Neutral Citation Number: [2019] EWHC 3558 (Ch)

Case No: CR-2016-001012

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

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 20/12/2019

Before :

HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

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

Between :

RUSSELL CRUMPLER AND CHRISTOPHER FARMER (JOINT LIQUIDATORS OF PEAK HOTELS AND RESORTS LIMITED) — **Applicants**

- and –

CANDEY LIMITED — **Respondent**

- -
- -

Ms Felicity Toube QC and Mr Stephen Robins (instructed by **Stephenson Harwood LLP**) for the Applicants
Mr Daniel Saoul QC and Mr Stephen Ryan (instructed by **Candey LLP**) for the Respondent

Hearing dates: 25th (reading), 28th-30th October 2019

- -

Approved Judgment

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

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HIS HONOUR JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

His Honour Judge Davis-White QC :

Introduction

1. The issue before me is the value of the legal services actually supplied by the Respondent, CANDEY Limited ("Candey"), to Peak Hotels and Resorts Limited ("PHRL") on or after 21 October 2015. As I shall explain, that issue has been remitted to this Court by the Court of Appeal. For convenience, I refer to this, as did the relevant order of the Court of Appeal dated 27 March 2019, as the "Valuation Issue".

2. The Valuation Issue arises in the context of the application of s245 of the Insolvency Act 1986 to circumstances in which Candey provided legal services to PHRL under a fixed fee agreement (the "FFA") effectively agreed on 21 October 2015. The fixed fee was some £3.8 million or so. In addition to the FFA, the parties also entered into a Deed of Charge dated 21 October 2015. Under that deed of charge what has, at an earlier stage of this application, been determined by me to be a floating charge over certain assets of PHRL was created in favour of Candey, providing security to Candey for the payment of the liabilities to Candey under the FFA.

3. The Court has also determined that the charge bites on certain property which is well in excess of the amount of the fixed fee. (As to these matters see my judgment of 23 June 2017 [2017] EWHC 1511 (Ch) ("my earlier judgment") and the Court of Appeal decision of 16 October 2018 [2018] EWCA Civ 2256.) In summary, the charge was held to extend to sums paid into court, in what have been referred to as the London Proceedings, by way of security for costs and fortification of cross-undertakings. The sums in question totalled some US$10,013,000 and £1,648,000 (the "Court Monies"). It was not disputed that the charge also extended to a sum of some US$1.5 million (plus interest) formerly held on trust for PHRL in an account with Standard Chartered Bank (the "SCB Monies"). The dispute before me regarding the SCB Monies was limited to the question of whether the charge was fixed or floating.

4. The legal services provided by Candey were in relation to the litigation arising from an ill-fated joint venture to purchase the Aman Group of luxury hotels in 2014 which is described in some detail in my earlier judgment.

5. PHRL entered liquidation in the British Virgin Islands (the "BVI") on 8 February 2016. This Court recognised those liquidation proceedings as a foreign main proceeding under Schedule 1 to the Cross-Border Insolvency Regulations 2006 on 24 February 2016.

6. The current application was issued on 27 September 2016. By it, the BVI Liquidators of PHRL (the "Liquidators"), currently Mr Crumpler and Mr Farmer, the applicants, seek, in effect, relief pursuant to s245 Insolvency Act 1986 ("IA 1986") in relation to the charge and FFA.

7. S245 IA 1986 avoids certain floating charges to a certain extent. In very broad terms four conditions need to be met. First, the company must be in liquidation or administration. Secondly, the floating charge must have been created at a relevant

time, that is within a certain period ending with the commencement of the relevant insolvency regime into which the company entered. Thirdly, where the charge was given to a person not connected with the company, the company must then have been insolvent or become insolvent in consequence of the charge. Fourthly, the charge must have been given, and will only be invalid to the extent that it is given, otherwise than for what Professor Goode has called "appropriate new value". In this case, the appropriate new value is the value of so much of the consideration for the charge as consists of services supplied to the company at the same time as, or after the creation of, the charge (see s245(2)(a) IA 1986). The identification and valuation of those services supplied by Candey is, in effect, the Valuation Issue.

8. At an earlier stage of this application, I determined that the floating charge meets the first three relevant conditions of s245 IA 1986 that I have identified above (see my earlier judgment which was not appealed on those points). The charge is therefore invalid subject to the proper application of s245(2) to the facts of this case and, therefore, determination of the Valuation Issue.

9. The Valuation Issue was originally tried by this Court in November 2017. In broad terms, Candey submitted that the relevant value conferred was about £3.8 million, the amount of the fixed fee. The Liquidators submitted that the value was the value calculated on a time costs basis, the time being identified from time sheets prepared by Candey, and applying hourly charging rates to the same. The time sheets in question were provided to the Liquidators in May 2016 (the "Timesheets"). At Candey's applicable charging rates those time costs were estimated to be some £1.2 million. However, the Liquidators asserted that the £1.2 million or so was the maximum value. They submitted that the true value of the services actually supplied was in fact substantially less. This was, they submitted, because Candey's standard hourly rates were in various respects unreasonably high and that some of the work the subject of the Timesheets could not properly be treated as being work carried out by Candey for PHRL.

10. Having heard oral evidence from experts and on the factual evidence before him, His Honour Judge Raeside QC (sitting as a High Court Judge) determined that the value of the relevant work was the fixed fee amount of about £3.8 million figure (see his judgment of 22 November 2017, [2017] EWHC 3388(Ch)).

11. The Liquidators successfully appealed the decision of HH Judge Raeside (see the judgment of the Vice President of the Court of Appeal, Underhill LJ with which the other two Lords Justices agreed: 8 March 2019 [2019] EWCA Civ 345 (the "2nd Court of Appeal Judgment")). As I have said, the Valuation Issue has been remitted to the High Court and it is now for me to resolve it, in light of the 2nd Court of Appeal Judgment and the guidance that it contains.

12. This judgment should be read with my earlier judgment and the 2nd Court of Appeal Judgment. In this judgment I have, in the main, sought to minimise summarising background matters set out in the two judgments or setting out large excerpts from them in full.

13. As regards the sums outstanding under the FFA, I should also note that Candey has been reimbursed the entirety of Counsel's fees (to the extent that it paid them) and

that in addition, on 7 November 2018, it was been paid by the Liquidators some £643,248.75 together with interest of almost £138,000 in relation to the fixed fee under the FFA.

The sub-issues

14. A number of sub-issues have been raised before me, briefly they are as follows:

(1) On whom does the burden of proof lie ("**the burden of proof**")?

(2) What is the correct basis of valuation to adopt in this case ("**the basis of valuation**")? In particular, should the valuation be based on a time cost charge basis or on some form of agreement based upon the contingency of there being a success or win (i.e. a damages based agreement, an investment agreement or a conditional fee agreement)?

(3) If the basis of the valuation is to be a time cost basis and if the matter is to be resolved by the Court now:

a. Should the Court determine the whole matter at this stage or only points of principle so that there should be at least one further hearing, and if so what should the nature of such further hearing be ("**Time cost charging: (1) the procedure**")?

b. What hourly rates should be applied **("Time cost charging: (2) hourly rates")**?

c. As regards the time spent, is Candey prevented from relying on a case and evidence contained in witness statements served after expiry of the time laid down by court order for the serving of such statements? The new case/evidence is to the effect that Candey worked for further (substantial) time which is not recorded in the Timesheets which had been put forward on both sides as accurately recording that time, or at least the maximum such time ("**time cost charging: (3) the scope of the evidence**").

d. What time should be properly taken into account in the light of the decision on (c) and, leaving aside (c), should the court discount certain timings in whole or in part on the basis of inadequate particularisation in the evidence and/or on the basis that it was improperly incurred at a time when PHRL (by the Liquidators) had terminated authority to Candey to incur the same or for any other reason (**time cost charging: (4) what time is to be treated as properly chargeable)**?

The case management conference and the Exemption Issue and the Lien Application

15. Before I leave the short chronological account of this application I must mention two matters. The first is relevant to the sub-issues of what case and evidence Candey is entitled to rely upon at this hearing and also to the sub-issue of what procedure should be followed.

16. The order of the Court of Appeal dated 27 March 2019 and remitting the Valuation Issue to this Court also made provision for a case management conference to be listed in the High Court for the purpose of determining what evidence might be relied upon or adduced at the remitted hearing, together with any procedural questions.

17. That case management conference took place before Mr Edwin Johnson QC (sitting as a Deputy Judge of the High Court). His order of 23 May 2019 (the "Directions Order"), among other things, laid down a timetable for the service of both factual and expert evidence but in each case:

> "*6. ….limited to such supplemental evidence as is required to take account of* [the 2nd Court of Appeal Judgment] *as to the correct approach to the Valuation Issue."*

18. In short, the Liquidators submit that certain evidence that was served very late by Candey and outside the timetable laid down should not now be admitted to evidence. They say that the case is one where there either is a sanction, or there should be treated as being one, and that relief against sanction and permission to adduce this late evidence should not be granted.

19. The second point that I should mention is that there are as yet further issues which have been determined by the High Court but in relation to which the Court of Appeal is to hear relevant appeals. I understand that an appeal hearing took place on 10-11 December 2019. I now turn to those matters.

20. Following the determination of the Valuation Issue by HH Judge Raeside QC , there was a "costs and consequentials" hearing which resulted in a further judgment and order of HHJ Raeside whereby, on 5 December 2017, he ordered that the Liquidators were to pay 80% of Candey's costs, but that a further issue should be adjourned. That issue was whether the solicitors firm representing Candey on this application, namely Candey LLP, was entitled to recover a success fee on its fees on the basis of an exemption in article 4(c) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 & Saving Provisions) Order 2013 ("the Exemption Issue").

21. On 17 April 2018, Candey then brought its own application against the Liquidators under s73 of the Solicitors Act 1974. In that application it sought an order to convert what it asserted to be a common law lien to secure the payment of the fixed fee into a charge ("the Lien Application").

22. The Lien Application and the Exemption Issue were heard by Mr Andrew Hochhauser QC (sitting as a Deputy Judge of the Chancery Division) on 10-13 July 2018. His judgment is dated 15 February 2019 and contains further useful descriptive detail about the FFA, the charge dated 21 October 2015 and the course of the application which is now (again) before me. By judgment ([2019] EWHC 282 (Ch)) and order dated 15 February 2019 he dismissed the Lien Application and decided the Exemption Issue in favour of the Liquidators. He also gave permission to Candey to appeal on both issues.

23. As I shall go on to explain, Candey submits that certain findings made by Mr Hochhauser QC on the Lien Application are relevant to resolution of the Valuation Issue.

24. In broad terms s73 Solicitors Act 1974 gives a right to a solicitor to apply "*for a charging order on property recovered or preserved through his instrumentality in litigation*" (per David Richards J (as he then was) in *Clifford Harris v Solland* (No 1) [2004] EWHC 2488 (Ch)). One of the issues before Mr Hochhauser was whether, as alleged by Candey, the Court Monies and the SCB Monies were recovered or preserved through Candey's "instrumentality". Candey submitted that they were. The Liquidators submitted that they were not. The SCB monies, they said, were not property recovered or preserved through Candey's instrumentality as they were not in issue in the London litigation. The Court Monies were preserved by means of a settlement agreement in relation to the London proceedings which Candey hindered rather than being instrumental in its achievement and were not the fruits of litigation but sums which had originally come from PHRL. On this issue, Mr Hochhauser decided in favour of Candey (see paragraphs [137]-[138] of his judgment). Although Mr Hochhasuer decided in Candey's favour in relation both to the issue of "instrumentality" and on an issue of whether it was an abuse of the court's process for Candey to raise the relevant arguments so late in the day (see paragraphs [139] to [150] of his judgment) he decided in favour of the Liquidators that Candey had waived its solicitor's lien and any rights it had under s73(1) Solicitors Act 1974 by entering into the deed of charge at the time of the FFA on 21 October 2015 (see paragraphs [119]-[120] of his judgment). Accordingly the order sought by Candey was refused.

25. Candey submits that the findings of instrumentality are relevant to its submissions before me that a conditional fee agreement or damage based agreement could have been negotiated at the time of the FFA and that, had it been, Candey would have been entitled to a relevant uplift under such agreement. This is on the basis that it had brought about recovery of the Court Sums and the SCB Monies. Such a hypothetical agreement is, submits Candey, an appropriate way of measuring the value of the services it provided. I will turn to these arguments further below. For present purposes I note that the decision on the issue of "instrumentality" does not form part of the appeal (or any cross-appeal) to the Court of Appeal.

Representation

26. Before me the liquidators were represented, as they were in the two Court of Appeal hearings, by Ms Felicity Toube QC and Mr Stephen Robins. Candey was represented before me by Mr Daniel Saoul QC and Mr Stephen Ryan, neither of whom appeared before HH Judge Raeside QC or before either constitution of the Court of Appeal. I am grateful to Counsel for their written and oral submissions and the manner in which they efficiently dealt with cross examination of two experts and the selection of appropriate documents to refer me to from the many files put before me. I must also express my gratitude to the respective solicitors involved and especially for the preparation of the hearing bundles.

The Evidence and submissions

27. Before me I had a number of witness statements which were admitted into evidence without cross-examination.

28. For Candey the factual witness evidence was primarily from partners of Candey, the lead Counsel acting at the relevant time in the case for PHRL, the director of PHRL and some of those with a commercial interest in the outcome of the litigation involving PHRL.

29. Mr Ashkhan Candey ("Mr Candey"), managing partner of Candey, has, over the course of the various stages of these proceedings, made nine witness statements. The admission of his tenth witness statement into evidence was objected to by the Liquidators and that is a matter I will have to deal with separately. In addition, factual witness statements on behalf of Candey were in evidence from Mr Dunn, a partner in Candey, (though his second witness statement stands in the same position as Mr Candey's tenth witness statement in terms of it being objected to by the Liquidators) and Mr John Brisby QC, leading the team of counsel in connection with PHRL's cases in the London litigation, litigation in the BVI and the Hong Kong arbitration.

30. Further evidence by way of witness statements on behalf of Candey was also in evidence from Carolyn Turnbull, sole director of PHRL from 2 October 2014 until it went into liquidation on 8 February 2016.

31. Finally, there were witness statements on behalf of Candey from:

    (1) Mr George Robinson, a financier and investment manager and the founding partner of the investment management firm, Sloane Robinson LLP. Mr Robinson had provided a personal loan to Silverlink Resorts Limited in 2006. Right to repayment of that loan had since been assigned to a company that had become a shareholder in PHRL. That shareholder, says Mr Robinson, had not paid him the relevant consideration due for such assignment and owed him some US$20 million plus interest. (He also claimed that the assignment had been brought about by misrepresentations.) In economic terms the chances of recovery of such sum (or the quantification of any loss) depended on the success or otherwise of the litigation in which PHRL was involved. Although having no say in the matter, Mr Robinson reviewed the position in relation to the FFA and was content that it be entered into.

    (2) Mr Ken Judge, a corporate lawyer and qualified barrister who had provided advice to Mr Robinson in connection with the best course for Mr Robinson to take in relation to the outstanding sums that I have mentioned.

    (3) Mr Adriaan Zecha, the founder of Aman Resorts. He had a close economic interest in the litigation involving PHRL both as a shareholder in it and as having personally guaranteed the repayment by PHRL of US$35 million lent to it by Jinpeng Group Limited. As such he had supported entry into the FFA.

32. For the Liquidators, I had two witness statements and five affidavits from Mr Crumpler and two affidavits from Ms Bower, a former liquidator of PHRL.

33. In addition I heard expert evidence from two experts who gave oral evidence and were cross-examined:

(1) For Candey, Mr Peter Hurst gave evidence. He has had a distinguished career over many years. Among other judicial positions connected with costs, he was the Senior Costs Judge of England and Wales at the Royal Courts of Justice from 1992 and 2014 and, prior to that, sat as a Costs Judge from 1981 to 1991. He was also Judicial Taxing Officer of the House of Lords from 2002-2009 and of the United Kingdom Supreme Court from 2009 to 2014 and of the Judicial Committee of the Privy Council from 2002-2014.

(2) For the Liquidators, Mr Andrew Thomas gave evidence. Mr Thomas is a costs lawyer with about 30 years of experience in costs in civil proceedings in England and Wales.

34. Each expert was an author of two expert reports. In addition there were joint memoranda setting out the scope of their agreement and disagreement over various issues. I found that both experts were doing their best to assist the course and were of assistance. Apparent differences between them tended to reduce in cross-examination. I deal with points that were of relevance below.

35. I should also mention that there seemed to me at the least a tension, if not various inconsistencies, in the written evidence proffered by Mr Candey as regards Candey's views as to a fair basis of remuneration contemporaneously and as regards the market with regard to what I shall loosely refer to as contingency charging (to encapsulate CFAs, DBAs and litigation funding models all of which are, to a greater or lesser extent, based on a "no win no fee" basis of reward). Although Mr Candey was not cross-examined, Mr Hurst, who to some extent adopted Mr Candey's case, did give evidence and I had contemporaneous documents dealing with the position. It emerged that some of Mr Candey's evidence on proper analysis was dealing with the market today rather than necessarily how it was in 2015. In the end I was satisfied that notwithstanding Mr Candey's more recent evidence I could come to the factual conclusions that I have.

36. By the end of the hearing before me I had in excess of 30 files of paper.

37. Following the oral hearing I received, over a three week period following the hearing, a number of further schedules and submissions which were to intended to bring further clarity to some points of detail. The last exchange occurred on 20 November 2019.

The Fixed Fee Agreement

38. The FFA and the charging document are dealt with in my earlier judgment at paragraphs [16] to [24] and the 2nd Court of Appeal Judgment at paragraphs [5],[6], [8], [20], [21].

S245 IA 1986

39. The circumstances in which s245 IA 1986 came to be applicable to PHRL, a BVI company in liquidation in the BVI, is set out in my earlier judgement at paragraphs [9] to [11] and in the 2nd Court of Appeal Judgment at paragraphs [2] and [3].

40. For the purposes of the issue which is before me, the relevant provisions of s245 are as follows:

> "*245 Avoidance of certain floating charges*
>
> *…..*
>
> *(2) Subject as follows, a floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregate of-*
>
> *(a) the value of so much of the consideration for the creation of the charge as consists of….. services supplied, to the company at the same time as, or after, the creation of the charge*
>
> *(b) …..*
>
> *(c) the amount of such interest (if any) as is payable on the amount falling within paragraph (a) or (b) in pursuance of any agreement under which the…… services were so supplied….*
>
> *(6) For the purposes of subsection (2)(a) the value of any … services supplied by way of consideration for a floating charge is the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the…. services in the ordinary course of business and on the same terms (apart from consideration) as those on which they were supplied to the company*".

41. The main points arising from the 2nd Court of Appeal Judgment appear to me to be as follows:

(1) The underlying purpose of s245 IA 1986 is to strike a fair balance between the interests of the holder of a floating charge and those of the company's unsecured creditors (paragraphs [32]-[33]);

(2) The effect of the section is to invalidate a floating charge which meets the relevant statutory criteria (in this case, having been entered into within the relevant time window prior to the company giving the charge entering a relevant specified type of formal insolvency, that being a time at which the company was insolvent), save to the extent that it secures the value of (in this case) new services supplied to the company on or after the date of creation of the charge and as part of the consideration for the creation of the charge (paragraph [33]).

(3) In this context, the "consideration for the creation of the charge" does not mean "consideration for the charge" in a technical sense under the law of contract but rather "by reason of" or "having regard to the existence of" the charge (see *Re Yeovil Glove Co Ltd* [1965] Ch. 148) (paragraph [15]).

(4) The effect of s245, if it operates, is only to invalidate the relevant security to the relevant extent. The underlying debt remains unaffected otherwise. To the extent any security is invalidated the relevant claim becomes unsecured but to

that extent the claim remains provable in the liquidation as an unsecured debt in the normal way (paragraph [34]) (see also *Re Parkes Garage (Swadlincote) Ltd* [1929] 1 Ch 139).

(5) The relevant saving provision under s245 is focussed on the value of the services actually supplied after the date of the charge and not those promised to be, but in fact not, supplied after that date nor the fairness of the commercial agreement in fact entered into (paragraphs [35]-[36]).

(6) In this case it is the provision of legal services which is Candey's business and it is the services actually provided during the relevant period which have to be valued (paragraph [37]);

(7) The value to be attributed to the services is, by virtue of sub-section (6), the amount in money which at the time of supply could reasonably have been expected to have been obtained for their supply in the ordinary course of business, and on the same terms (apart from consideration) as those on which they were in fact supplied. This test is objective. The terms of the FFA as regards consideration, and therefore the fixed fee must be disregarded in carrying out the process required under sub-section (6) (paragraphs [37] –[38]).

(8) A fixed fee is incompatible with the retrospective exercise required by sub-section (6), which focusses on the services actually provided. The point of a fixed fee is to provide certainty in advance before the precise amount of work has been identified. It therefore places a value on the risk that the work in fact done may be less or more than what was estimated. (In this case, the estimate of the work required was of the order of work costing £5 to £6 million but it was recognised that the actual work provided might in due course on a time cost basis give rise to a value (on a time charged basis) significantly higher or lower) (paragraphs [39]-[40]).

(9) What s245(6) requires is an objective and retrospective assessment of the amount that Candey would reasonably have charged for the services actually supplied in the ordinary course of its business, and on the same terms (apart from those relating to the consideration, including payment of the fixed fee) as those on which they were in fact supplied (paragraph [40]).

(10) The test is a hypothetical supply by a hypothetical supplier having the same characteristics, in terms of expertise and resources, of the actual supplier (paragraph [41]).

(11) The actual supplier's ordinary terms of business may be relevant evidence and guidance (though in no sense conclusive) as to what the objective terms and consideration under s245(6) would be. In this particular case Candey's standard terms and conditions provide for Candey's services to be charged on a time basis and to be invoiced monthly within 7 days of receipt: "*Accordingly that approach is likely to provide an appropriate basis for valuation of the services under sub-section (6))*" (paragraphs [40] and [41])

(12) The "ordinary course of business" referred to in s245(6) means that the supply must be assumed to be an unremarkable one arising out of no special or

particular situation and in which no reliance can be placed on the particular characteristics or situation of the company to which the services were supplied. Thus, the credit risk faced by the supplier cannot be taken into account. The test insulates the valuation of the services actually provided from any increase in the supplier's normal charging rates or any special terms of business attributable to the risk of non-payment by the recipient of the services (paragraphs [44]-[45]).

(13) The calculation of value under s245(6) cannot include a charge for credit in the form of compensation for delay in payment. This is not permitted because it would amount to the calculation being influenced by the particular circumstances of PHRL. Further, there is in any event a provision for interest under s245(2)(c) (paragraph [46]).

42. Although at some points Mr Saoul appeared to appeal to "fairness" or the striking of a fair balance by reference to the overall facts of the case, as I understood matters he ultimately accepted that the "fair balance" is struck by the terms of s245 itself and that it is its provisions that I have to give effect to rather than applying some wider or overall "fairness" test.

The burden of proof

43. I raised with the parties the question of on which party lay the burden of proof in establishing the calculation of value. Although few cases turn on the burden of proof it is always important for the court to have in mind the incidence of the burden of proof on any particular issue. This was especially important in this case for two reasons. First, on first sight (as I explain further below) there seemed to be an issue as to whether the onus lay on Candey to persuade the court as to the detail of particular hours being properly spent by Candey or on the Liquidators to disprove the same. Secondly, the factual evidence in this case was admitted by agreement without cross-examination. In those circumstances, any relevant dispute of fact that cannot be resolved on the face of the factual evidence before the court has to be assumed to be decided in favour of that party on whom the burden of proof does not lie, the court being unable to resolve that factual dispute without cross-examination (see e.g. *Re Lo Line Electric Motors Limited* [1987] Ch 447). That of course is subject to two caveats. First, if the person on whom the burden of proof lies produces appropriate evidence, that may have the practical effect of placing an evidential burden of proof on the other side. Secondly, in some circumstances the Court is able to disregard certain evidence, for example if it is sufficiently inherently self-contradictory or inconsistent with contemporaneous documents (see e.g. *Day v RAC Motoring Services Ltd* [1999] 1 All E.R. 1007).

44. Ms Toube for the Liquidators asserted that the burden of proof to establish what I have identified as the fourth condition of invalidity (though perhaps it is better described as determining the extent of the invalidity) lies on the person asserting pro tanto validity of the charge. She submits that that is consistent with the position under s127 IA 1986 whereby dispositions of company property taking place between presentation of a winding up petition and the making of a winding up order are void "unless the court otherwise orders". However, I gain little assistance from this provision because in terms the section makes relevant dispositions void and imposes a need to make an application to the court to validate, which understandably throws the

burden of establishing that the court should otherwise order on the person making the application.

45. After the hearing I considered s214 IA 1986. That section provides the power in the court to make an order to contribute to the company's assets against a director (or former director) where certain conditions are met. However, under s214(3) the court will not make a declaration if satisfied that after the relevant time that person took every step with minimising potential loss to the company's creditors as he ought to have taken. In *Brooks v Armstrong* [2015] EWHC 2289 (Ch) Mr Registrar Jones held that the burden of proof lay on the director to establish that he had taken every such step. Again, however, that position can be distinguished. The section talks in terms of the Court having to be satisfied that the condition is met.

46. Looking at the history of s245 IA 1985, its predecessor was s617 Companies Act 1985 (and before that s322 Companies Act 1948). Sub-section (1) of s617 CA 1985 provided:

> *"(1) Where a company is being wound up, a floating charge on its undertaking or property created within 12 months of the commencement of the winding up is invalid (unless it is proved that the company immediately after the creation of the charge was solvent), except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount*."

47. Under that sub-section the burden of proof on the issue of solvency was clearly on the person resisting the avoidance. That incidence seems to have been reversed under s245 IA 1986. However, I cannot identify any reason to think that the burden of proof on the immediately following issue (that of appropriate new value which determines the extent of the invalidity) lay on the person resisting invalidation, that is the floating charge holder. Certainly, Buckley on the Companies Acts (14th Edition 1981), while dealing with the burden of proof on the insolvency issue, does not suggest that the burden was on the chargeholder with regard to the establishing the appropriate new value (then in relation to a more limited form of consideration than now).

48. I conclude that the legal burden of proof on the Valuation Issue lies on the Liquidators.

The basis of valuation

49. As matters stood when the Valuation Issue came before HH Judge Raeside QC the contest was between a fixed fee of about £3.8 million (as propounded by Candey) and a fee calculated on the basis of applying appropriate hourly rates to the time properly spent (as propounded by the Liquidators). The latter would have given a maximum value of about £1.2 million, though the Liquidators said the proper figure was in fact lower (at the start of the hearing before me a figure of about £704,000 was suggested by the Liquidators).

50. Candey now submits that, in preference to applying an hourly rate to the time properly spent on the work actually carried out, the appropriate basis of valuation for the purposes of s245 is one containing some form of contingency element, treated as being payable on the basis that Candey has been instrumental in PHRL making

recoveries from the London Proceedings and having thus "succeeded" to some extent. In his eighth witness statement in these proceedings, made on 21 June 2019, Mr Candey submitted that the valuation of the services provided by Candey should be valued on the basis of:

(1) a notional Damages Based Agreement ("DBA") under which a hypothetical solicitor would have been entitled (he says) to 50% of the sum actually "recovered" in the London Proceedings (which he says is approximately US$13.2 million) being a consideration sum of approximately US$6.6 million (to include Counsel's fees);

(2) a Conditional Fee Agreement ("CFA") (with a 100% uplift) under which the hypothetical solicitor would have been due to receive £2.424 million together with the costs of Counsel (£988,250, but giving credit for £231,955 in fact paid by third parties);

(3) on the basis of a notional litigation funding agreement with Candey being a funder, such funder would have received (he says) some £4,851,404 (excluding counsel's fees), being calculated on the basis of a 400% return on an "investment" of £2.1 million (fees on a time cost basis).

51. As regards any "success" or "win" it was common ground that the settlement achieved by the Liquidators with regard to the London Proceedings resulted in the return to the Company of its own monies, being the sums originally paid into court, of US$10 million and £1.648 million together with the SCB Monies of US$1.5 million. In total the recoveries amount, roughly and for present purposes, to about US$13 million or £9.8m. The Liquidators point out that the settlement agreement also resulted in the Company being under a liability to repay Sherway the sum of US$50 million (which is a provable debt in the liquidation) as well as being under costs liabilities to Sherway such that the overall liability to Sherway was approximately £71m. In addition, there was a costs liability to Tarek estimated at about £8.7m. Prior to the FFA, PHRL had incurred liabilities in respect of legal costs of UK lawyers in a sum of approximately £3.4m (I have taken this figure from a Schedule provided by Counsel for the Liquidators after the hearing before me). Mr Crumpler in his second affidavit (paragraph 166) estimated Candey's time costs from April 2014 to October 2015 at between £3.54 million and £3.8 million.

The basis of valuation-the evolution of Candey's case: the written expert evidence

52. In his first expert report, dated 7 August 2017, Mr Hurst:

(1) rejected an hourly rate basis of remuneration as not adequately representing the value of the services provided. This was on the basis that Candey was bearing the risk of the client ultimately being unable to pay the costs under the FFA;

(2) considered litigation funding by a financial institution or individual providing funds as an investment in litigation, as a comparator to the FFA to decide whether Candey's fixed fee of approximately £3.8 million represented reasonable value for the services supplied. He considered that such a funder would, as a price of such funding, require either a percentage of the damages recovered or, more frequently, a multiple of the amount of funding. The

percentage of damages required would, he said, depend on the level of risk involved in the litigation, typically between 30% and 50%. As regards multiples of the amount of the funding, in his view three times the amount of capital advanced was normal, but it might be more than this. He treated a notional litigation funder in this case as advancing £1.2million (the relevant time costs of Candey as he was instructed) and considered that a litigation funder would expect to receive back the capital outlay plus £3.6 million. Against that background he considered Candey's fixed fee of about £3.8 million to represent reasonable value for the services it supplied;

(3) as regards CFAs, he says Candey put the chances of success at 58% (though this is nowhere in the factual evidence before me) "*which (on a conventional "ready reckoner" approach to calculating success fees) would mean an additional success fee of 72.4% being added to the costs, simply to cover the pure "burning cost" of the risk of losing.*" However, he considered that on the facts an uplift of 100% could be justified on the basis that Candey could charge a premium for taking on risk, the risk being the one arising from deferral of payment. He concluded:

> "*it will also be appreciated CFA's are open-ended, depending on the amount of work which ultimately needs to be done. Had this case gone to trial on a CFA with 100% success fee, the total cost to* [PHRL] *might have been much more than Candey's Fixed Fee*";

(4) stated that DBAs "*are generally not being used. The reason for this is that they are overregulated and the penalty for failure to comply with the regulations is that the agreement is unenforceable*".

(5) concluded that "*Hourly rates, CFA's and DBAs either do not adequately value the services supplied or, are inappropriate."*

53. The two experts, in accordance with usual practice and as ordered, met to identify further areas of agreement and disagreement between them. They produced a joint memorandum dated 10 November 2017. That joint memorandum identified, among other matters, the following regarding Mr Hurst:

(1) Mr Hurst had taken into account the actual circumstances of PHRL and thus its inability to meet its own legal expenses if it did not succeed in the litigation. That factor he regarded as "*central to the commercial ris*k" which Candey took on when agreeing to the fixed fee.

(2) In the circumstances of the instant case, Candey was acting both as the provider of legal services and in a role akin to a funder, accordingly the cost of such funding should be taken into account when considering the value of the services.

54. The joint memorandum also records that for the reasons set out in their respective reports:

(1) they were agreed that CFAs and DBAs would not be appropriate ways to value the relevant services;

(2) that in any event, due to the nature of the services (i.e. that various pieces of litigation were being run in various jurisdictions under a single retainer, but which could potentially have different results) it would be extremely difficult to devise a CFA or DBA which could effectively define a win or success. However, Mr Hurst went on to say that if the "win" had been defined in a DBA as obtaining the Court Monies and the SCB Monies, then a DBA would have been enforceable and he was instructed that under a DBA Candey would have charged 50% of $12.15 million recovered (referring to Mr Candey's 4th witness statement referred to below).

55. The Court of Appeal ruled against a fixed fee agreement as a basis of valuing the relevant services, in that event a further round of written expert evidence ensued.

56. In his Second Expert Report dated 5 August 2019 Mr Hurst dealt (among other things) with the possibility of valuing the relevant services provided by Candey on some form of contingency basis.

57. He "explained" the statement in his earlier report that CFAs and DBAs were "inappropriate" as having meant that "in the circumstances of the litigation, at the time CFAs and DBAs were considered, they were deemed to be inappropriate."

58. He asserted that when a CFA is entered into three factors are taken into account. They are (a) the risk of the client's insolvency, (b) the risk of the opponent's insolvency and (c) the risk of losing on the merits. He accepted that the risk of the client's insolvency has to be left out of account in the exercise under s245 but considered that the other two risks were properly taken into account in valuing the services supplied.

59. There is no risk assessment from 21 October 2015. However, Candey put the chances of success at 58% (this is not evidenced anywhere in the proceedings and was clarified as being part of his instructions) which on a conventional ready reckoner approach to calculating success fees would mean an additional success fee of 72.4% uplift "to cover the pure "burning costs" of the risk of losing. However, a solicitor would also be entitled to charge a premium for taking on risk.

60. Having considered the circumstances, his view is that a success fee of 100% (or close to 100%) is an appropriate and reasonable valuation method reflecting the parameters laid down by the Court of Appeal.

61. He also considered that the use of a DBA with a percentage recovery in the range 35% to 40% of the monies recovered, would also objectively represent an appropriate basis for valuing the services.

62. Finally, regarding an investor, he referred to a particular case identified by Mr Candey (see further below, the case involved Harbour Funding) in which the level of recovery was approximately 10.5 times the investment. However, as he pointed out, that was in circumstances where the funder also faced the risk of having to pay an adverse costs order. That risk would not apply to a litigation firm itself. He opined that the litigation funding model provides a further basis for valuing the services rendered by Candey.

63. Mr Thomas, for the Liquidators, also made a 2nd report. It is dated 9 September 2019. Among the points of relevance regarding the proper basis of valuation, his report includes the following:

> "7.30 *in my experience, however, CFAs have been much less used in commercial litigation* [compared with litigation relating to personal injury and consumer related issues where the claimant as an individual was often unwilling or unable to fund the litigation and where CFA's have become predominant] *save in certain specific areas, and in my experience the traditional hourly rate basis remains by far the most common method of funding generally in commercial litigation."*
>
> *7.32-7.33* [he confirms his view set out in the joint memorandum of experts dated 7 November 2019 that CFA's and DBAs would not be appropriate ways to value the relevant services in this case and in any event it would be very difficult to define a "win" .]
>
> *7.34* [that under a CFA, the base costs represent the objective value of services supplied. Success fees form part of a subjective value being added to the objective value to represent compensation received for the risk that the lawyers may not be paid some or all of their fees].
>
> 7.36 [that the second Court of Appeal judgment, as he understands it, precludes any reliance on the particular characteristics of the situation of the company to which services were supplied, and that valuing by reference to a CFA involves taking into account the particular characteristics or situation of the company]
>
> 7.37 [merits risk cannot be separated from credit risk]
>
> 7.38 [there is no evidence the prospects of success were 58% as asserted by Mr Hurst. However a letter dated July 2015 seeking funding refers to prospects of success having been estimated at more than 60%. If so, and applying the conventional ready reckoner approach, the success fee would be no more than 67% (assuming a full, not discounted CFA).]
>
> 7.43 [As regards the definition of "win", he remains of the view that on the facts of this case it would have been difficult to define. He doubts that such definition would have covered the situation on the facts of this case.]
>
> 7.47 [DBAs are excluded from the valuation exercise by virtue of the Court of Appeal's judgment]
>
> 7.48 "*I agree that more such agreements are being utilised, but in my experience, this is actually smaller and less complicated litigation whilst they are more common, I remain of the view, as I believe most commentators do, that they are still rare."*

64. Again, the experts met to narrow the areas of agreement and disagreement and produced a joint memorandum. The joint memorandum was dated 7 October 2019.

The basis of valuation-the oral expert evidence

65. Mr Thomas said, and I accept, that at the time, in 2015, a solicitor would prefer to negotiate remuneration on a time cost basis with payments on account. So much is borne out by the factual evidence in this case regarding Candey's approach at the time.

66. He also expressed the opinion that in his experience, a client that had sufficient money would prefer to remunerate a solicitor on that basis rather than on a results basis. It was suggested to him that a client might want to enter into an agreement in which remuneration was only paid on a contingency basis because (a) that might incentivise the solicitor and align him with the client in terms of a desire to win and (b) because it would mitigate legal costs liability if the case does not succeed. In other words the agreement in question would be "no win, no fee" or "no win, reduced fee" (reduced from the normal time\costs basis). Mr Thomas disagreed. It seems to me that he was speaking from his own experience of actual cases he had seen. I accept the possibility put forward to Mr Thomas in this respect even though he did not agree with it. However, two things follow. First, I accept Mr Thomas' evidence that in most cases there will be a cash flow saving from a contingency type agreement and therefore the agreement is likely to be sought by those with cash flow difficulties. Secondly, that as was put to him, such an agreement does not normally incentivise solicitors solely by reason of an increased fee (over normal charging rates) on a win but also by a decreased or no fee in the case of a "lose". On a CFA the base costs will be the normal value of the services but the uplift will be to compensate for the risk that if there is a loss the solicitor gets paid nothing or less than he would otherwise receive. The same is true in relation to DBAs and funding agreements where the liability to make payment turns on there being a win: again the size of the payment is in large part to compensate for the risk that there will be no payment in the event of a loss.

67. I should also note that in oral evidence Mr Hurst confirmed the general position that solicitors work was remunerated on a time cost basis. He also confirmed "as probably true" Mr Candey's assertion in his first witness statement that most of Candey's competitors do not undertake work on a contingency (CFA/DBA) basis and that they require instead to be paid pursuant to the traditional model on an hourly basis with funds on account. I accept this evidence of both gentlemen. Mr Hurst also confirmed that DBAs were extremely rare in 2015-2016. Again, I accept his evidence.

68. As regards litigation funding Mr Hurst had asserted in his report that the effect of the FFA was that Candey was acting as a de facto litigation funder. In cross-examination, he accepted that in reality it was not lending funds but extending credit and that no solicitor extending credit would expect to charge something like 400% of his normal hourly rate in return for giving credit. Rather they would charge interest. Again, I accept his evidence in cross-examination on these points.

The basis of valuation- The factual evidence

69. I turn to the factual evidence. This involves consideration of two strands. First, the contemporaneous facts of this case regarding PHRL and secondly, general factual and market evidence about CFAs, DBAs and "investment agreements" for the provision of funding.

70. I turn first to the circumstances in which the FFA came into being. These circumstances are relevant as being the background against which to test what could have been obtained in the open market at the time.

71. In emails between 22 and 24 April 2014 Mr Candey dealt with the question of agreeing a basis of remuneration for Candey. In this connection he was negotiating with Mr Omar Amanat who was then the sole director of PHRL, though the agreement seemed to extend beyond the costs of PHRL itself.

72. By email of 22 April 2014 having set out a wide range of matters upon which his firm had been asked to advise Mr Candey said:

> "*I cannot see how we can work on a contingency basis on any of the matters we have discussed to date. I am however willing to consider any proposal you may have provided that any agreement is secured. In the absence of any agreement on a contingency basis, unless and until we agree terms on that basis, we should charge you on an hourly basis as set out in the attached terms."*

73. The "attached terms" which were enclosed and had, apparently, been previously provided, provided by clauses 1, 3 and 4 as follows:

> "*1. Our Fees*
>
> *Our services are charged according to the time incurred by our fee earners in six minute units in accordance with industry practice. Our fee earners' rates are charged at between £100 and £700 plus VAT (currently 20%) per hour. We may require you to provide us with advance payment on account for costs and expenses. We will charge you for any expenses we incur on your behalf, most of which will be subject to VAT. These may include Court fees, barrister's fees, expert's fees, travelling costs, photocopying colour printing costs. All estimates of costs are for guidance only and may be revised because of changes in the parties' strategy and evidence.*
>
> *2……*
>
> *3. Invoicing*
>
> *We will invoice you on a monthly basis and we require our invoices to be paid within seven days of receipt. Thereafter, following seven days' notice, we may suspend work on your matter until payment is received and charge you interest. You are entitled to object to our invoices and to apply for an assessment under Part III of the Solicitors Act 1974. We are entitled to retain all papers until fees are paid in full.*
>
> *4. Alternative Funding for Legal Services*
>
> *We may be able to arrange finance to fund your legal costs via third parties or act on a no-win, no fee basis. You should check your all [sic] policies of insurance e.g. home or business insurance which could cover your legal costs."*

74. By email dated 24 April 2014 Mr Candey wrote as follows:

> "*The board are not persuaded that we can undertake this matter on a pure contingency basis. We really want to help you but we cannot take equity as there is a substantial risk of dilution and dissipation, and with so many BVI entities we could see any interest we hold being undermined by others.*
>
> *We are however prepared to act on a fixed fee price basis of £100,000 per month to include barristers' fees. The winning party in litigation is entitled to recover their time costs from the losing party. We would also want the right to recover these costs to be paid to us. This is an incentive for us to thus win and you get your cap and control*."

75. This agreement was re-iterated in an email dated 25 April 2014 in which Mr Candey referred to his proposed "war strategy":

> "*Throwing stones may be an option but I prefer to cause civil war amongst our opponents, cut off their supplies lines [sic], send in the air force and then attack with judicial force*".

76. By email dated 28 April 2014 Mr Candey confirmed:

> "*We are keen to find a solution to work on a pure or hybrid contingency. Until such point and as agreed in our conversation this evening and further to the attached incorporated emails on fees, including our terms and conditions attached, we have agreed a fixed monthly retainer of hundred thousand pounds to cover all legal fees, including the barristers, are set out in the attached email of 24 April.*
>
> *We expect our fees at hourly rates to substantially exceed this sum. In accordance with the principles set out in our email of 24 April if you obtain an order for costs or otherwise reach an agreement with the opponents (identified below) on costs we should be able to additionally recover our hourly rate costs provided these are paid by the opponents*…."

77. It appears that for the first three months of acting for PHRL Candey charged a fixed fee of £100,000 a month.

78. The applications for interim relief that ensued made very clear that the costs would be way in excess of £100,000 per month. Candey therefore agreed with Mr Amanat that Candey would revert to charging on an hourly rate basis. Between June 2014 and August 2015, Candey provided services on this charging basis.

79. Charging on a contingency basis was still under consideration however, although the proposals came to nothing. By email dated 9 July 2014 sent to Mr Amanat, Mr Candey set out a proposed "20% Contingency Agreement". One ingredient involved a monthly fee of £100,000 which would cover the costs of the English counsel team. Otherwise the proposed ("No Win No Fee") DBA involved the payment to Candey of:

> "*20% of any Success, monetised (in accordance with fair market values and norms (to be determined by Expert Determination as set out below in the absence of any agreement) of a benefit in non-monetary form. This amount is fixed and includes VAT (where applicable). A DBA gives you certainty that you will not pay more than a fixed amount.*
>
> *If we are unable to achieve a Success, you will not be liable to pay us anything.*
>
> *"Success" means that any claims brought by any of the Claimants against any of the Opponents are decided in any of the Claimant's favour, whether by a court decision or a settlement agreement or in any way that any of the Claimants derives any benefit of any kind from pursuing the claim.*
>
> *…..*
>
> *The reason for setting our payment at this level is because it reflects our risk of not being paid; our exposure to pay barrister's fees, foreign lawyer's fees, enforcement costs and other expenses from our own funds whether you win or lose; the likely manner in which your Opponents may try to defend your claims and/or evade payment of any Judgment we obtain; and the likely delay in receipt of our fees. There is thus significant risk but greater potential reward for the firm.*"

80. The proposed DBA also involved the payment of £5million to be held in an escrow account which could be used to meet the Sherway loan but otherwise would be charged to meet liabilities under the DBA, a charge over the proceeds of the litigation to meet liabilities under the DBA and an assignment to enable Candey to pursue the claims if PHRL was unable to do so but on terms that Candey accounted to PHRL for 20% of any damages paid.

81. In the end, the negotiations concerning the DBA did not come to fruition. In his evidence, Mr Candey also refers to having offered a hybrid fixed fee and contingency agreement. I am unclear if this is a reference to the subject matter of the email of 9 July 2014 or something else.

82. Candey continued to act on an hourly rate basis with an on account payment of £200,000. By August 2014, costs were growing and email correspondence shows Candey seeking further payments on account, which Mr Amanat was resisting.

83. By about May 2015, the ability of PHRL to meet the on account payments required by Candey was seriously in question. At this point an agreement was reached by PHRL with a vehicle of Mr Amanat, Peak Venture Partners LLP, that it would provide ongoing funding for PHRL's legal costs. Such agreement formed part of a standstill agreement under which proceedings between PHRL and PVP were stayed with the parties seeking to agree what sums were due as between them (the "Standstill Agreement"). One of its relevant terms was, in effect, that legal costs would be funded at a figure of £500,000 a month.

84. Mr Candey's evidence is that payments under the Standstill Agreement were delayed and that it did not provide the cash necessary to deal with the costs of the London Litigation and other proceedings. By August 2015, Candey was owed almost £1

million. A further agreement in respect of Candey's fees was regarded by Candey as being necessary. Mr Candey explains the position as follows in his first witness statement:

> " *86. Ideally this firm wanted to continue to be paid on an hourly rate basis as it had been throughout the early stages of the proceedings. As a firm we do however undertake a lot of work on a contingency basis in the form of damages based agreements and conditional fee agreements. We undertake that type of work as we have found that by taking substantial commercial risk we can obtain a higher fee. Most of our competitors do not undertake such work and they may require instead to be paid pursuant to the traditional model on an hourly rate basis with funds on account.*
>
> *87. In my experience the possibility or question of a fixed or contingent fee is something raised by most clients. It was, unsurprisingly, something I had discussed on occasion with PHRL (and internally with Mr Dunn) at various times during 2014 and 2015….. on 30 July 2015 I proposed to PHRL the outline of a contingency fee agreement. Having thereafter looked at the law relating to damages based agreements and conditional fee agreements we felt that the former was inappropriate (given that we were not funding Counsel) and the latter was incapable of dealing with all matters. This left open the option of a fixed fee. I discussed a possible terms and figures of Ms Turnbull (and Mr Dunn) in the summer of 2015 Ms Turnbull agreed terms in principle which recorded in my email of 9 August 2015. The proposed fee was £4.5 million*."

85. As Mr Candey goes on to explain the fixed fee was thereafter negotiated down. Ms Turnbull, says Mr Candey, negotiated that fee on behalf of PHRL, consulting with and involving Mr Robinson, his lawyer Mr Judge, Mr Zecha and Mr Amanat.

86. This explanation fits in with a letter from Candey dated 9 May 2016 to Stephenson Harwood, the Liquidators' solicitors, which argued for the validity of the FFA:

> *"The Company's initial intention was to enter into a form of mixed contingency-conditional fee agreement which we were not prepared to agree (in any respect) given the risks that such an agreement could be champertous and/or in breach of the DBA Regulations. This was something we considered from our own perspective with senior costs counsel. It was on this basis that we wanted to be paid either (i) on an hourly rate basis (a repeatedly articulated preference), with outstanding fees paid in the usual way, or (ii) a fixed fee on commercial terms*"

87. The FFA obviously took into account the risks of insolvency on the part of PHRL, as well as delay in payment. Candey says, in effect, that insolvency of PHRL was tied to legal (and economic) success in the proceedings.

88. In his first witness statement Mr Dunn records that the FFA agreement was entered into against a background of a consideration of the prospects of success "*in various proceedings including the London Litigation*".

89. According to Mr John Brisby QC, he regarded PHRL as having "*reasonable prospects of success*" in its claims in the London Litigation. As he explains in Part III of his witness statement (expanding upon what Mr Candey says in his 1st witness

statement) there were essentially four main groups of claims by PHRL. The first two related to claims concerning the running of the joint venture company (Peak Hotels and Resorts Group Limited, the "JVC") and alleged invalid acts and breaches of the shareholders agreement relating to the JVC entered into between PHRL and TIL. The main relief sought was the acquisition by PHRL of the shareholding of TIL in the JVC at 80% of "Fair Value" under the relevant shareholders' agreement. The third group of matters revolved around the manner in which Aman Resorts Group Limited ("ARGL"), a wholly owned subsidiary of the JVC, was said to have been permitted to default on what has been referred to as the Pontwelly Loan, being a loan of some US$168 million from Pontwelly. That loan was secured by a pledge over its shareholding in Silverlink Resorts Limited (until Summer 2015, the operating company of Aman Resorts and the wholly owned subsidiary of ARGL). The fourth group of claims related to Mr Eliasch and Sherway. The claims included claims that a notice by Sherway to acquire PHRL's shares in the JVC at 80% of fair value was invalid, misrepresentation resulting in a claim to rescission of agreements with Sherway, alternatively there were claims that such agreements had been terminated for repudiatory breach, claims for inducing or procuring breach of the PRHL shareholders agreement and/or unlawful means conspiracy. There was then a raft of counterclaims against PHRL. As Mr Brisby QC says: the London Litigation was "an incredibly complex piece of litigation". That of course was only one part of the litigation in which PHRL was involved and Candey was instructed.

90. As Mr Candey explains in his first witness statement, there were also what have been called the Power Capital Proceedings, the proceedings brought by Jinpeng in BVI, a Hong Kong arbitration brought by Jinpeng and proceedings in New York, including potential Chapter 11 proceedings brought by way of derivative claim.

91. The FFA was negotiated not only on the basis that it covered the London Litigation but also all these other pieces of litigation, as Mr Candey confirmed in his 1st witness statement, as well as "commercial/corporate" advice. His evidence is that the fee estimate for work in the London Proceedings was originally some £2 million but that this increased to £4 million as a result of the postponement of the trial from November 2015 to March 2016 and the addition to the litigation of claims relating to the Pontwelly Loan (requiring injunctive relief, pleading amendments, the addition of new defendants and derivative actions in BVI and New York). A further £2million was estimated to take account of all the litigation and all its uncertainties. A slightly different breakdown is provided by Mr Candey in his third witness statement.

92. In what is described as his fourth consolidated witness statement dated 7 August 2017, Mr Candey said, among other things, the following:

> "*17. The Applicants are fully aware that no credible London firm would have agreed to act on these cases on the standard hourly rate basis in October 2015 on terms that they might (depending on the outcome of the litigation or other external events in relation to the solvency of clients) never be paid, and in any event that they might well be paid nothing for a number of years…… Indeed, the reality is that the only basis upon which any competent firm would have agreed to act would be if their fees were funded by a third party. I do not believe that any other firm would have agreed to act on the same terms as our Fixed Fee. They would not have been in a position to take the risk. Through our extensive*

experience of working on alternative means of funding commercial disputes, I am unaware of any reputable, experienced law firm who would have agreed to step into act for PHRL at such a late stage in the proceedings other than on the basis that they would be paid a very large sum of money, of at least £1 million on account of their fees. As far as I am aware this simply was not an option open to the company.

18. There were other methods by which this litigation could have been funded. However, all of them would have involved the client paying very significantly more than conventional hourly rates for work done….. For example, my firm could have acted on a CFA. But this would have entitled it to charge a premium of 100% on its hourly rates. We did not, however, consider a CFA suitable for this case. The advantage of a Fixed Fee over a CFA was that it made price certain to both parties, whereas a CFA would have been open-ended. Litigating under a CFA could have been much more expensive to the client had this case gone to trial, or thereafter to appeal. Another possibility would have been a damages based agreement. Under such an agreement, lawyers are able to take up to 50% of any compensation recovered. Again, this enables lawyers to recover remuneration for risk which may greatly exceed their conventional time costs. Here, however, a damages based agreement did not appear to be appropriate, because the primary remedy sought was not damages, but a buy-out of the opponent's shares. A final possibility would have been third party funding. Here again, any firm would have required very substantial remuneration for risk. I understand that funders typically require a return of at least four times their funding from the proceeds of litigation…. In the present case, we were unable to obtain third-party funding. This left the Fixed Fee as the best option.

19. As a commercial business lawyer I believe that the value of the services supplied by my firm after 21 October 2015 in monetary terms is in fact very easy to determine. In the absence of the Fixed Fee the Company would have got nothing from the London Litigation. As a consequence of the Fixed Fee the sum recovered for the Claimant in the London Litigation amounted to the recorded sums as set out in settlement agreement which were released in cash. This sum was US$13.2 million or £10.15 million as at today's exchange rate. I would subtract from this sum the costs paid in disbursements after 21 October 2015, namely £1,226,725.95 which leaves a sum in excess of £8.9 million. That is one measure of the value for the value [sic] of the services supplied. The only other measure is the bargain struck, namely the Fixed Fee. It is the latter which is the better measure as it was the correct contract price, the deal freely agreed and negotiated by the parties."

93. So far as concerns a DBA, I should also record the contemporaneous thoughts of Mr Candey relayed to Ms Turnbull by e-mail dated 9 August 2015 by which he proposed and attached a draft of what became the FFA and in which he said (among other things):

"*Your primary claim against Tarek is for declaratory relief and the consequential right to buy Tarek out at 80% of market value to be assessed (at a point in time to be determined by the court) by an expert accountant/valuer.*

> *Thus there may be no damages as such.*
>
> *We think that a DBA would still work as the intention could not have been to exclude such claims from being undertaken on a contingency basis but it is not a risk we want to take (there is no case law at all on the point).*
>
> *We have therefore proposed a fixed fee…..*
>
> *We have yet to meet any litigation solicitors who actually undertake DBAs, we are pretty unusual: we do not think anyone would match this proposal….*
>
> *For the avoidance of doubt our preference is to be paid on an hourly rate with funds on account of future work but we are prepared to act on this basis*."

94. I turn now to the more general factual evidence regarding fee charging structures.

95. In his eighth witness statement, made on 21 June 2019, Mr Candey gave more general evidence about fee charging structures. In paragraph 5 of his witness statement he acknowledges that his firm does charge on an hourly rate basis and that the traditional hourly rate is a measure by which London law firms do charge fees to their clients. However, he points out that this is not the only fee structure used.

96. In paragraph 6 of his witness statement he asserts that it would be "completely wrong" to value the services provided by Candey on a time basis because that would:

> "*represent a wholly artificial assessment of terms on which modern day litigation is conducted. It would turn a blind eye to the reality and sophistication of the litigation market….. It would also…create a dangerous precedent that could have a stifling effect on the ability of wronged litigants to pursue their cases, shutting out deserved parties access to this honourable court, due to simply having a lack of funds to agree to pay the traditional hourly rate*".

97. In paragraphs 9 to 10 of his witness statement, as subsequently corrected in his ninth statement, he refers to "*the arrival of professional funders*" and the circumstances in which they:

> " *are often at the heart of the biggest cases and their influence, together with the increasingly competitive nature of the market generally and the growing sophistication of clients, are driving the litigation market. In my experience, from my discussions with them, funders generally require law firms to work, at least partly, on a contingent basis*".

98. In this connection, Mr Candey, refers to litigation that his firm has been engaged on where the opponent has been funded by Harbour Litigation. Harbour Litigation, he says, has incurred legal liabilities in excess of £13 million, to Allen and Overy LLP. In his experience, "*funders typically expect to recover 3 to 4 times their investment should they be successful*". The sum claimed by Harbour Litigation in the case in question is up to US$170 million.

99. However, what is clear from Mr Candey's witness statement is that a distinction is to be drawn between institutional investors and the payment of lawyers for legal

services. Both institutional investors acting as professional funders and many clients "*want to see solicitors taking risk*". Although Candey works with professional funders where possible it assumes risk and funds cases itself. The "three key ways" identified by Mr Candey as being methods of routine payment of lawyers in the London commercial litigation market are (a) fixed fees, (b) conditional fee agreements with a percentage of uplift on success and (c) damage based agreements where the client pays up 50% of any recovery.

100. Mr Candey's assessment is that of the alternative arrangements, "*the most common are fixed fees, then CFAs then DBAs, and often these are combined with third-party funding.*" He explains that there are at least two reasons why clients may wish to remunerate lawyers on an alternative basis to the traditional hourly rate basis. First, there is the desire to "incentivise" the lawyers so that, as Mr Candey puts it "they have skin in the game". Secondly, clients may not have readily available funds.

101. As regards Candey itself, from about 2010 it began undertaking CFAs where it was only paid on success, at double its hourly rates, with the fees and uplift paid by the opponent. Thereafter, CFAs formed the majority of the litigation work undertaken by Candey. After March 2013, and as regards insolvency matters March 2016, when the rules regarding recoverability of the uplift on CFAs from the paying party in the litigation were altered, Candey continued to undertake work on a CFA basis. Of the work undertaken by Candey in June 2016 about one third of its litigation matters were funded by CFAs and DBAs (with the ratio of CFAs to DBAs being 2 to 1).

102. As he points out, this does not tell the whole story:

> "*..of course one may have many hourly rate matters of a lower value and a much larger fee on a small quantity of DBAs, by value. It makes little sense to undertake smaller cases on a DBA, whereas it is much more attractive to do them on bigger cases where quantum is much larger….. What I can say is simply that contingent work is, and was at the relevant time, an integral part of our business and that we charge and have charged in accordance with variety of alternative fee models.*"

103. Mr Candey also recognises that "*There are many costs commentators who think that entering into a DBA is unwise, given the uncertainty that surrounds the wording of the regulations which govern the enforceability*". However, Candey, he says, considers that "*the uncertainty surrounding the damages based regulations to be an advantage as it allows and has allowed us to have a larger share of this market.*" He says that Candey has entered into a large number of DBAs.

The valuation basis: discussion and conclusions

104. There are some preliminary points that I should make.

105. The first point to note is that it is accepted by Candey, as it has to be, that valuing the work carried out by Candey on a time costs basis is a valuation basis open to the court. Even today, and even in the area of boutique firms within which category Candey is located, most firms acting in the ordinary course of business, are rewarded for their services on a time cost basis. In this respect I was referred to the CJC Costs Committee Report as well as the evidence on behalf of Candey dealing with the

narrower area of boutique firms akin to Candey. Candey's standard terms themselves provide for remuneration on this basis. Candey was paid on this basis for over a year when acting for PHRL. Further, as the contemporaneous evidence shows, in this case Candey actually preferred to be remunerated on a time cost basis and was not enthusiastic about remuneration on any other basis. The "after the event" evidence is that at the time Candey actually ruled out remuneration on a CFA/DBA basis. The evidence for Candey is that its direct boutique competitors are less likely to be prepared to operate on some form of contingency basis. I also consider that, at least to some extent, time cost basis of charging underlies or is a factor in mind when negotiating contingency or fixed fees.

106. I therefore reject the submission of Mr Saoul that it is "*simply unrealistic to suggest that a firm like Candey would usually be instructed on a matter such as this on the basis of an ongoing hourly rates based retainer.*" I do accept that a firm like Candey may well be (and in this case have been) instructed in preference to one of the larger city firms because it offers the option of some form of contingency funding. However, there are also other reasons why a client would go to a boutique firm like Candey and as the evidence shows Candey operated on a capped fixed fee then a time cost basis for a considerable period in this case prior to entry into the FFA. It follows that I also reject Mr Hurst's opinion (if that is what it is) as set out in his reports (but I think implicitly, if not explicitly, resiled from in cross-examination when taken through some of the relevant correspondence) that a boutique law firm such as Candey would not have been willing to supply services on an ongoing basis purely on an hourly rate basis and that an alternative method of funding would have been required by the solicitor which would have given greater rewards on a "win". That is simply inconsistent with the contemporaneous evidence, contemporary evidence being capable of properly being taken into account on the exercise under s245 IA 1986 as the Second Court of Appeal decision makes clear.

107. Secondly, although the overriding job of the Court under s245 is to determine the "value" of the services provided, that is best done by reference to s245(6) and ascertaining what consideration for the services could be obtained in the open market at the time of the supply of the services, hence references before me to a "hypothetical contract" for such services as were in fact supplied. There is no evidence before me that, other than the contingency types of agreement identified before me, there is another manner in which the court should value the services provided by way of outcome. There is no evidence of a market practice of paying for services (or of valuing the same) purely by reference to outcome akin to that of, for example, the scale of Official Receiver's fees charged on the basis of realisations and distributions under rule 18.22 of the Insolvency (England and Wales) Rules 2016. Leaving aside the CFA/DBA and funding agreement models, and using the terminology adopted in *Friston on Costs* (3rd Edition, Chapter 42) there is no room in the exercise that I have to undertake for some other version of value-based pricing rather than one based on the labour theory of value, finding its expression in costs-plus pricing.

108. Thirdly, the approach of the experts, particularly Mr Hurst, was to look at contingency agreements such as a DBA, CFA or investment agreement on the basis, at least as regards the first two of those, of considering whether he, as a tax costs judge, would have been able to allow through a relevant hypothetical agreement being put forward on a costs assessment on a solicitor and own client basis. It seems to me that this does

not really capture the issue before me which is whether, and if so what, agreement might hypothetically have been reached by a litigant and solicitor regarding remuneration of the latter for the work it in fact did at the time the work was carried out. Of course if such an agreement is in fact reached, then on an assessment by the court in relation to a solicitor/own client challenge, the fact that such an agreement was in fact freely negotiated is likely to be a relevant factor in the assessment process (see e.g. CPR r 46.9 setting out the presumptions that were, as I understand it though nothing turns upon any pre CPR period, applied in any event prior to the rule in question).

109. One difficulty is that, other than in relation to investment agreements, there was a dearth of factual (as opposed to expert) evidence from the experts (or others) in terms of or by way of comparables for contingency payment methods. This was less true in relation to the evidence of investment agreements but had validity in relation to hypothetical DBAs and CFAs. This was an area that has recently been considered in *Shepherd v Collect Investments* [2018] EWCA Civ 162. I concluded that at the end of the day the issue did not need further analysis by me, at least as regards valuing on an alternative basis to time cost charging. In effect, the problem was the same in relation to both experts on this area.

110. I turn now to the exercise that must be undertaken under s245 IA 1986.

111. The requirement of s245(6) is to ascertain *the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the…. services in the ordinary course of business and on the same terms (apart from consideration) as those on which they were supplied to the company.*

112. The services in this case were legal services. In my assessment they are to be treated as being limited to that and not as including any "funding" or "credit" element. As regards the FFA the Court of Appeal identified that the service provided was limited to the legal services. The consideration actually agreed for the services in question, the fixed fee, was based not on the services actually supplied but was, in effect, an agreed consideration based at least in part on what those services were thought likely to be and to cost on a time basis, the solicitors (and the client) taking the risk that the actual work carried out was more or valued at more (on a time basis) than the fixed fee (or was less or valued at less on a time basis than the fixed fee). In addition, the fee took account of the delay in payment and the risk (from the solicitor's perspective) that the client would not have the resources to pay the fixed fee when ultimately due.

113. I turn first to merit risk. In the case of any form of fee which is in some way contingent on "success" (whether CFA, DBA or investment agreement) the same would be agreed on the basis that the solicitors are to some extent funding the litigation costs (or providing credit) and taking a risk based on the merits of the case: if there is no relevant recovery then there would be no fee (ie to some extent the fee would be agreed on a "no win, no fee (or reduced fee) basis"). The valuation exercise that the court is required to do under s245 is to quantify the value of the legal services: there is no question of the price being inflated or being fixed by reference to the risk of there being no fee in the event of no win. With a fixed fee agreement, the primary risk is inaccurately assessing how much work will be involved. Under s245 that effect on valuation is left out of account because the risk does not exist: the work

in question is now capable of identification and valuation. The fixed fee becomes irrelevant to the valuation exercise because it is pricing something different. Similarly, as regards a fee payable only on the contingency of a win, that contingent risk is not taken into account under s245 because the basis of the valuation is that the legal services provided have a value which is to be valued. They are not valued on the basis that any hypothetical contract includes a provision that the value may not be payable because there is no "success". In my view, there is therefore no scope for "merits risk" to play a role in the s245 valuation exercise.

114. I consider that this is an aspect of the valuation with the benefit of hindsight that the Court of Appeal talked about. With hindsight the court knows not only the "amount" or content of the actual services provided but it proceeds on the basis that those services have a value and asks what would have agreed to have been paid for them, under a hypothetical agreement, at the time they were supplied on the basis they would then be paid for. Candey submitted that the Court should (1) decide the hypothetical contingency agreement the parties might have reached (factoring in the risk of no success no win) but then (2) take into account the success actually achieved. However (2) is something that is known with the benefit of hindsight and if it had been known at the time the hypothetical agreement was reached then a large factor of "risk" would not have existed. That risk (in terms of existence and the assessment of it) is of course highly relevant when setting the "success fee" when the future is uncertain.

115. Secondly, and if I am wrong about the role of "merits risk" playing a role in the valuation exercise, there is a related point. In my view it would be wrong to set the value of the work for s245 purposes by reference to a hypothetical "contingent fee" and then set the value by reference to the recoveries/win subsequently made/achieved. This is because the requirement of s245 is to identify the amount of money <u>at the time of supply</u> which could reasonably have been expected to be obtained for the services in question. If the notional services include a "funding/credit element" or a "sharing of the risk on the merits" then, the question is what is the amount of money at the time of entering into such an agreement that could be obtained for such a service. Put another way, rather like the proof of a contingent debt in a liquidation, that would involve assessing the merits risks and the likely recoveries to assess, in money terms, what liability the client is to be treated as undertaking under the relevant contingency agreement and converting that to money or money's worth (an exercise s245 does not in terms provide for as the whole point of a contingency arrangement is that there is no payment until the contingency happens so that under s245 no money would be paid for the services at that point). Thus, even if a hypothetical contingency risk or merits risk basis of remuneration is appropriate, in my view s245 requires that risk to be quantified and a value put on it so that the services are then treated as having some form of monetary value at the time the contract is entered into (or the services rendered) but without looking to the end point to see what success has in fact emerged and simply using that "success" as the determinant of the reward or its quantum.

116. Thirdly, in my view at the very least a DBA is not an appropriate way in which to assess the relevant value. That is because it is, to some extent, in the same category as an FFA as involving risks as to the actual amount of the legal services that will be supplied. However, that risk is no longer in play because it is the legal services that were actually supplied which have to be valued. In other words, the starting point for

assessing what return or value is appropriate is to consider what might be paid for the legal services actually supplied (whether by the client or by the funder). However, in the case of a DBA and (to some extent a funding agreement) there is at the outset of the agreement an uncertainty as to the scope of the legal services. This uncertainty is the same which exists in the case of the FFA. As the Court of Appeal has pointed out, there is now no uncertainty in that respect. For similar reasons to that relating to a FFA, a DBA/funding investment agreement analysis is not an appropriate basis for valuing the legal services actually supplied. In short, I do not have evidence of what would have been "charged" or what rate of return would have been (hypothetically) agreed if the only risk taken on by Candey had been "merit risk".

117. Fourthly, in my view all of the contingency payment methods identified involve factoring in as part of the "price", the provision of credit by the solicitors and I have no evidence enabling me to "strip out" this risk factor. This seems to cover both elements of deferral of payment and credit risk of being paid. These risk factor elements seem to be an important practical underlying driver to the sort of contingent fee agreements put forward by Candey. (Indeed on the facts here this is what drove PHRL to agree the same and the only reason why Candey accepted a fixed fee agreement, though it preferred a time cost method of charging). I am not satisfied that, in 2015, there was in fact a market which such factors were left out so that only a share in the risk on the merits entered into the equation, assuming for present purposes that such factor could be taken into account when carrying out a s245 valuation.

118. Some confirmation for my view in this respect, and that the factor is significant, is to be found in the Skeleton Argument of Mr Williams QC, then acting for Candey, before HH Judge Raeside QC which asserts that:

> "*As Mr Hurst shows, under a DBA a solicitor is entitled to take up to 50 percent of the sums recovered, <u>to remunerate it for deferring its entitlement to payment and to allow for the risk of non-payment</u>*" (stress provided).

And as regards a CFA:

> "*..the CFA may still be a useful point of comparison, as solicitors are expressly entitled to charge thereunder <u>for both deferment and risk</u>, up to a statutory cap of a 100 per cent enhancement on time spent." (emphasis supplied)*

119. Mr Thomas' oral evidence was that a success fee was to some extent compensation for taking the potential downside of a no fee (or reduced fee) in the absence of "success" or a "win".

120. As a connected point, I consider that the evidence shows that at least in 2015 any solicitor (and certainly Candey and any relevant city firm) would prefer working on or only work on a time cost basis. If that is correct, then there can be no prejudice to Candey in the s245 valuation being carried out on that basis.

121. Fifthly, as regards funding agreements there is no evidence that solicitors routinely enter (or in 2015 entered) into such agreements (quite apart from the fact that that would be a service different to simply the supply of legal services). The evidence is that funding agreements are entered into by third party funders not the solicitors' firm

carrying out the legal work, as Mr Hurst accepted. In any event, the true analysis is not that Candey was providing funding but that it was providing credit and for that it would not charge a 400% uplift on its hourly rates.

122. As regards DBAs I am also not satisfied that back in 2015 there were sufficient DBAs being entered into such that it can be said there was a market which can be relied upon for the ascertainment of the "consideration" for the legal work done under a DBA. This is in effect what Mr Candey was saying in his email of 9 August 2015 when he said that "*We have yet to meet any litigation solicitors who actually undertake DBAs.*" This fits in with Mr Thomas' and Mr Hurst's evidence, which I accept, that DBAs were rare in the commercial field in 2015. The regime had fairly recently come into force and there were doubts about its scope. That thread too is revealed by the contemporaneous evidence emanating from Candey.

123. Sixthly, it seems to me impossible on the evidence to come to a view as to the quantum of reward under a DBA, CFA or investment agreement that would be appropriate.

124. The litigation was extremely complex and multi-faceted spreading over various jurisdictions. In cross-examination Mr Thomas suggested that it might be that in the market there would have been separate agreements negotiated for the separate proceedings in question. In my view, this makes a lot of sense.

125. In the London Proceedings, at the least, the main relief claimed was (in effect) a buy out at a discounted value and the acquisition of a large stake in the relevant company. Candey submitted to me that a "win" or "success" could be defined to cover what happened here: namely the recovery back of some of the company's own money that it had paid into court and/or that had been held subject to the dispute. I accept an agreement could be framed in those terms.

126. The question though is if in the open market in 2015 such a broad "success" would be likely to have been agreed by a litigating party in relation to the very complex litigation facing Candey in 2015 and, even if it was, what the basis of remuneration would have been agreed (that is uplift under a CFA or percentage of recoveries, up to 50%, under a DBA).

127. It is, in my judgment, telling that the DBA asserted by Mr Candey in his witness evidence is one of 50% of the recoveries he says were made in the London Litigation. Mr Hurst, Candey's expert, put the percentage at 35-40%. He was not really able to justify this figure in cross-examination. Contemporaneously (July 2014) Candey suggested a DBA with a reward of 20%. That was on the basis particularly of certain identified risks which clearly included ones that should not be taken into account in the valuation process under s245.

128. The CFA rate of uplift discussed by Mr Hurst and Mr Thomas was on the basis of an assessment of 58% prospects of success but, late in the day, it became clear that there is no actual evidence as to that before me. Furthermore, it was accepted that normally some form of risk assessment would be carried out before agreeing to a form of contingency funding and no such risk assessment was available here (either as being one carried out contemporaneously or after the event but looking back to the position at the time the services were provided). The most I have are general statements from

Mr Brisby QC broadly that PHRL had "reasonable prospects of success" and a hearsay statement from Mr Hurst that Candey put the prospects of success at 58%, a matter that is not dealt with anywhere in the factual evidence and which is extremely general and unspecific as to time and basis. Accordingly, the expert evidence on CFA uplift is on a hypothesis that is not evidenced.

129. Further, it seems to me likely that a hypothetical litigant in the position of PHRL in the litigation would have also taken into account the fact that it had already paid (or was committed to paying) significant sums by way of costs for work to date. In other words, what is being hypothetically valued is, on one basis, not simply the entirety of the legal service to be provided over the litigation as a whole, but only some of it in circumstances where (in effect) it might be said that any hypothetical agreement would be more of a "no win, reduced fee", because of the fee already paid/due.

130. Looking at it another way, there is a very real question as to whether, and if so what, payment would have been agreed by a hypothetical solicitor and client in relation to what was eventually achieved. True it is that monies paid into court were returned and the SCB Monies were returned. However, PHRL did not in the London Proceedings (let alone the other proceedings) achieve what might be described as substantive success in terms of the relief it was seeking. Even under the settlement of the London proceedings it was forced also to pay the costs of the proceedings and submitted to a damages claim. It is submitted by Mr Saoul that it is (or was in 2015) very uncommon for eg. DBAs or CFAs to look at the "net" position when defining "success" or a "win". I am prepared to accept that. However, that does not mean that a hypothetical litigant in litigation facing PHRL in 2015 would have agreed to the very wide form of "success" which is covered by what in fact was occurred here or that, even if it did, it would have agreed the remuneration/return identified and propounded by Mr Candey and/or Mr Hurst.

131. In short, given all these uncertainties, I do not consider that the evidence begins to enable me to come to a view as to what form of "reward" would have been obtained in the market in the ordinary course of business in 2015 under the forms of "contingent" agreement that Candey propounds.

132. Finally in this context, I am not satisfied that at the relevant time it is possible to say an agreement on a contingency basis would have been reached. Certainly, Candey seemed unwilling to enter into one and seemed to consider that neither a DBA was suitable (given not least the risks of the same in terms of the then extant regulation applicable to DBAs) nor a CFA.

133. As a general matter, Mr Hurst made various assertions in his written reports that a time cost basis would not fairly recompense Candey for the services that it provided. In his early report that must have been largely on the basis that the largest risk that Candey was undertaking was credit risk and that a time costs basis of remuneration did not adequately reward Candey for that risk but, as the Court of Appeal has shown, such risk is not one that plays a role in the Valuation Issue. I also note that at the time Candey was clearly pushing for a time costs basis of remuneration so that it cannot have thought that such a basis of remuneration would be that unfair. In cross-examination Mr Hurst appeared to resile from his earlier stated position and agree with Ms Toube that, at the end of the day, a traditional time charge basis of

remuneration would fairly remunerate Candey or any hypothetical solicitors providing the legal services that were in fact provided.

134. I also note Mr Candey's assertion that were I to decide that the Valuation Issue by reference to a time costs basis of valuation then the result could be:

> "*a stifling effect on the ability of wronged litigants to pursue their cases, shutting out deserved parties access to this honourable court, due to simply having a lack of funds to agree to pay the traditional hourly rate"*.

I think this takes too pessimistic a view. The Valuation Issue arises in a s245 context, not generally.

Time cost charging: (1) the procedure

135. The next issue that I must consider is whether or not in principle I should decide some (and if so which) points of principle only and otherwise adjourn the Valuation Issue on the issue of quantification to some further, and if so what, form of hearing.

136. Logically, this question might be said to arise whichever basis of valuation is appropriate. Candey accepts however that the question of some further hearing only arises if I decide that the basis of valuation should be a CFA or on a time cost basis. As regards a CFA that is because the CFA brings about an uplift on the base costs which have to be determined. I have decided the appropriate basis is that of a time costs basis and so proceed on that basis.

137. The main reasons that underlie Candey's desire for me to adjourn the question of detailed quantification appears to be (1) that that would enable it to put in order its (new) case that the Timesheets do not accurately record the time spent by Candey on the relevant matters and (2) that that would enable Candey to better particularise or evidence their case that the times recorded in the Timesheets are properly chargeable, at least to the extent that they are challenged by the Liquidators on the grounds that the Liquidators have insufficient detail.

138. As regards the form of further hearing, Candey invites me to determine certain issues now but otherwise to adjourn the matter off for a further hearing on more evidence at which an exercise of or akin to that of a solicitor/own client taxation should be undertaken by a costs judge or that an assessor should be involved. In this context it prays in aid the procedures used to determine the remuneration of officeholders.

139. So far as the Liquidators are concerned, they resist any further hearing and invite me to determine the entirety of the Valuation Issue now.

140. As regards the first reason underlying Candey's desire for some further hearing an assessment I reject the same as being a good reason for a further hearing. I consider below the issue of whether Candey should now be allowed to raise a new case on the evidence that not all the times it spent are accurately recorded in the Timesheets. I conclude below that it should not. In those circumstances the question is what issues remain.

141. On the submissions before me there is an issue as to the appropriate hourly charging rates. This requires no further evidence and I cannot see that some form of further hearing is required to determine the point.

142. A further issue is whether work carried out by Candey is properly work which which should be treated as services provided to PHRL. The Liquidators allege certain costs were not incurred by Candey for the benefit of PHRL in circumstances, say the Liquidators, where the retainer had been ended and Candey were acting without instructions. They also allege that certain services were services carried out by Candey for its own benefit (in and about negotiating or securing payment to it of remuneration). Again, I cannot see that these sort of issues cannot be dealt by me now given the materials before me. On other points, the Liquidators take the broad point that certain time entries contained within the Timesheets are inadequately evidenced or just plainly excessive (as regards this latter point, particularly as regards charging for overseas travel) . I will come on to these aspects later but at present consider that there is sufficient material for me to resolve the matter fairly.

143. In considering what is "fair" there are two matters which in my view are very important. The first one is a question of proportionality and the issue of what it is I am deciding. I am not deciding what fee Candey can prove for. It is accepted, as I understand it, that, subject to the relevant charge, there will be an unsecured claim in this case for any difference between what is secured and the amount of the FFA. All I have to decide is to what extent value has been conferred by the services provided by Candey after entry into the FFA and charge such that s245 should not operate to remove security in relation to such value.

144. What is a proportionate way of valuation depends on all the circumstances. Even under existing law and practice, for example, summary, rather than detailed, assessment of some costs is the norm in certain situations. Further, there is no statutory based procedure for valuation under s245 comparable to that for the assessment of solicitors' costs under the Solicitors Act and the CPR.

145. It is also important to assume that the value conferred by legal services or the market price for such services has to be determined by the detailed assessment procedure under the relevant Solicitors Act and rules of court. Standing back, there is force in the submission that the valuation under s245 of professional services should not be radically different in the case of different professions.

146. The second point to note is the way in which this matter has arrived at the current hearing. In my view the time to raise the question of whether, even if only in certain events, there should be a split hearing and, if so, what steps needed to be undertaken prior to such a hearing was not raised or canvassed before the court at the Directions Hearing. Had it been, then at the least there may have been directions which would have resulted in a situation in which the dispute(s) between the parties was identified. It might be that the dispute was limited and did not need a full process akin to a detailed costs assessment under the CPR to be carried out. Further, the evidence that was ordered at the Directions Hearing was limited to evidence to deal with matters arising from the 2nd Court of Appeal judgment.

147. The issues as to quantification under the case management order proceeds on the basis that the current hearing before me is the hearing of the Valuation Issue and not a hearing of preliminary issues only. In those circumstances, and where the Valuation Issue has already been dealt with separately as a result of my view on the very first hearing that there was inadequate valuation evidence, it is difficult to see why this application should have yet a further, third, hearing at first instance on the substantive s245 issue. I would not do so unless unable to make a decision. At the end of the day the burden of proof is there to assist me.

148. Candey pleads in aid the fact that the Liquidators' application as issued sought (among other things) that the relevant charge was invalid save to the extent of the value of the relevant services supplied and that such value was limited to the lesser of the relevant time costs and "*such amount as is in due course determined or agreed to be properly payable by the Company and/or assesses to be payable following any assessment…..*" . In Mr Crumpler's second affidavit, he noted that the narratives of work set out in the Timesheets gave rise to concerns about the basis on which certain of the costs had been incurred and said that in due course the Liquidators might seek to have the costs assessed pursuant to s70 of the Solicitors Act 1974, if agreement could not be reached as to quantum. In my view this was an error. The actual costs are the fixed fee. There is no power under s70 of the Solicitors Act to determine the Valuation Issue, arising as it does under s245 IA 1986. S70 is limited to challenges to a solicitor's bill which, in this case, would be in the sum of the Fixed Fee. Of course the court could on the Valuation Issue no doubt adopt a similar process by analogy if it was thought appropriate.

149. Since then, the Liquidators' position has been clear (and for some time now) that they wished the court to determine the Valuation Issue based upon the evidence before it and not to adjourn the matter to another hearing.

150. It is true that the experts have consistently said, as experts, that they have insufficient detail to opine on disputed matters as to time spent by Candey. Nevertheless, neither party took steps either to give or require disclosure or to initiate a process whereby greater detail was provided by Candey to supplement the narrative statements in the Timesheets. I will consider this area in more detail when considering the question of the time spent by Candey in the provision of services.

151. Before turning to the procedure that I am invited to adopt by Candey, I should re-iterate a point made above. Had there been a need for it the Court could have directed greater engagement between the parties on the question of the quantum of time spent by Candey. Had that happened, the areas of dispute would have emerged. It does not automatically follow that the sort of detailed procedure now sought to be applied by Candey would have been the outcome.

152. Candey submitted that the appropriate course that the Court should follow was one that followed the suggestions of Mr Hurst in this respect.

153. In this respect, in his second report, Mr Hurst suggested that there be a detailed assessment by a costs judge or alternatively that I adopt a procedure akin to that for the determination of the remuneration of insolvency officeholders. The suggestion that he put forward was that the matter be referred to a costs judge to investigate and

report. The process would be akin to a detailed assessment. He estimated that it could take up to three days and would require production of many pages of documents. The costs judge would then report back to the High Court Judge who would then decide whether to accept the figures put forward or reach his or her own conclusion as to a final figure. However, he also accepted that a broad brush approach might be appropriate. In that connection he said the following:

> "*The situation appears to be, however, that there is a diminishing pot of money available. The longer this litigation continues the smaller that pot will become. This raises the question whether it is proportionate to prolong this litigation in the hope of finding a precise answer: "The perfect is the enemy of the good" ["La Bégueule" (Voltaire, 1772)]. Voltaire also said: "A long dispute means both parties are wrong.*"

154. Without commenting on the latter quotation from Voltaire, I consider that these latter remarks, directed at proportionality, helpfully indicate the correct path being the one that I have decided to take.

Time cost charging: (2) the hourly rates

155. Candey's hourly charging rates which, as I understand it, applied in respect of the period immediately prior to entry into the FFA ranged between £700 (Grade A fee earner) to £150 (Grade D). They were put forward in an email to the Liquidators dated 5 April 2016 as follows:

Grade A	£700 (2 solicitors) and £500 (one solicitor)
Grade B	£400 (1 solicitor) and £300 (one solicitor)
Grade C	-
Grade D	£150

156. Mr Hurst, in his first report, stated that these rates were similar to those charged by other firms involved in the London Proceedings as could be seen from their costs budgets. In cross-examination Mr Thomas described Candey's rates as the "*same as or very similar*" to the rates charged by the "*magic circle*" firms acting for the defendants in the London Proceedings.

157. Mr Hurst's main approach is to say that hourly rates, if relevant, can only properly be ascertained by a process akin to detailed assessment and spending many days of court time (for that and for assessing the hours in question). I disagree, it seems to me that hourly rates is something that is capable of being dealt with at this hearing and should be. The parties have had adequate time to formulate their respective cases.

158. Other than the alternative of some form of contingency remuneration (based on success/win), there is no suggestion by Candey of alternative hourly rates to those that were agreed by it with PHRL in 2016. The experts therefore create a choice between the rates put forward by Mr Thomas and those put forward in 2016 by Candey (or something in between).

159. In his first report, but factoring an element of compensation for delay in payment, Mr Thomas opined that the appropriate hourly rates that should be applied for valuation purposes under s245 in this case ranged from £455 (Grade A fee earner) to £180 (Grade D fee earner). In his second report, Mr Thomas accepted that he should not attribute any element of fee remuneration for delay in payment but he did not revise his previously suggested hourly rate charges downwards "as the element for delay was only a minor element". The figures considered to be appropriate are as follows:

Grade A	£455
Grade B	£350
Grade C	£280
Grade D	£180

160. The effect of applying Mr Thomas' proposed hourly rates to the total times set out in the Timesheets provided by Candey would be to reduce the cost (and thereof value) of the work from about £1.2 million to £927,780.

161. The figures currently set out in the guideline hourly rates for summary assessment, and which I shall explain later in this judgment and which are relied upon by Mr Thomas, are as follows. Candey was located in Lincoln's Inn in London WC2.

Area	Band A	Band B	Band C	Band D
City of London	£409	£296	£226	£138
London (including WC2)	£317	£242	£196	£126

162. Passages from the 2005 edition of the Guide to the Summary Assessment of Costs (the last published edition) is reproduced below, with amendments by the editors of the White Book (in square brackets) to bring it up to date:

> *"**Guideline figures** for solicitors' hourly rates*
>
> *41. **Guideline figures** for solicitors' charges (as at January 2005) are published in Appendix 2 to this Guide, which also contains some explanatory notes. The **guideline** rates are not scale **figures**: they are broad approximations only. In any particular area the Designated Civil Judge may supply more up to date **guidelines** for rates in that area. Costs and fees exceeding the **guidelines** may well be justified in an appropriate case and that is a matter for the exercise of discretion by the court.*

> *42. The **guideline figures** are not intended to replace **figures** used by those with accurate local knowledge. They are intended to provide a starting point for those faced with **summary assessment** who do not have that local knowledge.*
>
> *43. In substantial and complex litigation an hourly rate in excess of the **guideline figures** may be appropriate for grade A fee earners where other factors, including the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate to reflect higher average costs.*
>
> ……

Solicitors' hourly rates

The **guideline** rates for solicitors provided here are broad approximations only. In any particular area the Designated Civil Judge may supply more exact **guidelines** for rates in that area. Also the costs [statement] provided by the paying party may give further guidance if the solicitors for both parties are based in the same locality.

The following diagram shows **guideline figures** for each of three bands outside the London area [bands 2 and 3 merged in 2009], and a further three bands within the London area with a statement of the localities included in each band. In each band there are four columns specifying **figures** for different grades of fee earner.

Localities

44SC.35

The **guideline figures** have been grouped according to locality by way of general guidance only. Although many firms may be comparable with others in the same locality, some of them will not be. For example, a firm located in the City of London which specialises in fast track personal injury claims may not be comparable with other firms in that locality and vice versa.

In any particular case the hourly rate it is reasonable to allow should be determined by reference to the rates charged by comparable firms. For this purpose the costs [statement] supplied by the paying party may be of assistance. The rate to allow should not be determined by reference to locality or postcode alone.

Grades of fee earner

The grades of fee earner have been agreed between representatives of the [Senior Courts] Costs Office, the Association of District Judges and the Law Society. The categories are as follows:

- [A] Solicitors with over eight years' post qualification experience including at least eight years' litigation experience [and Fellows of CILEX with eight years' post-qualification experience].
- [B] Solicitors and legal executives with over four years post qualification experience including at least four years' litigation experience.
- [C] Other solicitors and legal executives and fee earners of equivalent experience.
- [D] Trainee solicitors, paralegals and other fee earners.

163. I also note that Friston on costs (3rd edition) includes at Table 68.11 "Jim Diamond's Hourly rate survey, 2003-15" ("The Diamond Survey Rates" or "DSR")). This is footnoted as follows:

"*Figures based on an ongoing and enduring survey carried out by Jim Diamond, a costs lawyer. Whilst the survey has not been carried out in a way that would survive peer review, it is generally regarded as a good indicator of the rates that are charged to clients (as opposed to those that are allowed between opposing parties). Indeed, the survey has been published or referred to by the Law Society, the Legal 500, Financial Times, Legal Week and The Guardian."*

164. The DSR figures for 2015 for "City of London Magic Circle" and "City of London and Top Firms (other than Magic Circle and US leading firms)" are as follows:

Magic Circle	Partner	£775-850
	Solicitor of 5 years' or more PQE	£500-575
	A newly qualified solicitor	£350-500
City of London Top Firms (other than Magic Circle and US)	Partner	£550-800
	Solicitor of 5 years' or more PQE	£350-495
	A newly qualified solicitor	£250-350

165. In his first report Mr Thomas carried out the following process as justifying the rates that he put forward.

(1) He took the guideline hourly rates ("GHR") for the summary assessment of costs as his starting point.

(2) To those guideline rates he carried out a process to enable the identification of what element of the guideline rate amounts to what used to be, before the CPR, the "A factor" used in calculating costs. The "A" factor represented the direct cost of doing the work. The "A factor" he derives from the GHR is two-thirds of the GHR on the basis that that sum should be taken to represent the overheads of the practice. The remaining one-third of the GHR he treats as representing the "B factor". The "B" factor was the profit element for the work. He then applied to that the "seven pillars of wisdom" being (1) the conduct of the parties; (2) the amount or value of any money or property involved (3) the importance of the

matter to all the parties (4) the complexity of the matter or the difficulty or novelty of points raised (5) the skill, effort, specialist knowledge and responsibility involved (6) the time spent on the case and (7) the place where and circumstances in which the work or any part of it was done (see now CPR r44.4(3)). That "revised" B factor was then added back by him to his "A factor" to reach a global figure. The highest uplift reported in case law has been 150% of the A factor.

(3) Finally, as a cross-check, he relied on charging rates of other firms which he says are comparable to Candey in terms of location and the service, expertise and resources that Candey offered.

166. In cross-examination, he identified four "cross-checks" that he had cumulatively applied:

(1) His reliance on the GHR in conjunction with the Band A/Band B analysis referred to above;

(2) His experience of rates seen from his own clients and from rates he has charged on behalf of his clients;

(3) Other published rates;

(4) Reported cases where the court has commented on the rates of London firms in litigation.

167. However, he said that he had ignored the hourly rates actually charged by Candey to PHRL on the basis that he had been instructed that such charges were irrelevant. In my judgment he thus left out of account the most cogent evidence that there was of what rates would be agreed in the open market for the work in question and started from the wrong starting point. In cross-examination he accepted that the fact that PHRL had been prepared to pay Candey at the rates in question was some evidence of the market and that the rates were the same rate as or very similar to the rates being charged for the defendants in the London Proceedings.

168. My starting point is that there is assistance as to what the market would bear by the fact that the client did agree the hourly rates of Candey in this case and which applied for a considerable period. There is no suggestion that such agreement was brought about by circumstances particular to the circumstances of the client in question nor that the rates agreed are otherwise than within the normal charging rates of Candey. This is therefore good evidence of the market hourly rates at the time for the work carried out by Candey.

169. Further, there is evidence that the other major city firms acting in the London litigation were charging comparable sums. Again, this is good contemporaneous evidence as to the cost of the services which could be charged in the ordinary course of business. As regards this, the Liquidators say that the costs charged by other firms were painted by Mr Brisby QC as being "astronomical" and that they are the costs of city firms rather than a west end boutique firm. However, in my judgment these points have to be weighed against the factors that the level of charging was similar to Candey so while Candey might in argument have described the costs (in an inter parties context) as "astronomical" that does not detract from what seems actually to

have been agreed by the Defendants and by PHRL. Secondly, there is the point that while Candey was a West End boutique firm whose overheads may have been lower than those of a large city firm it was providing a service that was more far reaching than the city firms acting in the London Proceedings for other parties. Candey was not simply acting in the London Proceedings. It was co-ordinating and in effect acting on the worldwide litigation that PHRL was involved in. Further, its service in the London Proceedings was, on the face of it, comparable to that offered by a City firm.

170. Finally, the Candey figures are in line with the DSR.

171. I accept the point made by Mr Thomas that, in the ordinary course of business, the hypothetical solicitor should be treated as being one who would agree a figure that is not materially in excess of the amount that would be recovered on an assessment. However, on a solicitor own client assessment the basis of assessment is on the indemnity rather than the (usual) standard basis and the presumption would be that agreement to a specific charging rate made that charging rate reasonable. As Mr Thomas put it himself in the course of cross-examination:

> "*when the court is assessing costs between solicitor and client, in more than 99% of the time, there will be a contract with an hourly rate specified in it. Unless that rate completely departs from normality, that would be allowed, because it is something that has been expressly agreed between the client and the solicitor. So it is actually very rare to have an assessment of hourly rates between the client and solicitor*".

172. Indeed, Mr Thomas went so far as to say:

> "*If there is an agreed rate in the retainer, that will be allowed, almost invariably, between solicitor and client*".

173. This is an important point because when the Court is assessing costs to be paid by one party to another, unless the costs are agreed, the court is (usually) focussing on both the proportionality and the reasonableness of the costs and the exercise is, in my view, therefore approached from a different angle.

174. Mr Thomas, in cross-examination, went on to say that if there was a solicitor and own client assessment of hourly rates "*the only starting point*" (absent agreed hourly rates) would be the GHR because they are designed to reflect market rates. I do not accept this because my suspicion is that costs judges will frequently be relying on comparables and their experience rather than simply relying on GSR as the "only starting point" (even in 2015), I accept though that they might use GHR as one form of cross-check.

175. Although in his first report, and as he started in cross-examination, it was fairly plain that his methodology started in fixing the value by reference to GHR and his "A factor/B factor" calculation and then checking that against other matters, his final position seemed to be that this was but one factor to be weighed with the others.

176. I am far from satisfied that the guideline rates for a summary assessment are an appropriate starting point on the evidence before me given the evidence of actual agreement of actual rates. I accept that the GHR rates were originally intended to

reflect market rates. Mr Thomas cites Lord Justice Jackson's Review of Civil Litigation Costs: Final Report (December 2009) where he stated:

> "*3.12 Principles upon which GHRs* [Guideline hourly rates] *should be set. One of the first tasks of the Costs Council will be to formulate the principles upon which GHR are set. I suggest that the aim of the GHR should be to reflect market rates for the level of work being undertaken. These would be the rates which an intelligent purchaser with time to shop around for the best deal would negotiate.*
>
> *3.13 How GHRs should be used in summary assessments. The GHRs are blended rates, unlike the old "A" and "B" rates which were formerly used. Therefore, as their name suggests, the GHRs can only be guidelines or starting points. The judge doing the summary assessment should move up or down from those rates, as appropriate*."

177. I particularly note that the fact that the rates are guidelines only is stressed. Further, I note that Lord Justice Jackson re-iterated that GHR had been issued "*solely for the purpose of summary assessment of costs*". The last edition of the Guide to the Summary Assessment of Costs dated 2005 contained the following paragraph 43:

> "*In substantial and complex litigation an hourly rate in excess of the guideline figures may be appropriate for Grade A fee earners where other factors, including the value of the litigation, the level of the complexity, the urgency and importance of the matter, as well as any international element, would justify a significantly higher rate to reflect higher average costs*".

178. I also note that the area rates are a somewhat blunt tool. Thus Lord Justice Jackson postulated the question:

> "*Is there any justification for paying "City" rates to firms of solicitors which choose to set up in the City of London but are not doing "City" work? In my view, "City" rates should only be paid for heavy commercial work. Defamation, clinical negligence and similar work should not be remunerated at rates above London 2".*

This general point, about specialisation of work and the bluntness of "across the board rates" was picked up as a factor militating against re-setting the hourly rates in 2015, as I set out later in this judgment.

179. In this context Mr Hurst picks up a point about the rents payable in Lincoln's Inn, where Candey were and are based, being much higher than those in the surrounding area of London WC2. I do not have reliable factual/expert evidence on this point and therefore do not rely upon it.

180. I also note that Lord Justice Jackson eschewed any idea that the mode of summarily assessing fees should be by way of returning to the old "A" and "B" rates.

> "*The GHRs are blended rates, unlike the old "A" and "B" rates which were formerly used. Therefore, as their name suggests, the GHRs can only be guidelines or starting points. The judge doing the summary assessment should move up or down from those rates, as appropriate*".

181. There are cogent reasons for thinking that the guideline rates for summary assessment do not reflect the market rates which a hypothetical solicitor in Candey's position would have expected to charge in 2015.

182. Prior to 2010, guideline rates tended to be published either annually or bi-annually.

183. Up until 2003 the relevant figures for each locality were determined by local judges and practitioners. Each town and city tended to have its "own rate". The process would often have the benefit of expense rate surveys carried out by the local law society. In 2002, a banding system was introduced and rates were set centrally. Guideline Hourly Rates were at that time issued by the former Supreme Court Costs Office (SCCO) at the request of the then Deputy Head of Civil Justice (Sir Richard Scott V-C). They were issued by the SCCO until 2006 as part of the SCCO's Guide to Summary Assessment. This seems to have reduced the incentive for surveys to be conducted and detailed data to be submitted. In any event, rates were uplifted linked to inflation in 2003, 2005 and 2007.

184. The Master of the Rolls took responsibility for publishing the guideline figures in 2007. From 2008 until 2012, responsibility for collating evidence and recommending GHR was undertaken by the Advisory Committee on Civil Costs (ACCC). The figures for 2008 involved an inflationary uplift of the 2007 rates by 4%, linked to the salary index for the private sector (the ONS Average Earnings Index (AEI) for Private Sector Services).

185. There are issues with the figures that were then recommended as outlined in Friston on Costs (3rd Edition, paragraph 51.17). In 2008 the ACCC attempted to match the guideline rates to market rates but the survey response was less than 8% and there is an issue as to how representative those replies were. There are also questions as to the methodology employed by the ACCC (see Friston on Costs 2nd edition, paragraph 28.3). The recommendation for 2009 was an up-rating by 1.7%, linked to the AEI and other inflationary factors.

186. In 2010 the relevant rates were accepted on the basis of simple inflationary uplift on 2009 figures, which was accepted as an interim measure. These rates have remained in place ever since.

187. In 2011 the Master of the Rolls felt unable to accept a recommendation of a purely inflationary index-linked calculation without a broader base of evidence having been sought.

188. In 2013 the ACCC was abolished with responsibility passing to the Civil Justice Council (CJC) and its Costs Committee.

189. In July 2014, the then Master of the Rolls published his conclusion that he had no evidential base to make any change to the existing GHRs, and they would therefore be remaining at their current rates, as originally set in 2010.

190. By statement dated 15 April 2015 the then Master of the Rolls again decided not to change the GHRs. In his statement announcing that decision he again determined that the evidence base for setting new rates simply did not exist:

> "*there is no funding available from any source for undertaking the sort of in-depth survey which the Civil Justice Council's Costs Committee and its expert advisers consider is required to produce an adequate evidence base.*
>
> *There is also considerable doubt that even if such funds were forthcoming there would be sufficient numbers of firms willing to participate and provide the level of detailed data required to enable the Committee (and in turn myself) to produce accurate and reasonable GHRs*."

191. He also referred to:

> "*…a number of trends in the legal services market and other factors that are rendering GHRs less and less relevant. They include, but are not restricted to:*
>
> - *advances in technology and business practices and models;*
> - *the ever-increasing sub-specialization of the law which is seeing the market increasingly dictate rates in some fields (particularly commercial law);*
> - *the judiciary's use of proportionality as a driving principle in assessing costs;*
> - *the greater adoption of (and familiarity with) costs budgeting amongst the judiciary and practitioners alike*."

In my judgment the second bullet point is of particular significance in this case.

192. In all these circumstances I do not accept Mr Thomas' view that the GHR "*are likely to represent a similar figure to that which would be arrived at in any negotiation between a Hypothetical Solicitor and a Hypothetical Client in relation to the fees payable*" for the services in this case. Even if they are a starting point it is clearly a very rough and ready one because it is accepted that GHR are only guidelines and subject to the guidance that I have already mentioned. In my judgment the evidence of the actual rates agreed are far more cogent.

193. I also consider that there are problems with a methodology that starts with the GHR and then assumes that two thirds of those rates are to be attributed to, in effect, overheads, and that the remaining one-third is then uplifted by reference to a Judge's perception of the seven pillars rather than by market evidence of actual rates. In my assessment this is simply adding another uncertain factor to the process of attempting to ascertain the "market rate" under s245(6). The matter is conveniently set out in *Friston On Costs* (3rd Edition) paragraph 51.43 when dealing with the table used by Mr Thomas to "convert" the GHR into A and B factors and back again:

> "*The table…. is based on the assumption that the relevant guideline rate includes a B factor of 50 per cent. This assumption could well be wrong; it is impossible to say because there is no reliable data by which the A factor can be discovered. This means that the role of the A-plus-B analysis is limited to being a cross-check or a tool for comparing rates; it should not be used as a means of calculating rates <u>de novo</u>.*"

194. As regards Mr Thomas' general experience of what his clients charge, I also have the contrary evidence of Mr Hurst as to the marketplace and so this evidence on either side is of little assistance to me.

195. Mr Thomas also relies upon his direct knowledge of the fees charged by five firms which he says are similar in profile and close geographically to Candey and which, he says, charge hourly rates which are equal to or lower than the rates which Mr Thomas propounds. However, again I am given no details, Mr Thomas feeling bound by confidentiality. In my judgment I can give this statement little weight. On this point it seems to me that the dicta about comparables in *Shepherd v Collect Investments* [2018] EWCA Civ 162 is relevant. Indeed, in cross-examination Mr Hurst was asked about this evidence but obviously there was nothing he could say about what was unevidenced/unparticularised assertion.

196. The published rates relied upon of one firm only, Humphries Kerstetter are little more than a straw in the wind and I can place little reliance upon them.

197. The reported cases relied upon by Mr Thomas are cases in which the Court was primarily considering inter-partes costs where, as I have said, the focus is different and the court's function is different. In addition, it is far from clear to me that the cases in question are comparable to the litigation being conducted by Candey. He relies on such cases as evidence that (a) the court views the costs similar to (or in some cases much higher) than those Candey puts forward in this case as being excessive and/or (b) much lower hourly rates are charged. Thus, by way of example he cites *The Capital Marktes Company Limited v Tarver* [2017] EWHC 2885 (Ch) as a case where Simmons and Simmons, a city firm, were relying on hourly rates of £705 for partners down to £350 for Grade C fee earners contrasted with Kingsley Napley (another city firm) rates of £500 down to £275. On a costs budget case the Deputy Judge considered that the Claimants (instructing Simmons & Simmons) should not expect to pay more than the rates of Kingsley Napley. However, as he accepts, that was "*not a complex commercial litigation in the same vein as the current case*" and it was an inter partes costs matter. The one exception to the inter-partes nature of the costs consideration is the case of *Edwin Coe LLP v Adiniantz* [2014] EWHC 3994 (QB). The rates in question were £390 for a partner and £270 for an Assistant Solicitor. However, again, the firm was of a different nature to Candey (it is not a boutique firm) and, as Mr Thomas says, "*the sums in this claim were modest and the case not comparable*" to the litigation that Candey was helping. In short, I get very little assistance from these cases.

198. In conclusion, I consider Mr Thomas' analysis is flawed in starting from GHR and the A and B Factors derived in the manner that he does from those GHR. The starting point should have been the rates actually agreed by Candey for the period prior to the FFA. From those rates it is necessary to carry out cross-checks. I am not satisfied that the cross-check relied upon by Mr Thomas as reducing the relevant rates by up to about half are cogent evidence resulting in that effect and am satisfied that on all the relevant evidence the appropriate market hourly rates are those put forward by Candey.

199. I therefore am satisfied that the hourly rates that Candey puts forward are a suitable basis for determining what would have been the agreed remuneration in the open market for the services that Candey did in fact provide under the FFA.

Time cost charging: (3) the scope of the evidence

200. I turn to the issue of whether or not Candey should be permitted to rely on the evidence contained in Mr Candey's 10th witness statement and Mr Dunn's 2nd witness statement. (I should also note that Mr Candey's 9th witness statement was served late, but not very late, and the Liquidators did not object to it going into evidence.)

201. The significance of the new evidence in the two witness statements in question is that until shortly before it was served, Candey's position had always been that the work that it had undertaken had been recorded in the contemporaneous timesheets that had been provided to the Liquidators as long ago as 9 May 2016. The case had proceeded on that basis. I need not cite the relevant passages in the evidence but I am satisfied that this was a key basis upon which both parties proceeded. Indeed, this was made clear in the expert reports in express terms (and in the first joint memorandum of the experts). In the applicants' evidence, it was also referred to in (among other places) Mr Crumpler's 2nd affidavit (26 September 2016); Mr Crumpler's 3rd affidavit (14 February 2017); Ms Bower's 2nd affidavit (22 September 2017) and Mr Crumpler's 4th affidavit (22 September 2017). Mr Candey also expressly asserted that the Timesheets were accurate (see e.g. his 5th witness statement dated 8 November 2017).

202. In his second report dated 9 September 2019, Mr Thomas picked up a comment of Mr Hurst in his, Mr Hurst's, second report dated 5 August 2019 in which Mr Hurst said:

> "..*It should also be borne in mind that, not infrequently, when a detailed schedule of costs is prepared, the total claimed is more than the figure first estimated*."

Mr Thomas expressed himself as to be unclear as to the meaning of this remark. He pointed out that where there was a recording of total time costs (as here), it would be very unlikely that a detailed assessment would produce a higher figure as that would require the solicitors to identify additional time spent but somehow not recorded on the time recording system. So far as he was aware, Candey was not suggesting that such further unrecorded time had been spent.

203. In the second Joint Memorandum of the Experts dated 7 October 2019, Mr Hurst answered this point by reference to "thinking time" which he said would have been involved but "might not always be recorded in..time sheets". He suggested that this should be taken into account in the valuation exercise referring to the skill, labour, specialist knowledge and responsibility involved on the part of the solicitor and thus, as I understand it, suggesting that this was a factor in setting the appropriate hourly rate for those involved.

204. Notwithstanding how I have understood Mr Hurst's comments recorded in the Joint Memorandum, Stephenson Harwood, solicitors for the Liquidators, followed up the issue by letter dated 8 October 2019. They re-iterated that Candey's case had always been that all times had been recorded in the Timesheets. They asked that, if Candey's position had changed, full particulars of the new position be provided, the Liquidators' reserving their position and in terms saying they did not accept a new case could be run at this late stage.

205. On the same day, 8 October 2019, but possibly in response to questions about the bundles rather than in response to the letter I have referred to, Candey LLP (acting for Candey and through Mr Ashkhan Candey) wrote that the Timesheets should not be in

the bundle and asserting that "*in circumstances where our client's believed that they were acing on a fixed fee they would unsurprisingly not have diligently captured all of their time*".

206. Under cover of an email dated 14 October the two witness statements that I have referred to provided by Candey LLP were sent to Stephenson Harwood in the context of "…thinking time and the time narratives provided". However, those witness statements go well beyond saying that the times entries left out are simply "thinking time".

207. Thus, as a result of the 10th witness statement of Mr Candey (and the 2nd witness statement of Mr Dunn each) made on 14 October, 11 days before the reading day on this application, it was for the first time made clear that the position of Candey had changed. Mr Candey's evidence is that as Candey's case had been that a time cost basis of valuation was inappropriate and that the Fixed Fee was the appropriate valuation, he had not focussed on checking the time records other than defending criticisms of them. Having carried out an "initial review" which is "very much just an initial assessment" he had identified that (on his analysis) Mr Dunn's time could not have been properly recorded but is in fact massively unrecorded, and that time spent in the BVI in December 2015 is massively unrecorded. Further, doing a "spot check" of his emails and phone records for 21 and 22 October 2015 there is, he says, no record of any times having been recorded for what are, on any view, a substantial amount of emails and phone calls. He does not suggest what the actual quantum of unrecorded time is on any of these matters or indeed generally over the period covered by the Timesheets. He concludes that he is "not confident" that the time was properly captured by the Timesheets. He says the only way that the matter can now be dealt with is for him to instruct a costs draftsman to analyse the position and produce a bill of costs "in the usual way". Mr Dunn largely supports Mr Candey's evidence in terms of confirming his concerns as to the absence of full time recording from specific examples. Largely if not entirely the examples mirror those identified by Mr Candey. In effect, the evidence seeks an adjournment of any quantum determination to the extent that the valuation should be conducted on the basis of time spent (which I have decided that it should be).

208. There are three further relevant factors. First, and as regards the contemporaneous evidence of charging, Candey in fact provided invoices to PHRL (pro forma as I understand it given there was in fact in place the fixed fee) on a time cost basis dated 31 January 2016, which invoices covered the period in which the FFA operated (some invoices overlapped a period before the FFA too). These were, to the relevant extent, later replaced by invoicing by reference to the FFA and the fixed fee. It was not suggested that the January 2016 invoices were provisional or inaccurate because full times had not been recorded.

209. Secondly, at least since the Court of Appeal judgment Candey has been arguing for a hypothetical CFA as one of the possible basis of charging (and before that was relying on it as a comparator to demonstrate that the Fixed Fee represented the value of the service provided). A CFA itself depends upon a time cost basis of charging coupled with an uplift to the same.

210. Thirdly, there is the question of the procedural orders in this case. By my order of 17 July 2017, having determined that I had inadequate evidence to determine the Valuation Issue, I directed that Candey was to file any further evidence of fact by 4 August 2017 and the Liquidators were to serve theirs by 8 September 2017. Expert evidence was to be filed by 4 September (Candey) and 8 September 2017 (the Liquidators).

211. HH Judge Raeside QC heard the issue in December 2017 and his order is dated 5 December 2017.

212. The 2nd Court of Appeal judgment, allowing the appeal against the determination of HH Judge Raeside is dated 27 March 2019. At the relevant hearing Ms Toube submitted that there should be no further evidence. However, the Court of Appeal determined that there should be a case management conference before a High Court Judge for the purpose of determining what evidence might be relied on or adduced.

213. The case management conference was conducted by Mr Edwin Johnson QC (sitting as a High Court Judge). By his order dated 23 May 2019, Candey was given until 4pm on 21 June 2019 to file any supplemental evidence of fact on which it wished to rely. The Liquidators were given until 4pm on 12 July 2019 for the same purpose. Candey was additionally given permission to rely on further supplemental evidence from Mr Hurst which was to be served and filed by 4pm on 12 August 2019. The Liquidators' extra expert evidence was to be filed and served by 4pm on 9 September 2019. A meeting of experts was to take place by 23 September and a joint memorandum was to be prepared by 4pm on 30 September 2019. All of the supplemental evidence was to be limited to

> "*such supplemental evidence as is required to take account of the decision of the Court of Appeal…as to the correct approach to the Valuation Issue*…"

214. It was also directed that there was to be no live witness testimony from factual witnesses at the Remitted hearing "unless the court grants permission". There was liberty to cross-examine the experts.

215. The direction regarding no live witness testimony from factual witnesses was, in my view, an example of the court exercising its powers under CPR r32.1(1)(c) and r32.5(1). I consider that the hearing before me was a resumed "trial" and the default rule, without a court order, would be that evidence would be given orally (CPR r32.2, 32.5).

216. The question is whether the sanction under CPR r32.10 applies, either directly or by analogy. CPR 32.10, as is well known, provides a sanction that in the event a witness statement is not served by the time prescribed by court order then that witness may not be called to give oral evidence unless the court gives permission. In my view it is implicit in the Order of Mr Edwin Johnson that the direction that oral evidence would not be given applied to the existing evidence and the further evidence served in accordance with his order. If the evidence was not so served then a further court order was required, extending time for service of witness evidence and, in effect directing afresh that oral evidence was not required (and incidentally disapplying the sanction that would otherwise apply under CPR r32.10). I consider that this is therefore a case where there is a direct sanction. There is a further point supporting

this view. Evidence regarding the actual time spent by Candey was not a new issue arising from the 2nd Court of Appeal judgment. Both experts had said they had inadequate evidence to opine on the time spent issue and the issue was therefore live before the 2nd Court of Appeal judgment, not least because the Liquidators always said that the Valuation Issue was to be determined by reference to time costs. The new evidence sought to be adduced is therefore not within the limits of the case management order and it would now be necessary to seek to adduce the same and the relevant order that would need extending is not that of Mr Johnson but my earlier order.

217. However, as I understand matters, Candey does not really resist the proposition that whether or not the sanction under CPR r32.10 strictly applies or not, I should approach the question of the admission of Mr Candey's 10th Witness Statement (and Mr Dunn's 2nd Witness Statement) on the basis that Candey needs or should be treated as needing, relief from sanctions in accordance with the *Denton* principles.

218. As regards the application of the relief from sanctions analysis even where there may be said to be no direct sanction, and in particular as regards retrospective extensions of time, I was referred to *Global Energy Horizons Corporation v Gray* [2019] EWHC 1132(Ch), itself relying upon *R (on the application of Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 and *Ellison v University College Hospitals of Morecombe Bay* [2015] EWHC 477 (QB). As regards the *Hysaj* case I also draw attention to *Salford Estates (no 2) Ltd v Altomart Limited* [2015] 1 WLR 1825 and *R (on the application of Fayad) v Secretary of State for the Home Department* [2018] EWCA Civ 54. In my judgment, even if the sanction under CPR r32.10 does not apply, the so-called "Denton principles" clearly apply by analogy in this situation.

219. By way of broad summary only the principles derived from the *Denton* case (*Denton v T H White Limited* [2014] EWCA Civ 906; [2014] 1 WLR 3926) which apply where the court is considering an application for relief from sanctions involves the following three stage test (which I take from the *Fayad* case):

(1) The court must identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order engaging CPR rule 3.9(1). If the breach was not serious or significant, it is likely that relief will be granted by the court, and it is unlikely that it will be necessary to investigate stages (2) and (3) in any depth.

(2) The court must identify and consider the reasons why the default occurred.

(3) To enable the application to be dealt with justly, the court must evaluate all the circumstances of the case, including the need to enforce compliance with rules etc and the need for litigation to be conducted efficiently and at proportionate costs.

220. It seems clear to me that the breach in this case is clearly serious and significant given (among other things) (a) the late stage at which the evidence is sought to be adduced given the time by which the evidence was required to be served and the history of orders in this case and (b) its effect, which is to seek to change a fundamental basis of Candey's case, upon which basis the parties and witnesses had been proceeding, at what can be described as the 11th hour.

221. So far as explanation is concerned, it seems to me that there is no good explanation for the late appearance of this evidence. From the very start, the Liquidator's case has been that the Valuation Issue is to be determined on a time cost basis and that the relevant times are those set out in the Timesheets. The only issues were whether the hourly rates claimed were too high, some time entries were not properly claimed because they were incurred at a time when the Liquidators had de-instructed Candey and whether the narrative details of the actual times were adequate. While Candey was arguing for a different basis of valuation, the Liquidators' case has not changed and Candey always faced the possibility that its case on an alternative basis of valuation to time costs would not succeed. Further, after the 2nd Court of Appeal judgment it must have been obvious that a time cost basis of charging was at the least a very real candidate for the basis of valuation which the court would adopt. Even on Candey's own case, a time cost basis of valuation was in part required under the CFA analysis. Further, no directions or agreement were sought that the entire issue of quantification on a time costs basis (if that was the court's decision) should be put off to a different procedure or further hearing and that further evidence would be required in that respect as regards the actual time spent by Candey in the provision of relevant legal services.

222. Looking at all the circumstances, my judgment is that relief should not be granted. It is even now wholly unclear the extent of time and costs of that time which would be brought into issue. At this stage the main suggestion is that there should be an adjournment to enable a costs draftsman to prepare a full bill of costs. This is likely to cause significant delay and cost. A whole new line of enquiry on both sides would be necessary. Candey has already had three opportunities to put evidence before the Court (in the lead up to the hearing before me, in the lead up to the hearing before HHJ Raeside and in accordance with the order of Mr Johnson). The case has been on foot for a not inconsiderable period of time. As I have already held, there is no reason as a matter of principle to adjourn this hearing to carry out a more detailed assessment process. However, even if I am wrong on the last point, and this matter were to be adjourned to a further "quantum" hearing of some sort, I do not consider that it would be just to the Liquidators to permit the re-opening of a primary factual matter upon which a time costs basis of valuation would be carried out.

223. I also reject the submission of Mr Saoul that if I proceed to determine all issues on the Valuation Issue now, without a further hearing, I should take into account the new evidence he relies upon. That is primarily because the Liquidators have not had adequate time to deal with it. Further, it is unclear what is its effect. This is because it does not spell out the time entries (both as to length of time and the rate in question) has been left out of the Timesheets in respect of the individual "spot check" matters it has identified. Further, there is a failure to identify the overall effect if the exercise of identifying the "missing time entries" from the Timesheets is carried out (which is another reason why the Liquidators cannot have been expected to deal with this evidence by evidence of their own).

Time cost charging: (4) what time was is to be treated as properly chargeable

224. On the facts, I do not understand the Liquidators to put forward a positive case that graded fee earners were used inappropriately on particular matters by reference to

their grade and that they accept that, subject to whether particular time was properly spent on the case, there is no issue that the actual grades applied were correct.

225. That leaves the question of the hours claimed to have been spent by Candey. As I have said, in that respect Candey relies upon the Timesheets with their narrative.

226. Mr Thomas challenges time entries shown in the Timesheets in the following categories but would allow a percentage recovery in relation to some such categories as follows:

Category defined by Mr Thompson		Further information	Percentage proposed by Mr Thomas to be allowed
B	Bills contain activity type but no Narrative	Activity Type specified (e.g. Attendance on Counsel; Considering documents).	0%
C	Insufficient narrative	Activity Type (e.g. as above) and narrative (e.g. "Disclosure, E-mails")	50%
D	Work done in relation to funding, fees and the charge in respect of the FFA		0%
E	Bulk items Time recorded in bulk to cover extended periods of time		50%
F	Internal meetings, strategy and reading in time		50%
H	Work undertaken post liquidation	Those parts done without Liquidators' authority should be disallowed	[Identified work]

Categories B and C: No or Insufficient narrative

227. Mr Crumpler at one point estimated the costs in question, on a time basis, as being in the region of £92,000. As regards these categories both experts are agreed that on a detailed assessment there is insufficient detail in the Timesheets for a Costs Judge to resolve the question as to whether the times are properly chargeable. However, as was common ground, the process that would follow is, in practice, one where a costs draftsman would prepare a more detailed bill of costs going back to the files (electronic and paper) of the solicitor to provide the detail necessary and such files could be made available to the Costs Judge in the event of continued dispute. In my assessment and from some experience when conducting assessments in another jurisdiction, at the stage of presentation of a detailed bills of costs, the scope of the dispute would likely diminish and be largely one of principle as regards particular types of charges.

228. Although it is said that there is no narrative or inadequate narrative, the Time Sheets do provide quite a lot of detail. The detail is of course far greater than that which a Court would see on a summary assessment or when deciding what size of payment on account of costs should be ordered. There is evidence that the time was incurred as set out in the Timesheets. That evidence has not been challenged. As regards these categories Mr Thomas says that he has given the benefit of the doubt to Candey. It remained unclear to me what this meant in practice.

229. Mr Thomas asserts that the percentage of such costs allowed should be 0% (category B) or 50% (Category C) but this amounted to little more than assertion with, for my purposes, no convincing reasoning to support it (e.g. Category B: "From the information available it is not possible to include this work in the valuation of the Relevant Services"; Category C: "Whilst a limited amount of information is available it is difficult to justify inclusion of more than 50% of this work in the valuation of the Relevant Services.").

230. I am satisfied on the balance of probabilities that the work was carried out and that it was, on its face, time properly chargeable.

Category D: work done in relation to funding

231. This seems to cover two different points. First, work done by Candey in relation to negotiating and/or drafting and/or finalising (e.g. by registration of the charge securing sums due under the FFA) matters relating to the fees of Candey. I accept that normally these matters are a cost to the solicitor of the supply of the service and consider that such times should not be included in valuing the services provided by Candey: essentially the work was not work for the client but for Candey and/or did not provide value to PHRL.

232. Secondly, there is work done by Candey in securing, or attempting to secure, funding for PHRL. Even though such funding may ultimately have been for the purposes of assisting in discharging legal fees, I consider that prima facie such time spent was of value to PHRL as assisting it in obtaining finance and that it would normally be taken into account. However, the Liquidators assert that at the relevant time Candey had been instructed by the Liquidators not to carry out work for PHRL unless expressly instructed and that Candey was not instructed to be involved in the attempts to raise

funding. I will deal with this point later in this judgment because it arises in relation to category H.

233. To some extent, though, it appears that work was done to obtain funding for PHRL in January and February 2016. In relation to those matters, so far as the work took place prior to liquidation, I consider that the time entries in the Timesheet should be treated as hours which should fall within the services to be valued be valued on the basis that such services would have been remunerated at the hourly rates I have allowed.

Category E: bulk items

234. At one point Mr Crumpler identified this category as representing time costs of some £111,000 or so. In relation to this category, Mr Thomas has identified what he describes as:

> "*Time which has been bulk recorded to cover numerous time entries in a single item, generally covering a large amount of hours over periods where it seems likely breaks would have occurred. In my view it is very difficult to record time accurately in this way*."

He suggests a reduction of 50% in the relevant times in the Timesheets on the basis that "Whilst limited amount of information is available, it is difficult to justify inclusion of more than 50%". Again, as regards the percentage allowed this is little more than a conclusion.

235. Again, the factual assertion that the work was properly carried out was not challenged. I am satisfied on the evidence and the balance of probabilities that this category should be allowed for the purposes of the valuation exercise at 100%, save where there are specific challenges, such as overseas travel, which I now turn to.

236. Within what has been identified by Mr Thomas as "Bulk items" are certain overseas visits. Ms Bower in her second affidavit indicates that the times in the Timesheets appear to include travel, and the full time away, including what one would expect to be sleeping hours rather than just the proportion spent on PHRL's work. As regards travel she points out that practices vary from no payment for travel time, through to 50% rate in respect of travel time to capped payment time (e.g 8 hours each way). The Liquidators' evidence in their written evidence the particular example of charges of 119 and 120 hours by each of Mr Candey and Mr Dunn for a 5 day visit to the BVI. Five days at 24 hours would be 120 hours. In at least one other case in 2014 Mr Dunn (by way of example) did not charge for sleeping time, though Candey later asserted that this was a "discount". There is an even more surprising example of Mr Dunn apparently charging the equivalent of 38.75 hours a day in respect of a visit to the BVI in late September early October 2015 (though that is outside the period that I am having to deal with for valuation purposes and may have been corrected as a mistake).

237. As regards this question of hours spent on overseas visits, Mr Candey asserts that there had been an agreement with PHRL that it pay Candey on the basis of the time spent from leaving the home to the time of entry to the home effectively on a 24 hour a day 7 days a week basis. Even if this was so it does not seem to me that I should allow such times as being times that conferred value on PHRL or that they amounted to part of the proper cost of the work to PHRL for the purposes of the Valuation

Exercise. In addition he suggests that this was Candey's general position and that it was in place to deter clients from instructing members of the firm to go overseas. This suggests to me that such a practice did not represent the overall value of overseas trips "on the open market". Doing the best that I can, and as a broad brush manner of valuation, I would allow, for valuation purposes in relation to s245, 40% of the time cost spent by an individual fee earner outside a long working day of 12 hours up to a maximum of 24 hours in any one day. This reflects a discounted charging rate for travel and being away from home but also taking into account that the precise hours worked in any one day is now probably difficult to reconstruct without disproportionate time and effort.

Category F: internal meetings, strategy and reading in time

238. It is unclear whether this category was comprised within the figures identified by Mr Crumpler that I have already mentioned. As regards this category, Mr Thomas, in his first report, accepted that "it is common and correct for team meetings to occur and for strategy to be considered in substantial complex litigation as this". However, he noted the significant amount of time recorded and the lack of a more detailed explanation. He suggests a 50% reduction on the basis that (an unidentified) "significant proportion" of it is non-chargeable work. The 50% figure does not seem to be based on anything particularly principled. In my judgment, the Timesheets identify that the work was carried out and supposition that there may be elements of non-chargeable "day to day supervision" or that the time was not properly spent is that and no more. Accordingly, I am satisfied that the full time recorded is the appropriate basis of valuation.

Category H

239. The Liquidators assert that work after they were appointed should not be treated as relevant work requiring to be valued unless incurred with their express authority given, not least, a letter of 22 February 2016 which in terms said this. At one point Mr Crumpler identified the relevant time costs as in the region of £66,000 (or £57,900 excluding block time and inadequately detailed entries on the Timesheets).

240. First, I do not agree with the Liquidator's position that Candey cannot charge for any time in the BVI immediately after the order for winding up. The directors still had a role in relation to such proceedings (for example in their capacity as directors of the company they might have needed advice on appeal) and in any event, the idea that the value of the service provided ceased immediately on the winding up with Candey staff in the BVI seems to me, with respect, unrealistic. The value of the work in the BVI required the company to pay to get the persons to the BVI and back again. I would allow times on the same basis that I have already mentioned regarding overseas visits.

241. The second relevant area is that of funding. I leave aside any funding work carried out prior to the date of liquidation (which I have already said is to be taken into account as work which requires to be valued). As regards funding post liquidation, Candey appears to have involved itself in seeking to broker funding for PHRL to enable, at the least, the London Proceedings to continue. The Liquidators say that they did not authorise Candey so to act. I accept that evidence. Accordingly such

work does not fall to be valued as part of the valuation exercise under s245 IA 1986. Mr Crumpler identifies this work as having a value of approximately £46,500.

242. Mr Crumpler also identifies sums of approximately £19,000 as incurred without authority in relation to work said to have been done on the London litigation file, the Jinpeng Arbitration, the BVI proceedings and Chapter 11 proceedings. Mr Candey admits certain of these sums have been wrongly charged and to that extent the Timesheets should be treated as amended accordingly.

243. Mr Candey asserts that certain work done after Candey's authority to act was revoked was as a matter of professional courtesy. That is as may be but I do not consider that this time should be taken into account for the purposes of the valuation exercise I am carrying out. The same applies regarding, for example, Mr Candey's point that he felt that Candey should involve itself in the Chapter 11 proceedings because Candey was concerned that US lawyers were being wrongfully directed by Omar Amanat.

244. Mr Candey also asserts that some of the relevant time in the Timesheets covers without prejudice communications and negotiations with the Liquidators over their proposal to vary the FFA prior to the settlement of the London proceedings. For the same reasons as given in relation to work on the FFA considered under Category D above, I do not consider that this time should be taken into account in the valuation exercise that I am carrying out.

245. Given the detail in the Timesheets and the spreadsheets prepared by Mr Thomas as contrasted with the broad generalities contained in the written evidence, I am unable to provide precise figures in the light of my judgment for the overall valuation or even the precise time entries. The above identifies points of principle rather than a decision as to which specific time entries fall into which categories. (I note for example that both sides have slightly corrected or fine-tuned their positions in respect of certain time entries). I would hope that in light of this judgment and bearing in mind proportionality and cost the parties will be able to agree what work should be treated as work that should be valued as well as the quantum of valuation. In the event there are difficulties there may need to be further representations but I should make clear that (unless the court otherwise orders, which is going to be extremely unlikely) no new evidence may be called by either side, and that the matter will be dealt with in the basis of the evidence as it stands.

Conclusions

246. The appropriate basis of valuation is a time cost basis rather than one based on a notional damages based agreement, conditional fee agreement or litigation funding agreement.

247. The appropriate time cost should be determined by hourly rates multiplied by the relevant time spent.

248. The hourly rates should be those put forward by Candey.

249. The relevant times to which the hourly rates should be applied are to be determined applying the principles that I have laid down earlier which are intended to resolve the issues of principle that have been raised.

Further hearing and form of order

250. I direct that an Order should be lodged, agreed if possible, by 4pm 10 January 2020. If at that point a valuation figure cannot be agreed the order should set out proposed declarations dealing with the points of principle that I have dealt with, so far as is possible. If such order cannot be agreed, the Liquidators should submit a composite form of draft order showing agreed parts but identifying, as regards non agreed parts, the parties' respective proposals and identifying which party a proposal is to be attributed to. In light of that and any written representations I will decide the best way ahead to finalise matters. I would anticipate at the least having a short hearing not long after Friday 10 January, which can be by telephone if the parties agree, seeking to finalise such of the order as can then be finalised and dealing with any consequential matters such as costs and appeal.

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