me from considering this request for immediate interim relief.

[29] Accordingly, I conclude that I have jurisdiction and that I ought to consider the request for immediate relief. In doing so, I wish to add a caveat that nothing I say in these reasons and on consideration of this request for immediate interim relief is determinative of what I will conclude on AHIP's stay application, or on ONE Lodging's application for interlocutory relief. Once I have reflected on the issues, the evidence, and the submissions I have heard, I will be issuing a decision or decisions with considered reasons. I do not have the liberty of doing that on this matter. I am making this decision with a very short timeframe in which to consider the matters given the exigency I have described.

[30] In particular, when I say, in these reasons, that I have not been taken to any evidence on a particular topic, I mean just that. When I have the matter under reserve, I may find that there is evidence on some topics, but I have not been taken to that evidence on these two days of these applications. I will say again, I do not have comprehensive evidentiary submissions or the time to read the entire record in the timeframe that this decision on immediate interim relief needs to be made.

Whether Interim Relief Should Be Granted

Serious Issue to be Tried

[31] At this first stage of the three-stage *RJR-MacDonald* test for interim or interlocutory injunctive relief, the court is to undertake a preliminary investigation on

the merits. The usual threshold is a serious question to be tried in the sense that the underlying claim is neither frivolous nor vexatious: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 13.

[32] The question is whether ONE Lodging has a serious question to be tried in resisting the stay application and on its own application for interlocutory injunction relief. At this time, I cannot do justice to describing the substantive arguments I have heard over these two days. There are many, and they were well made despite the time pressure. Counsel have given me a lot to think about. The arguments include whether there is, in fact, an arbitration agreement. ONE Lodging argues there is not an arbitration agreement based on the language of clause 11 and the structure of the process it sets out. On this issue, AHIP has advanced several arguments including that there are cases in which the language of clause 11 has been held to be consistent with an arbitration agreement, the plain language of clause 11 is consistent with an arbitration agreement, and when clause 11 is read in the context of the master agreement as a whole, it is appropriately seen to be an arbitration agreement.

[33] I have also heard arguments as to whether the dispute falls within the scope of clause 11. I have heard arguments about how clause 11 relates to other clauses, including clause 9.2 and 13.2 of the agreement and how I should consider that in determining what is in the scope and what is the process provided for in clause 11. I have heard significant arguments on whether the clause 11 process is an appropriate process to address the disputes that are raised in the notice of dispute and whether that impacts on whether clause 11, if it is an arbitration agreement, is operable or capable of performing as it is drafted.

[34] As I have said, the time on these applications was very compressed, and I am sure counsel wish there were more time to have presented their submissions. I would have benefitted from more time to hear these arguments and consider them and to consider the large volume of evidence and the five volumes of authorities that are on these applications.

[35] The arguments on AHIP's stay application overlap to a certain extent with the arguments on ONE Lodging's application for interlocutory relief. AHIP raises the argument that if I need to reserve on the question of whether or not a stay should be granted and whether there is a serious issue to be tried to grant the injunctive relief that ONE Lodging seeks on its application, I cannot now be in a position to decide that there is a serious issue to be tried to grant intermediate interim relief. I do not accept that argument. The issue I have to be satisfied on a serious issue to be tried on this immediate interim relief is not which party will be successful on the stay application or which party will be successful on the injunctive relief application on the issues that raise the standards of arguable case or serious issue to be tried. What I have to be satisfied on this immediate interim relief application is that ONE Lodging has raised a serious issue to be tried in resisting the stay application and in seeking its own interlocutory relief.

[36] In my view, it stands to reason that since I have had to reserve on both applications, there is a serious, i.e. not frivolous or vexatious, position advanced by ONE Lodging. It has advanced a non-frivolous, non-vexatious position on whether there is an arbitration clause and the other arguments it raised to oppose the stay application. It has advanced a non-frivolous and non-vexatious position on its application for injunctive relief.

[37] I add that I have the same preliminary view of AHIP's arguments. They have easily crossed the threshold of being neither frivolous nor vexatious, and those arguments that AHIP has raised are part of the reason I have reserved my decisions.

Irreparable Harm and Balance of Convenience

[38] Irreparable harm and the multifactor balance-of-convenience tests are commonly considered together in one analysis: *British Columbia (Attorney General) v. Wale*, 9 B.C.L.R. (2d) 333, 1986 CanLII 171 (C.A.), aff'd [1991] 1 S.C.R. 62, 1991 CanLII 109. The overall determination to be made is who will suffer greater harm from the granting or refusal of the relief. The relevant factors to be considered are:

the adequacy of damages as a remedy for such harm, the likelihood that an award of damages will be paid, whether the harm from granting or refusing the injunction would be irreparable, which of the parties has acted to affect the status quo, the strength of the applicant's case, the public interest, and any other factors affecting the balance of justice and convenience.

[39] In this case, the context for this analysis is that if I do not grant immediate interim relief, the clause 11 process will require the parties to make their submissions to the independent expert by August 12, and the independent expert will, under the terms of clause 11, make a decision by the end of August.

[40] If I were to grant a stay and not grant ONE Lodging's application for interlocutory injunctive relief, then there would be no harm or foul in that process proceeding in the meantime, but that is only one of the possible results that could occur. I could refuse to grant the stay, in which case this notice of civil claim will remain afoot and whether clause 11 has a role, and what role it might have in this dispute resolution will be an open question and one that is in part the subject of the interlocutory injunction relief sought.

[41] If I were to grant the stay and grant the interlocutory relief, then the clause 11 process ought not proceed except for any role a court may define for it. So, on both of the two types of outcomes I have just described, my decision would be rendered moot by the fact that the clause 11 process had already completed.

[42] AHIP takes the position that the status quo is the clause 11 procedure and the fact that AHIP has appropriately triggered the clause 11 procedure. ONE Lodging asserts that the status quo is its claim seeking to address the matters that are the subject of alleged defaults under the agreement, and until the Court determines the stay application, the claim is properly framed in its notice of civil claim, and the clause 11 procedure is inappropriate.

[43] My view on the current status quo is closer to that of ONE Lodging than AHIP. My view is that the current status quo is that AHIP must persuade me, on a standard

to be determined, that there is an arbitration agreement and that there is an arguable case that the dispute falls within it. If AHIP does not do so, then the notice of civil claim will not be stayed. In my view, therefore, the status quo is tied up in the decision that I have reserved.

[44] AHIP also asserts that even if I decide that there is no arbitration agreement and therefore do not grant a stay, clause 11 provides for a dispute resolution process for all disputes. Even though it is not an arbitration process, it is a process that the parties have agreed to and should proceed.

[45] Again, exactly what role clause 11 should play, if it is not an arbitration agreement, is a matter that is tied up in the injunctive relief application on which I have reserved. Accordingly, for the purpose of this interim relief sought pending my decisions on the stay application and the interlocutory injunction application, I conclude that the current status quo is that the interpretation of clause 11 and what the parties have agreed to is a matter of dispute that I will be considering on those decisions.

[46] AHIP also argues that this immediate interim relief is unnecessary, and therefore the balance of convenience is in favour of not granting the immediate interim relief, because ONE Lodging has not taken advantage of the procedures available to it to address the timing of the clause 11 process with Mr. Nardozza, the independent expert who AHIP appointed pursuant to clause11.

[47] There are several complicating features to that argument, which again I will have to consider, and without commenting on their merits, I will simply list them. The first is that according to ONE Lodging, after AHIP proposed Mr. Nardozza as one of three independent experts under clause 11, ONE Lodging stated, as it was entitled to do under clause 11, that it did not agree to any of those three, including Mr. Nardozza, and proposed its own. According to ONE Lodging, AHIP asserted that ONE Lodging's response to AHIP's proposed independent experts was an inadequate response and entitled AHIP to appoint Mr. Nardozza. Accordingly, whether Mr. Nardozza has the role of independent expert, available to determine a

request by ONE Lodging to address the clause 11 timing requirements, is a matter of dispute.

[48] The second complicating issue on this point is the process for ONE Lodging to make an appeal to independent expert about a timeframe that would allow for the process before this Court to conclude before the clause 11 process overtakes it. AHIP points to the *International Commercial Arbitration Act* and including s. 19, which reads as follows:

> (1) Subject to this act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing any agreement referred to in subsection (1), the arbitral tribunal may, subject to this act, conduct the arbitration in the manner it considers appropriate.

[49] AHIP's position, that s. 19(2) provides the independent expert with the authority to depart from the timelines set out in clause 11, is problematic given s. 19(1), which provides that the parties are free to agree on a procedure. If the Court accepts AHIP's position that clause 11 is an arbitration agreement, then arguably the procedure has been agreed to, including the timelines that are set out in clause 11. According to s. 19(2), the arbitral tribunal's ability to conduct the arbitration in the manner it considers appropriate, is subject to what the parties have agreed to.

[50] ONE Lodging points out that on this application, AHIP has strenuously submitted that the parties agreed to a fast and efficient dispute resolution mechanism, which it seeks to have applied, leaving the Court with a question as to whether or not a s. 19 application could, in fact, lead to a postponement of the timeframes or an extension of the timeframes in clause 11.

[51] Another complicating factor is whether s. 19 of the *International Commercial Arbitration Act* is even open to be triggered by ONE Lodging if ONE Lodging is correct that clause 11 is not an arbitration clause. ONE Lodging takes the position that the *International Commercial Arbitration Act* is only available as an avenue to address the process in clause 11 if it is indeed an arbitration clause, and if it is not, the *International Commercial Arbitration Act* has no applicability.

[52] Finally, the parties do not agree on whether, if it is an arbitration, it is the British Columbia statute that applies or legislation of the jurisdiction where the arbitration would take place or is “seated” as it was referred to in argument. AHIP takes the position that if it is not a British Columbia arbitration, it is an arbitration to which Arizona legislation applies. AHIP has brought to my attention what appears to be a restatement of the *Revised Uniform Arbitration Act* of Arizona, which provides:

> The arbitrator may issue such orders for interim remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy to the same extent and under the same conditions as if the controversy were the subject of a civil action.

[53] I have not had the benefit of any submissions on Arizona law as to whether that would permit an arbitrator to extend timeframes set out in a clause like clause 11. It is an open question. Accordingly, I am of the view that the fact that ONE Lodging has not taken other steps does not weigh heavily in the balance of convenience in terms of what I should do on immediate interim relief.

[54] With regard to irreparable harm, ONE Lodging makes many submissions on irreparable harm in support of its application for interlocutory injunction relief and which it also says applies to this interim relief sought. I will only consider those I considered to be directly applicable on this immediate interim relief, and generally speaking, that is what will happen if the clause 11 procedure proceeds according to the timeframe set out in clause 11.

[55] ONE Lodging asserts that if the Court does not grant this immediate interim relief, the independent expert will proceed to arbitrate the issues where the jurisdiction for it to do so is still at large given the civil action it has commenced and that this Court has not made the determinations which would recognize that the independent expert is an arbitrator and should determine his or her own jurisdiction. ONE Lodging argues that the issues that the independent expert will determine include whether ONE Lodging's role as the management of the hotels should be terminated and whether payments of up to over $17 million USD are required for it to address the alleged defaults.

[56] AHIP argues that the outcome of the clause 11 process cannot amount to irreparable harm for two reasons. First, AHIP asserts that irreparable harm from the clause 11 process is too speculative. Second, AHIP asserts that at least one of the outcomes of the clause 11 process is that the independent expert could decide the issues in favour of ONE Lodging, and therefore there will be no irreparable harm to ONE Lodging.

[57] I agree with ONE Lodging's position that requiring it to go through the clause 11 process without a decision on AHIP's stay application is irreparable harm regardless of the outcome of the clause 11 process. An independent expert acting as an arbitrator to make a final decision, when there is a civil proceeding on the same issues and the Court has not granted a stay, is irreparable harm to ONE Lodging which is entitled to a decision as to whether or not its civil claim should be stayed in favour of an arbitration. The competence-competence principle rests on that occurring. Rendering that decision moot renders the competence-competence principle moot and means that neither of the parties have had the judicial process they are entitled to.

[58] In addition, the resources that ONE Lodging would have to commit to responding to a very lengthy list of acts of default with its position as the managing entity of the hotels at stake, and an assertion of over $17 million USD in damages owing, are considerable regardless of the outcome. In addition, ONE Lodging asserts that it is a matter of public record that AHIP's resources are constrained in a dire manner. Accordingly, ONE Lodging asserts that if it is successful on AHIP's stay application, it will have no viable financial recourse against AHIP for inappropriately forcing ONE Lodging through the clause 11 process.

[59] AHIP responds that its financial circumstances are ONE Lodging's fault because ONE Lodging has mismanaged AHIP's only assets, that is the hotels, and the hotels are AHIP's only means of generating income. This is a matter on which I have not been taken to evidence. I have been taken to the evidence of AHIP's current financial circumstances. There is evidence that AHIP has turned some of its

assets over to its financers and has restrained the pay-outs to its limited partners because of its financial circumstances. But I have not been taking to any evidence of the cause of those circumstances, other than AHIP's opinion that it is the fault of ONE Lodging. The fact that ONE Lodging is managing AHIP’s only assets is obviously insufficient to determine that ONE Lodging has caused AHIP's financial problems. As ONE Lodging points out, its management of those assets has nothing to do with how AHIP finances them, what capital investments AHIP makes into them, or a myriad of other matters that can affect a business’ bottom line.

[60] AHIP argues that it is the party that will suffer prejudice if this immediate interim relief is granted because it will be deprived of the bargain it reached in clause 11 to have a speedy and efficient dispute resolution process. AHIP relates this to its financial circumstances and asserts that the "market has spoken" and is reflected in AHIP's severely depressed share price. AHIP asserts it is trying to right that ship, and the clause 11 process is part of that.

[61] AHIP also asserts that its financial circumstances are not so dire as to give rise to a concern that it will not be able to pay any future judgment against it. I would observe that this is clearly a matter of speculation. What is in evidence now is that AHIP's financial circumstances are a cause for concern to AHIP and that they have been, at least, on a downward trajectory.

[62] AHIP also submits that if the immediate interim relief is granted, the harm that will flow to it is that it will be tied to ONE Lodging for as long as it takes to resolve these issues and that it should not be deprived of its agreement to have them resolved quickly and efficiently through the clause 11 process. I observe that this submission assumes that I do not grant a stay and do not grant the injunctive relief sought, and therefore it does not assist with determining prejudice.

[63] What is tying AHIP to ONE Lodging is the master agreement that AHIP seeks to terminate. AHIP's options in that regard are the clause 11 process, or the usual type of court proceedings a party can use when it wishes to terminate a contract or a negotiation. All of these avenues are open to AHIP. It has chosen clause 11, and in

order to pursue that avenue, it has sought a stay of these proceedings. That stay application is a necessary step. The clause 11 process is not open to AHIP in the circumstances until it has obtained a stay. Maintaining the status quo until the stay is decided is not depriving AHIP of its chosen process. The decision on AHIP's application for a stay is part of the process.

[64] AHIP also asserts that the matters in the notice of default are urgent and involve issues of health and safety, and prejudice to it will accrue if they are not addressed urgently. I have not been taken to any evidence other than what is in the notice of default, and I specifically have not been taken to any evidence of any matter that is urgent and will require prejudice if this matter is not dealt with within the next month. The contents of the notice of default are not evidence of matters of health and safety. It is evidence of the position that AHIP takes on the matters it asserts are defaults.

[65] At bottom, AHIP is arguing that it will suffer prejudice due to delay in using the clause 11 process. Delay on its own does not usually outweigh actual prejudice. In this case, I do not consider it to outweigh the type of prejudice that ONE Lodging will suffer if forced through a process, the status and effect of which is currently a matter of debate. If it proceeds in accordance with AHIP's position, the outcome will determine whether ONE Lodging continues to manage these hotel properties and/or is liable to pay AHIP in excess of $17 million.

[66] For the reasons I have already articulated, I am not in a position to comment on the relative strengths of the parties' cases other than what I have already about them both raising serious issues to be tried.

[67] With regard to the public interest, I agree with the submission of ONE Lodging that the public interest is served by appropriate court proceedings not being rendered moot, and the court should make orders that can be reasonably made so that its process is effective: *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCCA 26 at para. 59.

[68] I conclude that the balance of convenience favours the relief that ONE Lodging seeks to enjoin the clause 11 process while my decisions on the stay application and the injunctive relief are outstanding.

Disposition

[69] I grant an injunction in the form of the draft order handed up by ONE Lodging as follows:

> The defendants shall not take any steps to advance the dispute initiated by the notice of appointment pursuant to article 11 of the hotel master management agreement, or otherwise seek or purport to abridge or terminate the plaintiff's continued rights under the master hotel management agreement and each of the hotel management agreements until this court has issued reasons for judgment on the application of the defendants for a stay and of the application of the plaintiffs for interlocutory injunction relief.

(DISCUSSION)

[70] THE COURT: All right. So, there will be a further term of the order that the defendants are not required to file a response to civil claim during the same period that my decisions are under reserve.

"Matthews J."