Neutral Citation Number: [2020] EWCA Civ 26

Case No: A2/2019/0703

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES)
MR ANDREW HOCHHAUSER QC (Sitting as a Deputy Judge of the High Court)
[2019] EWHC 282 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2020

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE MOYLAN
and
LADY JUSTICE ROSE

- -

Between :

CANDEY LIMITED	**Appellants**
- and –	
RUSSELL CRUMPLER and CHRISTOPHER FARMER (AS JOINT LIQUIDATORS OF PEAK HOTELS & RESORTS LIMITED (IN LIQUIDATION))	**Respondents**

- -
- -

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

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

Hearing dates : 10 and 11 December 2019

- -

Approved Judgment

Lady Justice Rose:

1. THE BACKGROUND

1. This appeal against the order of Andrew Hochhauser QC sitting as a Deputy Judge of the Chancery Division raises two separate issues relating to the recovery of legal costs incurred in the course of extensive litigation conducted in London and in several other jurisdictions around the world. The Appellant, Candey Limited ('Candey'), is an English registered company based in London. For a number of years Candey acted as the legal representative for a party to that litigation, Peak Hotels & Resorts Ltd ('Peak'), a company incorporated in the BVI. Peak is now being wound up in insolvency proceedings brought in the BVI court and the Respondents ('the Liquidators') were appointed by that court as the liquidators of Peak on 8 February 2016. Shortly after they were appointed, the Liquidators replaced Candey with other solicitors. A dispute then arose between the Liquidators and Candey about Candey's claim to unpaid fees owed to it by Peak. For the purpose of that dispute, Candey was represented by an English firm of solicitors, Candey LLP. Following one of many hearings that have taken place to resolve that dispute, the Liquidators were ordered to pay some of Candey's legal costs. The first issue in this appeal is whether the Liquidators are bound under that costs order to pay a success fee which Candey asserts it is bound to pay its lawyers Candey LLP under a conditional fee agreement ('CFA') between Candey and Candey LLP. For reasons that will become clear, this issue has been called the Exemption Issue because it turns on whether an exemption from the general prohibition on the recovery of a success fee from opposing parties applies to the proceedings between Candey and the Liquidators. The judge decided the Exemption Issue in favour of the Liquidators, holding that the proceedings were not covered by the exemption and so the success fees were not recoverable from the Liquidators as part of Candey's costs. Candey appeals against that decision.

2. The second issue relates to Candey's claim in the Peak insolvency proceedings to recover the unpaid fees it was owed by Peak for the legal work done. Candey asserts an equitable lien which it submits the court can and should convert into a charge on Peak's assets under section 73 of the Solicitors Act 1974 to secure those unpaid fees. This is referred to as the Lien Issue. On this issue the judge also found in favour of the Liquidators that the lien over Peak's assets had been waived by Candey and was no longer enforceable. Candey appeals against this finding. The judge did not agree with all the arguments that the Liquidators put forward as to why the lien no longer operated in Candey's favour. There is a Respondents' Notice from the Liquidators raising again some of the arguments that the judge rejected as alternative reasons for upholding his decision that the lien has been waived.

3. The factual background to this dispute was set out in the judge's clear and comprehensive judgment reported at [2019] EWHC 282 (Ch). I need only provide a brief outline here. Peak was incorporated in January 2014 to hold shares in a joint venture vehicle which owned a group of boutique luxury hotels. Relations between the joint venture partners broke down and Peak became embroiled in litigation for which Candey acted as its legal representative between April 2014 until 2 March 2016. There were proceedings in London, Hong Kong, in the BVI and in New York. One set of proceedings in which Candey acted on Peak's behalf was the claim brought by Peak in June 2014 in the Chancery Division of the High Court in London. This was referred to by the parties as the 'London Litigation'. In the course of the London

Litigation, Peak paid first $10 million and then £3 million into court to fortify its cross-undertaking in damages when it was granted injunctive relief and to provide security for the defendants' costs. By August 2015 Peak owed Candey several hundreds of thousands of pounds in unpaid legal fees and could not continue to finance the litigation in which it was involved. Peak and some of its backers negotiated a fixed fee with Candey to cover all the litigation going forward. Those backers included the American company Campion Maverick Inc although it was not involved in negotiating the fixed fee. The negotiations culminated in an agreement between Candey and Peak dated 21 October 2015 ('the FFA') under which Candey agreed to continue to act for Peak in various proceedings including the London Litigation. The FFA provided that Peak would pay:

i) The Fixed Fee of £3,860,637.48 in respect of future fees, payable only once judgment on liability was handed down or settlement agreed in the London Litigation or on Peak receiving other cash enabling it to pay;

ii) Outstanding Costs, that is the unpaid invoiced costs of £941,358.94 payable in three roughly equal instalments;

iii) Disbursements including counsel's fees payable on request.

4. Pursuant to an obligation in clause 11 of the FFA, a deed of charge and security was executed between Peak and Candey also on 21 October 2015 ('the Deed of Charge'). By the Deed of Charge Peak purported to create in favour of Candey (i) a fixed charge over its assets and undertakings; (ii) a fixed charge over all damages, costs, monies and other sums or benefits flowing from all the claims it was involved in; and (iii) a floating charge over any further assets which were not capable of being charged by a fixed charge. The Deed of Charge was then registered in the BVI. The Lien Issue is, in short, whether by entering into this Deed of Charge with Peak, Candey has waived its entitlement to rely on its equitable lien over any fruits of the London Litigation.

5. On 19 February 2016 Candey submitted a proof of debt in the insolvency proceedings in the BVI stating that the total amount of the claim as at the date of the appointment of the Liquidators was £3,860,637.48, being the Fixed Fee. The proof of debt referred to the Deed of Charge as the security for the debt, describing it as creating 'fixed and floating charges' over all of Peak's assets.

6. It rapidly became clear that there was going to be a dispute between Candey and the Liquidators over the payment of the sums due under the FFA. The Liquidators took the view that Candey's charge under the Deed of Charge was only a floating charge rather than a fixed charge. Moreover, they considered that Peak had been unable to pay its debts when it entered into the Deed of Charge so that the floating charge in favour of Candey could only secure the value of services provided by Candey after the creation of the Deed of Charge, in accordance with section 245 of the Insolvency Act 1986 ('the IA 1986').

7. In order to deal with actual and potential litigation taking place in London, the Liquidators applied on 22 February 2016 to the English High Court for recognition of the BVI liquidation pursuant to the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) ('CBIR'). A recognition order was made by Registrar Derrett on 24 February 2016, recognising the BVI liquidation as foreign main proceedings in

accordance with the UNCITRAL Model Law as set out in Schedule 1 to the CBIR. The order stayed all proceedings against Peak except for the proceedings listed in paragraph 3 of the order. Paragraph 4 of the order provided that the Liquidators have liberty to apply for relief under Article 21 of the Model Law. On 31 March 2016 Candey concluded a CFA with Candey LLP which is an English law firm regulated by the Solicitors Regulation Authority. It is a separate entity from Candey although it operates from the same offices and appears to have the same fee earners. Under the CFA, Candey was obliged to pay a 100% success fee to Candey LLP in the event that Candey was successful in its dispute with the Liquidators. Candey gave notice to the Liquidators of the CFA on 9 May 2016.

8. Meanwhile, the London Litigation was compromised by the Liquidators shortly before it was due to come to trial. A consent order was made by Asplin J dated 7 March 2016. The order directed the payment out of the sums that Peak had paid into court, directing that some of it be paid to Peak. The result was that about US$10 million and £1.6 million were paid back to Peak in May 2016. Subsequently, Peak received a further $1.5 million arising from the settlement (referred to as 'the SCB Monies' because they were held in an account at Standard Chartered Bank). Those are the monies, referred to as 'the Settlement Proceeds' over which Candey now asserts its solicitors' equitable lien.

9. On 27 September 2016 the Liquidators applied to the court to determine the nature of the Deed of Charge which Candey claimed made it a secured creditor for the sums due from Peak under the FFA. The Liquidators issued an application seeking a direction or other order pursuant to Article 21(1)(g) of Schedule 1 to the CBIR and/or section 168(3) of the IA 1986. This application is referred to in the judgment as 'the Liquidators' Application' and comprises the 'proceedings' on which the Exemption Issue turns. The Liquidators' Application came before HHJ Davis-White QC sitting as a Judge of the High Court. On 23 June 2017 judgment was handed down: [2017] EWHC 1511 (Ch) deciding:

    i) in favour of Candey, that the monies that Peak had paid into court in the London Litigation and which were returned to it when that litigation was settled were not new monies as the Liquidators had contended and that they were therefore assets covered by the Deed of Charge. This was referred to as the 'New Monies Point'.

    ii) in favour of the Liquidators, that on its true construction the Deed of Charge created a floating charge, not a fixed charge over Peak's assets.

    iii) in favour of the Liquidators, that Peak had been insolvent as at the date of the Deed of Charge so that section 245 of the IA 1986 was engaged and the floating charge was only valid as security for fees incurred after the date of the charge.

10. HHJ Davis-White declined to make a finding as to the value of the services supplied by Candey which could be secured by the Deed of Charge and he adjourned that issue. An appeal by the Liquidators on the New Monies Point was dismissed by the Court of Appeal on 16 October 2018 ([2018] EWCA Civ 2256). Candey did not appeal against the decision that the Deed of Charge created a floating charge rather

than a fixed charge. They also did not challenge the decision that Peak had been insolvent as at the date of the Deed of Charge.

11. The adjourned value of services issue was determined by HHJ Raeside QC (sitting as a Judge of the High Court) on 22 November 2017. He held that the fixed fee set in the FFA was a fair and reasonable fee for work done by Candey on behalf of Peak and that that sum was payable by the Liquidators to Candey with interest ([2017] EWHC 3388 (Ch)). Following a hearing to determine the costs and other consequential matters relating to the Liquidators' Application, HHJ Raeside also ordered on 5 December 2017 that the Liquidators pay 80% of Candey's costs with a payment of £538,780 on account. An appeal by the Liquidators in relation to the value of services issue was heard on 13 December 2018 and judgment was pending at the time of the hearing before Mr Hochhauser QC. The Liquidators' appeal was allowed on 8 March 2019 ([2019] EWCA Civ 345) and the valuation of services issue was remitted to the High Court. On 25 March 2019 the Court of Appeal gave consequential directions including that the costs of the first instance hearings, both of the value of services issue and of the other issues in the Liquidators' Application, were reserved to the trial judge at the conclusion of the remitted hearing. Judgment on the remitted value of services issue was handed down by HHJ Davis-White QC on 20 December 2019, after the hearing of this appeal ([2019] EWHC 3558 (Ch)). The judgment set a timetable for computing the value of services and for dealing with consequential matters such as costs early in 2020. The ultimate decision on who will pay the costs of the Liquidators' Application is therefore still pending at the time of this judgment.

2. THE EXEMPTION ISSUE

12. Both parties to the appeal before us agreed that the decision of the Court of Appeal on the value of services has not rendered the Exemption Issue academic because (i) the costs of the Liquidators' Application may yet be awarded in Candey's favour; (ii) there remains a costs order in Candey's favour following the Liquidators' unsuccessful appeal to the Court of Appeal on the New Monies Point; and (iii) this appeal is part of the same proceedings so that if Candey succeeds in this appeal, any costs award in their favour by this Court would also trigger the success fee in their CFA with Candey LLP. Thus the Exemption Issue remains live - the success fee is said to amount to over £1 million.

13. Section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 prevents a court from making a costs order which requires the payment by one party of a success fee payable by another party under a CFA. It does this by section 44(4) which substitutes a new subsection (6) in section 58A of the Courts and Legal Services Act 1990 providing that:

> "(6) A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement."

14. The commencement of section 44, and hence the coming into effect of the new section 58A(6) prohibiting the recovery of success fees, was dealt with by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 (SI 2013/77) ('the LASPO Order'). The LASPO Order

brought section 44 into force generally on 1 April 2013. However, the commencement of section 44 was made subject to article 4 of the LASPO Order, which provides:

> "**4. Saving provision**
>
> [The commencement provisions] do not apply to-
>
> (a) proceedings relating to a claim for damages in respect of diffuse mesothelioma;
>
> (b) publication and privacy proceedings;
>
> (c) proceedings in England and Wales brought by a person acting in the capacity of—
>
> (i) a liquidator of a company which is being wound up in England and Wales or Scotland under Parts IV or V of the 1986 Act; or
>
> (ii) a trustee of a bankrupt's estate under Part IX of the 1986 Act;
>
> (d) proceedings brought by a person acting in the capacity of an administrator appointed pursuant to the provisions of Part II of the 1986 Act;
>
> (e) proceedings in England and Wales brought by a company which is being wound up in England and Wales or Scotland under Parts IV or V of the 1986 Act; or
>
> (f) proceedings brought by a company which has entered administration under Part II of the 1986 Act."

15. The effect of article 4 of the LASPO Order was that, at the relevant date for the Candey CFA, the new subsection 58A(6) precluding the award of a success fee as part of a costs order had not been brought into force in respect of proceedings of the kind described in that article. This means that a court may still order the Liquidators to pay the success fee, as part of any costs they are ordered to pay to Candey in the Liquidators' Application, if the Liquidators' Application counts as proceedings in England and Wales brought by a person acting in the capacity of a liquidator of a company which is being wound up in England and Wales under Parts IV or V of the IA 1986. The issue for the judge and now for us is whether the Liquidators' Application constitutes such proceedings. Candey accepts that it bears the burden of establishing that the proceedings fall within the exemption. I shall refer to a liquidator of a company being wound up in England and Wales under Parts IV or V of the IA 1986 as an 'English liquidator'.

16. Candey submits that the effect of the recognition order made by Registrar Derrett under the CBIR is that the Liquidators were acting 'in the capacity of' English liquidators when they brought the Liquidators' Application. They point to the fact

that the Liquidators' Application is expressed to be made under section 168 of the IA 1986. That provides:

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

17. Since the power of a liquidator to apply to the court for a decision is limited by section 168 to English liquidators, the fact that the Liquidators were able to bring the Liquidators' Application shows, Candey submits, that they are to be treated as acting in the capacity of English liquidators. Mr Lord QC, appearing for Candey, accepts that the Liquidators are not 'acting as' English liquidators but that is not, he says, what article 4 requires. Some meaning must be given to the additional words 'in the capacity of' an English liquidator and those words cover not only actual English liquidators but also foreign liquidators who have the capacity to exercise such powers because they are recognised under the CBIR. Capacity must not be confused with status; although the Liquidators retain the status of foreign representatives under the recognition order they now have the same powers and abilities as an English liquidator and therefore brought the Liquidators' Application in the capacity of an English liquidator.

18. I consider the judge was right to reject this argument and to decide that the Liquidators' Application did not fall within article 4(c)(i) of the LASPO Order. An analysis of the CBIR shows that the recognition order does not have the effect that the foreign representatives are thereafter treated as either acting as or acting in the capacity of an English liquidator. The CBIR provide that the Model Law has the force of law in Great Britain in the form set out in Schedule 1 to the Regulations. Article 1 of Schedule 1 provides that the Model Law applies where assistance is sought in Great Britain by a foreign representative in connection with the foreign proceeding. A foreign representative is defined in article 2(j) as including a person or body authorised in a foreign proceeding to administer the liquidation of the debtor's assets or affairs. This can be contrasted with the definition of a 'British insolvency office holder' defined as including a person acting as an insolvency practitioner within the meaning of section 388 of the IA 1986, other than an administrative receiver.

19. Article 12 of Schedule 1 provides that upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under British insolvency law defined, in relation to England and Wales, as law made by or under the IA 1986, subject to certain exceptions. Chapter III of Schedule 1 deals with the recognition of the foreign proceeding and provides that a foreign proceeding shall be recognised if it meets the criteria set out in Article 17. Article 20 then imposes a stay on the commencement or continuation of proceedings against the

debtor upon recognition of the foreign proceeding. The stay is described as being 'the same in scope and effect' as if the debtor had been made the subject of a winding up order under the IA 1986: see Article 20(2)(a). Article 20(5) provides that the recognition of the foreign proceeding does not affect the right to request or otherwise initiate the commencement of a proceeding under British insolvency law or the right to file claims in such a proceeding.

20. Article 21 deals with the power of the court to grant any appropriate relief at the request of the recognised foreign representative where necessary to protect the assets of the debtor or the interests of creditors. That relief includes providing for the examination of witnesses, the taking of evidence or the delivery of information and entrusting the administration or realisation of the debtor's assets located in Great Britain to the foreign representative. The appropriate relief that can be granted by the court also includes, at Article 21(1)(g) 'any additional relief that may be available to a British insolvency officeholder under the law of Great Britain including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986'. Article 23 then provides expressly that upon recognition of a foreign proceeding, the foreign representative has standing to make an application to the court for an order under or in connection with a list of specified provisions of the IA 1986.

21. It was common ground between the parties before us that the relief available to a recognised foreign representative who applies to the court under Article 21 of Schedule 1 is the relief that is available to a British insolvency officer; the court cannot award any other relief that might be available to the foreign representative according to the domestic law of the court where the foreign proceedings are taking place: see *Fibria Cellulose S/A v Pan Ocean Co Ltd and another* [2014] EWHC 2124 (Ch), para. 108.

22. I agree with the judge's conclusion at para. 39(4) of his judgment that the effect of recognition is to confer on the foreign representatives the right to request or initiate proceedings under the IA 1986. When foreign representatives make such an application, they are exercising the right conferred on them by Article 21(1)(g) of Schedule 1 and not the right conferred on them by section 168 IA 1986. The fact that the Liquidators' Application referred to section 168 as well as to Article 21 does not affect the legal analysis of the powers that are available to them. Indeed, if the effect of the recognition order was generally to deem a foreign representative to have the same abilities, capacities and powers of a British insolvency practitioner, Article 21 would be redundant because the foreign representative would automatically have the powers that the Schedule expressly confers on him.

23. There is nothing in the structure or wording of Schedule 1 that supports the contention that a recognised foreign representative is to be treated as a British insolvency officeholder or that he acts in the capacity of a British insolvency officeholder. The provisions that refer to the recipient of the recognition order still refer to him as the foreign representative. Article 20(5) contemplates that there might be British insolvency proceedings as well as the foreign proceedings. I do not accept that the fact that some of the powers or forms of relief listed as being available to a recognised foreign representative are, on their owns terms, limited to cases where a company is being wound up in England and Wales has the effect for which Mr Lord contends. The effect of Article 21 is to widen the scope of application of those provisions so that they are no longer applicable only in the circumstances that they themselves specify

but also in circumstances where Article 21 applies. Further, as Mr Holland QC acting for the Liquidators pointed out, the powers or capabilities of the foreign representative are not in fact precisely the same as those of an English liquidator. For example, the capabilities of a recognised foreign representative are qualified by Article 22 of Schedule 1. This provides that before granting relief the court must be satisfied that the interests of creditors are adequately protected and may require the foreign representative to provide security for the proper performance of his functions as a condition of granting relief. Article 23 also modifies the IA 1986 provisions listed in subparagraph (2) in various ways so that they apply in this context differently from how they apply to an English liquidator.

24. Turning to the proper construction of article 4 of the LASPO Order, in my judgment it was not Parliament's intention to allow foreign representatives to continue to recover success fees under their CFAs in the same way as English liquidators. If that had been the intention it would have been a simple matter to make that clear. One can see many difficulties that would need to be addressed if the exception were intended to cover foreign representatives, for example whether a success fee is recoverable if it is payable under a CFA which is governed by the law of the place of the foreign proceedings rather than English law.

25. I do not agree with Mr Lord's submission that the construction accepted by the judge makes the inclusion of the words 'in the capacity of' in article 4(c) redundant. In order to benefit from article 4 of the LASPO Order, a person who is an English liquidator must be bringing the proceedings as part of the performance of those functions and not in some other personal or professional capacity, for example if he sues for his fees. The judge was right to hold that one does not need to draw a distinction between a person 'acting as' an English liquidator and a person acting 'in the capacity of' an English liquidator in order to give some meaning to that phrase; in this context the two phrases mean the same thing.

26. Candey's construction of article 4(c) would lead to the odd result that where the foreign representative brings proceedings in the company's own name, the company would need actually to be a company being wound up in England and Wales to be able to recover the success fee from the opposing party. A company in respect of which a recognition order was made would not qualify as 'a company which is being wound up in England and Wales' for the purposes of article 4(e). There would therefore be a significant disparity between the scope of article 4(e) and the scope of article 4(c)(i). Similarly, there would be a disparity between the scope of article 4(f) where a company can only benefit from the exception if it has actually entered administration under Part II of the IA 1986. If Candey's construction applied to the wording in article 4(d) too, a foreign representative acting 'in the capacity of' an administrator of such a company would also fall within the exemption if those foreign administration proceedings were recognised under Schedule 1 to the CBIR even though he was not appointed under Part II. I can see no rational basis for Parliament to have chosen that as an appropriate way of determining the scope of the exemption.

27. The judge was also right in my view to accept the argument put forward by the Liquidators that Candey's construction of article 4 of the LASPO Order would create an irrational disparity between proceedings brought by a foreign representative via the CBIR route and proceedings brought by him via one of the other routes available to him: see para. 66 of the judgment. Instead of applying for a recognition order under

the CBIR, a foreign representative might instead apply to the court under section 426 IA 1986 which deals with cooperation between courts exercising jurisdiction in relation to insolvency. He might be entitled to bring proceedings here under the EU Regulation 2015/848 on Insolvency and he may be entitled to relief at common law. Mr Lord accepted that a foreign liquidator would not be acting 'in the capacity of an English liquidator' if he brought proceedings using one of those other routes so that the exemption in article 4 would not apply. He argued, however, that there was a rational basis for making such a distinction. If a foreign liquidator brings proceedings under one of the other three routes, he does not limit himself to the kinds of relief available to an English liquidator but can, for example, ask the court to grant relief that is available under BVI law. I see that that may be a distinction between the CBIR route and the other three routes, but I do not see why the kind of relief being sought in the proceedings should make any difference to the ability of the liquidator to recover the success fee. On the contrary, the availability of the exemption conferred by article 4 under one route but not the others would risk skewing the decision of the foreign liquidator as to which route was otherwise the most appropriate and efficient way to get in the money for the estate.

28. Finally, Mr Lord argued that the Liquidators' construction of article 4(c) placed a foreign representative in a more favourable position than an English liquidator. The saving in article 4 not only allows the recoverability of the success fee by a successful English liquidator but also empowers the court to order the English liquidator to pay the success fee of the opposing party if the proceedings fall within the provision. If the Liquidators' construction is right, a foreign representative is protected from the risk of having to pay the opposing party's success fee whereas an English liquidator is not. I accept that the more limited construction urged by the Liquidators does have that consequence. However, that result does not strike me as being so absurd as to mean that the more limited construction cannot be correct. It is rational for Parliament to have intended to limit the exception to English liquidators bringing proceedings to get in funds to distribute to creditors based in this jurisdiction. It would be unfair to make the exception one-sided by allowing English liquidators to recover a success fee but not allowing their opponents to do so. I see no justification for extending the exception beyond that.

29. In my judgment the court is precluded from ordering the Liquidators to pay any success fee payable by Candey to Candey LLP by what is now section 58A(6) of the Courts and Legal Services Act 1990. That new subsection was brought into force on 1 April 2013 for this purpose by the LASPO Order and so applies to any costs order now made in the Liquidators' Application. I would therefore dismiss Candey's appeal on the Exemption Issue and hold that the court does not have power to order the Liquidators to pay the success fee under Candey's CFA with Candey LLP as part of the costs of these proceedings when they are ultimately concluded.

3. THE LIEN ISSUE

(a) The enforcement of solicitors' liens generally

30. The solicitors' entitlement to recover their unpaid fees out of the monies recovered by their client as a result of the litigation in which they are instructed is of long standing. The solicitor's equitable lien was described recently by Lord Briggs JSC in *Gavin*

Edmondson Solicitors Ltd v Haven Insurance Co Ltd [2018] UKSC 21 in the following terms: (para. 1)

> "In its traditional form it is the means whereby equity provides a form of security for the recovery by solicitors of their agreed charges for the successful conduct of litigation, out of the fruits of that litigation. It is a judge-made remedy, motivated not by any fondness for solicitors as fellow lawyers or even as officers of the court, but rather because it promotes access to justice. Specifically it enables solicitors to offer litigation services on credit to clients who, although they have a meritorious case, lack the financial resources to pay upfront for its pursuit."

31. Lord Briggs distinguished between the lien that a solicitor has over the clients' papers and other property in his actual possession pending payment and the equitable interest of the solicitor in the fruits of the litigation. The latter entitles the solicitor to deduct his charges from an amount he receives on behalf of his client under a judgment award or settlement agreement and can be enforced against anyone who, with notice of it, deals with the fruits of litigation in a manner which would otherwise defeat that interest. He said that although it is traditionally referred to as a lien, it is better analysed as a form of equitable charge over the fruits of litigation. It did not depend upon the fruits of the litigation including a specific amount for costs between the parties or an element in a settlement sum on account of costs.

32. The justification for the lien as facilitating access to justice had been put forward over two centuries ago in *Ex p Bryant* (1815) 1 Madd 49. There the attorney, Bryant, sought payment from his former client's judgment debtors even though those debtors had been ordered by the court to pay the judgment debt to the former client directly. Plumer V-C said that the court's order for direct payment of the judgment debt to the client was not intended to deprive the solicitor of his lien:

> "I do not wish to relax the doctrine as to lien, for it is to the advantage of clients, as well as solicitors; for business is often transacted by solicitors for needy clients, merely on the prospect of having their costs under the doctrine as to lien"

33. Importantly for our purposes it is also well established that the solicitor's lien prevails despite the insolvency of the client and gives the solicitor a first-ranking charge in the insolvency: see *Re Meter Cabs Ltd* [1911] 2 Ch 557 at 559 per Swinfen Eady J.

34. The ability of the solicitor to enforce the lien by applying to the court for a charging order is now dealt with by section 73 of the Solicitors Act 1974 ('section 73'). This provides:

> "**73. – Charging orders**
>
> (1) Subject to subsection (2), any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceedings may at any time-

> (a) declare the solicitor entitled to a charge on any property recovered or preserved through his instrumentality for his assessed costs in relation to that suit, matter or proceeding; and
>
> (b) make such orders for the assessment of those costs and for raising money to pay or for paying them out of the property recovered or preserved as the court thinks fit;
>
> and all conveyances and acts done to defeat, or operating to defeat that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor.
>
> (2) No order shall be made under subsection (1) if the right to recover the costs is barred by any statute of limitations."

(b) The waiver of solicitors' liens

35. Generally speaking, a person will not be treated as having waived his rights unless he makes an unequivocal representation either by words or by conduct that he forgoes those rights. At the time of making the representation, the person must be aware of the facts that give rise to the rights that are being forgone. The kinds of conduct that can amount to the waiver of a lien include where the parties enter into a new arrangement to provide the creditor with security for the debt already secured by the lien. Waiver can arise by inference if the holder of the lien enters into a new security arrangement with the debtor when the terms of that new arrangement are inconsistent with the terms of the lien he already holds. In *Bank of Africa v Salisbury Gold Mining Company Ltd* [1892] AC 281, the articles of association of the company provided that where a shareholder was indebted to the company, the company had a 'first and paramount lien' over his shares so that his disposal of those shares was subject to the approval of the directors. A shareholder who was indebted to the company purported to transfer his shares to a third party and that third party then sought to compel the company to register that transfer. The Privy Council held that the lien was effective and that the company was therefore justified in refusing to comply. Lord Watson giving the judgment of the Board of the Privy Council said: (at 284 – 285)

> "Their Lordships do not doubt that a right of lien may be discharged by a new arrangement between creditor and debtor the terms of which are incompatible with its retention, or by any other arrangement which sufficiently indicates the intention of the parties that the right shall no longer be enforced. An agreement giving the creditor new and special powers with respect to part of the subjects covered by his original lien may be conceived in such terms as to imply that he is not to have recourse against the remaining subjects."

36. The courts have always regarded a solicitor's equitable lien as rather more prone to being waived than other rights. The leading authority is *Re Taylor, Stileman & Underwood* [1891] 1 Ch 590 ('*Re Taylor*'). In that case a Mrs Payne Collier engaged solicitors to manage the income due to her under a trust, receiving the monies on her behalf and making payments to her. When she asked them to deliver the papers back

to her, they claimed a lien over the papers for their unpaid fees. She argued that their lien had been waived when she and her husband had earlier given the solicitors a joint and several promissory note, payable on demand and bearing interest at 5 per cent to secure what was due from her, together with a charge on a life assurance policy. The issue was whether the solicitor's lien over the documents had been abandoned by the taking of the new security. Lindley LJ held first that the solicitors' lien covered only the fees assessed by the taxing master to be due, not the whole invoiced amount. As to whether the lien had been waived he said: (at p. 597)

> "In considering this point, we must be careful. Whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case. In this particular instance we are dealing with a solicitor and his client. It strikes me that if a solicitor takes from his clients such a security as this solicitor took the *prima facie* inference is that he waives his lien. That appears to be the right and proper conclusion to come to, bearing in mind that it is the solicitor's duty to explain to his client the effect of what he is about to do. In the case of a banker, I should not draw the same inference, since a banker has not a similar duty towards his customer."

37. He therefore held that the lien had been waived by the taking of the additional security. Lopes LJ agreed. He said: (at p. 598)

> "It appears to me that in each case the question whether the lien is waived by taking security must be decided according to the particular circumstances. I do not mean to say that taking a security necessarily imports an abandonment of the lien; but if there are circumstances in the taking of the security which are inconsistent with the continuance of the old security, it is to be inferred that the solicitor intended to abandon his lien."

38. Lopes LJ then referred to a number of inconsistencies between the equitable lien and the new security. The promissory note was payable on demand with interest; there was also the charge on the life assurance policy. The promissory note was given by the husband as joint surety. Under those circumstances he held that it was a fair inference to draw that there was an intention between the parties to give up the old security of the lien and to rely on the new security. Kay LJ also held that the true rule was that: (pp. 600-601)

> "… in every case where you have to consider whether a lien has been waived you must weigh all the circumstances of that particular case, and that it is an important consideration that we are here dealing with the transaction between a solicitor and his own client. A solicitor has a duty to perform towards his client to represent to his client all the facts of the case in a clear and intelligible manner and to inform him of his rights and liabilities, and where you find a solicitor dealing with his client and taking from him such a security as was given in this case,

> not expressly reserving his right of lien, I quite agree that the inference ought to be against the continuance of the lien."

39. In the later case of *Re Morris and others* [1908] 1 KB 473, the Court of Appeal also referred to the difference between the position of a solicitor waiving his lien with that of a creditor who is not a solicitor. In that case the solicitors had acted for the client in a number of matters over about two years. The client deposited securities with the firm for the purpose of securing all sums which then were or should thereafter become due from him to them in respect of their fees. The Court found on the facts that the securities had not been intended to cover the solicitors' fees but only to secure counsel's fees and other disbursements so that as a matter of fact the lien was not abandoned. The comments of the court on whether the lien would have been abandoned if the new security had been intended to cover the solicitors' fees were therefore obiter. Lord Alverstone CJ said that the result of the authorities cited to the court was as follows:

> "Prima facie a solicitor has a lien for his charges upon the papers of his client. This lien may be lost, released, or waived in the same way as the liens which other persons possess. The main difference between the case of a solicitor's lien and those other liens is that, where a solicitor takes any security which is in any degree inconsistent with the retention of the lien, it is his duty to give express notice to the client if he intends to retain the lien, and that, should he not do so, his lien will be taken to be abandoned."

40. Buckley LJ at the start of his judgment said:

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

41. He also agreed that the case of a solicitor differs from that of other persons holding a lien for example, an innkeeper who is entitled to hold on to his guest's luggage until his invoice is paid. This difference 'arises from the fact that it is the duty of the solicitor to explain to his client the effect of that which the client is about to do.' (p. 477). Buckley LJ also confirmed that properly read, the judgments of the Court of Appeal in *Re Taylor* did not go so far as to say that the taking of *any* additional security without reservation of the lien would amount to an abandonment of the lien. The facts of the case need to be looked at to see whether the solicitor has taken a security incompatible with the retention of the lien or has made with his client an arrangement which sufficiently indicates the intention of the parties that the right shall no longer be enforced: see p. 479. Kennedy LJ agreed with the result but applied a broader principle. His inclination was to hold that the fiduciary duty owed by the

solicitor to his client meant that whatever the nature of the security, its acquisition in addition to the lien must be an advantage to the solicitor and the taking of something of value from the client. The solicitor must therefore either by express words or by necessary implication make that intention known to his client by reserving the lien. If the solicitor fails to prove that reservation, he should be treated as having abandoned his lien.

42. More recently there have been two judgments in the Chancery Division arising from the same proceedings. In *Clifford Harris & Co v Solland International Ltd & ors (No 1)* [2004] EWHC 2488 (Ch) ('*Solland (No 1)*') the solicitors Clifford Harris sought orders under section 73 charging money received under a settlement of proceedings in which they acted for Mr and Mrs Solland. The Sollands' defence was that they had executed a legal charge over their house in favour of Clifford Harris to secure the present and future costs and disbursements of the litigation. They submitted that the grant of the legal charge constituted a waiver by Clifford Harris of the right to any lien or charging order and applied to strike out Clifford Harris's application. At the hearing of the strike out application, David Richards J held that the principle of waiver applied as much to the lien under section 73 as it applied to any possessory lien: para. 15. The key questions were whether the new security was inconsistent with the solicitor's rights at common law and under section 73, and, because of the fiduciary relationship between them, did the solicitor inform the client that he was reserving those legal rights: 'If it is inconsistent, it will be taken to waive the solicitor's other rights, unless he has reserved them': para 17. One issue raised was whether the legal charge could be inconsistent with the lien even though it was secured on different property – the Sollands' home – from the lien which was secured on the settlement recoveries. David Richards J noted (at para. 29) that there had been no authority cited to him that the taking of a charge on an unrelated asset was inconsistent with the solicitor's lien and he considered it well arguable that as a matter of principle there was no such inconsistency. He accepted that the authorities did establish that if the new security arrangements confer a right to interest not otherwise payable, that would be inconsistent with the lien. He held, however, that the contractual position under the legal charge and the original retainer were unclear. The strike out application therefore failed since there was no obvious inconsistency.

43. The case came back to court for the application for the charge under section 73 to be determined and was heard by Christopher Nugee QC as he then was, sitting as a Deputy High Court Judge: [2005] EWHC 141 (Ch) ('*Solland (No 2)*'). He held at para. 38 that he was bound to follow the Court of Appeal's decision in *Re Taylor* and that he accepted the interpretation placed on that decision by the majority in *Re Morris*. He therefore concluded that a solicitor will only be held to have waived his lien if he takes a security which is inconsistent with the lien; it is not enough that he has simply taken additional security:

> "43. … In my judgment, what the majority [in *Re Morris*] meant by inconsistency is that there is some feature of the security which is incompatible with the lien such that the two rights cannot sensibly have been intended to subsist in parallel."

44. What then was the difference between a solicitor and any other person entitled to a lien such as the bank in *Bank of Africa v Salisbury*? Mr Nugee said that inconsistency

was 'somewhat more readily to be found in the case of a solicitor's lien than in the case of other liens'. This also accorded with principle since it was difficult to see why a solicitor should be taken to have abandoned a lien by taking a security which is in no way inconsistent with it. He rejected the submission that the parties' subjective intention was relevant. The judge then held that it was not inconsistent with the lien for the solicitor to take a security by way of charge on separate assets from those protected by the lien. However, in the case before him the legal charge was inconsistent because it provided for the payment of interest whereas the provision purporting to charge interest in the original solicitors' retainer was unenforceable. The section 73 right had therefore been waived by Clifford Harris taking the legal charge over the Sollands' home. He went on, however, to find on the facts that there had been an agreement between the solicitors and the Sollands that the debt would be paid out of the settlement monies and that that was sufficient to create an equitable charge in the solicitors' favour without the need to rely either on the lien or on the legal charge.

(c) The terms of the Deed of Charge and the FFA

45. It is clear from the cases I have described that the terms of the new security taken by Candey on 21 October 2015 are key to determining whether they thereby waived their equitable lien. The FFA contained the following relevant terms:

i) Clause 1 provided that the agreement 'supersedes and replaces any previous agreement between' Candey and Peak in respect of fees. It also stated :

> "By signing this agreement [Peak] confirms that it has obtained independent legal advice in respect of this agreement and it accepts that CANDEY is not providing advice to [Peak] in respect of this agreement."

ii) Clause 4 recorded that Peak did not wish to pay Candey's invoiced and unbilled costs incurred to date or to provide further funds in advance and wished instead to agree a fixed liability fee payable at a future date. The Fixed Fee for the future was set at £3,860,637.48. This was not payable before judgment on liability was handed down or a settlement agreed in the London Litigation unless Peak obtained cash from elsewhere. Clause 4 also provided that interest at 8% per annum would accrue on the Fixed Fee from the date of judgment or settlement.

iii) Clause 5 then dealt with the Outstanding Costs already invoiced by Candey to Peak and with future disbursements. We were told that the Outstanding Costs have been paid by a third party.

iv) Clause 7 provided:

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

v) Clause 8 gave Candey the right to terminate the agreement at any time without liability to Peak. In those circumstances or if Peak wished to terminate the agreement, Peak remained liable for the Outstanding Costs, plus the Fixed Fee and all disbursements 'subject of course to all its legal rights'. The Fixed Fee and Outstanding Costs also became immediately due for payment in the event that Peak was subject to any bona fide insolvency proceedings.

vi) Clause 10 provided that in the event of a successful outcome of the London Litigation, the lead members of the legal team would be entitled to a bonus by way of the same discounted rates for staying at Peak hotels as were afforded to Peak's directors.

vii) Clause 11 provided that 'as continuing security for the payment and discharge of all liabilities due from [Peak] to CANDEY pursuant to this agreement [Peak] shall execute a Deed of Charge and Security in the form annexed to this agreement.'

46. The Deed of Charge annexed to the FFA stated that the charge was given as continuing security for the payment and discharge of all liabilities to Candey under the FFA. After purporting to create the two fixed charges and the floating charge, the Deed contained the following relevant provisions:

i) paragraph 4:

> "Save for the Deed of Charge dated 25 March 2015 (and related security) in favour of Campion Maverick, [Peak] warrants and agrees that it has not created, and will not create or permit to subsist, any other security or charge over the rights and monies protected by this Deed."

ii) paragraph 5:

> "[Peak] irrevocably agrees and instructs CANDEY to act with full powers (and shall instruct any other and/or future lawyers to use their best endeavours to assist CANDEY) to ensure that any monies or benefits arising or payable in any Court proceedings in any jurisdiction shall be paid directly to CANDEY towards payment and discharge of any liability pursuant to the Fixed Fee Agreement prior to anyone else save for repayment of any bona fide liability due to Campion Maverick."

iii) paragraph 6:

> "In the event that any of [Peak's] rights title or interest in or to any monies or benefits covered by this Deed are assigned … to a third party, that third party shall receive such monies subject to this Deed and subject to the discharge of all liabilities to CANDEY pursuant to the Fixed Fee Agreement."

(d) The arguments relating to the Lien Issue

47. Candey assert that their lien entitles them to a first call on the Settlement Proceeds paid to Peak following the consent order compromising the London Litigation. On 17 April 2018 Candey issued an application under section 168 of the IA 1986 and section 73 for an order granting Candey a charge over the Settlement Proceeds. That application was heard by Mr Hochhauser QC at the same time as the Exemption Issue.

48. The judge held that Candey had been instrumental in the obtaining of the Settlement Proceeds for the purposes of imposing a charge under section 73. There is no appeal before us on that finding. However, he held that Candey had waived its lien when it entered into the Deed of Charge because that Deed was inconsistent in some but not all of the respects put forward by the Liquidators and that Candey had not reserved their entitlement to rely on the lien. The lien had therefore been lost at that point. He rejected an argument from Candey that the lien, if lost, had revived once it became clear that the Deed of Charge created only a floating charge and not a fixed charge as Candey had hoped. He considered the other points put forward by the Liquidators in case he was wrong as to his principal conclusion. He held that there had been no surrender of the lien when Candey lodged the proof of debt with the Liquidators in the winding up proceedings in the BVI without mentioning the lien. If the lien had not been waived, the Judge did not consider it would be an abuse of process for Candey to seek to rely on the lien now and he would have exercised his discretion under section 73 in favour of Candey and granted a charge over the Settlement Proceeds.

49. The Lien Issue before us therefore raises the following issues:

    i) What is the test in the circumstances of the present case for whether Candey waived its equitable lien over the Settlement Monies?

    ii) If waiver depends on there being inconsistencies between Candey's rights under the Deed of Charge and their rights under the equitable lien, are there relevant inconsistencies here?

    iii) Did Candey expressly or impliedly reserve their equitable lien when entering into the Deed of Charge?

    iv) If the lien was still enforceable at the date of Peak's liquidation, was it surrendered when Candey failed to refer to it in the proof of debt lodged in the BVI winding up proceedings?

    v) If the lien is still enforceable, was the Judge right to hold that it would not be an abuse of process for Candey to rely on the lien now and that it would be appropriate for the court to exercise its discretion in favour of granting a charge over the Settlement Proceeds to enforce the lien?

(e) The test for waiver in the present appeal

50. Mr Lord submitted that Candey has a knock-out point that renders most of the case law considered above irrelevant to the resolution of this appeal. He relies on the passages in *Re Taylor*, *Re Morris* and the two *Solland* decisions which explain the

reason for the lower threshold for inferring an intention to waive on the part of a solicitor entering into an inconsistent new security arrangement with his client as compared with the threshold applicable to a banker or innkeeper. That lower threshold applies because of the fiduciary relationship owed by the solicitor to his client in respect of the advice he gives about the effect of the new security. That 'somewhat quirky principle' has, he argued, no application here because Candey told Peak to obtain independent legal advice about the terms of the FFA and the Deed of Charge. Peak did in fact obtain that advice from separate counsel, William Frain-Bell, a barrister and chartered arbitrator. Mr Lord points to clause 1 of the FFA where Peak confirmed that it obtained independent legal advice and that Candey was not providing advice to it in respect of the FFA.

51. In the circumstances, Mr Lord submits that Candey is absolved from any obligation to explain to Peak the effect of the Deed of Charge on the equitable lien. Questions of inconsistency and the reservation of the lien simply do not arise because Candey has put itself in the position of a banker or innkeeper. Such inconsistencies as may exist between the terms of the Deed of Charge and the attributes of the security acquired by the solicitors' lien are not enough to amount to the kind of clear abandonment of their rights that would be necessary to defeat the lien claimed by a lien holder who is not a solicitor in a fiduciary relationship.

52. There was no authority cited to us directly on this point. Mr Lord relied on the decision of this Court in *Twigg Farnell (a firm) v Wildblood* (1998) PMLR 211 (CA). In that case the defendant solicitors acted for the plaintiff until 1991. The solicitor/client relationship ceased in 1991 and there followed contentious litigation about the claim for the unpaid fees by the solicitors. That litigation resulted in a judgment for a debt, namely the unpaid fees, together with an award of interest and costs to the solicitor as the successful party in the litigation. The judgment debt and interest were not paid so the former solicitor applied for a charging order over the former client's property. The question arose whether that charging order replaced the lien that the former solicitor had for his costs. Mummery LJ referred to *Re Taylor* as explaining the principle underlying the general rule that where the solicitor/client relationship is still existing the court may infer from all the circumstances of the case that the taking of the security by the solicitor who has a lien amounts to an abandonment of his lien. He said that it was clear from the passage cited from that case:

> "…that there is a substantial and important difference between a case where a solicitor takes a security from a current client, over whose property he has a lien for unpaid fees, and the case of a solicitor taking a security over the property of a former client."

53. In the case before him there was no inconsistency between the taking of the charging order in respect of the judgment debt and interest and the continuance of the lien. At p. 214G he said:

> "There was no duty on the solicitors towards their former client to give him notice of their intention to take this security. They were taking that security in their capacity as judgment creditors for unpaid fees. In those circumstances, the rationale for the

> general principle as between solicitor and client does not apply. There is no duty on the former solicitor to give the ex-client notice of their intention or to give him advice or to expressly reserve the rights of the lien."

54. Schiemann LJ agreed in a short concurring judgment:

> "The reason for the inference during the continuance of the solicitor/client relationship that the solicitor intended to waive his lien when taking further security is this. It is assumed that solicitors will intend to act in accordance with their duty. Their duty, if they are not waiving the lien, is to inform the client of what they are doing. If they do not inform the client it is assumed, in the absence of evidence to the contrary, that this is because they are waiving the lien. For that reason, which is no different from that in substance expressed by my Lord, I would dismiss the appeal."

55. In *Solland (No 1)* David Richards J referred to Clifford Harris's assertion that the Sollands had received legal advice in relation to the grant of the legal charge. The judge held that even if that was established on the facts, 'legal advice to Mr and Mrs Solland cannot take the place of information from Clifford Harris & Co as to whether they intend to reserve their common law and statutory rights'. The point does not appear to have been argued in *Solland (No 2)*.

56. In my judgment this argument does not provide the knock-out blow for which Candey was hoping. The argument must be rejected because it misunderstands why equity sets a different threshold for solicitors from that set for other lien holders. Lindley LJ in *Re Taylor* referred at p. 597 to the solicitor's duty to explain to his client 'the effect of what he is about to do'. Kay LJ in the same case referred to the duty of the solicitor 'to represent to his client all the facts of the case in a clear and intelligible manner and to inform him of his rights and liabilities'. I do not see that duty as focused on the terms of the new arrangements for additional security. What needs to be explained in a clear and intelligible manner is the combined effect of the new security and the lien on the prospects of the client recovering anything of value to him personally from success in the litigation in which the solicitor is instructed. The relevance of the solicitor's fiduciary duty in this circumstance is that the solicitor is seeking to ensure that his unpaid fees and future fees are paid out of the recoveries from the litigation in which he is representing the client. The client should be made aware that even though he is now being asked to grant security over the litigation recoveries on the terms of the new arrangements being negotiated with him, the solicitor will still have a first call on those recoveries. In most circumstances, as in Peak's case, the client is facing in effect a choice between either signing a new security agreement with his solicitors or abandoning the litigation. It is essential that in making that choice he has a complete understanding of what his solicitors' prior claims to the proceeds of the litigation will be if he continues to fight the case and thereby incur further legal fees. That is what the solicitor is under a duty to explain to him and why it is so important that the client understands that any monies he ultimately recovers are subject not only to the security he is now providing to his solicitors but also to their pre-existing lien which will continue in parallel with the new security arrangements.

57. Looked at in that light, it is clear that simply arranging for the client to obtain advice from an independent lawyer about the terms of the new security arrangement does not help. The independent adviser is in no better position than the client to know what the litigation solicitor's intentions are with respect to the equitable lien and so cannot explain this to the client. I accept that it might, depending on the circumstances, be sufficient to reserve the lien if the litigation solicitor made it clear to the independent adviser that the lien was to continue in addition to the new arrangement. But merely interposing an independent adviser to discuss with the client the merits of the new security arrangement does not enable the litigation solicitor to avoid the duty to explain the effect of the new security on his existing lien. Mr Lord submits that the independent adviser's task is simple. He should know that the litigation solicitor has a lien and that his own involvement means that any nice questions about inconsistencies between the lien and the proposed new security are irrelevant. As long as there is no clear abandonment of the lien, he can confidently advise the client that the lien continues to exist. That, however, would put the client in a false position as regards the litigation solicitor who is continuing to act for him. He may be unwilling to seek clarification from his litigation solicitor as to who will get what from any settlement that is being discussed or from any final judgment in case he jogs the litigation solicitors' memory about the lien which he did not in fact have in mind.

58. In the present case, the evidence as to advice taken by Peak before entering into the FFA and Deed of Charge comes from Carolyn Turnbull who was the sole director of Peak until it went into liquidation. We were shown a series of emails between her, Mr Frain-Bell and an Australian lawyer, Mr Judge who was advising one of the investors in the hotel group. Mr Judge wrote to Ms Turnbull and others on 11 August 2015 explaining what he saw as the effect of the proposed FFA. He noted that once judgment was handed down in the London Litigation, the Fixed Fee 'becomes an indebtedness which Candey will be in a position to pursue via the security arrangements that are proposed'. He expressed the view that any accelerated payment due under the FFA 'would ultimately prove challenging for Candey to enforce' but that they would have a contractual entitlement to press for payment 'probably in competition with a number of other claimants'. Mr Judge concluded:

> "The offer of a contingency arrangement is very helpful given the challenge of funding this sort of complex litigation but as with many contractual arrangements, the devil's in the detail so I am happy to assist in weeding out that detail and ensuring everyone is signing up to what they think they will get from the relationship."

59. There was then a protracted negotiation and discussion of the terms of the FFA and the Deed of Charge between the parties during September and October 2015. It is accepted by Candey that at no stage did anyone mention their solicitors' lien or suggest that there would be some security in place in addition to the Deed of Charge being negotiated.

60. I do not see that *Twigg Farnell v Wildblood* provides any support for Mr Lord's argument. In that case there was no continuing relationship between the solicitors and their former client whereas in the present case, the purpose of entering into the FFA and the Deed of Charge was to enable Candey to continue to represent Peak in the litigation.

61. In my judgment therefore Candey will be treated as having waived their equitable lien if one can infer from the inconsistencies between the terms of the new security taken in October 2015 that they intended thereby to abandon their lien and if they failed to reserve that lien. I turn therefore to the inconsistencies between the FFA and Deed of Charge on which the Liquidators rely as supporting such an inference.

(f) Waiver: the incompatibility of the lien with the new security arrangements

62. Mr Holland accepted that it was necessary for the Liquidators to show inconsistency between the new security arrangements and the equitable lien in order for the inference of waiver to arise. He accepted therefore that Mr Nugee was right in *Solland (No 2)* to hold that the case of *Re Taylor*, as interpreted by the majority of the Court (Lord Alverstone CJ and Buckley LJ) in *Re Morris*, required such inconsistencies to be established and that the broader principle adopted by Kennedy LJ in *Re Morris* did not represent the current state of the law. He also relied on Mr Nugee's conclusion that an inconsistency 'may be somewhat more readily be found in the case of a solicitor's lien than in the case of other liens'. Mr Lord for his part criticised the judge for in effect holding up the lien in his left hand and the Deed of Charge in his right hand an embarking on an exercise of 'spot the difference'. He did, however, accept that the burden lies on Candey to show that the lien has been retained. I consider first the two inconsistencies on which the judge relied in drawing the inference that the lien had been waived: the fact that the Deed of Charge covers the same asset as is secured by the equitable lien and that, as a floating charge, it ranks at a lower priority in Peak's liquidation than the equitable lien would.

(i) Identity of the assets covered by the lien and the Deed of Charge

63. Candey accepts that if the Deed of Charge had been limited to the Settlement Proceeds of the London Litigation then it would have covered exactly the same asset as was subject to the equitable lien. It would therefore have been inconsistent with the lien and given rise to an inference that the lien had been waived. That much is clear from *Curry v Rea* [1937] NILR 1. That case before the Court of Appeal of Northern Ireland concerned an action brought by the plaintiff client for the return of title deeds and other documents over which the solicitor claimed a lien for his fees. The facts are most clearly set out in the judgment of Best LJ. The solicitors' defence to the action claiming the return of the documents was twofold. First, that the documents were detained by virtue of a solicitor's lien for costs and monies advanced to the plaintiff some years before. Alternatively, they contended that the documents were held by the solicitor as mortgagee under a mortgage made between the plaintiff's father George Curry and the solicitor to secure the payment of the solicitors' fees which he owed them for legal work and for the repayment of some monies loaned to him. The mortgage was subject to interest at 5% per annum. Best LJ identified the relevant question as 'What became of the lien on the execution of the mortgage?'. He held that it was either waived or abandoned or became merged in the security of the mortgage: p. 18. Andrews LJ also held that since there was no evidence to show that the defendant had told his client that he intended to retain the security of his lien when he took the mortgage, the lien must be regarded as having been absolutely waived or abandoned: p. 13. The character of the defendant's possession of the deeds after that date was as mortgagee.

64. For his part, Mr Holland accepts that if a new security is taken by a solicitor over entirely different property from that secured by the equitable lien then there is no inconsistency between the two from which an inference of waiver can arise. That much is clear from the judgments in *Solland (No 1)* and *Solland (No 2).* Here the position is in the middle of those two extremes. The Deed of Charge covers the proceeds of the London Litigation which were the fruits of litigation for the purposes of the equitable lien but also secures those fees by a charge over all of Peak's assets, including any recoveries in other litigation.

65. The judge dealt with this point at para. 116(3) of his judgment. He held that this was an inconsistency when taken together with the further point on which the Liquidators relied about the difference in the priority ranking of the two securities. I agree that there is a material inconsistency here from which an inference of waiver should be drawn. The situation here appears to be the same as the situation which arose in *Groom v Cheesewright* [1895] 1 Ch 730. In that case the solicitor Mr Kimber acted for Mr Groom in a claim against Mr Cheesewright for shares in Fifeshire Main Collieries together with monies alleged to be owed to him. During the course of the action, Mr Groom executed a mortgage for the purpose of securing Mr Kimber's fees and the debts of his other creditors. The mortgage was entered into between Mr Groom and a Mr Maccall under which Mr Groom assigned to Mr Maccall 100 fully paid up shares in the Fifeshire Main Collieries as well as any cash and shares coming from Mr Cheesewright as a result of the litigation. The assets were assigned to Mr Maccall upon trust to secure the fees of Mr Kimber and then Mr Groom's other debts. The action was successful and Mr Kimber received on Mr Groom's behalf 185 fully paid up shares in the company and other monies. Mr Kimber applied to the court for an order under section 28 of the Solicitors Act 1860 (the precursor to section 73) charging the shares and all the other property recovered in the action for his costs. Kekewich J noted that the effect of Mr Kimber applying to enforce his solicitor's lien was that it would give him 'a footing above the deed which he accepted as security' because he would be paid before Mr Maccall could recover his own fees for acting as trustee. That was, the judge held, sufficient to put it out of Mr Kimber's power to enforce the lien.

66. I accept Mr Lord's point that it is not entirely clear from Kekewich J's decision whether that was the factor that he relied on when holding that the lien had been waived. Addressing the matter as a point of principle, the reasoning which led me to conclude that the solicitor's duty to explain the effect of the new security is not avoided by the taking of independent advice applies here too. The important point is that the solicitor is seeking to secure his future fees against the proceeds of the litigation in which he continues to act for the client. The client needs to be aware of the full extent of the solicitors' interest in those proceeds when it comes to considering any future advice about the prospects of success on the litigation, the wisdom of settling or accepting any payment into court. I do not regard the fact that additional security is also included in the new arrangements as affecting that result.

67. Further, I agree with Mr Holland that this inconsistency is a point that makes good the Liquidators' case without needing to be considered cumulatively with a different inconsistency. I therefore consider that one can infer from the taking of additional security over the proceeds of litigation which would otherwise be covered by the lien that the solicitor no longer intends to rely on that lien. Henceforward the terms on

which those recoveries are secured are exclusively the terms of the new security without the backstop of the lien unless the lien has been reserved.

(ii) The difference in priority ranking of the two securities

68. The second inconsistency accepted by the judge in para. 116(3) of his judgment was that the lien and the Deed of Charge had different rankings in priority of debts payable in the liquidation. He cited *Groom v Cheesewright* as authority for this proposition since it appears that it was the fact that Mr Maccall had a prior right to deduct his costs as trustee from the proceeds of the litigation that was fatal, in Kekewich J's judgment, to Mr Kimber's assertion that his lien gave him priority. The Liquidators put this priority ranking point in two ways. First, they say that the Deed of Charge expressly makes Candey's security over the Settlement Proceeds subject to a prior interest of Campion Maverick, the litigation funders. That is clearly inconsistent with the assertion of a lien which would rank in priority to any secured debts. Secondly, they say that since the Deed of Charge is only a floating charge that also has a lower priority in the winding up of Peak than the lien.

69. The position as regards the priority given in the Deed of Charge to Campion Maverick is as follows. I have already set out paragraph 4 of the Deed of Charge in which the existence of the security in favour of Campion Maverick over the monies protected by the Deed is expressly recognised and paragraph 5 which acknowledges that repayment of any bona fide liability due to Campion Maverick will be made prior to the discharge of any liability owed to Candey pursuant to the FFA. Mr Lord submitted that these paragraphs were not relevant on the question of inconsistency but constituted at most a modification of the reservation of the lien. That appears to me to be a distinction without a difference; the fact is that the Deed of Charge shows the intention of the parties that Campion Maverick would have first call on any monies recovered from, amongst other proceedings, the London Litigation. We were shown email exchanges in August 2015 between the parties on this point. Mr Ashkhan Candey sent Ms Turnbull at Peak a draft of the FFA saying that they would need to get Campion Maverick to enter into a deed of subordination so that the proposed charge in favour of Candey took priority over their earlier charge. Mr Judge told Ms Turnbull and others that he had no idea whether a deed of subordination from them could be delivered. It is apparent from the terms of the Deed of Charge ultimately agreed that Campion Maverick refused to subordinate their claim to that of Candey.

70. In my judgment this is a further clear inconsistency between the terms of the equitable lien which would have entitled Candey to a charge in priority to all other debts and the fact that Candey accepted that the funder was to have a prior claim to any proceeds of the litigation to satisfy any bona fide liability. These two features cannot sensibly have been intended to subsist in parallel, to adopt Mr Nugee's phrase from *Solland (No 2)*.

71. Mr Lord argued that this difference in priority is, in the event, irrelevant on the facts. According to the evidence of Mr Crumpler, Campion Maverick made a secured claim in the liquidation in the sum of $10.75 million. The Liquidators rejected this claim as it did not appear to them that Campion Maverick had actually advanced any funds to Peak. Campion Maverick appealed against the rejection of its secured claim to the BVI Court but that appeal was struck out so that Campion Maverick's claim has now been finally dismissed. I do not consider that that outcome makes any difference to

the question whether, on entering into the Deed of Charge, Candey agreed that the liabilities under the FFA would no longer take priority over all other debts but would be subject to any legitimate claim from the funder. Mr Lord also submitted that this point was not open to the Liquidators to take because it had not been raised before Mr Holland made his submissions to us. However Mr Holland drew our attention to the replacement skeleton argument served by the Liquidators which certainly raises the point.

72. As to the difference between the priority given to a floating charge and the priority given to the equitable lien, Mr Lord argued that if that difference in ranking is an indication of inconsistency from which an intention to waive a lien can be inferred then the taking of *any* new security would be inconsistent. The equitable lien will always rank ahead of other debts, according to the case law. But to hold that the taking of any new security over the assets already secured by the lien amounts to a waiver of the lien would be inconsistent with *Re Morris* and *Re Taylor* as discussed earlier. There is some force in the point and it may be stretching reliance on the decision in *Groom v Cheesewright* too far to treat it as authority that a difference in ranking arising purely by operation of law rather than on the express terms of the new security is a sufficient inconsistency for this purpose. I therefore prefer to rely on the acceptance by Candey that their claim to the proceeds of the London Litigation could be defeated by the prior claim of Campion Maverick as establishing a clear inconsistency as between the terms of the lien and the terms of the Deed of Charge.

73. I would therefore uphold the judge's decision that, subject to the question of reservation discussed below, the lien was waived when Candey and Peak entered into the new security arrangements in October 2015 because those arrangements are incompatible with the continued existence of the lien. That incompatibility lies in the fact that the new arrangements cover the same assets as were previously covered by the lien and in the fact that the new arrangements give priority to the charge in favour of Campion Maverick.

74. In deference to the full argument we heard on the matters raised in the Respondents' Notice, I turn now briefly to the additional inconsistencies that the Liquidators raised and which the judge rejected.

(iii) Difference in the right to interest on the debt

75. It was common ground that if there is a difference in the extent to which the security extends to interest due on the unpaid fees, that will be a sufficient inconsistency to give rise to an inference of waiver: see *Solland (No 2)* paras. 44 onwards and the cases cited there. The FFA provides for interest at 8 per cent to be payable in limited circumstances. It was charged in respect of delay in payment of the Fixed Fee and started to accrue from the date on which the Fixed Fee became payable, that is as from the date of judgment or settlement unless Peak obtained cash from elsewhere. Under the standard terms and conditions of the original retainer on which Candey had been retained there was no specified interest rate. The Liquidators argued that the new right to interest conferred by the FFA and secured by the Deed of Charge was therefore inconsistent with the previous position under which there was no entitlement to interest secured by the lien.

76. The judge rejected that argument, holding at para. 116(2) that there was no inconsistency so far as interest rates were concerned. He accepted Mr Lord's submission that the FFA amounted to a new retainer for the engagement of Candey in the litigation. Under that new retainer going forward from October 2015, interest was payable at 8% per annum in accordance with clause 4 of the FFA. If that was right, then there is no inconsistency between the interest rate protected by the equitable lien – 8 per cent – and the interest rate accruing under the Deed of Charge which must also be 8 per cent since the Deed of Charge is expressly intended to secure all the liabilities owed to Candey under the FFA.

77. On this point I part company with the judge because he was wrong, in my view, to compare the interest rate under the FFA with the interest under the Deed of Charge. The correct comparison was with the absence of any interest payable on unpaid fees under Candey's standard terms and conditions applicable before 21 October 2015 and the interest rate accruing thereafter secured by the Deed of Charge. It is artificial to treat the FFA and the Deed of Charge as separate transactions when they were intended to comprise a single arrangement providing Candey with new security for its unpaid fees. That is not how the parties viewed them. The two documents cross refer to each other and were signed on the same day. The new arrangement to secure the payment of the fees did therefore provide for the payment of interest, albeit in limited circumstances, when none had been payable under the pre-existing retainer and hence for the purposes of the pre-existing lien.

(iv) Power to appoint a receiver

78. The judge at para. 116(4) rejected the Liquidators' submission that there was an inconsistency between the Deed of Charge and the equitable lien in terms of Candey's ability to obtain the appointment of a receiver. Mr Holland submitted that the Deed of Charge, being a floating charge, entitled Candey to appoint a receiver by operation of law whereas the lien conferred no such right. Mr Lord did not accept that there was any right to appoint a receiver under the floating charge in respect of these assets. He countered that in any event, the court has power pursuant to section 37 of the Senior Courts Act 1981 and CPR Part 69 to appoint a receiver and might do so as part of the relief granted in an application made by a solicitor under section 73. Mr Holland argued that, even if that were the case, the appointment of the receiver would be by a different jurisdictional route and that, of itself, would be a sufficient inconsistency between the two securities to generate the inference of waiver. Given that there are several much clearer inconsistencies between the two securities I do not need to decide whether this rather abstruse argument would have entitled the Liquidators to succeed if that had been their best point.

(v) Post-liquidation surrender of the lien

79. On 19 February 2016 Candey submitted a proof of debt in the BVI insolvency proceedings stating that the total amount of its claim as at the date of the appointment of the Liquidators was £3,860,637.48, being the Fixed Fee. In the box where the creditor is asked to give particulars of any security held, the date it was given and the value of the security, Candey referred to the Deed of Charge dated 21 October 2015 and described the security as fixed and floating charges over all assets and undertakings of Peak and all of Peak's shares in the Peak Hotels group. There was no mention of the equitable lien.

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

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

81. The equivalent provision under English insolvency law is rule 14.16 of the Insolvency Rules 2016. By order of Hildyard J dated 24 April 2018 in these proceedings, the parties are deemed to accept that BVI law is the same as English law in this respect.

82. A 'security interest' is defined for the purposes of section 214 as including a charge and a lien: see section 2(1) of the BVI Insolvency Act and a 'secured creditor' is a creditor who has an enforceable security interest over an asset of the debtor in respect of his claim: see section 9(2). The term 'asset' is defined as including 'every description of property wherever situated and obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental, to property': see section 2(1).

83. Mr Lord submits that the equitable lien was not surrendered by the failure of Candey to refer to it when submitting their claim in the Peak liquidation because there was no existing 'security interest' as at 8 February 2016 when the Liquidators were appointed. By that date the monies had been paid into court by Peak and the SCB Monies were in the bank account but the London Litigation had not yet settled. He relies on the decision of Scarman J in *Re Fuld decd* [1968] P 727 as establishing that the lien only becomes a security interest when there are 'funds in sight'. In *Re Fuld* a litigant in person who had previously instructed nine different sets of solicitors was awarded costs out of an estate. Four of those firms applied to the court to prevent those costs being paid directly to her before their taxed costs could be met from that fund. Scarman J cited the statement of Lord Hanworth MR in *Mason v Mason and Cottrell* [1933] P 199 describing the solicitor's lien as a right to claim the equitable interference of the court. Scarman J went on:

> "If they are to obtain the assistance of the court, they must first show that there is a fund in sight. It is well settled that costs payable by one party to another are a fund which can be made the subject of a charge in favour of the party' solicitor: *Campbell v. Campbell and Lewis* [1941] 1 All ER 274."

84. Mr Lord submits that there were no 'funds in sight' as at 8 February 2016 because there were no fruits of the London Litigation and so no enforceable security. That

only happened at the earliest when the consent order of Asplin J was made on 7 March 2016. Mr Holland submits that this does not matter because the breadth of the definition of 'asset' under the BVI Insolvency Act is wide enough to include contingent assets and the term 'security' expressly includes a lien. He also argues that the restrictive definition put forward by Candey according to which a solicitor does not need to mention the equitable lien when submitting its proof in the liquidation undermines the purpose of section 214. A liquidator will need to decide fairly soon after taking office whether to pursue any litigation in which the insolvent company was engaged. That decision will undoubtedly be informed by an understanding of what claims there will be on any monies recovered from that litigation and who has the foremost entitlement to those monies. It would create a serious lacuna in the regime if a solicitor could assert the lien once monies were recovered by the liquidator even though he had not relied on it when submitting the claim for unpaid fees. Mr Holland relies on *Re Safety Explosives Ltd* [1904] 1 Ch 226 which concerned solicitors who had failed to mention the lien when proving their debt in the winding up of the company and applied to the court to amend or withdraw their proof so that they could rely on the lien. The assumption underlying the case was, Mr Holland submits, that if the solicitors had a retaining lien they would have to state in their proof that they relied upon it. He also submits that Candey's argument proves too much. If, as they say, they had no security interest as at 8 February 2016 and so did not have to mention it in the proof for the purposes of section 214, then they are too late to apply to the court to grant them a charge because of the principle that the court will not grant security after the date of liquidation. That proposition was established in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 in which the House of Lords held that the court should not make a charging order over the property of a company in liquidation because such an order would be inconsistent with the statutory scheme for distribution.

85. The judge considered this point at paras. 120 – 123. He said that in normal circumstances, by which he seems to have meant if there was no question of the lien having been waived, there would be no obligation to refer to the lien in the proof of debt. This was because of the statement by Sir John Romilly MR in *Haymes v Cooper* that 'every man who knows there is a fund in Court, knows also that it is liable to the lien for costs of the solicitor through whose exertion the fund has been obtained' and a similar statement in *Faithfull v Ewen* [1878] 7 Ch D 495. The position was no different, the judge held, if there were a valid co-existing additional security which was mentioned in the proof of debt – that did not amount to a waiver of the equitable lien.

86. The judge was wrong in my view to say that there was no need to refer to the solicitor's lien in the proof of debt because of that statement in *Haymes v Cooper*. Such a statement cannot be elevated to give every liquidator some form of constructive notice of a solicitor's lien thereby absolving the solicitor from the need to comply with section 214 or its English law equivalent. As Mr Crumpler said in his witness statement, what the liquidator needs to know is not simply whether the lien exists but whether the solicitor is intending to rely upon it. The failure to rely on a security interest in the proof of debt is not merely another instance of inconsistency or failure to reserve but is a separate omission, the statutory consequence of which is that the security interest is surrendered.

87. More difficult issues are first the nature of the interest that the solicitor holds as a result of the equitable lien before a fund comes into sight, secondly at what stage the fund is in sight for this purpose, and thirdly how one construes the term 'security interest' for the purpose of section 214. Since those issues are not determinative of the case before us and a decision on them may have wider repercussions for aspects of insolvency law on which we have not been addressed, I will leave them to be decided in a future case.

(g) Did Candey reserve its equitable lien?

88. Inconsistencies between the rights conferred by the equitable lien and the new security arrangements may raise an inference of waiver but that inference can be rebutted if the solicitor reserves the lien at the time the new arrangements are concluded. Candey submit that they did reserve their lien expressly at that time. Mr Candey's evidence in his witness statement dated 18 June 2018 was that he explained to Ms Turnbull that Candey 'would be paid first from any fruits of litigation and I believe that she understood this'. Although he accepts that he did not refer to the equitable lien in terms, he says that where possible his firm seeks to avoid using 'legalese' when dealing with their clients and aims to use concise language to communicate succinctly in plain English.

89. Mr Lord also relies on clause 7 of the FFA and paragraphs 4, 5 and 6 of the Deed of Charge, set out earlier in paras. 45 and 46 above. Clause 7 of the FFA is, he argued, a straightforward description of the effect of the solicitors' lien giving Candey first call on the fruits of the London Litigation. He accepts that clause 7 of the FFA covers a wider range of monies than merely the recoveries in the London Litigation that were secured by the lien. This does not prevent it from being, by implication at least, a reservation of the lien. He submitted that paragraphs 4 and 5 of the Deed of Charge were also descriptions of the effect of the lien, albeit modified to reflect the priority given to the Campion Maverick debt. He accepted that paragraph 6 could not be effective in so far as it purported to bind third parties in receipt of monies charged by the Deed but argued that, again, the thrust of the provision reflected the application of the lien.

90. I reject the proposition that anyone reading the FFA and the Deed of Charge, even if they had in mind the equitable lien, would read it as preserving that lien. Clause 1 of the FFA states expressly that the agreement supersedes and replaces any previous agreement between the parties in respect of fees. There is a saving for the standard terms and conditions which were attached, along with the Deed, to the FFA in so far as those terms were not inconsistent with the FFA, in which event the FFA prevailed. The FFA and Deed of Charge together provide a new arrangement for the payment of past and future fees and for the provision of security for those payments. It was expressly intended to wipe the slate clean so that Peak's indebtedness was from that date on to be determined purely by reference to the terms of those documents. Candey's rights to payment and to security were similarly to be determined exclusively by those terms. It was a carefully crafted agreement covering the potential recoveries from all the litigation in which Peak was engaged including the London Litigation. There is nothing in clause 7 to suggest that it is intended to preserve some pre-existing right. I accept Mr Holland's submission that the purpose of clause 7 is to reverse the usual right of appropriation that Peak as debtor would have to determine which of the three debts owed under the FFA should be treated as

having been reduced by any monies paid to Candey by Peak: see *Chitty On Contracts* (33rd edn., 2018) Vol.1 paras. 21.061. Instead, Candey was entitled to decide whether any monies received should be treated as paying off the Fixed Fee, the Outstanding Costs or the disbursements due. It has nothing to do with the lien. I do not see that any of the terms of the Deed of Charge assist Candey either. On the contrary, by paragraph 4 Peak is required to warrant that it has not created any other security or charge over the monies protected by the Deed, save for the charge in favour of Campion Maverick. Paragraphs 5 and 6 are dealing with a different point, namely that Peak must do its best to ensure that any monies recovered are paid directly to Candey and not to Peak or a third party. That does not constitute an acknowledgement of any other security over those monies in addition to the security expressly created by the Deed itself.

91. As to Mr Candey's evidence about what he said to Ms Turnbull, that is far from sufficient to reserve the lien; it is simply a description of what Peak was agreeing to in the FFA and the Deed. It is commendable to avoid 'legalese' when explaining contracts to clients and a lien can be reserved without needing to use the word 'lien' or refer to section 73. I emphasise again the importance for the litigating solicitor to explain in a transparent and straightforward way the totality of its claims to the fruits of the litigation. Something much clearer is needed than appears here. I would therefore hold that there was no reservation of the equitable lien here.

(h) Revivor of the lien

92. Some of the authorities I have referred to earlier raise the issue of whether a lien which has been waived by the solicitor can revive in certain circumstances. In *Curry v Rea* the Northern Ireland Court of Appeal considered whether the lien over the property deeds, which they held had been abandoned when the same property was mortgaged, revived when the mortgage became statute-barred. Andrews LJ said at p. 14 that no authority had been cited to show that the lien revived automatically in such circumstances and he was satisfied that no such authority existed. Any such revivor would, he thought, require evidence at least of a clear intimation by the solicitor to his client of his intention to assert the lien. In the *Solland* cases, there was a concern that the solicitors would fall between two stools in that the Sollands were contending both that the equitable lien had been waived when they granted a legal charge over their home but also that the legal charge should be set aside on the grounds that it was induced by duress or undue influence: see para. 37 of *Solland (No 1)* and para. 28 of *Solland (No 2)*. Having found that Clifford Harris had waived the lien when they took the legal charge, Mr Nugee returned to the question of revivor at paras. 52 of his judgment. He rightly noted that *Curry v Rea* was not authority for the possibility of a lien reviving. He thought that as a matter of principle it would not be possible for this to happen by the solicitors' unilateral act; there would need to be a fresh agreement between the solicitor and client that the equitable rights would be exercisable after all: para. 53. However, he then referred to the unfairness to the solicitor in that case if, in later proceedings, the legal charge over the Sollands' home was set aside:

> "54. … On the analysis I have adopted, the principle is that a solicitor is effectively presumed to intend to waive his rights whenever he takes a security that is in any way inconsistent with them. However, since the ground for assuming waiver is the taking of any inconsistent security, I do not see why the

> solicitor should be presumed to have intended the waiver to continue to have effect if the security he thought he was taking turns out not to have been valid and binding. In other words if the client is able to, and does, have the security avoided, then the parties are in my judgment entitled to be put back into the same position as that in which they would have been had it never been granted. In practical terms this means that if Mr and Mrs Solland are able to and do avoid the charge, then I consider that CH's section 73 rights would in any event revive as if they had never been waived."

93. Candey argues that a similar situation has arisen here because Candey thought that the FFA and Deed of Charge conferred on them a fixed charge over Peak's assets that would have given them priority over all other debts except for the debt to Campion Maverick. In the event, the Deed created only a floating charge so that their charge could be of little if any value. Mr Lord argued that in those circumstances, the lien should revive.

94. Assuming in Candey's favour that it is possible by operation of law rather than by express agreement for a lien to 'revive' if the inconsistent security taken to replace is set aside, that is not what has happened in this case. First, it is not right to say that Candey intended to obtain a fixed charge over Peak's assets. They intended to obtain the charge that was set out in the Deed of Charge and that is what they did in fact obtain. The fact that they wrongly thought that this would confer a fixed charge is to my mind irrelevant: see *Agnew v Commissioners of the Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710, at para. 32 *per* Lord Millett. Secondly, in the situation posited in the *Solland* case there is no inconsistency between the new charge and the lien because the new charge does not exist. Here, the floating charge that Candey obtained was just as inconsistent with the continuation of the lien as the fixed charge – it covered the same assets, it ranked below the debt owed to Campion Maverick and it secured an entitlement to interest that did not previously exist. I agree with the judge (see para. 118 of his judgment) that there is no scope for the application of any principle of revivor in the present case.

(i) Abuse of process and exercise of discretion

95. Mr Holland argued that it was an abuse of process for Candey to seek to rely on their equitable lien only after a great deal of time and money had been spent arguing over whether the Deed of Charge created a fixed or floating charge. Although the dispute between the Liquidators and Candey about Peak's liability under the FFA arose soon after Peak went into liquidation, Candey only asserted their equitable lien by letter dated 29 March 2018, several months after the judgment of HHJ Davis-White QC downgrading the Deed of Charge from a fixed to a floating charge had been handed down and after HHJ Raeside QC had determined the value of services issue. Even if it was not an abuse of process, he submitted that it was a reason why the court should not exercise its discretion under section 73. The judge dealt briefly with these points, stating at para. 150 that if he had reached the conclusion that there had been no waiver of the lien he would not have found that there was an abuse of process. He would have exercised his discretion in favour of imposing a charge. I do not have to address these issues since the lien has in my view clearly been waived by Candey. My inclination, however, would have been the same as that of the judge. It seems

unlikely that if Candey had raised the issue of their lien at an early stage, the Liquidators would simply have accepted that it entitled them to a first call on the fruits of the London Litigation or that the proceedings between the parties over the past years would have been avoided. As to the exercise of discretion, the cases are clear that if the lien exists, it should be enforced by the court unless there are good reasons why not: see for example *Fairfold Ltd v Exmouth Docks Co Ltd* [1993] Ch 196, *per* Ferris J at p. 204E and *Solland (No 2)* para. 22 and the cases cited there.

(j) The Lien Issue: conclusion

96. I would dismiss the appeal on the Lien Issue on the grounds that Candey's equitable lien was waived when the parties entered into the FFA and the Deed of Charge in October 2015. The rights conferred on Candey by those new security arrangements were inconsistent in material respects with the security conferred on them by the lien. This gave rise to an inference that they intended to waive the lien, in the absence of any reservation by Candey of their pre-existing rights. There was no such reservation of the lien by Candey. The fact that the Deed of Charge created a floating charge and not a fixed charge as Candey may have expected, did not cause the lien to revive.

4. OVERALL CONCLUSION

97. For the reasons given I would dismiss the appeal.

Lord Justice Moylan

98. I agree.

Lord Justice McCombe

99. I also agree.