Neutral Citation Number: [2019] EWCA Civ 345

Case No: A3/2018/0730

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST (ChD)**
**HHJ MARK RAESIDE QC**
**[2017] EWHC 3388 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2019

**Before:**

**LORD JUSTICE UNDERHILL**
**VICE PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION**
**LORD JUSTICE HENDERSON**
and
**LORD JUSTICE MOYLAN**

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**IN THE MATTER OF PEAK HOTELS AND RESORTS LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006**

**Between:**

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| **RUSSELL CRUMPLER AND SARAH BOWER (JOINT LIQUIDATORS OF PEAK HOTELS AND RESORTS LIMITED)** | **Appellants** |
| **- and -** | |
| **CANDEY LIMITED** | **Respondent** |

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**Ms Felicity Toube QC and Mr Stephen Robins** (instructed by **Stephenson Harwood LLP**) for the **Appellants**
**Mr Gavin Kealey QC and Mr Ralph Morley** (instructed by **Candey LLP**) for the **Respondent**

Hearing date: 13 December 2018

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# Approved Judgment

**Lord Justice Henderson :**

## Introduction

1. Part VI of the Insolvency Act 1986 contains a group of sections (sections 238 to 246) which enable the relevant office-holder of a company in liquidation or administration to apply to the court for an order adjusting certain types of prior transaction entered into by the company during a specified "twilight" period before the onset of insolvency. The subject matter of these sections comprises (in England and Wales) transactions at an undervalue (section 238), the giving of preferences (section 239), extortionate credit transactions (section 244), avoidance of certain floating charges (section 245) and the avoidance of liens on the company's books and records (section 246).

2. This appeal concerns a floating charge created within the specified period by a company which is now in liquidation in the British Virgin Islands ("BVI"), Peak Hotels and Resorts Limited ("PHRL"). It is also no longer in issue that the charge was created at a time when PHRL was unable to pay its debts within the meaning of section 123 of the 1986 Act. It follows that the provisions of section 245 would be directly engaged if PHRL were an English company being liquidated in England. The position is less straightforward than that, although not materially so, because PHRL is a company registered in the BVI and it was wound up in that jurisdiction after the contested hearing of a creditor's petition. Two foreign-based members of KPMG, Sarah Bower and Russell Crumpler, were appointed as joint liquidators. Ms Bower has recently been replaced by Christopher Farmer, but nothing turns on that. I will refer to them collectively as "the Liquidators".

3. On 24 February 2016, the English High Court recognised the BVI liquidation proceedings in relation to PHRL as a foreign main proceeding under Schedule 1 to the Cross-Border Insolvency Regulations 2006 ("the CBIR"). The CBIR give effect within Great Britain to the UNCITRAL Model Law on cross-border insolvency. By virtue of Article 23 of the CBIR, the Liquidators (in their capacity as the recognised foreign representatives of the BVI liquidation) are entitled to make an application to the court for an order under section 245 of the 1986 Act, subject to immaterial modifications set out in Article 23(3) and (4). In reliance on these provisions, the Liquidators made an ordinary application to the Companies Court on 27 September 2016 seeking an order under section 245, as well as determination of the prior questions whether the charge was on its true construction fixed or floating, and (if fixed) over which assets an effective fixed charge was created. As I shall explain, those prior questions, together with some threshold issues concerning the applicability of section 245, were decided by His Honour Judge Davis-White QC, sitting as a judge of the High Court, in a judgment which he handed down on 23 June 2017: [2017] EWHC 1511 (Ch), [2017] Bus. L.R. 1765. The judge decided, in short, that the charge was in its entirety a floating charge; that the assets subject to the charge included substantial sums in excess of £3 million which PHRL had been ordered to pay into court as security for costs; and that all the threshold conditions for the application of section 245 were satisfied.

4. At this point, I will set out the main relevant provisions of section 245:

"**245 Avoidance of certain floating charges**

(1) This section applies as does section 238, but applies to Scotland as well as to England and Wales.

(2) Subject as follows, a floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregate of –

(a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge,

(b) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the company, and

(c) the amount of such interest (if any) as is payable on the amount falling within paragraph (a) or (b) in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.

(3) Subject to the next subsection, the time at which a floating charge is created by a company is a relevant time for the purposes of this section if the charge is created –

…

(b) in the case of a charge which is created in favour of any other person, at a time in the period of 12 months ending with the onset of insolvency,

…

(4) Where a company creates a floating charge at a time mentioned in subsection (3)(b) and the person in favour of whom the charge is created is not connected with the company, that time is not a relevant time for the purposes of this section unless the company –

(a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or

(b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction under which the charge is created.

…

> (6) For the purposes of subsection (2)(a) the value of any goods or services supplied by way of consideration for a floating charge is the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the goods or services in the ordinary course of business and on the same terms (apart from the consideration) as those on which they were supplied to the company."

5. The deed of charge with which we are concerned was executed by PHRL on 21 October 2015, in favour of PHRL's London-based solicitors, Candey Limited ("Candey"). Candey was the respondent to the Liquidators' originating application and is now the respondent in this court. The deed was also duly executed by Candey, through its director and managing partner Mr Ashkhan Candey. The charge was expressed to be given as "continuing security for the payment and discharge of all liabilities to" Candey pursuant to a fixed fee agreement of even date, defined as "the Fixed Fee Agreement". The charge purported to operate (a) "by way of fixed charge" over all assets and undertakings of PHRL "including all monies in Court in all jurisdictions worldwide", as well as over all recoveries from the claims referred to in the Fixed Fee Agreement, and (b) "by way of floating charge" over all or any of PHRL's assets that were not capable of being charged by way of fixed charge (including the assets already described, if the fixed charge were for any reason defective).

6. The Fixed Fee Agreement is the document which lies at the heart of the present dispute. I will need to examine some of its terms in more detail later in this judgment, but at this stage a summary will suffice:

   (1) The document is headed "Confidential Fee Agreement between CANDEY Limited & Peak Hotels & Resorts Limited dated 9 October 2015", but the judge found that it was signed on behalf of PHRL on 10 October 2015 and by Candey on 21 October 2015. Clause 1 recorded that it superseded and replaced any previous agreement between Candey and PHRL in respect of fees, and that PHRL had obtained independent legal advice before signing it.

   (2) Clause 2 provided that, subject to the terms of the agreement, Candey would continue to act for PHRL in four specified sets of proceedings (two English High Court claims, some Hong Kong arbitration proceedings, and proceedings in the BVI Commercial Court), as well as "other matters expressly agreed from time to time (including ongoing general advice)".

   (3) Clause 3 then recorded that, as a consequence of a number of developments in various jurisdictions, Candey's previous estimate of costs had been "revised to £5 to £6 million", and "[t]he actual figure could be significantly higher or it could be substantially lower if an early settlement is achieved."

   (4) Clause 4 then said this:

   > "PHRL does not wish to pay CANDEY's invoiced and unbilled costs incurred to date or provide further funds in advance on

> account on a weekly basis and wishes instead to agree a fixed liability fee payable at a future date. It is therefore agreed that PHRL will pay CANDEY a fixed fee of £3,860,637.48 ("the Fixed Fee"). It is agreed that to assist PHRL's cash flow PHRL is not obliged to pay the Fixed Fee before judgment on liability is handed down or a settlement is agreed in the Tarek proceedings [*i.e the main English High Court proceedings*] unless PHRL obtains cash from elsewhere as set out in this agreement. Interest at 8% per annum will accrue from judgment or settlement."

(5) Clause 5 stated that PHRL would pay Candey's outstanding unpaid invoiced costs of £941,358.94 ("Outstanding Costs") in three tranches, time to be of the essence in respect of each payment. It was also made clear that disbursements were not included in the Fixed Fee, and PHRL was to remain liable for them, including all counsel's fees.

(6) Clause 8 provided for termination of the agreement, as follows:

> "CANDEY may terminate this agreement at any time for any reason without liability to PHRL. In those circumstances, or if PHRL wishes to terminate this agreement, PHRL will remain liable for the Outstanding Costs, plus the Fixed Fee and all disbursements, subject of course to all its legal rights. The Fixed Fee and Outstanding Costs become immediately due for payment in the event that PHRL is subject to any bona fide insolvency proceedings or arrangement or insolvency related Court order."

(7) Clause 9 stated that the agreement was "subject to English law and the exclusive jurisdiction of the English Courts".

7. After the Fixed Fee Agreement and the charge had been entered into, Candey continued to provide legal services to PHRL in accordance with the agreed terms. On 8 February 2016, however, a winding-up order was made against PHRL in the BVI, by Bannister J sitting as a High Court Judge of the Eastern Caribbean Supreme Court, and the Liquidators were appointed. The position confronting the Liquidators in relation to the Tarek proceedings in London was described as follows by Judge Davis-White at [46]:

> "When [*PHRL*] entered liquidation in February 2016, the London Litigation was at a critical stage. There was a liability in respect of Counsel's brief fees and an outstanding obligation pursuant to a court order to pay additional security for costs. There was a risk of adverse costs in respect of the Defendants' costs in the London Litigation, which was covered neither by insurance nor fully covered by the existing sums paid into

> court. Having unsuccessfully attempted to obtain a third party fortified indemnity in respect of adverse costs, the Liquidators decided that the appropriate course was to seek to settle the London Litigation. Ultimately they were successful in this endeavour. The terms of settlement provided for the release to [*PHRL*] of the two sums paid into court of US $10 million and £1,648,000. These sums were paid to the Liquidators by order of Asplin J dated 7 March 2016."

8. The effect of the winding-up order was to make the Fixed Fee become immediately due for payment under clause 8 of the agreement; and even in the absence of that provision, PHRL would have become obliged to pay it in full upon the settlement of the Tarek proceedings, together with interest at 8% from the date of the settlement. The Liquidators were unwilling, however, to pay the Fixed Fee, because although Candey had done a considerable amount of work since the Fixed Fee Agreement was entered into, application of Candey's standard hourly charging rates to that work would have resulted in the payment of a much smaller sum, later quantified in the region of £1.2 million. Nothing turns at this stage on the precise figure, although I should mention that the Liquidators in fact continued to use Candey's services for some time after 7 March 2016, before finally deciding to dispense with them. According to the second affidavit of Mr Crumpler served with the originating application, the total fees payable to Candey on the basis of Candey's time sheets and standard charging rates amounted to £1,212,851, comprising £704,626 from 1 October 2015 until the commencement of the liquidation on 8 February 2016, and £508,213 for work done thereafter on behalf of the Liquidators. The important point is that the amount of the Fixed Fee exceeded the costs which Candey would have been entitled to charge on a conventional time cost basis for work done since 1 October 2015 by an amount of the order of £2.5 million.

9. For its part, Candey sought to prove in the liquidation as a secured creditor for the full amount of the Fixed Fee, together with contractual interest at 8% from 2 March 2016. The Liquidators were unwilling to agree to this, contending that, insofar as the charge created a floating charge, it was invalid under section 245 of the 1986 Act, save to the extent of the value of the services supplied to PHRL on and after 21 October 2015, and that the value of those services was to be ascertained in accordance with section 245(6). On the latter point, the Liquidators further contended that the appropriate figure was in fact substantially less than £1.2 million, because Candey's standard hourly rates were in various respects unreasonably high, and there were also issues about the extent to which work done after the liquidation could properly be charged for.

10. In broad terms, this was the background to the issue of the Liquidators' ordinary application in September 2016 and the hearing which took place before Judge Davis-White QC over three days in March 2017. I have already summarised the main points which the judge determined in his judgment of 23 June 2017: see [3] above. There was then an appeal to this court on the question whether the monies which PHRL had paid into court, and which were subsequently paid out to the Liquidators upon the settlement of the London litigation, were subject to the charge. The appeal was dismissed, on the basis that PHRL retained the property in the money that it paid into

court, with the consequence that the money continued to be one of its existing assets and therefore fell within the scope of the charge: see [2018] EWCA Civ 2256. The judge also held that the floating charge given to Candey was invalid under section 245 of the 1986 Act "save to the extent of the value of the services supplied to [*PHRL*] by Candey on or after 21 October 2015": see paragraph 2 of the judge's order dated 17 July 2017. There has been no appeal by Candey against the judge's conclusions that the charge was a floating charge created at a time when PHRL was unable to pay its debts, and therefore at a "relevant time" for the purposes of section 245(3) and (4).

11. The remaining issue, which it was agreed would have to be dealt with at a subsequent hearing, was therefore the valuation of the services supplied by Candey to PHRL on or after 21 October 2015. Trial of this issue took place before His Honour Judge Raeside QC (sitting as a judge of the High Court) on 22 November 2017. The judge heard argument from Stephen Robins for the Liquidators and Benjamin Williams QC for Candey. The following day he delivered an oral judgment, of which we have a written version approved by the judge: [2017] EWHC 3388 (Ch). In short, he rejected the Liquidators' submissions, and held that the value of the relevant services, within the meaning of section 245(2)(a) and (6), was the whole of the Fixed Fee, namely £3,860,637.48.

12. The Liquidators now appeal to this court, with permission granted by the judge. As he pointed out at the start of his judgment, there is apparently no previous authority on the question.

13. We have had the benefit of clear and helpful written and oral submissions on both sides, with Felicity Toube QC now leading Mr Robins for the Liquidators and Gavin Kealey QC leading Ralph Morley (neither of whom appeared below) for Candey.

## Legislative history

14. Statutory invalidation of floating charges created within a limited period before a company's liquidation may be traced back at least to section 212 of the Companies (Consolidation) Act 1908, which provided that a floating charge created within three months of the commencement of the winding-up was invalid, absent proof that the company was solvent immediately after the creation of the charge, "except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest…". In In re Orleans Motor Co Limited [1911] 2 Ch. 41, Parker J described the purpose of section 212 as follows:

> "The section was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts or for monies which do not go to swell their assets and become available for creditors."

15. The corresponding provision in the Companies Act 1948, section 322, extended the relevant period to 12 months before the commencement of the winding up, but the scope of the section continued to be confined to the provision of cash paid to the company at the time of or after the creation of the charge, and in consideration for the

charge. In In re Yeovil Glove Co Limited [1965] Ch. 148, this court held that the words "in consideration for" in section 322 were not used in the technical sense of the law of contract, but rather meant "by reason of" or "having regard to the existence of" the charge. Accordingly, the exception extended to subsequent payments made to the company by its bankers after the date of a floating charge taken to secure its substantial overdraft, even though there was no consideration in the strict contractual sense for the creation of the charge and the bank was under no obligation to make any further advances: see in particular the judgments of Russell LJ at 177-178 and Willmer LJ at 183-185.

16. Section 245 of the 1986 Act for the first time broadened the scope of the exception from invalidation of the charge so as to include the value of "goods or services supplied" to the company at or after the time of creation of the charge, as well as money paid during that period. The section also refers to the consideration for "*the creation* of" the charge, rather than the consideration "for" the charge. Despite this change in wording, I provisionally incline to the view that the word "consideration" is still being used in a non-technical sense, and is looking at payments of money, or the supply of goods or services, in reason of or in reliance on the charge, whether or not there is a binding contractual promise to make them. The contrary view, however, finds some support in the observations of Arden LJ in Pagemanor Limited v Ryan and Others (unreported, 2 October 2002), where she said at para 15:

> "There is no statutory definition of the word "consideration", and it seems to me that it must be a reference to that which a party agrees to provide under the transaction."

I emphasise that it is unnecessary for us to decide this question, and we heard no argument on it. All of the relevant services in the present case were supplied by Candey pursuant to the terms of the Fixed Fee Agreement, as security for which the charge was created.

17. As for the extension to goods and services, the rationale for this is described in Goode, Principles of Corporate Insolvency (5th Edition, 2018) at para 13-111:

> "The effect of s. 245 is that the most common forms of new value – money, goods, services, payment of debt – now suffice to preserve the validity of the floating charge. This extension in the concept of new value represents a compromise between the views of the hardliners who considered that the old restriction to cash should be retained and the proponents of the opposing view that any form of money's worth should suffice. The Cork committee rather cautiously recommended the addition of goods to cash but the exclusion of services [*Insolvency Law and Practice, Report of the Review Committee, Cmnd. 8558, para 1564*]. In the end, services were added to the list. The result in broad terms is that admissible new value is restricted to those forms of benefit to the company which arise from day-to-day trading and finance and have a readily ascertainable value. Excluded are a wide range of other assets, both tangible and intangible, including land and buildings, intellectual

> property rights, debts and other receivables and rights under contracts."

## The factual background

18. It is unnecessary to say much about the general factual background to the "plethora of international litigation" (as Judge Davis-White termed it) in which PHRL became involved. It is enough to say that the litigation arose from an ill-fated joint venture to purchase the Aman Group of luxury hotels in 2014. The partners in the joint venture were PHRL (believed to be under the ultimate control, through a family trust, of a Mr Omar Amanat) and another BVI company called Tarek Investments Limited, apparently controlled by a Mr Vladislav Doronin. A fuller account, for those who are interested, may be found (for example) in a judgment which I delivered in February 2015 on an application for security for costs against PHRL: see [2015] EWHC 386 (Ch) at [2] to [13].

19. It is equally unnecessary, in my view, to go through the history of the relationship between Candey and PHRL, and the arrangements which were made for payment of Candey's fees, before the Fixed Fee Agreement was entered into. A good deal of written evidence on these matters was included in the trial bundle below, and in our supplemental bundle, but the Fixed Fee Agreement largely speaks for itself, and the subjective intentions and motives of the parties are in any event inadmissible as aids to construction. Indeed, Judge Raeside recorded at [19] that before him "no specific reliance [*was*] placed on any relevant factual matrix for a true and proper construction or understanding of the Fixed Fee Agreement."

20. The salient points which emerge from the Fixed Fee Agreement itself are these:

    (a) PHRL was unwilling to pay Candey's outstanding invoiced costs of approximately £941,000 or to continue providing funds in advance on account on a weekly basis. It therefore wished to replace the existing contractual arrangements for the payment of fees and the provision of funding with a single fixed fee to be paid in the future.

    (b) Candey's previous global estimate of total costs for the litigation had been revised upwards to £5 to £6 million, but the actual figure could turn out to be significantly higher or lower, depending on the work involved and whether an early settlement was achieved.

    (c) Agreement was therefore reached that Candey would continue to act for PHRL in the four specified pieces of litigation, as well as other matters expressly agreed from time to time, in return for the Fixed Fee of approximately £3.86 million. Importantly, the Fixed Fee was not to become payable before judgment on liability or a settlement in the Tarek proceedings, unless PHRL obtained cash from elsewhere. Interest would accrue at 8% per annum from judgment or settlement.

    (d) Payment of the Outstanding Costs was also rescheduled, the three tranches becoming payable on signature of the agreement, on 1 December 2015 and on 1 February 2016, time being of the essence for each payment.

(e) PHRL would also remain liable for all disbursements, including "most significantly" all counsel's fees, and would provide money on account for such disbursements upon request and in any event no later than 7 days after a request for payment: see clause 5. If any disbursements were not paid on time, Candey would be entitled to terminate the agreement or cease work, but PHRL would remain liable to Candey for all sums due under the agreement: see clause 6.

(f) The agreement could also be terminated in accordance with clause 8, and in particular Candey was free to terminate the agreement "at any time for any reason without liability to PHRL". In those circumstances, PHRL would remain liable for the Outstanding Costs, the Fixed Fee and all disbursements.

(g) As continuing security for the payment and discharge of all liabilities due from PHRL to Candey, PHRL agreed to execute a Deed of Charge and Security in the form annexed (i.e. the charge which was executed on 21 October 2015).

21. It was, no doubt, implicit in the agreement, as Mr Kealey QC submitted, that Candey would make available sufficient resources and personnel to enable it to continue to act for PHRL in the four specified sets of proceedings. I do not, however, agree with him that the bargain should be viewed as akin to the provision of an ongoing facility, pursuant to which Candey would be obliged to provide further unspecified legal services, unrelated to the four sets of proceedings, as and when PHRL might request them. The final limb of clause 2 extended only to "other matters expressly *agreed* from time to time (including ongoing general advice)" (my emphasis). Furthermore, Candey was free to terminate the agreement at any time with or without cause. Thus Candey did not enter into an open-ended commitment, apart from the commitment inherent in continuing to act in the four pieces of litigation.

## <u>The judgment of Judge Raeside QC</u>

22. Near the beginning of his judgment, Judge Raeside referred to the earlier judgment of Judge Davis-White, and the preliminary consideration which he had given to the Fixed Fee Agreement in the context of section 245 at [116] to [120] of his judgment, under the heading "The value of the services supplied". Judge Davis-White had there said he considered it arguable "that the services in fact provided (on the terms of the Fixed Fee Agreement, other than the term relating to consideration) could be valued on the basis of a lump sum value rather than by way of a court assessment": see [117]. Judge Davis-White had also raised the question of how the value of services supplied is to be ascertained, if the service includes "a facility which the company may not call upon", giving this example at [119]:

> "To take an extreme example, is a repair or advice or bank facility service available for a period and which is provided at a certain cost, a "service supplied" or is the service supplied only that when the company calls down on the facility (by asking for an actual repair or actual advice or drawing on the bank facility)?"

23. Judge Raeside recorded at [7] the written factual evidence before the court from Mr Candey and the Liquidators, together with two sequential expert reports and a joint memorandum from the parties' experts. Candey's expert was Peter Hurst, a very experienced senior costs judge who was the Senior Costs Judge of England and Wales from 1992 to 2014. The Liquidators' expert was Andrew Thomas, a costs lawyer with around 30 years' experience of costs in civil proceedings in this jurisdiction.

24. After referring to the background facts and the relevant provisions of section 245, the judge commented at [16] that assistance on the proper construction of the section was "surprisingly thin". He referred to the relevant passages in the 2017 edition of Sealy & Milman, Annotated Guide to the Insolvency Legislation, and to Armour and Bennett, Vulnerable Transactions in Corporate Insolvency (Oxford, 2003), at paragraphs 5.50 and 5.51.

25. At [20] to [24], the judge described the expert evidence, recording that the experts had made little progress because they disagreed fundamentally about the appropriate way to value the relevant services. Mr Hurst's evidence was that, if the Fixed Fee Agreement had come before him for review under section 61 of the Solicitors Act 1974 when sitting as a costs judge, he would have had no difficulty in finding that it was "in all respects fair and reasonable" within the meaning of section 61(2)(a). It was his opinion that the value to be attached to the professional services in fact provided by Candey "should be the very consideration contained in clause 4" of the agreement: see the judgment at [23]. By contrast, the judge considered that Mr Thomas' report was constrained by his instructions about the nature of the legal test to be applied, and that he had in consequence given only superficial consideration to the approach of Mr Hurst. The judge was left "in no doubt at all" that he preferred the evidence of Mr Hurst, and he therefore found at [24] that the Fixed Fee "could reasonably have been expected to have been obtained for the services provided by Candey".

26. The judge then summarised the submissions of counsel, before saying at [30] that the "essence of the dispute" remained:

> "(1) whether according to the Liquidators in valuing the services it is right to carry out a re-measurement of the fees actually provided on a time (and hourly rate) basis, or whether, according to Candey Limited the Fixed Fee Agreement is the basis for valuing those services, and (2) whether one has to value the services in fact provided and not the facility provided by the Fixed Fee Agreement that was available but not called upon."

27. The judge next analysed the provisions of section 245, concluding at [33] that "agreements for a reasonable sum for goods or services in a transaction ought in principle to stand the rigour of subsequent insolvency". Accordingly, had the Fixed Fee Agreement simply stated that Candey was entitled to a fixed fee, but not stated the sum, the law would have fixed a reasonable fee in all the circumstances known at the time of the agreement to reflect the services that were to be supplied in the future: [34]. The judge then turned to the mandatory requirements of section 245(6),

concluding at [36] that they required the court to start with the actual transaction and then adjust only the consideration agreed for the supply of services, having regard to how they were provided. On the basis of his analysis, the judge concluded at [38] that there was "no basis in law" to value the services provided by Candey on a time basis. On the contrary, the Fixed Fee Agreement provided the correct basis for valuation of the services.

28. The judge then turned to the second main disagreement between the parties, holding at [39] that it was necessary to have regard to the facility that Candey made available to PHRL. He pointed out that the provision of a facility of the kind envisaged by Judge Davis-White itself had a value, whether the service was called on or not. The judge found it difficult to see why the section should strike down such arrangements reasonably and fairly made simply because it was possible that the services "would or could not be called on". Accordingly, the Liquidators' second main argument also failed.

29. Finally, the judge summarised his conclusions at [41] to [43]. The summary makes it clear that he also accepted Mr Hurst's evidence that the provision of professional services on the basis of a fixed fee forms part of the ordinary course of a solicitor's business in the modern era.

## The Liquidators' grounds of appeal

30. The Liquidators' grounds of appeal are set out in five paragraphs, which I would summarise as follows:

(1) The judge was wrong to hold that the services supplied took the form of a facility. He should have held that the "services supplied" within section 245(2)(a) consisted of the work actually done by Candey. In any event, Candey had not committed itself to provide an open-ended facility because under clause 8 of the agreement it was entitled to terminate it at any time.

(2) The judge should have held that the "consideration" to be excluded under section 245(6) covered every part of the Fixed Fee Agreement relating to payment by PHRL, including the concept of payment by way of a fixed fee.

(3) The judge was also wrong to hold that the concept of a "fair and reasonable" agreement within the meaning of section 61(2)(a) of the Solicitors Act 1974 has any relevance to the assessment required under section 245(6). The judge should have confined his analysis to the concepts within section 245 itself.

(4) The judge was wrong to have regard to the hypothetical question of what Mr Hurst would have decided if the matter had come before him when sitting as a costs judge. Not only was that question irrelevant, but it involved an impermissible delegation of the judge's role to an expert witness.

(5) Instead of asking whether the Fixed Fee was a fair and reasonable fixed fee for the services promised to be supplied, the judge should have begun by seeking to ascertain the amount of work actually done by Candey, and he should then have applied the valuation test required by section 245(6), excluding any notion of payment by PHRL

on a fixed fee basis. On that approach, the judge should have held that the relevant amount could not logically exceed Candey's time costs of approximately £1.2 million.

**Discussion**

31. The Liquidators submit, and I agree, that it is important to begin by placing section 245 in its statutory context in the law of insolvency and examining how the section operates.

32. As I have already explained, section 245 is one of a group of sections which enable transactions entered into during a specified period before the onset of insolvency to be set aside or adjusted. Parliament has decided that these powers are needed in order to strike a fair balance between the creditors of a company which enters liquidation or administration. As Ms Toube QC reminded us, the general position in a liquidation, absent adjustment, is that creditors' debts which are secured by fixed charges rank first for payment, followed by the expenses of liquidation, followed by debts secured by floating charges, leaving the remaining assets (if any) to be distributed on a pari passu basis among the unsecured creditors.

33. The critical distinction between fixed and floating charges, at least in the present context, is that a fixed charge necessarily attaches from its inception to existing property of the company, whereas a floating charge remains in suspense until the happening of a crystallising event, whereupon it will attach to the company's assets of the types specified in the charge as at the date of crystallisation, whether or not they were in existence when the floating charge was created. This has the potential to cause unfairness between the holder of a floating charge and the company's unsecured creditors if the charge is created at a time when the company is of doubtful solvency and it later goes into liquidation or administration. In particular, the secured creditor would be likely to gain an unfair advantage if it were thus able to obtain priority for any part of the company's indebtedness to it which in substance preceded the date of the charge, or which post-dated the charge but exceeded the further value actually provided by the creditor to the company before the charge crystallised. In general terms, that is the mischief which section 245 seeks to combat. It does so, like its predecessors in the Companies Acts of 1908 and 1948, by providing that a floating charge over the company's property or undertaking, created during the specified "relevant period", is invalid except to the extent specified in the section. Before the 1986 Act, the exception was confined, broadly speaking, to cash paid to the company at or after the date of creation of the charge. Since 1986, as I have explained, the scope of the exception has been widened to include the supply of goods or services, but again the supply must take place on or after the creation of the charge. In short, therefore, the effect of the section is to invalidate the floating charge, save to the extent that it secures the value of new money paid, or new goods or services supplied, to the company on or after the date of the creation of the charge, and as part of the consideration for its creation.

34. The next important point to note is that the effect of the section is only to invalidate *the charge* to the specified extent. The section has no effect on the underlying contractual relationship of debtor and creditor between the parties, or on the ability of the creditor to prove for its debt as an unsecured creditor to the extent that the floating charge is invalidated. Accordingly, if the Liquidators' arguments in the present case were to prevail, Candey would remain free to prove in the liquidation of PHRL for the

unsecured balance of the Fixed Fee and contractual interest thereon. This reflects the underlying purpose of the section, which is to place the holder of a floating charge created during the "twilight" period on the same footing as the unsecured creditors, save to the extent that the charge secures the provision of new money, goods or services.

35. Against this background, it is now necessary to examine the wording of section 245 more closely. The Liquidators submit that the clear focus of the section is on the value of the services actually supplied by Candey to PHRL after the date of creation of the charge on 21 October 2015. That is the clear import of the words "services supplied" in subsection (2)(a), and of the way in which the valuation test in subsection (6) is formulated:

> "the value of any goods or *services supplied* by way of consideration for a floating charge is the amount in money which *at the time they were supplied* could reasonably have been expected to be obtained for supplying the goods or services in the ordinary course of business and on the same terms (apart from the consideration) as *those on which they were supplied* to the company"
>
> (emphasis added).

Furthermore, submit the Liquidators, the phrase "at the time they were supplied" presupposes that the relevant goods or services are those which were in fact supplied, rather than any which were merely promised to be, but were not in fact, supplied.

36. In my judgment, these submissions are clearly correct. The focus of the section is indeed on the services actually supplied by Candey to PHRL from 21 October 2015 until the Liquidators terminated their relationship. Those services were supplied pursuant to the Fixed Fee Agreement, but for the purposes of section 245 the question is not what sum was contractually due from PHRL to Candey in return for those services. That question is relevant only to the extent of Candey's claim in the liquidation as an unsecured creditor. The relevant issue is the extent to which Candey is entitled to enforce its charge, and for that purpose what has to be ascertained is the value, calculated in accordance with section 245(6), of the services actually supplied by Candey to PHRL during the relevant period. That is the measure laid down by Parliament to ensure a fair balance between the interests of Candey as the holder of a floating charge, on the one hand, and the interests of the general body of unsecured creditors (including Candey, to the extent that the charge is invalid) on the other hand. It has nothing whatever to do with the commercial fairness, as between Candey and PHRL, of the contractual terms of the Fixed Fee Agreement.

37. A similar confusion, as it seems to me, infects Candey's alternative argument that the "services supplied" by Candey to PHRL must be identified, for the purposes of section 245, as the provision of a facility, or something akin to a facility, upon which PHRL could draw pursuant to the Fixed Fee Agreement, regardless of the actual amount of work which that would entail for Candey. As I have already said, I do not regard the provision of a facility as a helpful analogy, given the specific nature of the work agreed to be undertaken in the Fixed Fee Agreement and the ability of Candey to withdraw from it at any time. But even if it were, it would be nothing to the point,

because what matters for the purposes of section 245 is the work actually done by Candey during the relevant period. The business of Candey is the provision of legal services, and it is the services actually provided during the relevant period which have to be valued. By virtue of subsection (6), the value to be attributed to those services is the amount in money which, at the time of supply, could reasonably have been expected to be obtained for their supply in the ordinary course of business, and on the same terms (apart from the consideration) as those on which they were in fact supplied.

38. The test is therefore an objective one, and although it is common ground that the services were supplied by Candey in the ordinary course of its business as solicitors, and that they were supplied on the terms of the Fixed Fee Agreement, the terms of the agreement relating to "the consideration" have to be disregarded. In the present case, the services were supplied in return, inter alia, for PHRL's contractual obligation to pay the Fixed Fee. It has not been argued that any distinction should be drawn for this purpose between the services supplied before and after the date on which PHRL was wound up. There can be no doubt that the obligation to pay the Fixed Fee was, on any view, a term relating to "the consideration" for which the services were supplied. It follows, therefore, that the Fixed Fee must be disregarded in performing the calculation required by subsection (6), and the value of the services must be ascertained otherwise than by reference to PHRL's contractual obligation to pay the Fixed Fee.

39. This must also mean, in my opinion, that the whole concept of provision of the services in return for a fixed fee has to be disregarded, because such a concept is incompatible with the exercise which section 245(6) requires to be performed. The point of a fixed fee is that it provides the parties with certainty in advance, before the precise amount of work needed to provide the relevant services has been ascertained. That uncertainty is reflected in the express recognition in the Fixed Fee Agreement that the actual costs ultimately incurred by Candey in providing those services might turn out to be significantly higher or lower than Candey's revised estimate of £5 to £6 million. But the exercise required by section 245 is of a fundamentally different nature. It is retrospective, and requires a valuation with the benefit of hindsight of the work which has actually been done. Only to that extent may Candey be regarded as a validly secured creditor. To allow the concept of a fixed fee to return again at this stage of the analysis would in my view be incompatible with the hypothetical enquiry mandated by subsection (6), and would be likely to lead (as it has in the present case) to the circular conclusion that the fixed fee should be upheld in its entirety, regardless of the objective value to the company of the services actually provided.

40. The basic fallacy in the approach adopted by the judge, if I may say so, is that he allowed the underlying commercial fairness, as between PHRL and Candey, of the Fixed Fee Agreement, together with the opinion evidence on that point of Mr Hurst, to influence not only his assessment of the statutory purpose and language of section 245, but also his analysis of the retrospective valuation exercise required by subsection (6). Once that misapprehension has been cleared away, the application of the statutory language to the facts of the present case is in my judgment reasonably clear. The charge is rendered invalid, save to the extent of the value of the services actually supplied by Candey on or after 21 October 2015. That value must be ascertained in accordance with the hypothesis in subsection (6), which requires an

objective and retrospective assessment of the amount that Candey could reasonably have charged for those services in the ordinary course of its business, and on the same terms (apart from those relating to the consideration, including payment of the Fixed Fee) as those on which they were in fact supplied. By clause 1, the Fixed Fee Agreement was expressly made subject to Candey's attached standard terms of business, although the terms of the agreement were to prevail if and to the extent that they were in conflict. The standard terms provided for Candey's services to be charged on a time basis and to be invoiced monthly, with payment due within 7 days of receipt. Accordingly, that approach is likely to provide an appropriate basis for valuation of the services under subsection (6), once the provisions relating to payment of the Fixed Fee have been eliminated.

41. In reaching this conclusion, I am not of course suggesting that the standard terms annexed to the Fixed Fee Agreement formed part of the agreement between the parties insofar as they related to the consideration for Candey's services. To that extent, the standard terms were overridden by the express terms of the agreement; and even if they were not overridden, they would anyway have to be disregarded by virtue of section 245(6). The point which I am making is a different one. Once the Fixed Fee has been eliminated, an alternative basis for valuing Candey's services has to be found, on the footing that the services were supplied in the ordinary course of Candey's business. For that purpose, it is in my view both legitimate and helpful to look at Candey's standard terms for guidance, although they are in no sense conclusive, because the test is an objective one and it does not necessarily have to be assumed that the supplier of the services would have been Candey itself rather than another firm with comparable expertise and resources.

42. I hope I have now said enough to explain why, in my judgment, the judge's approach to the construction of section 245 and its application to the facts of the present case cannot stand. In particular, I can see no proper basis for the retrospective valuation of the services actually provided by Candey to be carried out on a fixed fee basis, once the Fixed Fee and the other terms relating to payment by PHRL have been disregarded. To the extent that the judge found support for his approach in the expert evidence of Mr Hurst, and his opinion of the commercial fairness of the bargain struck between Candey and PHRL, whether or not in the context of section 61 of the Solicitors Act 1974, the judge was in my view wrong to do so. I agree with the Liquidators that it is not helpful to import considerations relevant to a different statutory scheme into the interpretation and application of section 245, and I respectfully think that Mr Hurst's evidence was of little, if any, relevance to the key issues which the judge had to decide. For similar reasons, I have ultimately gained little assistance from many of the submissions advanced to us by Mr Kealey QC on behalf of Candey, attractively though he presented them.

43. In these circumstances, it is no longer suggested by the Liquidators that we should attempt to value the relevant services ourselves. The question will have to be remitted to the High Court for further consideration of the issue, in the light of our judgments. It therefore remains for us to consider whether there is any further guidance which we can usefully give at this stage. It is clearly desirable that the scope for future disagreement about the nature of the valuation exercise required by section 245(6) should be reduced as far as possible. To that end, there are a few further points which it may be helpful for us to clarify.

44. First, it is common ground that the "ordinary course of business" referred to in subsection (6) is the ordinary course of the supplier's business, that is to say Candey's business as solicitors. The Liquidators submit that this means that the supply in question must be assumed to be an unremarkable one which arises out of no special or particular situation, and that it also precludes any reliance on the particular characteristics or situation of the company to which the services were supplied. Thus, the credit risk faced by the supplier, i.e. the risk of non-payment by PHRL, cannot be taken into account. In support of this submission, the Liquidators referred us to the decision of the High Court of Australia in Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (1948) 76 C.L.R. 464, where the Court construed the expression "in the ordinary course of business" in section 95(2)(b) of the Bankruptcy Act 1924-1946. Section 95 provided, in short, that preferential payments or transfers of property made by a person who is insolvent within six months before the commencement of his subsequent bankruptcy are void as against the trustee in bankruptcy, subject to a saving in subsection (2)(b) for "the rights of a purchaser (or) payee… in good faith and for valuable consideration and in the ordinary course of business." In that context, Williams J said at 480:

> "It seems to me, therefore, that the expression refers to a transaction into which it would be usual for a creditor and debtor to enter as a matter of business in the circumstances of the particular case uninfluenced by any belief on the part of the creditor that the debtor may be insolvent."

45. Mr Kealey submitted that no assistance could be derived from this authority, because it related to a different statute, in a different jurisdiction and in a different context. That is of course true, but I think the passage which I have quoted is nevertheless of some persuasive value, particularly as it relates to the construction of the same phrase in a provision designed to prevent transactions of a specified type before the onset of insolvency proceedings from being avoided in the interests of creditors generally. See too the fuller discussion of the same topic by Taylor J, also in the High Court of Australia, in Taylor v White (1964) 110 CLR 129 at 151-153. In any event, I agree with the Liquidators on this point. For the purposes of the objective test under section 245(6) of the 1986 Act, the words "in the ordinary course of business" clearly have a function to perform, and part of that function in my view is to insulate the valuation of the services actually provided from any increase in the supplier's normal charging rates or any special terms of business attributable to the risk of non-payment by the recipient of the services.

46. Secondly, I also agree with the Liquidators that the calculation of value under section 245(6) cannot include a charge for credit in the form of compensation for delay in payment, even though one of the purposes of the Fixed Fee Agreement was to postpone the time when PHRL would have to pay for the services rendered by Candey. There are two main reasons, in my judgment, why such an approach would be misconceived. The first reason is that it would again allow the objective calculation required by subsection (6) to be influenced by the particular circumstances of PHRL which led it to negotiate the Fixed Fee Agreement. The second reason is that section 245(2)(c) itself provides a saving for contractually agreed interest in the agreement under which the services were supplied. Thus, in the present case Candey is entitled

to, and does, claim interest at 8% per annum from the date of settlement of the Tarek proceedings. But it would be inconsistent with that express statutory entitlement if Candey were also able to enhance the value of its services so as to compensate it for any notional delay in payment of its fees before that date.

## Conclusion

47. For the reasons which I have given, I would allow the Liquidators' appeal and remit the matter to the High Court so that the value of the services actually supplied by Candey to PHRL on or after 21 October 2015 can be valued on the basis which I have set out.

**Moylan LJ:**

48. I agree.

**Underhill LJ:**

49. I also agree.