Neutral Citation Number [2019] EWHC 282 (Ch)

CR-2016-001012

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF PEAK HOTELS & RESORTS LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986 AND THE CROSS BORDER INSOLVENCY REGULATIONS 2006

MR ANDREW HOCHHAUSER QC
(Sitting as a Deputy Judge of the Chancery Division)

7, Rolls Building,
Fetter Lane
London

15 February 2019

BETWEEN:

CANDEY LIMITED

Applicant/Respondent

-and-

RUSSELL CRUMPLER and CHRISTOPHER FARMER
(AS JOINT LIQUIDATORS OF PEAK HOTELS & RESORTS LIMITED (IN LIQUIDATION))

Respondents/Applicants

Hearing dates 10, 11, 12, 13 July 2018

DAVID LORD QC, DANIEL SAOUL and STEPHEN RYAN
(instructed by Candey Law LLP) for Candey Limited

DAVID HOLLAND QC and STEPHEN ROBINS
(instructed by Stephenson Harwood LLP for the Joint Liquidators

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

ANDREW HOCHHAUSER QC

APPROVED JUDGMENT

Table of Contents

Introduction

1. In this matter the Court has to determine two separate applications between Candey Limited, a firm of solicitors ("**Candey**"), and Mr Russell Crumpler and Ms Christopher Farmer[1], the joint liquidators ("**the Liquidators**") of Peak Hotels & Resorts Limited ("**PHRL**"), a company registered in the British Virgin Islands ("**the BVI**"), which was a former client of Candey. They are:

   (1) The determination of the following issue directed to be determined by paragraph 8 of the Order of HHJ Raeside QC dated 5 December 2017 ("**the Exemption Issue**"), namely: whether, for the purposes of Candey seeking recovery of a success fee under a conditional fee agreement ("**CFA**") dated 8 May 2016 with Candey Law LLP ("**Candey LLP**"), the Liquidators' application by Application Notice dated 27 September 2016 ("**the Liquidators' Application**") amounts to "proceedings" within the definition of article 4(c) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No.5 & Saving Provisions) Order 2013 (SI 2013/77) ("**the LASPO Order**").

   (2) The determination of Candey's application by Application Notice dated 17 April 2018 ("**the Lien Application**"), seeking a charging order under section 73 of the Solicitors Act 1974 ("**the 1974 Act**"). The Lien Application came before Hildyard J on 24 April 2018, pursuant to which directions were given in an Order dated 4 May 2018. Pursuant to paragraph 4 of that Order, the Lien Application was listed together with the hearing of the Exemption Issue.

2. The evidence before me in relation to the Exemption Issue and the Lien Application consisted of the Fifth Affidavit of Mr Crumpler sworn on 24 May 2018 ("**Crumpler 5**"), with two exhibits RC5 and RC6, on behalf of the Liquidators, and the Sixth Witness Statement of Mr Ashkhan Candey dated 14 June 2018 ("**Candey 6**") on behalf of Candey. There were also references made to evidence that had been filed at earlier hearings, namely the First to Third Affidavits of Mr Crumpler and the First to Fourth Witness Statements of Mr Ashkhan Candey and the First Witness Statement of John Brisby QC ("**Brisby 1**"), who had been instructed by Candey as Leading Counsel on behalf of PHRL.

[1] Ms Sarah Bower was formerly one of the Joint Liquidators and a party to the proceedings but has been substituted by the Order of ICC Judge Middleton dated 20 November 2018..

3. At the hearing, Candey was represented by Mr David Lord QC, leading Messrs Daniel Saoul and Stephen Ryan and the Liquidators were represented by Mr David Holland QC, leading Mr Stephen Robins. I am grateful to them for their helpful written and oral submissions.

The relevant background

4. This matter has a long and contentious history and arises against a backdrop of extensive previous litigation, including two appeals to the Court of Appeal, the first of which was heard on 21 June 2018, with judgment being handed down on 16 October 2018.

5. PHRL was incorporated in the BVI in January 2014. Its purpose was to hold shares in a joint venture vehicle, Peak Hotels and Resorts Group Ltd ("**the JVC**"), in which the other joint venture party was Tarek Investments Ltd ("**Tarek**"), another BVI company. The JVC owned the Aman Resorts group, a boutique luxury hotel group operating about 26 hotels internationally, by virtue of having purchased in January 2014 for approximately US$358m, 100% of the shares in Aman Resorts Group Limited ("**ARGL**"), which in turn held 100% of the shares in Silverlink Resorts Limited ("**Silverlink**") which held the hotel assets of the Aman Resorts group.

6. There were four major sources of funding for the joint venture:

   (1) First, on 24 January 2014 PHRL borrowed under a convertible loan some US$35m from Jinpeng Group Limited ("**Jinpeng**").

   (2) Second, on 31 January 2014 ARGL entered into a loan facility with Pontwelly Holding Company Limited ("**Pontwelly**") under which it borrowed US$208m.

   (3) Third, on 2 April 2014, PHRL borrowed US$50m from Sherway Group Limited ("**Sherway**").

   (4) Fourth, the monies paid by Tarek upon completion of the acquisition in the sum of US$95,000,000.

7. Relations between the joint venture partners soon broke down and PHRL became involved in a plethora of international litigation, for which Candey acted as PHRL's legal representatives. Candey was first instructed by PHRL in April 2014 and continued to act for PHRL until 2 March 2016 when they were disinstructed by the Liquidators

who appointed their present solicitors Stephenson Harwood LLP ("**Stephenson Harwood**") after having previously agreed terms of settlement on the same day. The matters for which Candey acted on PHRL's behalf included:

(1) "**The London Litigation**": Proceedings brought by PHRL in June 2014 in the Chancery Division against, amongst others, Tarek, Sherway Group Limited, and their ultimate beneficial owners, in which PHRL relied on breaches of various contractual arrangements and the economic torts of inducing a breach of contract and conspiracy.

(2) Hong Kong arbitrations concerning the US$35m loan from Jinpeng ("**the Hong Kong Arbitrations**").

(3) Proceedings in the BVI Court of Appeal concerning the above loan.

(4) Proceedings in the BVI for permission to bring Chapter 11 proceedings in New York.

(5) Proceedings in the BVI relating to costs of the discharge of PHRL's provisional liquidators and the costs incurred in proceedings before the BVI Commercial Court.

(6) Stayed proceedings in New York brought by Mr Doronin, the individual behind Tarek.

(7) A dispute in New York with an entity known as SURF in respect of monies held by Standard Chartered Bank ("**the SCB Monies**").

(8) A dispute with Bryan Cave LLP over their accounting practices.

(9) Assisting Lalit Modi, a named Third Party in the London Litigation.

(10) Assisting PHRL with corporate finance raising.

(11) Injunctive relief against Mr Omar Amanat, the founder of PHRL who had appropriated PHRL's money ("**the Power Capital Proceedings**").

(12) Anticipated Chapter 11 proceedings in respect of ARGL, alongside US firm Brown Rudnick LLP.

8. As part of the London Litigation PHRL sought and obtained various injunctions in June and July 2014. On the return date in September 2014, HHJ Pelling QC made an Order

dated 19 September 2014, requiring PHRL to pay US$10 million into Court to fortify PHRL's cross-undertaking in damages. Subsequently, and also as part of the London Litigation, on 20 February 2015 Henderson J (as he then was) made an Order requiring PHRL to provide £3,128,000 as security for the Defendants' costs. Those funds were paid into Court.

9. By August 2015, PHRL was indebted to Candey for several hundreds of thousands of pounds in fees and did not have the cash to continue to finance the various proceedings in which it was involved. Consequently, PHRL, together with the stakeholders who had invested in it, negotiated a fixed fee with Candey to cover all litigation going forward, that fixed fee being payable when monies became available. Those negotiations resulted in the conclusion on 21 October 2015 of a 'Fixed Fee Agreement' ("**the FFA**") between Candey and PHRL, by which:

(1) Candey agreed to continue to act for PHRL in (i) the London Litigation, (ii) the Hong Kong Arbitrations, (iii) proceedings in the BVI Commercial Court and Eastern Caribbean Supreme Court, (iv) the Power Capital Proceedings, and (v) other matters expressly agreed from time to time (including ongoing general advice) [Clause 2].

(2) PHRL agreed to pay Candey a fixed fee of £3,860,637.48 ("**the Fixed Fee**"), but "*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 [the London Litigation] unless PHRL obtains cash from elsewhere as set out in this agreement*". Interest at 8% per annum would accrue from judgment or settlement [Clause 4].

(3) The Fixed Fee excluded Candey's outstanding unpaid invoiced costs of £941,358.94 ("**the Outstanding Costs**"), which PHRL agreed to pay in specified tranches on particular dates. It also excluded all disbursements including (amongst other things) Court fees and Counsels' fees [Clause 5].

(4) "*Any monies recovered by PHRL from the date of this agreement (whether for costs or otherwise) will be applied by Candey towards the Outstanding Costs and/or the Fixed Fee and/or disbursements at Candey's discretion.*" [Clause 7].

10. By clause 1, the FFA was made subject to Candey's terms of business (**"the Terms"**), which were attached. Paragraph 3 of the Terms provided:

> *"Invoicing*
>
> *We will invoice you on a monthly basis and we require our invoices to be paid within 7 days of receipt. Thereafter, following 7 days' notice, we may suspend work on your matter until payment is received and charge you interest... We are entitled to retain all papers until our fees are paid in full".*

No rate of interest was specified.

11. The FFA also provided (in Clause 11), that "*as continuing security for the payment and discharge of all liabilities due from PHRL to Candey pursuant to this agreement PHRL shall execute a Deed of Charge and Security in the form annexed to this agreement.*"

12. Pursuant to this, on 21 October 2015, the same day as the conclusion of the FFA, a Deed of Charge and Security was executed (**"the Deed of Charge"**), by which PHRL purported to create in favour of Candey (i) a fixed charge over its assets and undertakings, (ii) a fixed charge over all damages, costs, monies and other sums and/or benefits flowing from all claims, and (iii) a floating charge over all such or further assets of PHRL's that were not then capable of being charged by way of a fixed charge "*(including any such assets described at (1) or (2) above in the event the fixed charge is defective for any reason)".*

13. The Deed of Charge also provided:

> 4. *"Save for the Deed of Charge dated 25 March 2015 (and related security) in favour of Campion Maverick, PHRL warrants and agrees that it has not created, and will not create or permit to subsist, any other security or charge over the rights and monies protected by this Deed.*
>
> 5. *PHRL irrevocably agrees and instructs CANDEY to act with full powers (and shall instruct any other and or future lawyers to use their best endeavours to assist CANDEY to ensure that any monies or benefits arising or payable in any Court proceedings in any jurisdiction shall be paid directly to CANDEY towards payment and discharge of any liability pursuant to the Fixed Fee Agreement prior to anyone else* ***save for repayment of any bona fide liability due to Campion Maverick.*** [Emphasis added]
>
> 6. *In the event that any of PHRL's rights title or interest in or to any monies or benefits covered by this Deed are assigned (which assignment shall require CANDEY's prior written consent) or awarded to a third party by Court*

order, or such monies are otherwise paid (contrary to the irrevocable instructions above) to a third party, that third party shall receive such monies subject to this Deed ***and subject to the discharge of all liabilities to Candey pursuant to the Fixed Fee Agreement.*** *"* [Emphasis added]

14. The clauses referred to above were not numbered but followed on from clause (3). I have therefore numbered them sequentially for ease of reference. The Deed of Charge was registered in the BVI.

15. In order to cover PHRL's additional expenses (i.e. the Outstanding Costs and also disbursements), funding of US$5million was obtained in January 2016, pursuant to which Candey received US$1,999,962.80 on 12 January 2016 and an amount of US$279,989.99 on 26 February 2016.

16. Meanwhile, Jinpeng, having called in its loan (leading to the arbitration proceedings in Hong Kong and related proceedings in the BVI) successfully petitioned for PHRL's winding up, such that PHRL was placed into liquidation in the BVI on 8 February 2016, on which date the Liquidators were appointed as joint liquidators. Candey lodged a proof of debt on 19 February 2016 (i.e. prior to the subsequent settlement of the London Litigation and the receipt by the Liquidators of monies pursuant to that settlement). In box 8, which required "*Particulars of any security held, the date it was given and the value of the security*", it simply referred to the Deed of Charge and made no reference to any pre-existing solicitor's equitable lien for their unpaid fees.

17. The Liquidators took the view that Candey's charge under the Deed of Charge was a floating charge, rather than a fixed charge, because the necessary element of control, on which a fixed charge depends, was entirely absent. Candey disagreed with the Liquidators' analysis and maintained that it had the benefit of a fixed charge, pursuant to the Deed of Charge, rather than a floating one. It was common ground that Candey's security interest was governed by the FFA and the Deed of Charge. The debate as to whether the security was fixed or floating turned on the proper interpretation of the rights conferred by the Deed of Charge. Prior to 29 March 2018, Candey did not suggest that it had any other or further rights which were not governed by the FFA and the Deed of Charge.

18. The Liquidators also considered that the Company had been unable to pay its debts when it entered into the Deed of Charge and that the floating charge in favour of Candey should therefore secure only the value of the services actually provided by

Candey after the creation of the Deed of Charge, pursuant to section 245 of the Insolvency Act 1986 ("**the 1986 Act**"), rather than the full Fixed Fee.

19. In order to resolve the disagreement as to the correct characterisation of Candey's security interest, the Liquidators sought a determination of the issue from the English court. However, because the Liquidators were not appointed in England, being appointed in the BVI, they had no automatic right to seek any relief from the English court. As a preliminary step, therefore, the Liquidators brought a recognition application ("**the Recognition Application**") under the Cross-Border Insolvency Regulations 2006 ("**the CBIR**") for recognition of the liquidation of the Company in the BVI as the "foreign main proceeding" in respect of the Company. On 24 February 2016, Registrar Derrett made an order in the terms sought ("**the Recognition Order**").

20. The trial in the London Litigation was due to commence in April 2016. By this point, Candey had been acting for PHRL in relation to the London Litigation for almost two years, having been instructed from the pre-action stage, through pleadings, multiple interlocutory hearings, a CMC, PTR and disclosure. However, on the day that witness statements were due to be exchanged, the parties compromised the proceedings, agreeing terms of settlement on 2 March 2016 embodied in a consent order of Mrs Justice Asplin (as she then was) dated 7 March 2016 ("**the Consent Order**"), in terms of which:

    (1) PHRL was ordered to repay US$50 million plus accrued interest to Sherway.

    (2) The sums paid into Court by way of security for costs were to be paid out as to (i) £750,000 to Tarek, (ii) £750,000 to Sherway[2] and (iii) any remaining amounts (including all accrued interest) to PHRL.

    (3) The sums paid into Court by way of fortification of the cross-undertakings were to be paid to PHRL.

21. The net result of (2) and (3) above was that an amount of US$10,013,000 and £1,648,000 were paid to PHRL ("**the Settlement Proceeds**") on 5 and 10 May 2016 respectively. In addition, as part of the settlement, Tarek and PHRL agreed to co-operate to achieve the release of the SCB Monies (US$3 million), with half going to

[2] The Liquidators have stated that Tarek and Sherway have loaned these monies back to PHRL.

each party. That release occurred and resulted in PHRL receiving US$1.5 million (plus interest).

22. The settlement was reached by the Liquidators without the involvement of Candey or Counsel they had instructed and indeed when they discovered its terms, they regarded it as very unsatisfactory. Mr John Brisby QC described it in an email dated 9 March 2016 to the legal team as "*pathetic*".

23. On the same day that the parties achieved the settlement embodied in the Consent Order, Candey was informed by the Liquidators that it was no longer instructed on behalf of PHRL. The following day Stephenson Harwood LLP sent Candey a Notice of Change of Legal Representative.

24. After being dismissed by the Liquidators, Candey concluded a conditional fee agreement ("**the Candey CFA**") with Candey LLP, which is a law firm regulated by the Solicitors Regulation Authority separately to Candey, although they operate from the same offices and appear to have the same fee earners. Candey owns and controls more than 75% of Candey LLP, with the remainder being owned and controlled by individual partners of Candey and the wife of Mr Ashkhan Candey. Under the Candey CFA, Candey LLP was instructed by Candey in relation to disputes against the Liquidators, and in the event of being successful in litigation against the Liquidators, Candey was obliged to pay a 100% success fee to Candey LLP. The Candey CFA was entered into on 31 March 2016. Its date, however, is recorded in the Order of HHJ Raeside QC dated 5 December 2017 as being 8 May 2016. Candey state that this date is an error. 8 May 2016 is, however, relevant, because it was on 9 May 2016 that Candey gave notice to the Liquidators of the Candey CFA; in accordance with the relevant rules, it is from the date of that notice that Candey seeks to recover the success fee from Liquidators (and thus in its costs schedules, Candey claimed costs without an uplift until 8 May 2016).

25. On 27 September 2016 the Liquidators brought the Liquidators' Application, seeking (a) a direction as to whether and to what extent the Deed of Charge was effective to create a fixed charge or a floating charge over all or any of the assets of PHRL, and (b) a declaration under Section 245 of the 1986 Act that the value of services supplied to PHRL by Candey at or after the creation of the Deed of Charge is limited to £1,212,839

plus interest. Section 245 of the 1986 Act applies to a floating charge but not to a fixed charge.

26. The Liquidator's Application was considered first by HHJ Davis-White QC on 6 to 8 March 2017. At that hearing, the Liquidators raised a preliminary point as to whether Candey's charge (whether fixed or floating) could extend to the Settlement Proceeds at all. In summary, the Liquidators argued that the Settlement Proceeds, which were paid from money PHRL had paid into court, were not existing assets of the Company as at the commencement of its liquidation to which Candey's charge could attach, but were new monies obtained by the Liquidators subsequent to the commencement of the liquidation, which fell outside the ambit of Candey's charge (the "**New Monies Point**").

27. On 23 June 2017 HHJ Davis-White QC held that:

    (1) on the New Monies Point, the Settlement Proceeds and SCB Monies were not 'new monies' but were the proceeds of existing assets of the Company which fell within Candey's charge;

    (2) the Deed of Charge was a floating charge, rather than a fixed one; and

    (3) the Company had been insolvent as at the date of the Deed of Charge, so that section 245 of the 1986 Act was engaged.

28. Although the Judge found that the Deed of Charge was a charge created at the relevant time when PHRL was unable to pay its debts within the meaning of s245 of the 1986 Act, he considered that he had insufficient evidence to determine the value of the services supplied by Candey, which would be secured by the charge pursuant to section 245 of the 1986 Act ("**the Value of Services Issue**") and he adjourned this issue.

29. The Liquidators appealed (with the permission of HHJ Davis-White QC) on the New Monies Point. As stated above, that appeal was heard by the Court of Appeal on 21 June 2018 and judgment was handed down on 16 October 2018, dismissing the appeal. At [90] of its judgment, Rimer LJ, with whom Henderson and Patten LJJ agreed, held that *"[PHRL] retained the property in the money that it paid into court, the money thus continued to be one of its assets and it was able to, and did, charge its interest to Candey by the charge.*"

30. Candey did not appeal against HHJ Davis-White QC's decision that Candey's security in the Settlement Proceeds and the SCB Monies took the form of a floating charge (rather than a fixed one) or that the Company had been insolvent as at the date of the Deed of Charge so as to engage section 245 of the 1986 Act.

31. The Value of Services Issue was determined by HHJ Raeside QC, who held in his judgment dated 22 November 2017 that:

    (1) Candey's Fixed Fee of £3,860,637.48, rather than a "time cost" basis, was the basis for valuing Candey's services and that was a fair and reasonable fee for work done by Candey on behalf of PHRL;

    (2) The Liquidators' Application was dismissed;

    (3) The sum of £3,860,637.48 was payable by the Liquidators to Candey with interest thereon in the sum of £543,874 with daily interest accruing in the sum of £846.17.

32. Thereafter there was a costs and consequentials hearing, pursuant to which HHJ Raeside QC ordered on 5 December 2017 that (amongst other things) the Liquidators were to pay 80% of Candey's costs of the Liquidators' Application, to be assessed by way of detailed assessment on the standard basis, if not agreed. He further ordered the Liquidators to pay £538,780.40 to Candey as a payment on account. The Exemption Issue was adjourned. Permission to appeal was granted to the Liquidators in relation to the Value of Services Issue. That appeal was heard on 13 December 2018 and judgment was reserved.

33. On 17 April 2018 Candey brought the Lien Application, and on 24 April 2018 Hildyard J gave directions for the hearing of that application. That Order records an agreement between the parties that the law of the BVI is materially the same as English law in relation to the surrender by a creditor of his security in a liquidation, *mutatis mutandis*.

The Exemption Issue – the background

34. The recovery of success fees as part of a costs order was abolished by section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (amending s.58A(6) of the Court and Legal Services Act 1990, which applies to CFAs entered into after 1 April 2013).

35. However, the effect of this was made subject to the provisions of the LAPSO Order. Article 4 of the LAPSO Order provides:

> *"4. Saving provision*
>
> *Article 2(1)(a) and (c) and article 3(a) and (c) do not apply to-*
>
> ...
>
> *(c) proceedings in England and Wales brought by a person acting in the capacity of-*
>
> *(i) a liquidator of a company which is being wound up in England and Wales or Scotland under Parts IV or V of the 1986 Act"*

36. Pursuant to Article 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No.12) Order (SI 2016/345), this saving provision was removed in relation to retainers concluded after 6 April 2016. Although, as set out in paragraph 37 of their skeleton argument, the Liquidators have raised a number of challenges to the recoverability of the success fee, including the contention that it has "*all the hallmarks of a sham*", alternatively it is a "*wholly artificial device which was intended solely to inflate the recoverable fees and lacks any genuine commercial rationale.*", they are content, for the purposes of this hearing, for the Court to answer the Exemption Issue on the assumption that the CFA was made on 31 March 2016 and is otherwise enforceable. I shall do so on that basis.

37. Accordingly, the effect of Article 4(c)(i) for present purposes is that the success fee will be recoverable from the Liquidators if these proceedings qualify as proceedings in England and Wales brought by a person *acting in the capacity of a liquidator of a company which is being wound up in England and Wales* under Parts IV or V of the Insolvency Act 1986. That is the issue that I have to decide. It is a short point of construction.

38. Candey accepts that it bears the burden of establishing that it falls within the exemption. I turn to the parties' submissions

Candey's submissions on the Exemption Issue

39. Candey submits that although PHRL is a company being wound up in the BVI, the Liquidators are acting *in the capacity* of liquidators of a company being wound up in England and Wales, because they applied for and obtained a Recognition Order under the CBIR which has precisely that effect:

(1) The Recognition Order provides at paragraph 1 that PHRL's liquidation in the BVI "*be recognised as a foreign main proceeding in accordance with the UNCITRAL Model Law on cross-border insolvency as set out in Schedule 1 to the CBIR*".

(2) Article 20 of Schedule 1 to the CBIR sets out the effect of recognition of a foreign main proceeding.

i. Under paragraph 1(a) of Article 20 "*upon recognition of a foreign main proceeding, commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed*".

ii. However, paragraph 5 of Article 20 provides that the stay in paragraph 1 "*does not affect the right to request or otherwise initiate the commencement of a proceeding under British insolvency law or the right to file claims in such a proceeding*".

iii. 'British insolvency law' is defined in Article 2(a) as "*provision extending to England and Wales and made by or under the Insolvency Act 1986 (with the exception of Part 3 of that Act) or by or under that Act as extended or applied by or under any other enactment (excluding these Regulations).*"

(3) Article 21 of Schedule 1 sets out the relief that may be granted upon recognition of a foreign main proceeding. Paragraph 1 of Article 21 provides:

> "*1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including-*
>
> ...
>
> *(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986".*

(4) Accordingly, the effect of the Recognition Order was to give the Liquidators the right to request or initiate proceedings under the Insolvency Act, in the same way as such proceedings might be available to a "British insolvency officeholder".

40. That the Recognition Order had the effect that the Liquidators acted in the capacity of liquidators of a company being wound up in England and Wales is demonstrated by the fact that following the Recognition Order, the Liquidators brought the Liquidators' Application, in which, at paragraph 1, they expressly relied upon Article 21(1)(g) of Schedule 1 to the CBIR to allow them to bring an application under section 168(3) of the Insolvency Act 1986. An application under section 168(3) is a domestic application made under the provisions of Part IV of the Insolvency Act 1986. Section 168 provides:

> *"168. Supplementary powers (England and Wales)*
>
> *(1) This section applies in the case of a company which is being wound up by the court in England and Wales.*
>
> *(2) The liquidator may seek a decision on any matter from the company's creditors or contributories...*
>
> *(3) The liquidator may apply to the court (in the prescribed manner) for directions in relation to any particular matter arising in the winding up."*

41. Since section 168 can only apply in the case of a company which is being wound up by the Court in England and Wales, by bringing an application under section 168(3), the Liquidators acted in the capacity of liquidators of a company which is being wound up in England or Wales, having expressly sought powers and standing to act in that capacity by virtue of the Recognition Order under the CBIR.

42. In *Fibria Celulose SA v Pan Ocean* [2014] EWHC 2124 (Ch), the administrators sought to argue that reference to "any appropriate relief" in Article 21(1)(g) allowed the Court the power to order relief which would be available to the administrator in a Korean court applying Korean insolvency law. Morgan J dismissed this suggestion and held that Article 21(1)(g) does not authorise the Court to apply foreign law (or to apply English law in a manner that replicates or achieves an identical result to relief available under foreign law if such a result could not be achieved under domestic English law); it only authorises the Court to grant relief that may be available to a British insolvency officer-holder under the law of Great Britain. He stated at paragraph 80 of the Judgment:

> *"80. ...I consider it somewhat surprising that subparagraph (g) is expressed in the way in which it is if it had really been intended that the phrase "any appropriate relief" permitted the recognising court to grant relief which it would not be able to grant in an insolvency conducted in accordance with the laws of the recognising court. A power for the recognising court to grant relief*

in that way would be a very significant power. It is odd to think that such a power was intended without there being any specific reference to the recognising court's ability to apply the law of a foreign state, or even to do something which no system of law anywhere would allow. This is particularly so in view of the terms of sub-paragraph (g) which deliberately limit relief under that sub-paragraph to relief which would be available to a British insolvency office holder under the law of Great Britain." [Emphasis added]

43. Furthermore, it is stated in Richard Sheldon QC et al. *Cross-Border Insolvency* 4th ed. (2014) at 3.93, reflecting on the decision in *Pan Ocean*:

> *"**3.93**...the supposition of 'a British insolvency office-holder' is important because it restricts additional relief to that available to a British insolvency office-holder. It would seem to rule out relief available at common law, by way of judicial assistance, to a foreign office-holder, and such relief would, in any event, seem to be limited to relief equivalent to that available in an analogous British insolvency proceeding."*

44. In other words, the effect of recognition under the CBIR is to treat the foreign office holder as if he were a British insolvency office holder in domestic insolvency proceedings. That is synonymous with saying that recognition under the CBIR allows a foreign liquidator to "*act in the capacity*" of a liquidator of a company which is being wound up in England and Wales. The reference to "capacity" is not a reference to status, but a reference to someone's abilities or powers. It is therefore directed to whether or not someone is using the capabilities or the powers that a liquidator of a company being wound up in England and Wales would have. The fact that the Liquidators are not officers of the Court is irrelevant. The relief one can seek identifies the capacity in which one is acting. Furthermore the Liquidators' contention that the rights afforded by recognition are not identical to the rights afforded to an English liquidator does not stand scrutiny, when one properly examines the provisions of Article 22 of Schedule 1 to the CBIR.

45. This conclusion is strengthened by the Courts' interpretation of the effect of recognition under the common law. As was stated by Lord Hoffmann (sitting in the Privy Council) in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 (PC) at paragraph 22:

> *"...the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies*

to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum".

46. Further support for this conclusion is found in the fact that if it were otherwise, the words "in the capacity of" in the saving provision would be redundant. It is significant that the saving provision does not, for example, use words such as "acting as", which Mr Lord submitted is more narrow and which is to be found in section 388 of the 1986 Act, which contains the meaning of "*act as insolvency practitioner*" and provides: "*(1) A person acts as an insolvency practitioner in relation to a company by acting (a) as its liquidator...*" If Article 4 of the LAPSO Order had the meaning contended for by the Liquidators, the words "*acts as*" would have been used.

47. In his reply submissions, however, he accepted that within the context of section 388, there was no material difference, and he conceded that had the words "*acts as*" been used in Article 4, Candey would not be entitled to come within the exception.

48. Indeed if the position adopted by the Liquidators was correct, the form of words used in the saving provision would not make any sense and the wording underlined below would be completely otiose:

"Article 2(1)(a) and (c) and article 3(a) and (c) do not apply to...

(c) proceedings in England and Wales brought by a person acting in the capacity of

i) a liquidator of a company which is being wound up in England and Wales or Scotland under Parts IV or V of the 1986 Act; or

ii) a trustee of a bankrupt's estate under Part IX of the 1986 Act"

49. Plainly the underlined words are to be construed in a manner that does not render them devoid of any meaning and effect.

50. Accordingly, for the purposes of the saving provision in Article 4 of the LAPSO Order, the Liquidators' Application constitutes "*proceedings in England and Wales brought by a person acting in the capacity of a liquidator of a company which is being wound up in England and Wales*", with the effect that the prohibition on the *inter-partes* recovery of a success fee does not apply, so that Candey is entitled to recover that success fee from the Liquidators.

51. The ministerial statement relied upon by the Liquidators, referred to at paragraph 64 below, is of no assistance because, although there may be cases where foreign

liquidations bring no economic benefit to the Inland Revenue or the British economy, there may be circumstances, depending on the facts, where such benefits are conferred.

52. Finally the fact that there were different methods by which a foreign liquidator could come before the English Courts to claim relief, which would not give rise to the exemption, did not affect Article 4 of the LAPSO Order being construed as Candey contended.

53. *Haq v Singh* [2001] 1 WLR 1594 relied upon by the Liquidators, referred to at paragraphs 68-69 below did not assist and did not detract from the submission that the construction advanced by the Liquidators would render the words "*in the capacity of*" otiose.

The Liquidators submissions on the Exemption Issue

54. Mr Holland submits that Candey do not come within the exemption for the following reasons: PHRL is not being wound up in England and Wales and is not being wound up under either Part IV or Part V of Insolvency Act 1986. Part IV applies only to companies incorporated in England and Wales and could not apply to the Company, but in any event no winding-up order has been made under Part IV. Part V is capable of applying to foreign companies but no winding-up order was made under Part V either. As the Recognition Application and the accompanying statement made clear, the Company was incorporated in the BVI; did not carry on business within England and Wales; and had no place of business or branch office within England and Wales. The order placing the company in liquidation was made by the BVI court under the British Virgin Islands Insolvency Act 2003. It is common ground that the Liquidators are not English Licensed Insolvency Practitioners and are not licensed to be liquidators in an English winding up. This is of course why the Liquidators applied to have the BVI liquidation recognised as a foreign main proceeding under Schedule 1 to the CBIR. However, such recognition does not turn a foreign liquidation into a liquidation under Parts IV and/or V of the Insolvency Act 1986.

55. By Articles 2 and 17(2) of Schedule 1 to the CBIR, a foreign main proceeding is one which is "*taking place in the State where the debtor has the centre of its main interests*".

56. By Article 20(1) and (2) of Schedule 1 to the CBIR, it is provided that:

"1. Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this article–

(a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) execution against the debtor's assets is stayed; and

(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

2. The stay and suspension referred to in paragraph 1 of this article shall be–

(a) the same in scope and effect as if the debtor...in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986; and

(b) subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case,

and the provisions of paragraph 1 of this article shall be interpreted accordingly."

57. Article 21 provides:

"1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

...

(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986(28)".

58. Article 25 provides:

"1. Subject to paragraphs 6 and 9 of this article, upon recognition of a foreign proceeding, the foreign representative has standing to make an application to the court for an order under or in connection with sections 238, 239, 242, 243, 244, 245, 339, 340, 342A, 343, and 423 of the Insolvency Act 1986(29) and sections 34, 35, 36, 36A and 61 of the Bankruptcy (Scotland) Act 1985".

59. Thus, whilst recognition allows the foreign liquidation to be treated in many respects by the Court as if the foreign company was in liquidation in England and Wales, it does not become an English liquidation. It remains expressly a "*foreign...proceeding*". A foreign liquidator who has been recognised expressly remains a "*foreign*

representative" and does not become a "*British insolvency officeholder*". As Mr Robin Dicker QC, sitting as a Deputy Judge of the High Court, emphasised in *Glasgow v ELS Law Ltd* [2017] EWHC 3004 (Ch) at [82] to [86], the effect of recognition is not to make the foreign liquidator an officer of the English court (as English liquidators are).

60. Candey's argument confuses status with relief. There is nothing in the CBIR which makes or deems the Liquidators to be the liquidators of a company which is being wound up in England and Wales under the 1986 Act. Article 21 of the CBIR simply allows a foreign representative to obtain certain forms of relief from the English court. It is "concerned with procedural matters" and the relief "is of a procedural nature" (see *Rubin v Eurofinance SA* [2013] AC 236 at [141]-[143] and *Fibria Celullose v Pan Ocean* [2014] EWHC 2124 (Ch) at [111]). The scheme of the CBIR merely defines the relief available to a foreign representative of a recognised foreign main proceeding by reference to the relief available to a "*British insolvency officeholder under the law of Great Britain*". However, that definition of the scope of available relief does not turn the foreign representative into a British insolvency officeholder or mean that he must be claiming relief in the capacity of a British insolvency officeholder.

61. Indeed, the fact that, on recognition, the foreign representative can obtain the same or similar orders from the English court as an English liquidator, does not in any way give him the status of an English liquidator. The rights afforded by recognition are not identical to the rights accorded to an English liquidator. For example, Article 22 of Schedule 1 to the CBIR contains limitations on the grant of an Order under Article 21 which do not appear in section 168 of the 1986 Act. A foreign representative does not become an officer of the English court. He does not, as a matter of ordinary language, act "*in the capacity*" of an English liquidator. He continues at all times to act in the capacity of a "*foreign representative*" whom, by virtue of the Recognition Order, Article 21 allows to obtain the same or similar relief. Section 168(3) of the 1986 Act is only available to the foreign Liquidator by reason of the Recognition Order.

62. As the Court made clear in *In re Hartmann Capital* [2015] EWHC 1514, the wording of Article 4 of the LAPSO Order is clear and is to be interpreted narrowly. Newey J (as he then was) made clear that Article 4 of the LASPO Order applied only to administrators "*appointed pursuant to the provisions of Part II of the 1986 Act*". In that case the administrators were appointed pursuant the Investment Bank Special

Administration Regulations 2011, and not Part II of the 1986 Act. In such circumstances, although the Judge could "*think of no sensible reason for denying the administrators of an investment bank the funding possibilities which are available to ordinary administrators*", he said "*I cannot however, see how I can achieve the result for which [Counsel for the joint administrators] contends consistently with the wording of Article 4...*" [8]. Mr Holland submitted that this decision indicates that there is no room for expanding the application of Article 4 of the LASPO Order by purposive interpretation. It is a narrow exception to a wide exclusion.

63. Mr Holland's primary submission was that the words were clear on their face but, if one is to take a purposive approach, looking more widely, there is nothing irrational in Parliament seeking to favour only English liquidations. It might well be said that the intention behind Article 4(c) of the LAPSO Order was to facilitate, for a short and transitional period, the recovery of assets by liquidators and trustees in British insolvency proceedings for the benefit (largely) of British creditors.

64. The ministerial statement referred to in the *Hartmann* case at [2] refers to "*insolvency proceedings*". Immediately before the passage quoted it states (in relation to the delay in the abolition of success fee recovery in Article 4(c)):

> *"This delay was to give insolvency practitioners and other interested parties time to prepare for and adapt to the changes."*

The previous ministerial statement (which is referred to in the statement of 26th February 2015) is that dated 24th May 2012. It said this:

> *"Secondly, the provisions in relation to sections 44 and 46 will not come into effect until April 2015 in respect of insolvency proceedings. Insolvency cases bring substantial revenue to the taxpayer, as well as to other creditors, and encourage good business practice which can be seen as an important part of the growth agenda with wider benefits for the economy. These features merit a delayed implementation to allow time for those involved to adjust and implement such alternative arrangements as they consider will allow these cases to continue to be pursued".*

These would appear to be entirely consistent with the ambit of the intended exception being territorial.

65. Further, it is important to note that a foreign liquidator may have a number of different options for seeking relief from the English court:

(1) He may apply under the CBIR;

(2) He may apply under section 426 of the 1986 Act;

(3) He may be entitled to bring proceedings in England under the Regulation (EU) 2015/848 on insolvency proceedings ("**Recast Insolvency Regulation**"); or

(4) He may be entitled to apply for relief at common law (see *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675).

66. In the second, third and fourth of these options, the relief available is not defined by reference to the relief "*available to a British insolvency officeholder under the law of Great Britain*". Indeed:

(1) Under section 426 of the 1986 Act the English court may choose to apply foreign insolvency law and may grant the relief available to a foreign insolvency officeholder under foreign law;

(2) Under the Recast Insolvency Regulation, the liquidator in a foreign main proceeding in a Member State of the EU is entitled to seek relief under the laws of the Member State in which the liquidation is being conducted; and

(3) At common law, the Privy Council held in *Singularis* that the available relief does not include the statutory relief "*available to a British insolvency officeholder under the law of Great Britain*". Common law assistance cannot involve such relief.

67. Therefore, according to Candey's argument about the construction of the concept of "*acting in the capacity of ... a liquidator of a company which is being wound up in England and Wales or Scotland under Parts IV or V of the 1986 Act*", Parliament decided that the exemption should apply to English liquidators and to foreign liquidators who chose to seek relief in England under the CBIR, but not to foreign liquidators who chose instead to seek relief in England under section 426 of the 1986 Act or the Recast Insolvency Regulation or at common law. There is no rational explanation for drawing any such distinction. The true distinction is between English liquidators (who fall within the exemption in Article 4 of the LASPO Order) and foreign liquidators (who do not).

(1) Candey's purposive argument also falls foul of the fact that the words "*acting in the capacity of*" are found only in paragraphs (c) and (d) of Article 4. They do not

appear in paragraphs (e) or (f) of Article 4. On Candey's case, this gives rise to a major unexplained anomaly: When a company goes into liquidation, causes of action may be vested in the company itself (e.g. claims to recover pre-liquidation debts owed to the company) or they may be new statutory claims vested in the liquidator (e.g. section 238 of the Insolvency Act 1986). Some of the claims vested in the company may be brought in the name of the liquidator under section 212 of the Insolvency Act 1986.

(2) Candey's argument seeking to bring foreign liquidations within Article 4 fastened onto the reference to "*capacity*" in paragraphs (c) and (d). However, that word does not appear in paragraphs (e) or (f) and there is no conceivable basis for contending that paragraphs (e) or (f) apply to companies which are in liquidation abroad.

(3) On Candey's approach, therefore, there is an unexplained difference in treatment between English liquidations (which will fall within Article 4 of the LAPSO Order whether the claimant is the English liquidator or the company itself) and foreign liquidations (which, it is said, will fall within Article 4 where the claimant is the foreign liquidator but cannot fall within Article 4 where the claimant is the company itself). This further undermines Candey's purposive construction and supports the Liquidators' position. The fact that paragraphs (e) and (f) cannot apply to foreign liquidations confirms that paragraphs (c) and (d) were intended to be confined to English cases as well (as the language of those provisions itself makes clear).

68. The words "*in the capacity of*" are not otiose on the Liquidators' construction of Article 4 of the LASPO Order. It draws a distinction of a liquidator acting as such as opposed to acting in a personal capacity, for example, by suing for his fees. Mr Holland placed reliance on the Court of Appeal decision of *Haq v Singh* [2001] 1 WLR 1594, where the Court was looking at "capacity" in the context of CPR 17.4, which provides:

> *"(1) This rule applies where -*
>
> *(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and*
>
> *(b) a period of limitation has expired ....*

(4) The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings were started or has since acquired."

69. At [18]-[20] of *Haq v Singh*, Arden LJ held that "*to alter the capacity*" in CPR 17.4(4) meant an alteration from a representative capacity or personal capacity to another representative capacity, or (in the case of a representative claim) to a personal capacity. On the facts of that case it did not apply because the claimant brought her claim in her personal capacity both before and after the assignment on which reliance was placed. At [20] she stated: *"[Capacity] denotes the characteristics which a person has and which give him an ability to sue or be sued on the claim or restrict that ability."* Mr Holland submitted that a similar approach should be taken in relation to Article 4 of the LASPO Order.

Discussion and conclusion

70. I have reached the conclusion that the Liquidators' Application does not amount to "proceedings" within the definition of Article 4(c) of the LASPO Order.

71. I do so for the following reasons:

(1) I accept the Liquidators' submissions that the Recognition Order obtained by the Liquidators does not turn a foreign liquidation into a liquidation under Parts IV and/or V of the Insolvency Act 1986;

(2) Although the Recognition Order confers the right to relief under Articles 20, 21 and 25 of Schedule 1 to the CBIR and allows the foreign liquidation to be treated in many respects as if the foreign company was in liquidation in England and Wales, it remains expressly a "*foreign proceeding*." A foreign liquidator does not become "*a British insolvency officeholder*." The effect of recognition is not to make the foreign liquidator an officer of the English Court [See *Glasgow v ELS Law Ltd* [2017] EWHC 3004 (Ch) at [82] to [86]];

(3) In my view there is a distinction to be drawn between the status of the Liquidators and the relief to which they are entitled. I do not accept Candey's submission that the effect of recognition under the CBIR, which confers certain powers upon the Liquidators is synonymous with saying that recognition under the CBIR allows a foreign liquidator to "*act in the capacity*" of a liquidator of a company which is being wound up in England and Wales. That confuses the exercise of powers and

the relief that is available with the status of the person who is entitled to exercise those powers and obtain the relief.

(4) The reliance on paragraph 22 of Lord Hoffmann's advice in the *Cambridge Gas* case does not, in my view, assist Candey in relation to this issue. As Mr Holland drew to my attention in oral submissions, that case has been the subject of subsequent criticism – see [18], [19] and [37] of the judgment of Lord Sumption in the *Sigularis* case, which described the *Cambridge Gas* case as a "*controversial decision*" and at paragraph 18 the Board reversed it in certain respects, stating "*The Board considers it to be clear that although statute law may influence the policy of common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law. So far as Cambridge Gas suggests otherwise, the Board is satisfied that it is wrong for the reason suggested by Lord Collins of Mapesbury. If there is a corresponding statutory power for domestic insolvencies there will usually be no objection on public policy grounds to the recognition of a similar common law power. But it cannot follow that there is such a power...*";

(5) I do not accept that there is a material distinction to be drawn between the phrases "*acts as*" as employed in section 388 of the 1986 Act and "*acts in the capacity of*" as employed in Article 4 of the LAPSO Order. As Mr Lord ultimately accepted, if the words "*acts as*" were used in Article 4, Candey would not be within the exemption. Since I see no material difference between the two phrases, the same result follows. Nor, in my view, are the words "*acts in the capacity of*" otiose, if that Article is construed as contended for by the Liquidators. I accept that there is a distinction to be drawn between Liquidators acting as such, as opposed to acting in a personal capacity as identified by Arden LJ in *Haq v Singh* [2001] 1 WLR 1594, albeit in the context of CPR 17.4(4).

(6) Thus I find that the proper construction of the words of Article 4 on its face results in the Liquidators' Application not falling within its terms. However, if it were necessary to employ a purposive construction, I would have reached the same conclusion by reference to the ministerial statements referred to in paragraph 64 above.

(7) I further accept the submission made by the Liquidators that, given the different options available to a foreign liquidator in order to seek relief from the English court, as set out at paragraph 63 above, in relation to the options there mentioned other than under the CBIR, on Candey's construction Parliament decided that the exemption should apply to English liquidators and to foreign liquidators who chose to seek relief in England under the CBIR, but not to foreign liquidators who chose instead to seek relief in England under section 426 of the 1986 Act or the Recast Insolvency Regulation or at common law. In my view there appears to be no rational explanation for drawing any such distinction.

Conclusion on the Exemption Issue

72. I therefore decide the Exemption Issue in favour of the Liquidators.

The Lien Application

73. On 29 March 2018, Candey wrote to the Liquidators' solicitors contending that it had the benefit of a common law lien to secure the payment of the Fixed Fee and that it was entitled to ask the Court to convert this lien into a charge pursuant to s.73 of the 1974 Act ("**s.73**") This was the first time that Candey had mentioned any such lien. It had not asserted this in previous correspondence, its proof of debt, or in any of the other documents which it had previously filed.

74. By the Lien Application, Candey seeks a charge under s.73(1), which provides:

> *"(1) Subject to sub-section (2), any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceedings may at any time*
>
> *(a) declare the solicitor entitled to a charge on any property recovered or preserved through his instrumentality for his taxed costs in relation to that suit, matter or proceeding; and*
>
> *(b) make such orders for the taxation of those costs and for raising money to pay or for paying them out of the property recovered or preserved as the court thinks fit; and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor".*

75. In relation to this section, the authorities make clear a number of propositions:

(1) A solicitor has three sources of security for his costs by operation of law. "*First at common law, he has a possessory or retaining lien over documents and other property in his possession, secondly, also at common law, he has the right to*

apply to the court for a direction that personal property, including money, recovered or preserved as a result of his work in the litigation should stand as security for his costs. Thirdly, under section 73 of the Solicitors Act 1974, he has a right to apply for a charging order on property recovered or preserved through his instrumentality in litigation..." per Richards J (as he then was) at [12] in *Clifford Harris v Solland (No.1)* [2004] EWHC 2488(Ch) ("*Clifford Harris no.1*)";

(2) In *Re Born* [1900] 2 Ch 433 Farwell J decided that in making a charging order then under the Attorneys and Solicitors Act 1860, he was not giving the solicitor any new right but giving the statutory charge in aid of the existing common law lien, that is "*merely enabling them more cheaply and speedily to enforce a right they already possess*". The section is therefore largely procedural (although not wholly so; for example, it has been held to extend to real property which the common law right does not) - see *Clifford Harris v Solland International* [2005] EWHC 141 (Ch) at [21(ii)] per Mr Christopher Nugee QC (as he then was), sitting as a Deputy Judge of the High Court, ("*Clifford Harris no. 2*").

(3) The so-called equitable lien over property recovered in proceedings is not a true lien, which can only exist in the strict sense where the person claiming the lien has the property which he claims to be subject to the lien in his possession. It is "*only a claim or right to ask for the intervention of the court for his protection*" (*Mercer v Graves* (1872) LR 7 QB 499, 503 per Cockburn CJ): see *James Bibby Ltd v Woods and Howard* [1949] 2 KB 449, 453f per Lord Goddard CJ. It is a "*right to claim the equitable interference of the court*" see *Re Fuld* at pages 735-6 and *Fairfold Properties v Exmouth Docks (No.2)* [1993] Ch 196. It has recently been described in the Supreme Court as "*a form of equitable charge*" (see *Gavin Edmondson v Haven Insurance* [2018] 1 WLR 2052 (at [2] to [4] and [30]-[37]) ("*Haven Insurance*")).

(4) A solicitor has no absolute right to a charging order under the section, and the court has a discretion in the matter: *Re Born* [1900] 2 Ch 433, 435. See also *Re Fuld (no. 4)* [1968] P. 727 at page 736; *Fairfold Properties Ltd v Exmouth Docks Co Ltd (no. 2)* [1993] Ch 196 at pages 202-3; *Clifford Harris no. 2* at [22]-[23] and *Gavin Edmondson v Haven Insurance* at [57].

(5) The statutory charge will be limited to costs properly incurred in the proceedings in which the property was recovered or preserved. See *Re Fuld (no. 4)* at page 739.

76. There are three objections raised by the Liquidators to Candey's claim to a lien:

(1) **Waiver** – pre-liquidation, when entering into the Deed of Charge at the time of the FFA, namely 21 October 2015, alternatively post-liquidation by failing to mention the lien when filing a proof of debt in the liquidation, and by making no mention of it thereafter prior to 29 March 2018;

(2) **Instrumentality** – if there has been no waiver, the Liquidators submit that the funds held by the Liquidators, which Candey asks the court to charge in its favour, were neither recovered nor preserved through Candey's instrumentality;

(3) **Abuse of process** – the Liquidators contend that it is an abuse of process for Candey to seek to rely on a lien at this stage in the proceedings. They submit that Candey is precluded from seeking an order under s.73 or that the Court should exercise its discretion thereunder by declining to grant a charge or by ensuring that any charge does not confer on Candey any rights which exceed those under the Deed of Charge.

I shall consider each of these in turn.

Waiver

77. I begin by considering the authorities.

(1) Both the so-called equitable lien and the right under s.73 can be released or waived if a solicitor takes alternative security for his costs which is inconsistent with his common law and statutory rights and does not preserve those rights. See *Re Morris* [1908] 1 KB 473 (at pages 475, 477, 479, 480-1); *Clifford Harris no.1* (at [15]-[17]) and *Clifford Harris no.2* (at [26]-[29], [35], [38], [43] and [49]-[50]);

(2) The authorities describe a number of circumstances in which a solicitor will be treated as having waived his rights:

In Re Morris Buckley LJ stated at page 477:

"Where a solicitor entitled to a lien takes from his client security upon property already included in the lien, or where such an one takes a security which gives time (say for a period of three years), or which gives a right to interest which would not otherwise be payable, it may well be that the lien is gone. In such case there is a new arrangement between creditor and debtor which...is incompatible with the retention of the lien. The existence of the security is inconsistent with the continued existence of the lien."

See also *Curry v Rea* [1937] NI 1 where a charge over the same property was held to be inconsistent with the lien so as to give rise to waiver of the lien;

(3) In *Clifford Harris no.1*, David Richards J stated at [17]:

"There are two key questions, as reflected in the passage cited above from Cordery: *is the security inconsistent with the solicitor's rights at common law and under section 73, and, because of the fiduciary relationship between them, did the solicitor inform the client that he was reserving those legal rights. If it is inconsistent, it will be taken to waive the solicitor's other rights, unless he has reserved them."*

And at [23]:

"There is clear authority that a charge on the same asset as that covered by a lien or right to apply for a charge will displace the lien or right. The decision of the Northern Ireland Court of Appeal in Curry v Rea [1937] NILR 1 is authority in respect of a possessory lien, and puts it on the basis of either waiver or merger. Waiver of the right to apply for a charge is the effect of Groom v Cheesewright. There is an obvious inconsistency between an express charge, and a lien or right to apply to a court for a charge, on the same asset.";

(4) If, on taking security, the solicitor is to preserve his common law and statutory rights then he has to reserve them: see *Re Morris* [1908] 1 KB 473, a majority decision of the Court of Appeal (at pages 475, 479, 481) *Re Taylor, Stileman & Underwood* [1891] 1 Ch 590 ("*Re Taylor*") (at pages 597 and 601), *Clifford Harris no.1* (at [17] and [28]). There is a controversy as to whether the reservation can be implied as well as express to which I will turn later;

(5) There is a helpful analysis of the earlier authorities in *Clifford Harris no.2* by Mr Christopher Nugee QC, from which the following principles can be ascertained:

(a) The doctrine of waiver applies equally to rights under s.73 as much as it does the common law lien [24]-[25];

(b) There was previously some controversy as to whether the absence of a reservation was sufficient in itself to amount to a waiver, or whether there was a further requirement of inconsistency. The majority of the Court of Appeal in *Re Morris* (Buckley LJ, with whom Lord Alverstone CJ agreed), held that an express or implied reservation was necessary, where the solicitor took security which was inconsistent with his general lien. Further in *Re Taylor*, the Court of Appeal unanimously held that a firm of solicitors had lost their retaining lien over their client's papers by taking a promissory note from the client and her husband with interest at 5%, and a charge over a client's life policy. The way in which each member of the Court of Appeal expressed themselves, did not suggest that the lien will be destroyed in every case where the solicitor takes any substantial security [33]. The fact is that each member of that Court referred to the decision of Sir John Leach MR in *Roberts v Jeffreys* (1830) 8 LJ (OS) (Ch) 137, where a solicitor lost his lien by the taking of a promissory note. In that case the court regarded as crucial the fact that the promissory note would entitle the solicitor to claim interest which he would not otherwise have been able to claim [34]-[35];

(c) Following the Court of Appeal decision in *re Taylor* and the interpretation placed upon that decision by the majority in *Re Morris*, Mr Nugee QC concluded that a solicitor will only be held to have waived his lien if he takes a security which is inconsistent with the lien [38];

(d) What is meant by 'inconsistency' is that there is some feature of the security which is incompatible with the lien (such as time to pay and retaining the client's papers in the meantime) such that the two rights cannot sensibly have been intended to subsist in parallel [43];

(e) In the case before him, neither party had in mind the s.73 right at the time the charge was given, and neither party positively intended to preserve it [43 iv)]

> *"I accept that if both solicitor and client positively intend that the solicitor's existing rights will be unaffected by the taking of the security, that will be effective to preserve them. But that will not usually be the case unless the solicitor explains the position to the client. It is not in my judgment sufficient to defeat a waiver that the solicitor had no positive intention to waive: if there is an inconsistency, the solicitor will be regarded as having waived his rights unless he expressly reserves them."* [40] [Emphasis added].

It is to be noted that at [40] the Deputy Judge there limited reservation to express reservation, whereas in *Re Morris*, at p477 Buckley LJ (with whom Lord Alverstone CJ agreed) refers to a solicitor who *"expressly or, having regard to all the facts, impliedly reserves his lien"*, and at page 479 cited with approval Lindley LJ's statement in *Re Taylor* that "*whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of* ";

(f) Mr Nugee QC's analysis in *Clifford Harris no. 2* has been approved by the Court of Appeal in *Metall Market OOO v Vitorio Shipping Co Ltd* [2013] EWCA Civ 650 at [45]:

> *"The nub of [Mr Nugee QC's] analysis is in paras 38-40 where he explains, on the basis of In re Taylor [1891] 1 Ch 590 but also subsequent authorities, that even a solicitor, with the duty he owes to explain matters to his client, will not be taken to have waived his lien unless he has done something inconsistent with it; that an inconsistency will, however, be more readily found in the case of a solicitor because of that duty owed to his client; that the test of waiver is objective; and that such objectivity allows for the position where both parties positively intend that existing rights will be unaffected by the taking of security or where it is made plain that the rights of lien are reserved."*

(g) The inconsistency in *Clifford Harris no.2* arose from the fact that the charge included provision for interest at 8%, and that it was well established that a security which makes provision for interest that would not otherwise be due is an example of inconsistency ([44]). On that basis, the learned Deputy Judge held at [51] that the s.73 right was waived;

(h) Finally, at [62], the Deputy Judge referred to the possibility of reviver in the following terms:

> *"Before leaving reviver, however, it seems to me to be potentially relevant in another way. On the analysis I have adopted, the principle is that a solicitor is effectively presumed to intend to waive his rights whenever he takes that a security that is in any way inconsistent with them. However, since the ground for assuming waiver is the taking of inconsistent security, I do not see why the solicitor should be presumed to have intended the wavier to continue to have effect if the security he thought he was taking turns out not to have been valid and binding. In other words if the client is able to, and does, have the security avoided, then the parties are in my judgment entitled to be put back into the same position as that in which they would have been had it never been granted..."*
> [Emphasis added]

The Liquidators' submissions on waiver

78. The Court cannot grant a new charge to a creditor after the commencement of the Company's liquidation, since to do so would to be interfere with the statutory scheme for distribution: see, for example, *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192, in which the House of Lords held that the Court should not make a charging order over the property of a company in liquidation, because such an order would be inconsistent with the statutory scheme for distribution.

79. However, the right under s.73 is different, because, under the section, the Court does not grant a new security interest but merely makes a charging order to give effect to the solicitor's pre-liquidation lien. The authorities make clear that the Court's ability to make a charge under the 1974 Act after the commencement of the client's liquidation depends on the fact that the charge is merely replacing the solicitor's existing security in the form of the lien. See *Re Born* (see paragraph 75(2) above) and *Addleshaw Goddard LLP v Wood* 2015 WL 4578583 at [105] per Master Campbell.

80. Thus, if the solicitor did not have a lien at the commencement of the client's liquidation, the Court will not improve the solicitor's position by granting a charge to him after the commencement of the client's liquidation. However, if the solicitor had a lien at the commencement of the client's liquidation, the Court will be able to grant a charge in his favour under s.73 consistently with the scheme of *pari passu* distribution

in the liquidation, because the charge under s.73 will merely give effect to the solicitor's pre-liquidation security interest.

81. It is the Liquidators' principal contention that, by taking a charge under the Deed of Charge without expressly reserving its lien, Candey waived its lien. It did not, therefore have a lien at the commencement of the Company's liquidation, and the Court cannot now improve Candey's position by granting a charge under s.73.

82. They rely upon *Clifford Harris No 1*, where Richards J stated at [23]:

> "*There is clear authority that a charge on the same asset as that covered by a lien or right to apply for a charge will displace the lien or right. The decision of the Northern Ireland Court of Appeal in Curry v Rea [1937] NILR 1 is authority in respect of a possessory lien, and puts it on the basis of either waiver or merger. Waiver of the right to apply for a charge is the effect of Groom v Cheesewright.* ***There is an obvious inconsistency between an express charge, and a lien or right to apply to a court for a charge, on the same asset***" (Emphasis added).

83. The Liquidators submit that there are at least four relevant inconsistencies here:

(1) First, the lien and the Deed of Charge covered the same property. As set out above, the authorities make clear that "*security taken on property already included in the lien*" is a paradigm example of inconsistent security.

(2) Secondly, according to Candey, the lien and the Deed of Charge have a different priority ranking. As explained above, the Deed of Charge has been held to rank at floating charge level, after liquidation expenses. Candey seeks to by-pass this finding by now contending for a lien which (it says) will rank ahead of liquidation expenses. If this is right, the lien will necessarily be inconsistent with the Deed of Charge, because Candey's claim will rank simultaneously at two different levels in the priority waterfall. See *Groom v Cheesewright* [1895] 1 Ch 730 at page 733.

(3) Thirdly, Candey has consistently contended that the Deed of Charge conferred a right to appoint a receiver (see its communications dated 13 February 2016, 9 May 2016, 2 June 2016, and 6 September 2016). The lien would not have conferred any such right.

(4) Fourthly, the package of rights conferred by the Fixed Fee agreement and the Deed of Charge included a right to interest at 8% per annum (see clause 4 of the FFA). No such right was available under Candey's standard terms and conditions to which the lien would have attached. As set out above, the grant of a more favourable rate of interest under a new security is a paradigm case of inconsistency resulting in waiver of the lien: see *Clifford Harris no.2* at [44].

84. Further, Candey did not purport to reserve its lien. Its contentions to the contrary are misconceived and wrong. In summary:

(1) First, Candey relies on paragraph 3 of its Terms and Conditions. However, that is expressly limited to the retaining lien on client's papers and goes no wider.

(2) Secondly, Candey relies on clause 7 of the FFA and the third paragraph of the Deed of Charge to say that it would be entitled to any recoveries. However, those provisions are part of the package of rights granted by the FFA and the Deed of Charge and seek to describe the effect of those documents. They are not express reservations of the solicitor's lien. Clause 7 of the FFA does not reflect the equitable lien or statutory right. It refers to *"any monies recovered by PHRL from the date of this agreement (whether for costs or otherwise)"* which wording is apt to cover a much wider range of sums than merely "any property recovered or preserved" in the London Litigation. As clause 2 makes clear, the FFA covered more than just the London Litigation.

(3) The fact that the lien did not survive is made clear by the fourth paragraph of the Deed of Charge which provides: "*Save for the Deed of Charge dated 25 March 2015 (and related security) in favour of Campion Maverick, PHRL warrants and agrees that it has not created* ***and will not*** *create or* ***permit to subsist*** *any other security or charge over the rights and monies protected by this Deed*" (Emphasis added).

85. There was no reservation of the clear and unequivocal type which the authorities have required in order for the lien to be preserved. The Liquidators submit it is clear that the agreement embodied in the FFA and the Deed of Charge (which must of course be read together and with the attached "Terms & Conditions") was intended to demarcate thoroughly all the rights granted by the Company to Candey and there is simply no room to imply that any additional common law or statutory rights were to be preserved.

86. It follows that Candey waived its lien prior to the Company's liquidation.

Post-liquidation waiver of the lien

87. If Candey did not waive its lien when it entered into the Deed of Charge, the Liquidators submit that it is clear that Candey has since waived it by filing a proof of debt in the liquidation which did not mention the lien (and indeed by making no mention of it prior to 29 March 2018). In his oral submissions, Mr Holland relied upon the case of *Re Safety Explosives Ltd* [1904] 1 Ch 226. There solicitors, who had a lien for costs upon title deeds, of a company, stated in the proof that they held no security for the debt, and they voted at a meeting of creditors in respect of the whole debt (without making any deduction for the value of the security). The result was that they were deemed to have surrendered the security. The Court of Appeal refused leave to amend or withdraw the proof because (a) they had not satisfied the burden of showing the proof was sworn by inadvertence and (b) importantly they had released the title deeds and any relief granted would be illusory. Reliance was also placed by him on *Hammonds v Thomas Muckle & Sons* [2006] BPIR 704 at [20]-[21]. In that case, however, Hammonds did no more than commence winding-up proceedings and, as an administration intervened, the stage of proof never arrived.

88. Section 214 of the BVI Insolvency Act 2003 provides:

> *"(1) Subject to subsection (2), if a secured creditor omits to disclose his security interest when submitting a claim in the liquidation of a company, he shall surrender his security interest for the general benefit of the creditors.*
>
> *(2) The Court may, on application by a secured creditor who is required to surrender his security interest under subsection (1), if it is satisfied that the omission was inadvertent or the result of an honest mistake by order direct*
>
> *(a) that he is not required to surrender his security interest; and*
>
> *(b) that he values his security interest and amends his claim accordingly".*

(The equivalent provision in England is Rule 14.16 of the Insolvency Rules 2016.)

89. In its proof of debt dated 19 February 2016 filed in the Company's liquidation in the BVI, Candey mentioned its security under the Deed of Charge. It did not, however, mention any lien or right at common law or under statute. Therefore, if it had a lien prior to that point in time, by lodging a proof of debt without mentioning the lien, Candey surrendered the lien [See *LCP Retail Ltd v Segal* [2006] EWHC 2087 at [22]-[25]].

90. Further, Candey has not applied to the BVI court for relief under section 214(2).

91. Candey appears to contend that it could not have surrendered its lien when it lodged its proof of debt, because it did not have a lien at that time. Candey seems to say that it did not obtain its lien until a later date, when the English court made an Order for the payment of the Settlement Proceeds to the Liquidators (see the Order of Asplin J dated 7 March 2016).

92. Candey appears to rely on the fact that the Court's jurisdiction under s.73 is not exercisable until there is a "*fund in sight*": see *Re Fuld* (at page 736). However, this confuses the existence of the lien with the Court's statutory jurisdiction to grant a charge to enforce it.

93. In any event, Candey's contention that the lien did not arise until the English court made an order for the payment of the Settlement Proceeds to the Liquidators is self-defeating. If correct, it would mean that Candey did not have a lien at the commencement of the Company's winding-up, when its rights in the liquidation were fixed. As the authorities set out above make clear, the Court will not exercise the jurisdiction under s.73 to turn an unsecured creditor into a secured creditor after the commencement of the client's winding-up. To the contrary, it will grant a statutory charging order to a solicitor only if and to the extent that the solicitor was secured by its lien before the commencement of the client's winding-up.

94. In the present case, the true position is that Candey lodged a proof of debt in the liquidation without referring to any lien. The Liquidators submit that Candey thereby waived any lien that it might have otherwise had. By waiving its lien, Candey lost any right to a charge under s.73.

Candey's submissions on waiver

95. In relation to the nature of a solicitor's equitable lien, Candey relies upon the analysis of Lord Briggs JSC in the *Haven Insurance* case at [1]-[4], [37] and the *Addleshaw Goddard* case cited above where Master Campbell said:

> *"83. The legal principles upon which AG relies to advance its claim for a charge over the funds held by the Administrators are these:-*
>
> *'The lien of a solicitor is grounded on the principle that it is not just that the client should get the benefit of solicitor's labour without paying for it' (Cotton LJ at 491 in Guy v Churchill)*

'It is right that they who get the benefit of the recovery of money should bear the expense of recovering it'. (Lindley LJ at 492 in Guy v Churchill).

84. The rationale behind the principle goes back at least to Haymes v Cooper which was cited in Guy v Churchill. It is predicated on the basis that the solicitor has a right that no one else enjoys, namely to ask the court to interfere equitably in order to protect the rights of an unpaid solicitor by the grant of a charge over any property recovered or preserved through his instrumentality. It follows that in a simple case, where the solicitor takes proceedings to recover a debt for his client as a result of which a sum is paid to him and not to his client, a common law lien arises, and the solicitor has an entitlement to apply to the court for a s.73 charge over the fund until he is paid. The solicitor's right is one that is unique and which is recognised by the court and cannot be exercised by anyone who is not a solicitor.

96. In the two authorities referred to by Master Campbell above, Candey rely upon the following passages which show the justice and fairness in allowing the solicitor's lien:

(1) In *Haymes v Cooper* [1865] 33 BEAV. 431, Sir John Romilly MR stated: "*I have always understood the law to be, that a solicitor had an inherent equity to have his costs paid out of any fund recovered by his exertions; and that the court would not part with it until these costs had been paid, except by the consent of the solicitor.... My opinion is that where a man knows that there is a fund in court, he knows also that it is subject to a solicitors' lien for his costs of recovering it and that he is entitled to be paid in the first instance...*".

(2) In *Guy v Churchill* [1887] 35 D CH 489, Cotton LJ stated "*The lien of a solicitor is grounded on the principle that it is not just that the client should get the benefit of the solicitor's labour without paying for it.*"

(Of similar effect is the statement by Kekewich J in *Groom v Cheesewright* [1895] 1 Ch 730 at 732.)

97. The repeated references to the justice and fairness underlying the solicitor's lien is relevant to s.73 in that although the section gives a discretion to courts, it should ordinarily be exercised in favour of the solicitor: see *Clifford Harris No.2* per Mr Nugee QC who stated at [22] that "*there is a constant repetition in the authorities of the justice of a solicitor being given such an order*". The very point of the equitable lien, and of s.73, is to avoid the solicitor merely being an unsecured creditor, and instead has the deliberate effect of ranking him first in the insolvency (see *Re Meter Cabs Ltd* [1911] 2 Ch 557 per Swinfen Eady J at pages 559, 561). It is akin to salvage (see

Scholey v Peck (1893) 1 Ch 709 at page and *Greer v Young* (1883) 24 Ch D 545 per Lord Brett MR at page 552 and Bowen LJ at page 556). These points are to be borne in mind when considering waiver.

98. Candey contends that there was no waiver when they entered into the Deed of Charge, because of an express, alternatively an implied reservation. On a correct reading of the relevant principles, there is no reason why an implied reservation is not sufficient to avoid a waiver. As I observed in paragraph 76(5)(e) above, Buckley LJ in *Re Morris* at page 477 refers to a solicitor who *"expressly or, having regard to all the facts, impliedly reserves his lien"*, and at page 479 cited with approval Lindley LJ's statement in *Re Taylor* that "*whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case*".

99. It submits there are two bases upon which Candey can be said to have reserved its lien. First, the FFA was expressly made subject to Candey's terms of business, which were attached, and clause 3 of those terms, which states "*We are entitled to retain all papers until our fees are paid in full.*" and expressly refers to the solicitor's lien. Second, clause 7 of the FFA itself reserves Candey's right to be paid from monies recovered by PHRL at its discretion and thereby explains in plain language the effect of the reservation to the client. Clause 7 reads: "*Any monies recovered by PHRL from the date of this agreement (whether costs or otherwise) will be applied by CANDEY towards the Outstanding Costs and/or the Fixed Fee and/or disbursements at CANDEY's discretion.*"

100. In Candey's submission, this provides a basis for saying that it *expressly* reserved its lien when the Deed of Charge was concluded. Mr Lord refers to Candey 6, where Mr Candey states at paragraph 8: "*In response to Mr Crumpler's position that Candey waived its rights to its solicitor's lien by entering into a legal charge, I explained to PHRL's director that Candey would be paid first from the fruits of litigation and I believed that she understood this.*" In any event, it certainly provides a basis for saying that Candey *impliedly* reserved its lien. Clause 7 of the FFA clearly explains the effect of this reservation of rights to the clients, namely that Candey would be paid first from any recovery.

101. In oral argument Mr Lord made two further points:

(1) At the time the FFA and the Deed of Charge was made, there was a deed of charge (and related security), creating a prior fixed charge in favour of Campion Maverick. Although I was informed that the Campion Maverick charge was subsequently not recognised by the Liquidators, it was regarded as valid at the time the FFA and the Deed of Charge was entered into. The Campion Maverick charge is expressly referred to in clause 4 of the Deed of Charge and the effect of this is that at that time Candey believed that it had a fixed charge, but not a first fixed charge. This is to be compared with the solicitor's lien which placed Candey in a better position because in Mr Lord's words "*the effect of section 73 is that you go in right at the top, because it is akin to salvage*"[3]

(2) Mr Lord also relies on clause 6 of the Deed which provides:

> *"In the event that any of PHRL's rights title or interest in or to any monies or benefits covered by this Deed are assigned (which assignment shall require CANDEY's prior written consent) or awarded to a third party by Court order, or such monies are otherwise paid (contrary to the irrevocable instructions above) to a third party, that third party shall receive such monies subject to this Deed* ***and subject to the discharge of all liabilities to Candey pursuant to the Fixed Fee Agreement.****"* [Emphasis added].

He submits the concluding words beginning with the word "and" means the reference to the fixed fee agreement must by reference and inference include the preservation of the lien.

102. Secondly, as is clear from Mr Christopher Nugee QC's analysis in *Clifford Harris no. 2*, and from the cases referred to therein, the question of inconsistency is not to be approached by seeing whether the two security rights cover the same ground, but rather whether "*there is some feature of the security which is incompatible with the lien such that the two rights cannot sensibly have been intended to subsist in parallel*" [43].

103. The intention in Candey obtaining the charge under the Deed of Charge, which is to be determined on an *objective* basis, as confirmed by the Court of Appeal in *Metall Market* at [45], was clearly to obtain the best security possible: a *fixed* charge over *all* assets and undertakings of PHRL in *all jurisdictions worldwide*, a *fixed* charge over any damages, costs, monies or other sums and/or benefits flowing from *all* claims together

[3] Day 1/133 lines 13-14

with all related rights title and interest, and a floating charge over any assets that were not at that time capable of being charged by way of a fixed charge. This was not a case where Candey was only acting in one set of proceedings in England; prudence required that Candey also secured costs incurred overseas, and there is no reason to suppose that this charge could not subsist in parallel with the lien.

104. This case is unlike *Clifford Harris no.2* in that the Deed of Charge does not purport to grant Candey (for example) a right to interest that would not otherwise be payable, nor is there any other inconsistency between the Deed and the lien. They subsist together. The fact that there is provision made in clause 4 of the FFA for interest of 8% per annum to accrue from judgment or settlement does not create an inconsistency, because that is part of the retainer, rather than being contained in the Deed of Charge. Mr Lord relies on the passage in *Haven Insurance* case at [66], where he stated:

> *".....the remedy [the solicitor's equitable lien] exists to provide security for the solicitor's charges under his retainer, limited to the amount of the debt created by the settlement agreement."*

On this basis, he submits, the s.73 lien included the 8% entitlement within the FFA, the original retainer and it is not inconsistent with the Deed of Charge, unlike the position in *Clifford Harris no.2*.

105. It is unreal to suggest that Candey, by seeking, with its client's agreement and ultimately for its client's benefit (enabling it to continue to pursue the litigation), to obtain the best security possible, should in fact undermine its entitlement to a s.73 charge and therefore find itself worse off.

106. Thirdly, there is no presumed intention to waive where the Deed of Charge was not effective to create a fixed charge. The Liquidators sought in the Liquidators' Application to challenge the Deed of Charge as being invalid. Since the presumption about an intention to waive a lien is based upon *inconsistency*, Candey could never be taken to have intended to waive its lien in circumstances where its additional security did not give it a fixed charge over PHRL's property. In the Liquidators' Application, it was held that the Deed of Charge was *ineffective* to create a fixed charge; it only gave Candey a floating charge. Accordingly, *even if* (i) Candey did not reserve its lien and (ii) the Deed of Charge cannot subsist in parallel with the lien, then at best for the Liquidators, Candey's intention was only to waive its lien *provided that* the Deed of

Charge was effective to create a fixed charge. The effect of the finding in the Liquidator's Application is that *if* the lien was waived, it revived after the finding that the Deed of Charge only created a floating charge.

107. This argument is exactly what was contemplated by the Deputy Judge in *Clifford Harris no. 2* at [62] as set out at paragraph 77(5)(h) above: a solicitor should not be presumed to have intended a waiver to continue to have effect if the security he thought he was taking turns out not to have been valid and binding; and if the security is avoided, the parties are entitled to be put back into the same position as that in which they would have been had it never been granted, which in practical terms means that the solicitor's s.73 rights would exist as if they had never been waived.

108. Further at [23], in *Clifford Harris no. 2*, the Deputy Judge stated:

> *"If the taking of the charge had the effect of waiving CH's s 73 right, the setting aside of the charge would cause the s 73 right to spring up again or revive. Indeed this would I think be a paradigm case of "reviver", a point I return to below. It seems to me therefore that it is unlikely that CH could find themselves in a position in which they lose the benefit of both the charge and the s 73 right".*

109. This has obvious parallels with this case. Candey previously thought it had a fixed charge under the Deed of Charge. This was subsequently found to be incorrect – the Deed of Charge was ineffective to create a fixed charge. It cannot be correct, or in accordance with justice, that Candey has waived its fixed charge under the lien on the basis of its having accepted a fixed charge under the Deed of Charge, only subsequently to learn that it never had that charge in the first place, with the result that it cannot rely on either.

No post-liquidation waiver

110. Insofar as it is argued that Candey waived its lien by failing to reserve it or mention it in its proof of debt, they make three points.

111. First, there is no basis for asserting that if a party does not expressly, in his proof of debt, identify the juridical basis of his entitlement, he then waives that entitlement. Candey was not required to refer to an equitable lien or the possibility of an application for a section 73 charge in the proof of debt. To the contrary, as stated by Sir John Romilly MR in *Haymes v Cooper* [1865] 33 BEAV. 43, and subsequently by the Court of Appeal in *Faithfull v Ewen* (1878) 7 Ch D 495, all persons aware of litigation are to

be treated as being on notice of a solicitor's right to payment out of the proceeds of that litigation. The solicitor is not required to spell this out.

112. Secondly, the proof of debt was filed approximately two weeks prior to the settlement. The notion that a solicitor must assert rights over the proceeds of a settlement that has *not yet been reached*, failing which he is deemed to waive any rights he may have over those hypothetical proceeds, is unrealistic in the extreme and again without any legal foundation.

113. Thirdly, and returning to the principles relating to waiver, and the presumed intentions of the parties, the simple point is that the principles discussed above apply to the *taking of additional security*; they cannot simply be transposed onto a different factual situation i.e. where a solicitor submits a proof of debt to its client's liquidators. The difference between the two situations is clear. In the case of taking additional security, the presumption that a solicitor has waived his lien by failing to mention it is based upon a positive duty owed to his client to explain. In the case of submitting a proof of debt to a company's liquidators, there is no such positive duty on the solicitor to inform the liquidator as to what other security rights might exist against the Company (and in this regard it is notable that the Liquidators' case is that they did not rely on Candey at all after their appointment[4]).

114. Insofar as the Liquidators seek to reply upon the case of Re *Safety Explosives Ltd* [1904] 1 Ch 226, it is of no assistance to them in this context: it is simply not authority for the proposition that a solicitor must be taken to waive his lien by failing to mention it in a proof of debt. *Re Safety Explosives* was a case about whether solicitors, who had submitted a proof of debt, stating that they held no security for the debt, failed to mention their solicitor's possessory lien, which was confined to their right to retain papers within their control, could obtain *leave to amend or withdraw their proof of debt on the basis of inadvertence*. The Court declined to grant leave to amend or withdraw the proof of debt because (i) the solicitor did not satisfy the onus of showing that the omission was caused by inadvertence (page 233) and (ii) the liquidator had acted in a way consistent with the facts as mentioned in the proof (page 236), and it was within the Court's power not to grant leave because *"it is impossible to undo what has been done"* (page 238): possession of the papers having physically been lost.

[4] Crumpler 5/§140

115. There has been no waiver of the lien, either by entering into the Deed of Charge prior to the liquidation or post-liquidation and the Liquidators contention to the contrary should be dismissed.

Discussion on pre-liquidation waiver

116. I turn first to the question of inconsistency:

(1) In relation to the question of whether there is an inconsistency between the security obtained and the solicitor's rights at common law and s 73 of the Act, in my judgment, one has to look at the FFA, the attached Terms and Conditions and Deed of Charge as part of the same transaction. I accept the Liquidators' submissions in this regard. That appears to be accepted by Candey, because it relies upon clause 7 of the FFA and clause 3 of the Terms and Conditions, which were incorporated into the FFA, save insofar as they were not inconsistent, in order to defeat the Liquidators' assertion of waiver. Indeed it was accepted by Mr Lord that one had to look at the FFA, the Deed of Charge and the Terms and Conditions as "one document" although he then sought to draw a distinction when one was considering the question of inconsistency.[5]

(2) Applying the test for inconsistency laid down by the Deputy Judge in *Clifford Harris no.2*, at [43], which Candey accepts is the correct test, namely "*is there some feature of the security which is incompatible with the lien such that the two rights cannot sensibly have been intended to subsist in parallel?*", under the terms of clause 4 of the FFA, it is clear that there is an entitlement to an interest rate in excess of what would otherwise be the case under Candey's Terms and Conditions. The Liquidators point to that as a clear inconsistency, as was found to be the case in *Clifford Harris no.2*. In the course of his oral submissions, Mr Lord argued because the increased rate on interest was contained in the retainer, namely the combination of the FFA, and the Terms and Conditions (insofar as the latter was not inconsistent with the former), as opposed to the Deed of Charge, that was a material difference.[6] At first I was of the view that there was no distinction to be drawn, but on analysis it seems to me that Mr Lord's submission is correct, and reflects Lord Briggs' judgment at [66] of *Haven*, where he stated "*the remedy exists to provide security for the solicitor's*

[5] Day 3/314 lines 12-18
[6] Day 1/112 line 24-114 line

charges under his retainer". One can test the matter in this way: assume there was no Deed of Charge; the lien would apply to the retainer, which would include the interest rate under clause 4 of the FFA. There is therefore no inconsistency in that regard with the Deed of Charge;

(3) Looking at the other matters relied upon by the Liquidators, first, they rely upon the fact the security was taken on property already included in the lien and that is a paradigm example of inconsistent security. Applying the dictum of David Richards J at [23] in *Clifford Harris no. 1*, referred to at paragraph 82 above, in my view this point is well made, when taken with the further point on which they rely, namely that according to Candey, the lien and the Deed of Charge have a different priority ranking. As explained above, the Deed of Charge has been held to rank at floating charge level, after liquidation expenses. Candey seeks to by-pass this finding by now contending for a lien which will rank ahead of liquidation expenses. If this is right, the lien will necessarily be inconsistent with the Deed of Charge, because Candey's claim will rank simultaneously at two different levels in the priority waterfall. See *Groom v Cheesewright* [1895] 1 Ch 730 at page 733.

(4) Finally the Liquidators take the point that Candey's frequent assertion in correspondence, referred to in paragraph 83(3) above that the Deed of Charge conferred a right to appoint a receiver is a benefit to which Candey would not have been entitled under a solicitor's lien, is another material inconsistency. It is important to remember, however, that this assertion was made before the Order of 23 June 2017, holding that the Deed of Charge created a fixed rather than a floating charge. In those circumstances I do not regard this as being of much assistance to the Liquidators in this regard.

(5) By reason of my findings at paragraph 116(3) above, however, I have reached the conclusion that there was an inconsistency between the Deed of Charge and the solicitor's lien.

117. That takes one to the next question of reservation of rights:

(1) I accept Candey's submission that the requisite reservation of a solicitor's lien can be either express or implied, and to the extent that the Deputy Judge in *Clifford Harris no.2* limited what was sufficient to defeat waiver to express

reservation, that failed to take proper account of the majority of the Court of Appeal in *Re Morris*, which approved the statement by Lindley LJ in *Re Taylor* referred to in paragraph 98 above. In my judgment, however there was neither here;

(2) I further accept that Candey's submission that its intention in obtaining the charge under the Deed of Charge, is to be determined on an objective basis. I therefore turn to the provisions of the FFA, the Terms and Conditions and the Deed of Charge on which Candey relies.

(3) The last sentence of clause 3 of the Terms & Conditions refers only to a retaining lien on client's papers and I accept the Liquidators' submission that this takes matters no further. Further, I do not accept Candey's submission that, properly construed, clause 7 of the Deed of Charge amounted to an express or implied reservation of the solicitor's lien. It does not reflect or intend to refer to the equitable lien or statutory right. It refers to *"any monies recovered by PHRL from the date of this agreement (whether for costs or otherwise)"* which wording is apt to cover a much wider range of sums than merely "any property recovered or preserved" in the London Litigation. As clause 2 makes clear, the FFA covered more than just the London Litigation. Nor do I regard Mr Candeys' statement, referred to at paragraph 100 above, as amounting to a reservation of the lien. I therefore accept the Liquidators' submissions in this regard.

(4) In my judgment paragraph 4 of the Deed of Charge does not assist either Candey or the Liquidators. The fact that Candey appreciated at the time that they were not getting a first fixed charge, does not in itself amount to an implied reservation of their lien, and the wording of paragraph 4 of the Deed of Charge, which states:

> *"...PHRL warrants and agrees that it has not created* ***and will not*** *create or* ***permit to subsist*** *any other security or charge over the rights and monies protected by this Deed"*

does not seem to me to warrant that Candey have no other security or preclude them from reserving their lien. It relates to actions on its part, not Candey's. It could not unilaterally remove Candey's solicitors' lien, had it been expressly or implicitly reserved.

(5) In relation to the point made by Mr Lord on the proper construction of the final words of clause 6 of the Deed of Charge, namely

> *"that third party shall receive such monies subject to this Deed* ***and subject to the discharge of all liabilities to Candey pursuant to the Fixed Fee Agreement****." [Emphasis added],*

I do not accept Candey's submission that the final words of the clause following the word *"and"*, must by reference and inference include the preservation of the lien. They are confined to the liabilities owed to Candey under the FFA, as the words state on their face.

118. In relation to the question of reviver, unlike the illustration provided in [54] of *Clifford Harris no. 2*, the Deed of Charge has not been avoided, it remains in place but as a floating, not a fixed, charge. In such circumstances, I cannot see how it can be said that the fact it is of lesser effect than Candey would have wished is sufficient to revive a lien, otherwise waived. The Deed of Charge is still valid but ranking at a floating charge level only. They still have a security on which they can rely, albeit one which is not effective as a lien which will rank ahead of liquidation expenses, which as stated above creates an inconsistency. As the Liquidators submit, correctly in my view, that this creates a problem because Candey's claim will rank simultaneously at two different levels in the priority waterfall: see *Groom v Cheesewright* at page 733.

Conclusion on pre-liquidation waiver

119. I have therefore reached the conclusion that when entering into the Deed of Charge at the time of the FFA on 21 October 2015, without any express or implied reservation, Candey has waived its solicitor's lien and thereby any rights to which it may have been entitled under s.73(1) of the 1974 Act. It did not, therefore, have a lien at the commencement of the liquidation.

120. My finding in relation to pre-liquidation waiver is sufficient to dispose of the Lien Application, but in case this goes further I will address the arguments raised by the parties in relation to post-liquidation waiver, instrumentality and abuse of process, albeit in rather less detail.

Post-liquidation waiver

121. In my judgment, had there been no waiver of the lien and s.73 rights as result of entering into the Deed, there was no waiver by Candey lodging its proof of debt

without expressly referring to the lien. I accept Candey's submission that, in normal circumstances, there would be no obligation to refer to the lien in a proof of debt. As stated by Sir John Romilly MR in *Haymes v Cooper* [1865] 33 BEAV. 43, and subsequently by the Court of Appeal in *Faithfull v Ewen* (1878) 7 Ch D 495, all persons aware of litigation are to be treated as being on notice of a solicitor's right to payment out of the proceeds of that litigation. The solicitor is not required to spell this out.

122. The position is no different were there to be a valid, co-existing additional security, which had not been waived at the date of the liquidation. Once again, I accept Candey's submission that there is a distinction to be drawn between a waiver based upon a solicitor's obligation to explain the position to a client at the time of taking additional security, and the obligation towards the Liquidator when filing a proof of debt in relation to a solicitor's lien. The facts here are very different to those in *Re Safety Explosives.*

123. I do not, however, accept Candey's submission that the fact that the settlement had not been reached could be relied upon as a reason for not referring to the lien, if there was otherwise an obligation so to do.

Instrumentality

124. This issue arises because section 73 of the 1974 Act applies only to monies recovered or preserved through the solicitor's instrumentality. In the *Haven Insurance* case Lord Briggs said that the following question had to be asked:

> *"did those settlement debts owe their creation, to a significant extent, to [the solicitors] services provided to the claimants under the [retainers]?"*

125. The funds which Candey asks the Court to charge consist of the Settlement Proceeds and the SCB Monies.

126. The Liquidators contend that the assets over which Candey says it has a charge were not recovered through Candey's instrumentality; rather the assets were obtained as a result of the Liquidators' efforts, and Candey had "*absolutely no role in, or causative effect upon, the result that was achieved*". Candey's response is that it is absurd to suggest that Candey, who acted as PHRL's solicitors in those proceedings and in various other proceedings and who were its solicitors on the record at the time of settlement, were not instrumental in causing PHRL to be in a position where a settlement on any terms favourable to PHRL was even remotely possible. Candey were

similarly instrumental in the separate proceedings concerning the SCB Monies, but in any event the preservation and recovery of PHRL's portion of the SCB Monies was due to Candey's instrumentality in the London Litigation.

The Liquidators' submissions on instrumentality

127. The Liquidators submit that Candey's evidence makes clear that it was implacably opposed to the settlement agreement in respect of the London Litigation which the Liquidators negotiated and would not have negotiated such an agreement itself. As Mr Candey himself states:

> *"...insofar as it is suggested that we could have foreseen a settlement on the terms negotiated that is wrong. I do not believe that we would ever have been given authority to settle on the terms that he [Mr Crumpler] did. Ms Turnbull and Messrs Zecha and Robinson would never have agreed to settle on those terms."*

(Candey 1 paragraph 106). At paragraph 85 of Brisby 1, Mr Brisby QC states that, along with Messrs Zecha, Turnbull, Judge and Candey, he was *"shocked and disappointed when I learned about the settlement"* describing it as *"pathetic"*. Thus, had the liquidation not occurred and the Liquidators not intervened, the London Litigation would have ploughed on to trial and beyond.

128. Indeed, the Liquidators deliberately excluded Candey from settlement negotiations because they considered that it was hindering a settlement. Thus, far from being instrumental, Candey had to be excluded in order to allow the settlement to occur.

129. The Settlement Proceeds were not the fruits of the litigation but were rather sums which originally came from the Company and had to be paid into court by it in order for the London Litigation to continue. But for the intervention of the liquidation and the Liquidators, all the evidence is that the Company and Candey would have sought to continue the London Litigation to trial and beyond.

130. The Liquidators also say that, quite separately, the SCB Monies are not property recovered or preserved through Candey's instrumentality as they were simply not in issue in the London Litigation.

131. On this basis, the Liquidators say that the Settlement Proceeds and the SCB Monies fall outside of s.73.

Candey's submissions on instrumentality

132. Candey submits that the authorities show that the word 'instrumental' should be broadly and purposively construed and encompasses the present situation. That it does so is confirmed by a number of authorities dealing with analogous circumstances, see *Moxon v Sheppard* (1890) 24 QBD 627, *Re Meter Cabs Limited* [1911] 2 Ch. 557, *Hyde v White* [1933] P. 105, *Hanlon v The Law Society* [1981] AC 124 (HL) and *Hammonds v Thomas Muckle & Sons* [2006] BPIR 704.

133. Reliance is placed upon the dictum of Romer J in *Scholey v Peck* (1893) 1 Ch 709, where he expressed the test as being one of "but for" causation:

> *"Here undoubtedly the property was preserved by the action brought by these solicitors on behalf of the Plaintiff, and but for the proceedings taken by them the mortgagee would have lost her security..."* (Emphasis added)

134. From the above authorities Candey submit the following principles are clear:

(1) The phrase 'property recovered or preserved through his instrumentality' is widely construed, having regard to the purpose of the Solicitors Acts.

(2) A former solicitor's instrumentality is not denied by the fact that the client has chosen to compromise the action without reference to the solicitor, nor is it affected by the appointment of liquidators over the client company.

(3) The fact that a solicitor is unaware that a party has compromised proceedings is no reason to deny his instrumentality in getting the party to the position immediately prior to compromise.

(4) The solicitor's instrumentality prior to an insolvency event continues beyond the insolvency event, which does not break the chain.

(5) The fact that the company went into liquidation does not allow the liquidators to say that the solicitor's *prior* work was not instrumental in obtaining the result under the compromise.

135. Applying these principles to the facts of this case, it is clear that Candey was instrumental in obtaining the Settlement Proceeds and the SCB Monies. It relies upon the following facts:

(1) It acted for PHRL in relation to the London Litigation, and numerous other matters, many of which were closely related to the London Litigation, from April 2014 until it was disinstructed on 3 March 2016, the day after the settlement was reached, and three weeks after the Liquidators were appointed;

(2) Whilst PHRL's difficulties in funding the various litigation in which it was involved are clearly acknowledged by the Liquidators[7], what is not acknowledged by the Liquidators is that but for Candey, PHRL would not have been able to continue *any* of the litigation in which it was involved. Candey had shown enormous flexibility on fees, continued working and also helped PHRL to source funding for its claim, all of which was essential to keeping the case going and ultimately to achieving a settlement.

(3) The day on which the proceedings were settled was the same day on which witness evidence was due to be exchanged. Candey had finalized PHRL's evidence, ready for service, and believed that PHRL's opponents would have real difficulties in setting out their case. In such circumstances, it is obvious why PHRL's opponents would have been so ready to engage in settlement discussions.[8]

(4) Mr Crumpler's suggestion that the funding position of PHRL as at the date of settlement was such that PHRL had to settle, is not only irrelevant (for the reasons given above i.e. it requires the Court to disregard Candey's instrumentality prior to that date), it is also factually incorrect, since Mr Candey explains that Candey had secured additional funding for PHRL in January 2016 in the form of a US$5m facility provided by Mr Jerry Liu. [9]

(5) This reasoning applies to the SCB Monies just as to all other proceeds of the litigation: payment of a share of the SCB Monies to PHRL was a term of the settlement. As Mr Crumpler himself puts it (Crumpler 5, paragraph 39): "*it was agreed between the Company and Tarek that, subject to certain conditions, they would cooperate to achieve the release of a sum of USD3 million held by Standard Chartered Bank ("SCB") in an account in the name of ARGL but considered, in fact to be beneficially owned by the Company and Tarek in equal*

[7] See, e.g. Crumpler 5/§30
[8] Candey 6/§§35-36
[9] Candey 6/§44

shares, to be split equally between the Company and Tarek. The Company's share of this was USD1.5m (the "SCB Funds")" and at paragraph 146: "*the transfer of the SCB Funds ... was a purely mechanical event which flowed from the accord which the Liquidators were able to reach with Tarek by reason of the compromise of the dispute that was the subject matter of the London Litigation*"

(6) Accordingly, since Candey was clearly instrumental in PHRL obtaining the settlement, it follows that it was also instrumental in PHRL recovering its portion of the SCB Monies.[10]

136. The Liquidators' argument to the contrary is flawed for the following reasons:

(1) It requires the Court to consider the question of instrumentality from the moment of the Liquidators' appointment, as if it constituted a break in the chain, and without regard to Candey's exertions prior to that involvement. As a matter of principle, that is the wrong approach;

(2) It requires the Court to disregard the obvious reality that a party's negotiating position in obtaining a compromise is a direct result of the conduct of their case up to that point – quite apart from authority, as a matter of common sense it is absurd to suggest that the result that was achieved in the compromise had nothing to do with Candey's involvement in the case leading up to that compromise;

(3) If it was correct, it would mean that anyone could defeat a solicitor's lien by secretly settling a case; this would render the security worthless and could not possibly have been intended by the phrase 'property recovered or preserved by his instrumentality'.

Discussion and conclusion on the instrumentality issue

137. I have reached the conclusion that there is no basis on which Candey should to be denied any rights under s.73 on the basis of an alleged lack of instrumentality.

138. I do so for the following reasons:

(1) I accept Candey's submissions that having regard the authorities referred to in paragraphs 132 and 133 above, it is clear that one must take a broad interpretation

[10] Candey 6/§59

of the word 'instrumental' and apply the "but for" test. The principles set at paragraph 134 above are to be derived from those authorities;

(2) Applying those principles to the facts of this case, it is, in my view, wholly artificial to disregard Candey's role and the earlier substantial work done by it the London Litigation from April 2014 until it was disinstructed on 3 March 2016, the day after the settlement was reached;

(3) I accept Candey's submissions that the facts set out in paragraph 135 above are indicative that it was instrumental in relation to both the Settlement Proceeds and the SCB Monies.

(4) In my judgment the stance taken by the Liquidators simply ignores the fact that a party's negotiating position in obtaining a compromise significantly affected result of the conduct of their case up to that point. I accept Candey's submission that the logical effect of the Liquidators' argument is that it would mean that anyone could defeat a solicitor's lien by secretly settling a case. Such an argument failed in *Moxon v Shepherd* referred to in paragraph 132 above;

(5) The Liquidators' argument that but for the intervention of the liquidation and the Liquidators, all the evidence is that the Company and Candey would have sought to continue the London Litigation to trial and beyond appears to me to miss the point. The fact that they may have far preferred to continue the London Litigation in the expectation, well-founded or otherwise, that this would provide a better outcome, does not prevent Candey being 'instrumental' in relation to the Settlement Monies, given their considerable work prior to the settlement being reached and by what Mr Candey refers to in Candy 6 at paragraph 34 as Candey's "*commitment to the cause*".

Abuse of process and the Court's exercise of its discretion

139. The Liquidators contend that it is an abuse of process for Candey to seek to rely on a lien at this late stage in the proceedings, having previously asserted only that its debt was secured by the Deed of Charge. They submit that Candey is precluded from seeking an order under s.73 or that the Court should exercise its discretion under s.73 by declining to grant a charge or by ensuring that any charge does not confer on Candey any rights which exceed those under the Deed of Charge. Candey submits that the Liquidators' contentions do not come close to the exceptional circumstances

required to disentitle a solicitor from an order under s.73 and further there is no basis for declining to grant or restricting the relief under s.73.

The Liquidators' submissions on abuse of process and the Court's exercise of its discretion

140. The Liquidators submit that this falls within the *Henderson v Henderson* species of *res judicata,* recently described by Lord Sumption in *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2014] AC 160 at [17] as a rule which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier ones. If Candey is right to contend that it has a lien which falls outside of section 245 of the 1986 Act, then the existence of this right would have been a complete answer to the Liquidators' Application which Candey could and should have raised at the time.

141. They rely upon the following matters:

(1) As explained above, the parties have spent significant time and incurred substantial cost litigating over Candey's reliance on the security rights contained in the Deed of Charge. (See Crumpler 5 at paragraphs 47 to 57);

(2) Further, it is clear from previous correspondence and witness statements that Candey was relying on the security contained in the Deed of Charge (which it contended was a fixed charge), and not on any other form of security, such as a lien;

(3) Candey contended that its security over the Settlement Proceeds and the SCB Monies took the form of a fixed charge, pursuant to the Deed of Charge. Further, Candey did not seek at any stage to argue that it was secured by way of a lien;

(4) The Order of HHJ Davis-White QC declares that Candey's security takes the form of a floating charge. There has been no appeal by Candey in relation to that and it is now out of time to do so. If it is right that Candey has a lien which falls outside of section 245 of the 1986 Act and ranks in priority to liquidation expenses, it will follow that the entirety of the litigation to date has been pointless and a waste of time and money dealing with an academic point. Candey would have had a complete answer to the Liquidators' Application which it failed to

mention for over 2 years and instead allowed the litigation to proceed on a different and inconsistent basis.

142. If Candey still does have such a lien, the Liquidators contend that it would be an impermissible abuse of process for Candey to seek now to rely on its lien at this late stage in the proceedings and that Candey should not be permitted to do so. Alternatively, the Court should exercise its discretion under s.73 of the 1974 Act to achieve the same result.

Candey's submissions on abuse of process and the Court's exercise of its discretion

143. The Court of Appeal has, on a number of occasions (see for example *Haymes v Cooper* and *Faithfull v Ewen* cited above) made it clear any person aware of litigation is deemed to be on notice of a solicitor's right to be paid out of the proceeds of that litigation. The Liquidators were always on notice of Candey's rights. In those circumstances, it is not open to them to accuse Candey of abusive conduct merely for not asserting those rights at an earlier time.

144. Secondly, it was the Liquidators that brought the Liquidators' Application against Candey, which was required to defend it in order to protect its security rights. The Liquidators have, prior to the issue of that application, raised numerous challenges to the FFA itself, contending that it was (i) obtained by undue influence and (ii) a preference: arguments which the Liquidators have since abandoned.[11]

145. Thirdly, in the present circumstances the doctrine of abuse of process does not apply. Under that doctrine, a party should bring its *entire* claim or defence within the same proceedings and may be estopped from putting forward additional claims or defences that they could *and should* have put forward in the earlier litigation: *Henderson v Henderson* (1843) 3 Hare 100. In this case, however, it would not have been a defence to the Liquidators' Application for Candey to assert some other security right, since the issue in that application concerned the validity of the security rights under the Deed of Charge and the FFA. In those circumstances, on what basis could it be said that Candey *should* have put forward an entirely irrelevant defence? On any view, it is well established that the mere fact that a claim *could* have been brought in earlier proceedings does not mean that it *should* have been: see, e.g. *Henley v Bloom* [2010] 1 WLR 1770.

[11] See the letter dated 25 May 2016 from Stephenson Harwood to Candey

146. Fourthly, the Liquidators' contention that the Liquidators' Application could have been avoided if Candey had asserted its lien at an earlier stage is wrong. Had the Liquidators not brought the Liquidators' Application, they would not have obtained an order to the effect that the Deed of Charge only created a floating charge, so the Liquidators would *in any event* have had to challenge the Deed of Charge. Furthermore, the Liquidators' Application also determined the disputed issue of whether Candey's fees were fair and reasonable; an issue that would no doubt also have arisen in the context of a s.73 application, such that the costs of those proceedings would have had to have been incurred *in any event.*[12]

147. Fifthly, the Liquidators' contention that these proceedings could have been avoided if Candey had asserted the lien earlier is also wrong. In response to Candey asserting the lien, the Liquidators disputed Candey's entitlement to it, principally on substantive grounds such as waiver and instrumentality, rather than only on grounds of abuse of process. The Liquidators have never suggested that had the lien been asserted earlier, it would have been conceded. Since those same factors would have applied equally had Candey asserted its lien earlier, these proceedings would not have been avoided.[13]

148. Finally, in the course of argument, Mr Lord indicated that the reason the lien was not asserted earlier, "*may be that it was not thought of before...The reality is that it did not matter all the time Candey thought they had a fixed charge*".[14]

149. Accordingly, the Liquidators' contentions based on abuse of process are insufficient to disentitle Candey from its entitlement under s.73 and further, in the circumstances there is no basis for the Court to exercise its discretion to Court under s.73 by declining to grant a charge or by ensuring that any charge does not confer on Candey any rights which exceed those under the Deed of Charge.

Discussion and conclusion in relation to abuse of process and the Court's exercise of its discretion

150. I have reached the conclusion that if there had not been a waiver of the lien, I would not have found that there was an abuse of process by Candey, so as to disentitle it to an order under s.73; nor would I have declined to grant a charge or to do so in restricted terms sought by the Liquidators. It seems to me that the distinction drawn by

[12] Candey 6/§61(a);
[13] Candey 6/§61(d)
[14] Day 1/105/ lines 10-13, 106/lines 5-6

Lord Neuberger in *Henley v Bloom* is relevant here. Contrary to Candey's submission, in my judgment it would have been desirable for Candey to have raised their reliance on the lien which falls outside of section 245 of the 1986 Act, because whilst not a defence to the application, it would have rendered it moot. That, however, is not the same as saying that raising it now for the first time amounts to an abuse of process. That said, I would have penalised Candey in costs because, had Candey raised it earlier in the Liquidator's Application, it would have saved substantial costs.

Conclusion

151. I decide the Exemption Issue in favour of the Liquidators and I dismiss the Lien Application. I invite the parties, if possible, to agree a draft Order in advance of the handing down of this Judgment.