Neutral Citation Number: [2020] EWHC 1365 (Ch)

Case No: CR-2016-001012

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

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 1 June 2020

Before :

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

- -

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

Between :

RUSSELL CRUMPLER AND CHRISTOPHER FARMER (JOINT LIQUIDATORS OF PEAK HOTELS AND RESORTS LIMITED)	**Applicants**
- and –	
CANDEY LIMITED	**Respondent**

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- -

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

Hearing dates: 19 March (reading), 20 March 2020

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Approved Judgment

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

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

His Honour Judge Davis-White QC :

Introduction

1. This judgment should be read together with my judgment handed down on 20 December 2019, [2019] EWHC 3558 (Ch) (the "December 2019 Judgment"). That judgment dealt with what I there described as the "Valuation Issue" arising under s245 Insolvency Act 1986. The applicants (the "Liquidators") rely upon s245 Insolvency Act 1986 in respect of a floating charge which the respondent ("Candey") says secures its fee for legal services provided to Peak Hotels and Resorts Limited ("PHRL"). Section 245 invalidates, in certain circumstances, a floating charge save to the extent that value is thereafter conferred by the charge holder on the company. I decided that the value of legal services provided by Candey under a fixed fee agreement (the "FFA"), was to be ascertained on a time cost basis, rather than by reference to what might have been charged on some form of contingency basis. I also made various determinations with a view to reaching a figure for that value. That included determining the appropriate hourly rates that were to be used in carrying out the valuation process and identifying certain work that could properly be treated as conferring value on PHRL under the FFA and certain work that could not.

2. Following the handing down of the December 2019 Judgment, Candey raised two points. The first was in relation to my ruling regarding the question of whether Candey conferred relevant value under the FFA by work that it says that it properly undertook, post liquidation, on seeking further funding for PHRL. The second point was in relation to a matter that was simply not canvassed at all in the hearing before me. That related to the question of disbursements paid by Candey which, again, was said to be value conferred by Candey as part of the legal services properly provided by it to PHRL. In addition, an outstanding question was that of costs in relation not just to the hearing resulting in the December 2019 Judgment but earlier hearings too.

3. The parties agreed the form of Order that gave effect to my judgment of 20 December 2019. It determined that the value of the services provided by Candey under the FFA, and secured by the relevant floating charge, was some £1,086,755 but that this was without prejudice to the following questions raised by Candey:

    (1) whether Candey's floating charge also secures disbursements (and if so in what sum) (the "Disbursements Issue"), and
    (2) whether Candey's costs in connection with the obtaining of funding for PHRL in the period from 8 February 2016 to 22 February 2016 are secured by Candey's floating charge (the "Funding Costs Issue").

4. In addition, I have before me the questions of the incidence and basis of costs, whether there should be interest payable on costs and whether there should be a payment on account (and if so in what amount).

Representation

5. As before, Ms Toube QC, leading Mr Robins, appeared for the Applicant liquidators. Mr Saoul QC appeared for Candey. He had been assisted by Mr Stephen Ryan, who

had been party to the Skeleton Argument for Candey. Mr Ryan was unable to attend the hearing before me on this occasion. I am grateful to each of Counsel for their assistance and for their continued attempts to agree issues where possible. Following the hearing I received further written submissions on the question of costs as recorded below.

6. Given the hearing took place in the context of the Coronavirus epidemic, the parties agreed that it should take place by way of Skype video call. I am grateful to all the parties for their co-operation on this issue and especially the solicitors for doing a lot of the necessary organisational work. I should also record my gratitude for the creation of some four core bundles for the hearing which made the running of the hearing more efficient. I also apologise for the delay in producing this judgment but, as I hope the parties will appreciate, the last months have not been ordinary times.

The Disbursements Issue

7. The position of Candey was that the floating charge secured not only the fixed fee (subject to s245 Insolvency Act 1986) but also disbursements and that the Valuation Issue should be determined on the basis that separate value should be attributed to disbursements in addition to the value attributed to the work in fact carried out by Candey. By letter dated 31 January 2020, a schedule setting out disbursements totalling £68,920 (plus VAT of £2,869) was provided.

8. As regards this, the position of the Liquidators was that:

   (1) it was now too late to raise this issue;

   (2) disbursements are not secured by the Floating Charge;

   (3) as regards the disbursements claimed: (a) some are liabilities of the PHRL and not Candey and therefore are not disbursements for which Candey is liable; (b) certain sums had been or would be paid by the liquidators as an expense of the Liquidation and in relation to those the issue raised was academic; and (c) there was insufficient information regarding certain sums. Further, VAT was claimed but the Liquidators said that it was not payable by Candey. It was also disputed that the value conferred by Candey should include interest.

9. Shortly before the start of the hearing before me, the only issue for me to decide was whether or not disbursements of some £18,936 (owed to one creditor) should be included as part of the value conferred by Candey for the purposes of s245 Insolvency Act 1986. By the time of the hearing, it had been agreed that that issue did not arise either. Candey accepted that the Liquidators had or would be paying the relevant disbursement as an expense of the liquidation and so the position under the charge regarding disbursements had become academic.

The Funding Costs Issue

10. As originally formulated Candey asked me to confirm whether or not I intended by my December 2019 Judgment to allow as part of the value conferred on PHRL only those costs of Candey attributable to obtaining funding up to the date of liquidation and not thereafter and, more particularly, whether I intended to exclude any work

undertaken by Candey in obtaining funding between the date of liquidation (8 February 2016) and a letter from the Liquidators to Candey dated 22 February 2016 which, in express terms, stated that work should not be carried out for PHRL without their express authority. It was accepted that no express authority after that date was given to carry out work in seeking funding.

11. The basis of Candey's case was that it was said that I had altered my position between circulating a draft of the judgment of 20 December 2019 and handing down the final version on 20 December 2019 and "clarification" was sought in light of the evidence that had been put before me.

12. The matter having been expressly reserved by an order agreed between the parties, it seems to me that I am entitled to revisit the matter in the same manner that I would have been entitled to revisit it prior to the drawing up of any order giving effect to my judgment. I consider that I am still able to alter my judgment or, if I remain of the view expressed in the December 2019 Judgment, then in any event I can and should amplify my reasoning.

13. At the hearing in March I was taken through a number of documents that I had not been taken through before and/or which had not been in evidence before. Greater detail was explained and the parties were able to reach agreement regarding various factual matters.

14. In summary, I remain of the view (as set out in the December 2019 Judgment) that Candey's efforts post liquidation to broker funding for PHRL to enable, at the least, the London proceedings to continue was a course of conduct not authorised by the Liquidators and which accordingly does not fall to be valued as part of the valuation exercise under s245 IA 1986 (see paragraph [241]). However, this is subject to one caveat. There was a short matter of days after the liquidation when Candey, with the consent of the Liquidators, procured a payment of £200,000 to be made to the Liquidators to enable them to carry out an initial review of the litigation. The payment in question came in on 12 February 2016. As regards that "funding" only, to the extent that Candey carried out work for the Liquidators in getting the money in, then value was thereby conferred on PHRL, which value falls to be taken into account in the exercise under s245 IA 1986.

15. Given various concessions I do not need to go through all the correspondence in detail. So far as the £200,000 obtained to carry out an initial review, an email from Mr Crumpler dated 10 February 2016 stressed the importance of an initial review being carried out:

> *"What also needs to be reiterated is that the parties opposing PHRL are almost certainly viewing the liquidation as an opportunity to see the London litigation discontinued in their favour. The only feasible first step in stopping this happening is for us to commence our review of the litigation and reach a determination. If that review does not commence with absolute priority we will have little choice but to seek to discontinue that litigation and focus our efforts on recovery of the fortification amounts from the English Court*."

16. He then went on to say, a little later in the email:

> "*Please, therefore, proceed to seek to obtain GBP200,000 in funding to be paid over to an account of the joint liquidators' designation asap. This funding is likely to be capable of being repaid as an expense of the liquidation subject to recoveries and the satisfaction of other direct costs…"*

17. As is clear from the contemporaneous communications, the funder was a client of Candey who was looking to fund the litigation generally, not just the immediate £200,000 required to carry out the "independent review". Ms Toube's initial position before me was that it was not entirely clear that, in getting in the £200,000, Candey was acting on the Liquidators' authorisation. However, on instructions she confirmed during the course of the hearing that for the purpose of the hearing before me the Liquidators accepted that the work carried out by Candey in getting in the £200,000 was work authorised by the Liquidators. In my judgment that concession was properly made. It follows that the December 2019 Judgment needs to be read subject to the point that work undertaken by Candey in obtaining the £200,000 for the initial review of the litigation, which sum was received on 12 February 2016, is work for which Candey is entitled to credit as part of the Valuation Issue.

18. Candey had clearly been seeking to broker a situation in which more funding was provided to PHRL even before the liquidation. After the liquidation, their efforts in this respect continued. However, I am satisfied that in that respect they were not acting for and on behalf of the Liquidators with the latter's authority. During the course of the hearing in March I was taken through most of the contemporaneous documents that I had been taken through prior to the December 2019 Judgment, as well as the witness statements in evidence before me. That process confirmed me in the conclusion that I had reached in the December 2019 Judgment. Having gone through the exercise I have just described, Mr Saoul confirmed that Candey did not after all challenge the conclusion that I had reached in the December 2019 Judgment regarding funding post liquidation. He said that his client was satisfied with the concession of the Liquidators regarding the £200,000 sum I have mentioned and did not after all ask for further reasons to be given. In light of that concession, Ms Toube confirmed her clients did not require any further amplification of the reasons why I had excluded from the valuation exercise the costs said to have been incurred by Candey in relation to obtaining funding after the date of liquidation (other than in relation to obtaining the funding of £200,000, received by the Liquidators on 12 February 2016).

19. That leaves the question of the value of the services provided by Candey with regard to this matter. Following the December 2019 Judgment, the value conferred on PHRL is to be calculated by reference to the time spent by Candey. At one point in the hearing Mr Saoul invited me to adjourn the case again so that the issue of quantum could be dealt with at a further hearing, if not agreed. I declined his invitation. It emerged at the hearing that the maximum sum in question was £8,000 (on my calculation the precise sum is £8,260). It is disappointing that so much time and money should have been taken up on, what is, in context, such a miniscule sum. The £8,000 (or £8,260) was made up of two items. The first item is 9 hours of time "Facilitating funding and assisting liquidators" at £700 an hour on 10 February 2016. The total time charge is £6,300. The second item is itemised in the bill as a telephone call with the (ultimate) funder (Mr Liu) and his team to raise funds, dealing with Carolyn Turnbull (director of PHRL but whose management powers were suspended

by the liquidation) and Mr Zecha (the immediate funder, to whom Mr Liu lent funds) on 11 February 2016. This involved 2:48 hours at £700 an hour totalling £1,960.

20. In my assessment £8,260 is an excessive value to place on the work carried out by Candey on the narrow issue of the £200,000 immediate funding. It is clear from the contemporaneous documents that the £200,000 interim funding was only part of a larger package of funding that Mr Candey was seeking to broker at this time and in my assessment a significant proportion of the time costs relate to this wider funding. Indeed, a further £200,000 by way of further funding was facilitated by Candey later in February (though, as I have held, Candey were not acting on behalf of the Liquidators in this respect). Further, as at 11 February 2016, the emails reveal a confirmation from Mr Candey to KPMG that the money was being transferred the following day by Mr Zecha and that, although he was speaking to Mr Zecha some time that day, his suggestion was that he would propose to him that he/his people (that is Mr Zecha or his people) make direct contact with Sarah Bower of KPMG.

21. Mr Candey does not in his evidence explain or give any greater detail about the specific times set out in the timesheets that he has provided. Doing the best that I can, I would limit the value of the work on this matter (arranging the funding for the immediate review) at £4,000. As I have said before, this does not of course limit the sum that Candey can prove for: it simply affects the amount of its claim which is secured.

Costs: the incidence

22. Both parties were agreed on the applicable legal principles. In this case the issues can be summarised as follows. In very broad summary: the starting position is the identity of the winning party, the general rule being that such party will usually obtain an order for costs in its favour (CPR r44.2(2)(a)). The next issue is whether an order for all costs should be made in favour of the winning party or whether the winning party has lost one or more issues such that it should not obtain an order for all of its costs. If the winning party has lost on one or more issues such that it should not obtain all its costs, the next issue is whether the court should make an issues based costs order or (the starting point under CPR r44.2(7)) whether the winning party should receive a reduced percentage of its costs instead, where this is practicable.

23. Among other cases I was referred to decisions and dicta in the well-known cases of *Bank of Credit and Commerce International SA (in liquidation) v Ali (No 4)* (1999) 149 NLJ 1734; *A L Barnes Limited v Time Talk (UK) Limited* [2003] EWCA Civ 402; *McGlinn v Waltham Contractors* [2005] EWHC 698 (TCC); HLB *Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm); [2008] 3 Costs LR 427; *J Murphy & Sons Ltd v Johnston Precast Ltd (No 2)* [2009] 5 Costs LR 745 and *Walker Construction (UK) Ltd v Quayside Homes Ltd* [2014] EWCA Civ 93. I need not set out the various extracts from the judgments in those cases in this judgment but have the principles well in mind.

24. I consider the facts, first without considering certain *Calderbank* offers, without prejudice save as to costs, that were made in this case by the Liquidators and relied upon by them on the issue of costs. I then consider the *Calderbank* offers to see if

they change my view and/or as to whether they justify an indemnity basis of costs assessment.

25. The costs that I have to deal with are the costs of the entire application (but leaving aside the costs of the appeals which have been dealt with separately). This encompasses the costs of the hearing before me leading to my judgment in June 2017. On that occasion, I determined in the Liquidators' favour that the relevant charge was a floating charge, not a fixed one, and that one of the conditions for the application of s245 IA 1986, insolvency of PHRL at the relevant time, was met. I also determined in favour of Candey that the floating charge extended to sums paid into court (which was disputed by the Liquidators) as well as the sums referred to as the SCB Monies (which the Liquidators accepted fell within the charge). I then adjourned what has subsequently been referred to by me as the Valuation Issue.

26. Ms Toube submitted that although the Liquidators failed on the issue of whether the charge extended to the monies paid into court, that has proved academic as the sum now found to have been secured is less than the SCB Monies. I do not accept that submission so far as it bears on costs. The point as to whether the charge covered the monies paid into court was fully contested (indeed it went on appeal). For some time there was a lack of clarity whether the SCB monies were subject to a prior charge and what the quantum was. In the Court of Appeal, as I understand it, Ms Toube's argument was put forward as a reason why the Court of Appeal should not determine the issue regarding the property to which the charge extended but instead should start with considering the Valuation Issue, as had by then been determined by HHJ Raeside QC. The Court of Appeal declined to follow that course and dealt with the substantive issue of whether the charge caught the monies in court and ordered the Liquidators to pay the appeal costs, the appeal by them having failed. Accordingly, I consider that from a costs perspective, Candey should be treated as having "won" on that issue, that it was an issue that was appropriately "fought" and the question of the incidence of costs should be approached from that perspective.

27. It is submitted by Mr Saoul that the question of whether the monies in court were caught by the charge was a, or even possibly the, main issue on the application. In my view, it is wrong to overly focus on that issue as if it determined who is "overall" the winner on the application. Further, the costs attributable to that issue are, in the global scale of all the other issues and the evidence, much less significant than the issue stated in isolation might appear. At bottom line the application was about whether Candey had security for £3.8million of its fixed fee or whether it had security for a much smaller sum in the £1million region.

28. The Valuation Issue was first decided by HHJ Raeside QC, who determined the point in favour of Candey and set the value of the services provided as the amount of the fixed fee. That decision was overturned by the Court of Appeal. The Court of Appeal ordered Candey to pay the costs of the appeal but remitted the question of the costs decided by HH Judge Raeside QC for re-determination (but not including the costs of a new issue raised which was dealt with separately thereafter, namely the effect of the fifth commencement order relating to the Legal Aid, Sentencing and Punishment of Offenders Act 2012).

29. The costs decided by HH Judge Raeside QC covered not only the costs of the Valuation Issue before him but also the entire costs of the application. He determined that the Liquidators should pay 80% of Candey's costs on the application. This clearly reflected the fact that Candey was the overall winner, having won both the issue as to the extent of the charge and also the Valuation Issue. The reduction to 80% reflected the fact that Candey had lost on the issues of insolvency and that the charge created a floating not a fixed charge.

30. Mr Saoul submitted to me that as regards the costs of the Valuation Issue before HHJ Judge Raeside QC the appropriate way of regarding the matter from a costs point of view was that this was a novel issue and that accordingly no order for costs (whether against Candey or against the Liquidators) should be made in relation to that hearing, alternatively the costs of that hearing should not be counted against Candey if I were to take the course of reducing the costs payable to Candey for issues it had lost on or to assess whether the Liquidators were the winning party. Put more fully, he suggested that this was the just conclusion flowing from the facts that (1) Candey succeeded before HHJ Raeside QC; (2) the Court of Appeal overturned HHJ Raeside QC's decision but (3) the legal principles upon which it did so were "entirely new"; (4) the result of the appeal was to remit the case not determine it; (5) the Liquidators' submissions before HHJ Raeside QC that the value of the services was about £650,000 was pursued and rejected at the renewed hearing.

31. I reject Mr Saoul's submission. The issue before HH Judge Raeside QC was whether or not the value of the services provided by Candey was the same value as the sum payable under the Fixed Fee Agreement. HH Judge Raeside QC decided that it was. That decision was overturned by the Court of Appeal. The Court of Appeal determined that Candey should pay the costs of the appeal on that issue. The Court of Appeal did not determine that there should be no order for costs as regards the appeal costs on the basis that the issue was a novel and/or difficult one. They also remitted the question of the costs before HH Judge Raeside QC. This followed submissions from Candey that no order for costs should be made until the Valuation Issue had been newly determined as it did not follow from the appeal that the Liquidators would succeed in showing that security for the services provided by Candey was to be limited to just over £704,000 or a sum not exceeding just under £1.2 million on a time cost basis of charging. The Valuation Issue remained to be determined (as it turned out by me) and the value of the services that I have determined applied was a value way below the figure of in excess of £3 million claimed by Candey. In my assessment the correct course is to treat the hearing before HHJ Raeside QC as, effectively, costs in the issues which then came before and were determined by me, being the Valuation Issue.

32. As I have said, the starting point in determining the incidence of costs is to identify the "winner" (if any). Somewhat surprisingly, the largely "common sense" approach to this issue was said by each party to result in the diametrically opposite answer to that put forward by the other party. The Liquidators submitted that they had won. Candey submitted that it was the winner.

33. Just as it was clear to HH Judge Raeside QC on the basis of his decision on the Valuation Issue that Candey was the overall winner, so it seems to me that the reversal of his decision coupled with my subsequent decision is that the Liquidators

are clearly the overall winners. Quite simply, and looked at in the large, Candey was asserting that it was a secured creditor to the extent of in excess of £3million, the amount of the fixed fee. The Liquidators were asserting that Candey was only secured to the extent Candey had properly spent relevant time on the case at the appropriate rates. The Liquidators won on these points. I accept Ms Toube's submission that, in effect, the Liquidators put forward a range within which that value fell. In the application, the range was identified as the lesser of a maximum of just over £1.2 million to such amount as is determined or agreed to be properly payable. Various figures were put forward at various times as the sum properly payable, which took account of arguments, primarily, as to the appropriate hourly rates and an identification of what work could properly be charged for. As referred to by HH Judge Raeside QC in his costs judgment, the lowest figure put forward to him by the Liquidators was some £704,000. Although the quantum achieved by Candey is significantly greater than £704,000, it falls within the bracket set by the Liquidators and is £1,090,755. I reject the submission of Mr Saoul that I should treat the Liquidators as losing because they did not achieve a valuation of £704,000. In assessing the winner I must take into account the substance of the dispute between the parties. Candey was asserting the secured value was over £3 million. Candey's submitted quantum figure was so high compared with the maximum value identified by the Liquidators and in each case on such different bases of assessment that it can justifiably be said to be of a different nature and on which it lost. As I have already said, I consider that the question of the extent of the property caught by the charge was an important issue. However, in my judgment that is most appropriately dealt with by assuming, in principle, that the costs attributable to that issue should be payable to Candey rather than saying that there is no winner overall or that Candey is the overall winner.

34. The next question is whether there should be a departure from the starting point, that the winners (the Liquidators) should be paid their costs. If there should be a departure from the general rule, then the question is whether an issues based order is appropriate or whether the relative success of the parties on different issues can be met by making a proportionate costs order.

35. In my judgment, as I have said, this is a case where it is clearly appropriate to make a different order to "winner takes all". The Liquidators lost on the significant and discrete issue of whether the charge in question encompassed the monies paid into court. I should however note that, although in the hearing before me in 2017, substantial time was taken before me on this issue (the Liquidators accept that it took up just under a third of the hearing), little time or paper was spent on the issue in the evidence or indeed in inter-party correspondence prior to the hearing. The argument was largely one of law. Secondly, I consider that I should take into account that, in the hearing before me in October 2019 resulting in the December 2019 Judgment, the Liquidators lost on the question of hourly rates (as I noted in paragraph [160] of the December 2019 Judgment, the Liquidators' case on hourly rates would have reduced Candey's work on a time cost basis (using the times it had claimed) from about £1.2 million to £927,000) so the argument was significant in effect. Although this issue took up some paragraphs of my judgment, the overall costs of this issue looked at in the context of the costs in general were, in my assessment, not major. The Liquidators also lost on some issues regarding the time of Candey to be treated as properly chargeable. However, they also won on a number of sub-issues in this

respect and I consider that overall no adjustment to the general rule would be required to deal with this aspect.

36. The next issue is whether or not there should be an issues based order or whether I should simply reduce the amount of costs recoverable by a proportion. In my judgment, the latter is the appropriate and just course in this case.

37. Mr Saoul submits that I should make an issues based orders by reference to the individual hearings but that causes great complication and fails to deal with the point that the evidence clearly cost a lot of money to prepare and was used (to a greater or lesser extent) at more than one hearing.

38. That leaves the question of the proportion below 100% to which the Liquidators' costs should be reduced. Having taken into account all the submissions (including the helpful written submissions received after the costs hearing before me), I consider that the appropriate proportion of their costs which the Joint Liquidators should receive is 85%. Although the costs of the parties are different, on a rough and ready basis this can be said to equate to a costs order in favour of Candey in respect of 7.5% of the overall costs. This is probably less than the percentage of court hearing time taken up by the issues but takes into account the fact that the costs of the relevant evidence were much less than the costs of the evidence going to the issues on which the Liquidators won. I have also taken into account that the Liquidators' costs overall are (at least on the material before me) more than those of Candey. It follows that, for example, I reject Mr Saoul's submission that Candey should be regarded as a 75% winner of the hearing before me on the Valuation Issue which completely fails to recognise the amount of time (and evidence) spent on the issues on which Candey lost and the fact that Candey was arguing for a valuation of several millions of pounds rather than the much narrower range put forward by the Liquidators.

39. It was not argued before me that, as regards the reserved costs of Candey's application dated 18 November 2016 for permission to refer to privileged material, there should be any order other than that made by HH Judge Raeside QC, namely that they be costs in the application. I accordingly make that order.

The Calderbank offers

40. The Liquidators rely upon *Calderbank* letters both as justifying an order that they obtain all of their costs (at least after the date of expiry of the offer in question) and that they should do so on an indemnity basis.

41. As regards *Calderbank* letters, I was originally referred to three offers dated respectively 4 July 2016, 18 October 2016 and 14 March 2017. The last offer was not relied upon as it was a lower offer than the second offer dated 18 October 2016. The Liquidators rely upon CPR r44.2(4)(c) which provides that in deciding what order to make as to costs the court must take into account all the circumstances, which will include admissible offers to settle which are not CPR Part 36 offers. For present purposes the Liquidators rely upon the two offers.

42. For the purposes of their submissions as to the indemnity basis of costs, the Liquidators relied upon cases such as *Epsom College v Pierse Contracting Southern Limited* [2011] EWCA Civ 1449; [2012] 3 Costs LR 451 for the propositions that:

> "*the general requirements before indemnity costs are imposed, namely that the case in question falls outside the norm and that conduct must be unreasonable to a high degree…can be met where there has been an unreasonable failure to accept offers of settlement, or a party has unreasonably resisted a sensible approach to finding a solution to the proceedings; even if such a case deserving of indemnity costs has been described as a rare case indeed*" (*Epsom College* at para [71] and I also note the comments at [72]).

43. The offer of 4 July 2016 was a payment of £1.5million (inclusive of interest and costs) in full and final settlement of Candey's secured and unsecured claims, subject to any prior ranking claims. The difficulty that I have is in determining that this offer was one that Candey failed to beat. Thus, although the secured sum as now determined is less than the £1.5 million offered, Candey retains the right to prove for the balance of its £3.8 million claim and may recover more than the £1.5 million that was offered. It is said that it is now known that the dividend on Candey's unsecured claim is unlikely to exceed £30,000. That may be so. However, in comparing what Candey was offered and what it eventually obtained it is necessary, in my judgment, to consider the value of the offer at the time that it was made. At that time, the position seemed very unclear. I adverted in my first judgment to the issue of whether PHRL might have a claim to certain assets which might have been subject to the relevant charge granted to Candey and how uncertain the position was as regards recoveries in that respect.

44. Further the claim does not in terms deal with the issue of whether resort could be had to the monies paid into court if the SCB Monies were insufficient (the letter refers to a possible prior charge which I take it is the prior charge which might have existed over the SCB Monies). Given the uncertainties at the time (the question of prior charge was unresolved), I also do not consider that Candey acted unreasonably in refusing the offer such that indemnity costs should be visited upon it.

45. The offer dated 18 October 2016 involved an acceptance of Candey's secured claim in the sum of £1,225,000 plus interest at 8% from 2 March 2016, with the unsecured balance of Candey's claim to the fixed fee being a provable debt in PHRL's liquidation. Under this offer no further sums were to be payable in respect of Candey's costs. Disbursements that Candey was claiming were also to be covered (and either paid by the Liquidators or repaid to Candey if Candey had already paid them).

46. I will deal with indemnity costs separately. The first question is whether this offer (and its refusal) causes me to change my view that the Liquidators should receive only 85% of their costs of the application. Subject to one point, the offer, if accepted, would have given Candey more than it has achieved. Mr Saoul submits that it is wrong to say that Candey has not beaten the offer because the offer did not include the costs incurred by Candey as at that date. Had it done so, he says, then Candey would have been paid more than the £1.2m odd figure with interest. However, in my assessment the position is simpler than that. Candey has not in fact achieved any order for costs in its favour and the sum it has achieved as being secured is less than the sum offered to be paid in October 2016. Further, there is in my judgment no reason why the offer should have included an offer to pay Candey's cost on top. Had

this been all, I would have ordered Candey to pay 100% of the Liquidators' costs after 8 November 2016 (when the offer lapsed).

47. As I have said, Candey, had it accepted the offer, would have been in a better position than that it has achieved, but that is subject to one point. The one point is that which was a constituent element of the July offer: namely that although the principal sum of £1,225,000 plus interest was to be treated as subject to the valid floating charge security, it was subject to the prior interest ranking ahead of it (which covered the Campion Maverick claim, then unresolved) and it was wholly silent as to whether the floating charge was to be treated as encompassing the monies in court. In those circumstances, I am not satisfied that the offer was a better result than the one that Candey has achieved. Candey has established that the monies in court are covered by the charge and at the time of the offer it was a contingency as to whether and how much of the SCB Monies would have to be applied to the apparent prior charge holder.

48. It follows that the existence of the *Calderbank* offers does not cause me to alter my conclusion as to the order that I would make regarding the incidence of costs. I also note that the Liquidators' skeleton focussed on the *Calderbank* letters as a reason for ordering indemnity costs against Candey rather than that Candey pay 100% of their costs, though this is not a matter that I rely upon in reaching my conclusion.

Basis of assessment

49. As a basis for an order for costs on the indemnity basis, the Liquidators rely upon (1) the *Calderbank* letters and (2) the conduct of Candey with regard to (a) contesting the relevant insolvency of PHRL, being one of the conditions for the application of s245 IA 1986 and (b) making its failed application to admit late evidence at the hearing before me, and, in effect, seeking to reverse its former position that the total chargeable times spent by Candey on the case were as detailed in the time sheets provided to the Liquidators.

50. As regards the *Calderbank* offers, in light of what I have already said I do not consider that Candey was unreasonable in refusing to accept either of them and do not consider that costs on the indemnity basis are appropriate because of them.

51. So far as the other two matters are concerned, I do not consider that either would give rise to an indemnity basis of assessment, even if I had been ordering costs to be paid by reference to specific issues. As it happens, I am not ordering costs to be paid on an issues basis. It thus becomes much harder to apply an indemnity basis of assessment in those circumstances. It was suggested that I could order a percentage of the overall costs to be paid on an indemnity basis. Having considered the matter I have come to the conclusion that I would not have made an order for assessment on the indemnity basis, even if I would otherwise have ordered an indemnity basis of assessment with regard to either matter had there been separate issues based orders. I might have considered altering the percentage of recoverable costs to take into account the possibility of a greater recovery on the indemnity basis for some of them but do not feel I have the material before me to do so and such was not argued before me so that I had no submissions going to the point. As I have said, this aspect is academic because looking at the two matters separately I would not have ordered an indemnity

basis of assessment with regard to either of them. As I understand it, HH Judge Raeside QC also declined to order indemnity costs when dealing with the costs of the initial hearing before me regarding the insolvency issue and this gives me some comfort that my conclusion is not unreasonable or irrational on that point.

Interest on costs

52. The Liquidators ask that I order interest on the costs awarded to them. This is on the basis that the Liquidators are required to pay their solicitors, Stephenson Harwood, interest on the costs payable to Stephenson Harwood.

53. The basis of this application is that Candey asserted that the Liquidators should hold the monies recovered from the settlement of the London Litigation to Candey's order and "kept safe". In effect, as I understand it, Candey was saying that it had security over the monies and a claim to over £3 million to be satisfied from such proceeds.

54. The Liquidators say that the consequence is that they have had to hold the monies on a segregated basis and have not been able to use them to pay a large part of their own remuneration and the costs of other advisers.

55. I am not satisfied that it is appropriate to order interest on the costs payable by Candey. The Liquidators took a commercial decision to retain whatever they retained. They could have put Candey to the election of seeking to obtain an injunction (or offered an undertaking) on the basis that Candey offered a cross undertaking in damages. I am also not satisfied on the evidence before me that it can be said that Stephenson Harwood were not paid because of the retention of monies to meet Candey's fixed fee, in the event that that was found to be the sum secured. Finally, there are issues as to whether interest on the costs payable by Candey at the rates suggested and for the periods to which it applied would in reality compensate for the interest in fact payable to Stephenson Harwood. For these reasons I decline to order interest on the costs ordered to be paid by Candey. Nothing I say on this issue is intended to determine any arguments about interest that may be raised on a detailed assessment of the relevant costs.

Payment on account

56. I did not understand it to be contested that an order for payment of costs on account is the correct order in this case and that there is no good reason not to do so (see CPR r44.2(8)). I did not understand a 50% on account payment to be disputed as being appropriate, although Mr Saoul did suggest that the costs more recently incurred by the Liquidators (post the latest Court of Appeal decision on the Valuation Issue) were so significant that I might consider reducing the on account payment to 35 or 40%.

57. The Liquidators' overall costs, to the date of the hearing before me, were said to be in the region of £1,595,061.63. Candey's costs are said to be in the region of £1,383,565. I do not consider that the Liquidator's stated costs are so out of the norm that a 50% payment on account is likely to be more than they will recover on an assessment. Accordingly, I order that Candey should make an on account payment of 50% of 85% of the Liquidators' figure, rounded down to £677,900.

Conclusions:

58. As regards the issues raised before me:

(1) I make no determination regarding disbursements;

(2) As regards the services provided by Candey after the date of the liquidation, I find that services to obtain funding of £200,000 for an immediate review of the London proceedings, the sum being received on 12 February 2016, were services provided to PHRL which were authorised by the Liquidators and that the value of the same was some £4,000. Other than that, my earlier judgment remains unchanged to the effect that no services were properly provided by Candey in relation to the pursuit of funding for litigation after the date of liquidation;

(3) I determine as regards costs that Candey should pay 85% of the Liquidators' costs of the Application on the standard basis to be the subject of detailed assessment if not agreed;

(4) I order a payment on account of such costs of £677,900.

59. I invite the parties to agree a form of order to give effect to this supplemental judgment. If the matter cannot be agreed then by 12 noon on 2 June 2020 the Liquidators should submit a draft order showing what is agreed and, where not agreed, identifying which party propounds which text. I will then consider the matter on the papers unless any party requires a further oral hearing.