EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2014/0116

IN THE MATTER OF PEAK HOTELS AND RESORTS LTD (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN:

CANDEY LTD

Applicant

and

(1) RUSSELL CRUMPLER
(2) CHRISTOPHER FARMER
(As Joint Liquidators of
Peak Hotels and Resorts Ltd)

Respondents

Appearances:

Mr. Muhammed Haque QC instructed by Forbes Hare for the Applicant
Ms. Felicity Toube QC and Mr. Andrew Willins of Appleby for the Respondents

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2020: September 16, 18
October 2

JUDGMENT

[1] **JACK, J [Ag.]**: By an application dated 7th August 2020, Candey Ltd ("Candey") apply for orders in the liquidation of Peak Hotels and Resorts Ltd ("PHRL") under section 273 of the **Insolvency Act 2003**[1] as follows:

(a) That the sum of £3,860,637.48 sterling together with interest thereon payable by PHRL to Candey under a fixed fee agreement ("the FFA")

[1] No 5 of 2003, Laws of the Virgin Islands.

dated 21st October 2015 be paid as an expense of the liquidation pursuant to rule 199(a), (i) and/or (k) of the **Insolvency Rules 2005**[2];

(b) That following payment on account of £643,248.75 sterling by the liquidators to Candey on 7th November 2018, the remaining balance of £3,217,388.73 sterling due under the FFA be paid to Candey in accordance with section 207(1)(a) of the Insolvency Act 2003;

(c) That interest be paid;

(d) That any costs payable by Candey to the liquidators arising from various proceedings in England may be off-set against the outstanding sum and interest;

(e) That the liquidators be prevented from making any further distributions until Candey's claim be determined.

Candey no longer rely on rule 199(i), but now seek to rely additionally on rule 199(h). Nothing turns on this.

The background

[2] In a separate case, **Peak Hotel and Resorts Group Ltd and another v Stuart Mackellar and others**,[3] I described some of the background as follows:

> "[2] …The facts go back to 2013, when an Indian company put a luxury hotel group, Aman Resorts, on the market. Mr. Vladislav Doronin heard of the investment possibility. He was introduced to Mr. Omar Amanat, an American. They agreed to purchase the hotel group together.
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> [3] The structure which the two men put together was this. Mr. Amanat used a company, [PHRL], to own a 33.77 per cent share in a holding company, Peak Hotels and Resorts Group Ltd ('PHRGL'). Mr. Doronin used a company, Tarek Investments Ltd ('Tarek'), to hold the remaining 66.23 per cent of PHRGL. PHRGL in turn owned all the share capital in Aman Resorts Group Ltd ('ARGL'). ARGL has been renamed AHL Hotels (2017) Ltd… ARGL in turn owned all the shares in Silverlink Resorts Ltd ('Silverlink'), which is or was the operating company for the hotel chain.

[2] SI 2005 No 45, Laws of the Virgin Islands.

[3] BVIHC (COM) 2017/0155 (determined 26th November 2019).

> [4] Another Doronin company, Pontwelly Holding Co Ltd ('Pontwelly'), made a loan of US$168 million to ARGL. This loan was secured by a pledge of all the shares in Silverlink.
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> [5] Unfortunately, Mr. Amanat, it turns out, was a fraudster. He was in December 2017 convicted before District Judge Gardephe and a jury in the Southern District of New York of various fraud offences involving securities. None of the offences concerned the current case. The judge refused him bail pending sentence on the basis that he had shown 'a disregard and a distain for the Court and for legal process.' Notwithstanding the long period which has elapsed, I am told Mr. Amanat has still not been sentenced and is presumably still languishing in gaol.[4]
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> [6] Relations between Mr. Doronin and Mr. Amanat broke down soon after completion of the purchase. By July 2015 ARGL had defaulted on its loan repayments to Pontwelly. Pontwelly commenced foreclosure proceedings in New York (which was the governing law and jurisdiction of the loan). These resulted in a judgment on 11th August 2015 whereby Pontwelly became the legal and beneficial owner of the shares in Silverlink. Pontwelly subsequently transferred the shares in Silverlink to Aman Hotels Overseas Ltd ('AHOL').
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> [7] PHRL had earlier [in June 2014] issued proceedings ['the London Litigation'] in London, initially against Tarek, PHRGL and two other individuals which were amended to include a challenge [to] the transfer of ownership in the hotel chain. On 2nd October 2015 Leon J (Ag) granted PHRL leave to bring derivative proceedings as a minority shareholder in PHRGL and as an ultimate minority shareholder of ARGL. The Particulars of Claim in the London action were subsequently amended to reflect this change. Mr. Doronin was added as an additional defendant, as was AHOL, and others.
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> [8] In the meantime, PHRL lost an arbitration in Hong Kong between it and some Chinese investors."

Jinpeng's claims: the appointment of liquidators

[3] The background to the arbitration was that PHRL had borrowed US$35 million from Jinpeng Group Ltd ("Jinpeng"), which was a vehicle of Beijing Tourism Group Company ("BTG"). There was a formal loan agreement lending the money for one year, but also a memorandum of understanding intended to give BTG the right to

[4] I am told this remains the position, even today.

convert the loan into shares. Both documents are dated 24th January 2014 and included an agreement to arbitrate in Hong Kong. A dispute soon arose between Jinpeng and BTG on the one hand and PHRL and Mr. Amanat on the other. The US$35 million had disappeared.

[4] On 18th September 2014 Jinpeng issued an originating application in this Court seeking the appointment of a liquidator on the just and equitable ground (section 162(1)(b) of the **Insolvency Act 2003**) and provisional joint liquidators. On 25th September 2014 PHRL issued a cross-application seeking to strike out Jinpeng's application. Jinpeng's application was heard *ex parte* on notice on 25th and 26th September 2014, at the conclusion of which Bannister J (Ag) appointed provisional joint liquidators from KPMG on the basis that PHRL's assets were "in some jeopardy". Although there have over time been some changes in the persons acting as liquidator, the first respondent to the current proceedings ("Mr. Crumpler") has been the lead liquidator throughout. Para 3 of Bannister J's order permitted the directors of PHRL to continue to have conduct of *inter alia* the London Litigation and denied the provisional liquidators access to information and documents subject to legal professional privilege in the London Litigation.

[5] On the return date of Jinpeng's application on 17th October 2014, the judge acceded to PHRL's cross-application, struck out Jinpeng's application and discharged the provisional liquidators. Jinpeng appealed. On 8th December 2015, the Court of Appeal allowed the appeal and restored the original order of Bannister J.[5] Webster JA held that there was no genuine and substantial dispute between Jinpeng and PHRL as to the fact that PHRL owed Jinpeng US$35 million. (The one year period for repayment of the loan had in any event by this time elapsed.) The existence of the Hong Kong arbitration proceedings did not prevent the reappointment of the provisional joint liquidators, which is what the Court of Appeal did. After the arbitration award was issued, this Court on 8th February 2016

[5] BVIHCMAP 2014/0025 and BVIHCMAP 2015/0003 (conjoined appeals).

directed that PHRL be wound up and appointed the provisional liquidators as (final) liquidators.

The London Litigation

[6] Candey acted for PHRL in the London Litigation from its commencement in June 2014. What then happened is helpfully recounted in the English High Court judgment[6] of 23rd June 2017 of His Honour Judge Davis-White QC (formerly Davis-White J (Ag) when he sat in this jurisdiction):

> "40. In the London Litigation, Peak obtained various injunctions in June and July 2014. The return date in relation to such injunctions took place in September 2014. By order of His Honour Judge Pelling QC, sitting as a judge of the Chancery Division, dated 19 September 2014, Peak was required to pay US$10 million into court to fortify its cross-undertaking in damages given to the court.
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> 41. More detail about the BVI proceedings and the London Litigation is set out in judgments in the London Litigation, first of His Honour Judge Pelling QC (sitting as a judge of the Chancery Division),[7] and secondly, Henderson J…[8]
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> 42. In December 2014 Peak discovered that at least US$35 million of the money lent by Sherway had been misappropriated by two entities, Peak Venture Partners LLC and Peak Venture Partners (II) LLC. These entities were connected with Mr. Amanat, who had ceased, at least formally, to be a director of Peak in September 2014. This resulted in further proceedings, conveniently referred to as the 'Power Capital Litigation'.
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> 43. On 20 February 2015, Henderson J made an order in the London Litigation that Peak should provide £3,138,000 by way of security for the Defendants' costs which was paid into court.
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> 44. In July 2015, Pontwelly demanded repayment of the Pontwelly Loan in full from ARGL, relying on an alleged event of default said to have occurred in February 2015. On 13 August 2015, purportedly pursuant to the relevant share pledge, Pontwelly appropriated ARGL's shares in Silverlink, transferring them to another company. In August 2015 Peak

6 [2017] EWHC 1511 (Ch).
7 [2014] EWHC 3066 (Ch).
8 [2015] EWHC 386 (Ch).

amended its claims in the London Litigation to seek relief against Pontwelly and others.

45. It was against this background that the Fixed Fee Agreement and Charging Deed came to be entered into on 21 October 2015. Prior to such agreements, and under its terms of business, Candey's invoices fell due for payment within 7 days. Arrears built up. On 8 October 2015, Candey sent an email complaining that 'this firm is now owed in excess of £1.2 million.' As I have mentioned the Fixed Fee Agreement in terms dealt with then outstanding unpaid invoiced costs of £941,358.94.

46. When Peak entered liquidation in February 2016, the London Litigation was at a critical stage. There was a liability in respect of Counsel's brief fees and an outstanding obligation pursuant to a court order to pay additional security for costs. There was a risk of adverse costs in respect of the Defendants' costs in the London Litigation, which was covered neither by insurance nor fully covered by the existing sums paid into court. Having unsuccessfully attempted to obtain a third party fortified indemnity in respect of adverse costs, the Liquidators decided that the appropriate course was to seek to settle the London Litigation. Ultimately they were successful in this endeavour. The terms of settlement provided for the release to Peak of the two sums paid into court of US $10 million and £1,648,000. These sums were paid to the Liquidators by order of Asplin J dated 7 March 2016."

The FFA and the deed of charge

[7] The FFA was made between Candey and PHRL. Although it is dated 9th October 2015, it was only signed on behalf of PHRL the following day and by Candey on 21st October 2015. Candey agreed to continue to act in various pieces of litigation, not just limited to the London proceedings, and "other matters expressly agreed from time to time (including ongoing general advice)." The FFA was subject to English law and jurisdiction.

[8] Clause 3 provided that Candey's previous estimate of costs had "been revised to £5 to £6 million. The actual figure could be significantly higher or it could be substantially lower if an early settlement is achieved." Clause 4 provided:

> "PHRL does not wish to pay [Candey's] invoiced and unbilled costs incurred to date or provide further funds in advance, on account on a weekly basis and wishes instead to agree a fixed liability fee payable at a future date. It is therefore agreed that PHRL will pay [Candey] a fixed fee of £3,860,637.48 (the 'Fixed Fee'). It is agreed that to assist PHRL's cash flow PHRL is not obliged to pay the Fixed Fee before judgment on liability is handed down or a settlement is agreed in the Tarek proceedings unless PHRL obtains cash from elsewhere as set out in this agreement. Interest at 8% per annum will accrue from judgment or settlement."

[9] Clause 5 provided for PHRL to pay the outstanding invoiced costs of £941,000 in three tranches, the first of £341,000 on the signing of the agreement, the second of £300,000 on 1st December 2015 and third of £300,000 on 1st February 2016. Clause 8 provided:

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

[10] Clause 10 gave senior members of Candey the right to "directors' discounts". Counsel tell me these were effectively use of hotel rooms at the resorts at steep discounts. Clause 11 provided for PHRL to enter the deed of charge. The deed of charge, which was executed at the same time as the FFA, provided:

> "As continuing security for the payment and discharge of all liabilities to [Candey] pursuant to the fixed fee agreement of today's date… PHRL hereby charges to [Candey]:
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> (1) by way of fixed charge, all assets and undertakings of PHRL, including shares, present or future, and including all monies in Court in all jurisdictions worldwide;
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> (2) by way of fixed charge, any and all damages, costs, monies or other sums and/or benefits flowing from all claims including the specific claims set out in the Fixed Fee Agreement (including for the avoidance of doubt those costs orders made by Bannister J in the BVI on 17 October 2014

and 2 February 2015 which have not yet been assessed) together with all related rights title and interest; and

(3) by way of floating charge, all such or further assets belonging to PHRL that are not today capable of being charged by way of fixed charge (including any such assets described at (1) or (2) above in the event the fixed charge is defective for any reason)."

[11] As a result of our Court of Appeal's decision of 8th December 2015, it should be noted that PHRL was from at latest January 2015 unable to pay its debts as and when they fell due and was probably balance sheet insolvent from at latest September 2014. Thus, this deed of charge of October 2015 was executed at a time when PHRL was insolvent.

[12] It will be recalled that the provisional liquidators were appointed as final liquidators on 8th February 2016. This was the first time the liquidators were able to see privileged materials held by Candey, because their appointment as provisional liquidators had not given them that right. Thus, although the liquidators knew in broad terms about the London Litigation, the 8th February was the first time they could take a detailed view of the merits of the litigation. This placed them in a difficult position. The trial was listed for hearing in April 2016. Witness statements were due imminently, although the date was subsequently put back slightly to 2nd March 2016. There was a three-day directions hearing starting on either 9th or 11th February 2016. (There are different dates in the papers, but nothing turns on this.) Counsel's brief fees for the trial were due very shortly.

[13] The liquidators did not want to adopt the London Litigation until they were able to take a view on its merits. Likewise, they did not want to accept the liabilities under the FFA as part of the expenses of the liquidation until they had decided whether to adopt the London Litigation. Whether they succeeded in this wish or not is at the heart of the current application.

[14] Before looking at the evidence on this in detail, it is convenient to give an overview of what subsequently happened. On 26th February 2016, Bannister J gave the liquidators directions to continue the London Litigation, provided that by 2nd March

2016 the liquidators had arranged suitable funding (including provision for a fortified indemnity against any adverse costs orders against PHRL) or had reached what the liquidators considered suitable settlement terms. On 2nd or 3rd March 2016 the liquidators did agree a settlement with the other parties. Candey say this was done behind their back, but nothing turns on this legally. On 3rd March 2016 the liquidators appointed Stephenson Harwood LLP to act for PHRL in the London Litigation and a notice of change of solicitor was served. The settlement agreement was incorporated in an order of Asplin J on 7th March 2016.

Candey's claims in subsequent English litigation against the liquidators

[15] Following the settlement, Candey asserted a claim for the monies due under the FFA in priority to other creditors of PHRL. The liquidators denied Candey's entitlement to priority. Much litigation thereafter ensued in the English Courts. It was agreed in England that there was no relevant difference between BVI and English insolvency law in relation to the issues in dispute between Candey and the liquidators: see the explanation at paras [9] to [11] of the judgment of 23rd June 2017. I agree. In particular, both laws have the same rules on the distribution of assets on liquidation of a company. So far as relevant to the instant case, first priority is given to holders of a fixed charge, insofar as the fixed charge is sufficient to pay the debt secured. Second priority, after payment of fixed charge-holders, is the expenses of the liquidation. Third priority, after payment of the aforegoing, is given to the holders of floating charges. (I do not need to consider priority as between different holders of floating charges.) Fourth priority is the payment *pari passu* to the unsecured creditors. The order of priority is sometimes described as a waterfall.

[16] The first round of litigation commenced in front of His Honour Judge Davis-White QC and resulted in the judgment from which I have already cited. He declared that the deed of charge was not a fixed charge, but was a floating charge over US$1.5 million held in an account with Standard Chartered Bank and over the sums of US$10 million and £1.648 million sterling paid out of Court pursuant to the

settlement of the London Litigation. He also declared that the floating charge was "invalid save to the extent of the value of the services supplied to PHRL by Candey on or after 21 October 2015." This latter provision resulted from the fact that PHRL was insolvent when it granted the charge.

[17] The liquidators appealed that part of the judgment of HHJ Davis White QC that related to the question of whether the floating charge could attach to the monies paid out of Court. In a judgment[9] delivered by Sir Colin Rimer on 16th October 2018 the Court of Appeal dismissed the appeal with costs.

[18] This left outstanding the issue of what the value of the services was which Candey provided after 21st October 2015. Candey submitted that the value was the figure fixed by the FFA. The liquidators submitted that Candey were only entitled to their reasonable fees on a time spent basis. The matter was tried before His Honour Judge Raeside QC, sitting as a High Court judge in the second round of litigation. In his judgment[10] of 22nd November 2017 he held:

> "The amount of money they could reasonably have expected for the provision of those services applied in fact is not on a time and hourly basis but on a fixed fee, which meant that Candey… received no payment whatsoever as this work progressed. The opinion of Peter Hurst [the retired senior taxing master, who gave expert evidence], which I accept, was that it was fair and reasonable that they should expect to be paid £3,860,637.48."

He accordingly held that Candey were entitled to be paid the full sum under their floating charge.

[19] The liquidators appealed. This time their appeal succeeded with costs awarded in their favour. Henderson LJ delivered the judgment of the Court of Appeal. He held:[11]

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[9] Crumpler and another v Candey Ltd [2018] EWCA Civ 2256.
[10] [2017] EWHC 3388 (Ch) at para 41(2).
[11] [2019] EWCA Civ 345 at para [38].

> "The test [for assessing value] is… an objective one… [T]he Fixed Fee must be disregarded in performing the calculation required by [section 245(6) of the UK Act[12]], and the value of the services must be ascertained otherwise than by reference to PHRL's contractual obligation to pay the Fixed Fee."

[20] The assessment of the appropriate value to be placed on Candey's services came back before His Honour Judge Davis-White QC. In his judgment[13] of 20th December 2019 he held that Candey's hourly rates (ranging from £700 an hour for one band A fee-earner down to £300 per hour for one band B fee-earner and £150 per hour for a band D fee-earner) were reasonable. Subsequently, there was a measure of agreement between the parties on the amount. By orders dated 20th January 2020 and 2nd June 2020, Judge Davis-White QC fixed the costs secured under the floating charge at £1,090,755.00. After giving credit for a payment on account of £643,248.75 made by the liquidators, this left the balance secured by the charge as £447,506.25.

[21] This was, however, a Pyrrhic victory for Candey. The judge ordered Candey to pay 85 per cent of the liquidators' costs with an interim payment of £677,900 pending detailed assessment. An application for permission to appeal against this costs order was refused on 2nd September 2020 by David Richards LJ.

[22] In the meantime, Candey had proceeded with a third round of litigation in England. This comprised two issues. The first was whether Candey were entitled to recover from the liquidators a success fee due under a conditional fee agreement Candey had entered with a sister firm of solicitors, Candey LLP. The second was whether Candey were entitled in respect of the sums due under the FFA to a solicitor's lien, or more technically a charging order under section 73 of the **Solicitors Act 1974**,[14] over the monies recovered by the liquidators. These matters were determined by a judgment[15] of 15th February 2019 of Mr. Andrew Hochhauser QC,

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[12] The equivalent of section 247(2)(c) of the BVI Act.
[13] [2019] EWHC 3558 (Ch).
[14] 1974 c 47.
[15] Candey Ltd v Crumpler and another [2019] EWHC 282 (Ch).

sitting as a deputy High Court judge. He found against Candey on both points. As regards the first matter, he held at paras [70] to [72] that the recovery of the success fee did not survive the general abolition of such recovery affected by the **Legal Aid, Sentencing and Punishment of Offenders Act 2012**[16] with effect from 1st April 2013. As regards the second matter he held at para [119] that the terms of the deed of charge were inconsistent with continuing existence of a solicitor's lien, so that Candey must be taken to have waived their right to such a lien.

[23] Candey appealed. By a judgment[17] delivered by Rose LJ on 23rd January 2020, the Court of Appeal dismissed the appeal against both points. I am told an application for permission to appeal to the UK Supreme Court is currently pending.

The fourth round of litigation: Henderson v Henderson

[24] There comes before me now a fourth round of litigation in which Candey seek to recover their fixed fee, but this time by way of the fee being one of the expenses of the liquidation. When I first heard counsel, I raised the question whether this was possible, given the rule in **Henderson v Henderson**.[18] In the first round of litigation they had sought to recover the fixed fee under a fixed charge, but had lost. In the second round, they had sought to recover the full fixed fee under a floating charge. They won at first instance but lost on appeal. In the third round, they had another go, this time seeking the full fixed fee under a solicitor's lien, which would have given priority over the expenses of the liquidation.

[25] It seemed to me to be reasonably arguable that putting a new case for full recovery of the fixed fee a fourth time was an abuse of the process of the Court. Now it is true that **Henderson v Henderson** is one of the six species of *res judicata* identified by Lord Sumption in **Virgin Atlantic Airways Ltd v Zodiac**

[16] 2012 c 10 section 44.
[17] [2020] EWCA Civ 26.
[18] (1843) 3 Hare 100.

Seats UK Ltd.[19] It is also right that issues of *res judicata* must generally be pleaded if a party is to rely on them. However, the Court is entitled to take issues of abuse of process itself. A sufficiently grave case of abuse of process can amount to a contempt of court.[20] In my judgment, the Court is entitled to apply **Henderson v Henderson** of its own motion.

[26] In the event, Ms. Toube QC indicated that she did not wish to take the **Henderson** point. The liquidators instead wanted me to determine the application on its (de)merits. Mr. Haque QC of course was happy for the **Henderson** point not to be taken. I am not bound by counsel's agreement and must always have regard to the proper allocation of the Court's resources under the Overriding Objective: CPR 1.1(2)(e). Nonetheless, the fact that liquidators appointed by this Court seek determination of a matter is a powerful consideration against my simply dismissing the application on **Henderson** grounds. Weighing the considerations in my discretion, I shall not dismiss the application as an abuse of process.

The submissions of counsel on Lundy Granite

[27] In his skeleton, Mr. Haque QC puts Candey's case as follows:

> "48. The **Lundy Granite**[21] principle may be summarised as follows:
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> 48.1. The **Lundy Granite** principle is a judge made 'deeming provision' under which certain liabilities are deemed to have been incurred by the office holder in the course of the winding-up or administration (**Jervis v Pillar Denton Ltd**[22]).
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> 48.2. The principle applies where:
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> (1) a company has entered into a contract with a third party before the commencement of an insolvency process,
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> (2) the contract continued to have effect after the insolvency process, and

[19] [2013] UKSC 46, [2014] 1 AC 160.

[20] See my judgments in Ewing v Times Newspapers Ltd 2015 Gib LR 39 and Ewing v Times Newspapers Ltd (No 2) 2015 Gib LR 49.

[21] Re Lundy Granite Co, Ex parte Heavan (1871) LR 6 Ch App 462.

[22] [2015] Ch 87 at para [77].

(3) the office holder elected to retain the benefit of the contract for the purposes of the insolvency process (**Re Portsmouth City Football Club Ltd**[23]).

48.3. The question of whether the liquidator has elected to retain the benefit of the contract is determined objectively by what the liquidator has said and done (**Grapecorp Management Pty Ltd (in liquidation) v Grape Exchange Management Euston Pty Ltd**[24]).

48.4. The foundation of the principle is the application of equity. Put simply 'you can't have the penny and the bun' (**Jervis v Pillar Denton Ltd** at paras [77] and [83]).

48.5. Where the **Lundy Granite** principle applies, the Court has no discretion to decline to treat the liability in question as an expense in the liquidation (**Re Toshoku Finance Ltd**[25]).

49. Where the **Lundy Granite** principle applies, that liability falls within what in the BVI would be… rule 199(a) [of the **Insolvency Rules 2005**] (**Re Portsmouth City Football Club Ltd** at para [91]; **Re Toshoku Finance Ltd** at para [38]), and is therefore afforded the highest priority, although such liabilities have also been held to fall within the equivalent of… rule 199(h) (**Re Portsmouth City Football Club Ltd** at para [91]).

50. Additionally, it is submitted that liabilities that fall within the **Lundy Granite** principle could come within rule 199(k) in that, if they are deemed to have been 'incurred' by the liquidator, and are 'fees, costs, charges, or expenses properly incurred … or properly chargeable by the liquidator in carrying out his functions in the liquidation'.

51. Obviously, if the Court accepts that liabilities that fall within the **Lundy Granite** principle come within rule 199(a), then the question of whether they might also fall within rule 199(h) or (k) is rendered otiose."

[28] In his oral submissions, Mr. Haque QC expanded on his case as set out in paras 48.2(3) and 48.3 of his skeleton. He took me through the email exchanges between Candey and the liquidators in the initial days after 8th February 2016 and submitted that these showed the making of a binding contract, with at least one offer by Candey which the liquidators accepted by conduct. (As I shall discuss it is doubtful whether this route to recovery of the fixed fee on the part of Candey by

[23] [2012] EWHC 3088 (Ch), [2013] Bus LR 374 at para [95].
[24] [2012] VSC 112, 265 FLR 33 at para [83].
[25] [2002] UKHL 6, [2002] 1 WLR 671 at [38].

way of a binding contract is properly an example of the **Lundy Granite** principle, but Ms. Toube QC made no objection to Mr. Haque QC taking the point.) Alternatively he said the behaviour of the liquidators showed an election to take the benefit of the FFA, so as to engage **Lundy Granite**.

[29] Ms. Toube QC submitted that the email correspondence does not show any binding contract being reached between Candey and the liquidators. She denied that on the facts there was any election, which could bring the **Lundy Granite** principle (or the "salvage principle", as some of the cases call it) into play. It is easier to explain her submissions when considering the cases on which each side relied. In addition, she said that there was a principle of "joint benefit". In the current case, Candey stood to benefit from continuing to act in the London Litigation, because in practice victory in that litigation was the only means by which Candey would ever receive its fixed fee. The existence of this joint benefit from Candey continuing to act excluded the application of the **Lundy Granite** principle, she submitted.

[30] Both sides made submissions about the divisibility of the fixed fee in the event that the **Lundy Granite** principle applied, so that divisibility was an issue, and about interest. I indicated that, if these points arose, I would deal with them after handing down this judgment.

Actual agreement and adoption of the FFA

[31] I shall consider first Mr. Haque QC's submission that there was an actual agreement between the liquidators and Candey for Candey to be retained on the terms of the FFA. The retainer on these terms is said to have arisen as a result of the correspondence (largely by email) between the liquidators and Candey and by the liquidators' acquiescence. There is no allegation of any oral agreement, so this issue can be determined solely by looking at the documentation.

[32] The first email to which I was taken was from Mr. Ashkhan Candey, the managing partner of Candey, to Mr. Christopher Farmer (and copied to Mr. Crumpler). It is dated 10th February 2016 and timed at 20.54. Mr. Candey confirmed that there were no insurance policies in place. "As to estimates for costs to trial this depends on what happens to the fixed fee agreement. On hourly rates I would anticipate £1.5 million for solicitors' fees and £1 million for counsel."

[33] In an email of the same date timed at 6.45 pm (due to differences of timezone, this may post-date the email set out above), Mr. Candey told the liquidators "[Work in progress] stands at £280,000 so our estimated hourly rates costs would be £1.8 million plus £1 million billed to date = £2.8 million. This is strictly without prejudiced [*sic*] to the overriding terms of the Fixed Fee Agreement." This was followed by emails of 11th and 12th February discussing Candey's hourly rates and the likely time commitment.

[34] There was then discussion between the liquidators and a potential litigation funder, Mr. Jerry Liu, some of which was copied to Candey. On 18th February 2016 at 11.14 am, Mr. Dunn, a senior solicitor at Candey, sent the liquidator an email, which discussed proposed funding of £2.45 million from Mr. Liu. (The email is headed "without prejudice and subject to contract", but counsel took no issue on its admissibility.) Mr. Dunn raised some issues about the timing of payments. He then said:

> "We trust you will put this to Jerry's team as soon as possible. If you are unable to agree terms with Jerry, then our fixed fee and charge would obviously stand."

[35] Mr. Crumpler promptly responded and said that they would discuss the matter with the funder. The following day, he wrote a long letter to Candey which said:

> "[W]e have instructed Paul Chaisty QC… to undertake an urgent review of the merits, and… are urgently exploring funding options. Provided that we are satisfied as to the merits, and if acceptable funding arrangements can be put in place, we anticipate making a decision to continue the Litigation and reaching terms with your Firm to enable you to continue to act. Any

> such terms would of course address your outstanding fees as well as your fees to the conclusion of the trial. However, because any such decision is dependent upon the facts mentioned above, it is simply too early to say with certainty that the [joint liquidators] will form this view. You will also be aware that, in order for the [joint liquidators] to continue with the Litigation, we would have to seek sanction from the BVI Court."

[36] Mr. Haque QC submitted that, because terms were not agreed, but the liquidators permitted Candey to continue to act, the liquidators should be taken to have agreed the proposal in Mr. Dunn's 11.14 am email by their conduct . I do not agree. (With some irrelevant exceptions) entering a contract requires offer and acceptance. It is trite law that acceptance can be by conduct. However, here the letter of 19th February is rejecting any (or at any rate any immediate) acceptance of Candey's proposals.

[37] Mr. Haque QC put the email of 11.14 am as the high point of his submission that there was an actual contract, so I shall not refer to any further of the correspondence. I should, however, mention that there is a potentially nice legal question as to the basis on which Candey were entitled to remuneration in the period after the appointment of the liquidators. There was some discussion before me as to whether this claim would be a restitutionary claim for *quantum meruit* or a non-restitutionary contractual claim for *quantum meruit*. This latter form of *quantum meruit* occurs where a party does work under a contract but the basis of remuneration has not been agreed. The Court then awards a reasonable sum for the work done. The point is, however, wholly academic, because the liquidators accept (and His Honour Judge Davis-White QC has found) that they are entitled to be paid on a time and hourly rate basis for that work.

[38] The work which Candey did before settlement was reached comprised the service of Replies to a Request for Further Information, finalising witness statements and signing specific disclosure statements. Each of these were individually authorised by the liquidators on a limited basis. The liquidators insisted that all these steps

be done on the express basis that the liquidators had not yet adopted the litigation and had not elected to adopt the FFA. Candey acted on that basis.

[39] The other point I should mention is that Mr. Haque QC submitted that the liquidators were in a weak bargaining position vis-à-vis Candey. This was relevant, he submitted, to the objective interpretation of what occurred. I do not accept that the liquidators were in a weak position either as a matter of law or as a matter of fact. As a matter of law, a solicitor cannot simply down tools when they are on record as acting in litigation. They must apply to the Court to come off the record. If, as here, key procedural steps were due imminently, the trial was coming on within weeks and the client (the company acting through its liquidators in this case) was agreeable to payment of the solicitor's hourly rates for specific work which was required, it is unlikely that leave to come off the record would be given under (English) CPR 42.3(1). The right given a solicitor by section 65(2) of the **Solicitors Act 1974** (UK)[26] to decline to continue to act in litigation, where the client has refused to make a reasonable payment on account of costs would not have arisen: see **A Law Firm v Three Clients**[27] on the equivalent legislation in this Territory.

[40] As a matter of fact, too, in my judgment Candey were in a weak position. If they did refuse to act further, the trial would almost certainly have been unable to proceed in April 2016. An adjournment (if it were granted at all) would materially weaken the liquidators' bargaining position vis-à-vis the defendants to the London Litigation. I accept Ms. Toube QC's submission that, in reality, the only substantial prospect Candey had of recovering its fixed fee was if the trial continued in April 2016 and PHRL won, or if the liquidators made an advantageous settlement.

[41] Insofar as it is necessary to take into the account the background facts in assessing whether the liquidators agreed to proceed on the basis of the FFA or elected to adopt the FFA, these are indications against any adoption.

[26] 1974 c 47.
[27] BVIHC (COM) [redacted] (determined 25th May 2020).

[42] So far as adoption of the FFA is concerned, the order of 26th February 2016 of Bannister J is of particular importance. This allowed the liquidators to continue the London Litigation, but only if they had a suitable funding arrangement (with adequate fortification) in place by 2nd March 2016. That never occurred.

[43] It was common ground between counsel that the question of election had to be considered objectively: see the **Grapecorp** case. Viewed against the correspondence, which I have set out, in my judgment objectively there was no election by the liquidators to adopt the FFA.

[44] Accordingly, Candey's claim fails. However, the **Lundy Granite** point was fully argued. Since the matter may go further, I shall consider this point on the assumption that there was an adoption by the liquidators of the FFA.

Lundy Granite

[45] The **Lundy Granite** principle had its origin in the nineteenth century. The **Companies Act 1862** (UK)[28] prevented a landlord from levying a distress against a company after it had been wound up without leave of the Court. In **Re Progress Assurance Co; Ex parte Liverpool Exchange Co**,[29] Progress, the tenant, was wound up on 22nd June 1869. In September 1869, Exchange, the landlord, levied a distress for the then outstanding rent on Progress's offices. Furniture was seized and subsequently sold for £152. The liquidators gave Exchange possession of the premises on 19th November 1869. The £152 was paid into Court and the issue was whether it should be paid to the landlord or to the liquidators (leaving the landlord to prove in the liquidation for the outstanding rent).

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[28] 25 & 26 Vict c 89 section 163.
[29] (1870) LR 6 Eq 370 at p 372.

[46] Lord Romilly MR held:

> "In all the cases in which an execution or distress has been allowed, it has issued before the date of the winding-up order. The only exception to the operation of [section 163] when distress is issued after the winding-up order is where the company has retained, not merely formal, but actual possession of the property for the purpose of carrying on the business of the liquidation; but here the offices were retained for the benefit of all parties, and the Exchange Company never required possession to be given up to them till the 19th of November."

[47] **Lundy Granite** itself was different in that the liquidator had used the premises for purposes of the liquidation. James LJ, sitting in the Court of Appeal in Chancery, held:[30]

> "[I]n some cases between the landlord and the company, if the company for its own purposes and with a view to the realization of the property to better advantage, remains in possession of the estate, which the lessor is therefore not able to obtain possession of, common sense and ordinary justice require the Court to see that the landlord receives the full value of the property. He must have the same rights as any other creditor, and if the company choose to keep the estates for their own purposes, they ought to pay the full value to the landlord, as they ought to pay any other person for anything else, and the Court ought to take care that he receives it."

[48] Mellish LJ was to the same effect:

> "If the official liquidator, for the convenience of the winding-up, does not surrender the lease, but continues to keep possession for the purpose of obtaining a better price for the goods [stored on the land], the landlord should not be deprived of his right to recover his rent."

[49] What was the rent to which the landlord was entitled under the **Lundy Granite** principle? In the nineteenth century, rents were generally payable in arrears, so the **Apportionment Act 1870** (UK)[31] readily allowed the calculation of the rent for the period during which the liquidator held leased property for the benefit of the liquidation. The situation where rent was payable in advance was different,

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[30] (1871) LR 6 Ch App 462 at p 466.
[31] 33 & 34 Vict c. 35.

because there could be no statutory apportionment. This gave rise to caselaw which held that the key question was when the obligation arose. The first of these cases was **Re Levi & Co Ltd**,[32] where a liquidator adopted a lease, but was then held liable to pay the landlord's claim for dilapidations in full, notwithstanding that the property was already in a dilapidated state when the company was ordered to be wound up.

[50] This "all or nothing" approach was adopted by His Honour Judge Purle QC, sitting as a High Court judge, in **Goldacre (Offices) Ltd v Nortel Networks UK Ltd (in administration)**.[33] In that matter, the administrators had occupied about a quarter of the demised premises for the purposes of the administration, but the judge held they had to pay the whole of the rent, not just the portion associated with the part actually used. The same approach was taken by His Honour Judge Pelling QC, sitting as a High Court judge, in **Re Luminar Lava Ignite Ltd (in administration)**.[34] The company was put into administration the day after the quarter day on which rent was payable in advance. The judge held that, notwithstanding that the administrator had used the property, nothing was payable as an expense of the administration, because the debt had fallen due before the commencement of the administration.

[51] These cases rejected earlier cases going the other way. In **Shackell & Co v Chorlton & Sons**[35] rent was payable in advance. Kekewich J ordered that it should be apportioned, so that the company should only pay the rent during the period the liquidator actually used the property demised. **Re ABC Engineering Co Ltd (No 3)**[36] was to the same effect. So too was **Re Atlantic Computer Systems plc**,[37] which concerned computers granted on hire purchase to Atlantic, which had subsequently gone into administration. The company sub-let the

[32] [1919] 1 Ch 416.
[33] [2009] EWHC 3389 (Ch), [2010] Ch 455.
[34] [2012] EWHC 951 (Ch), [2014] Ch 165.
[35] [1895] 1 Ch 378.
[36] [1970] 1 WLR 702.
[37] [1992] Ch 505 at p 540.

computers to end users. The Court of Appeal ordered that rents from the sub-lessees should be paid to the head-lessors during the period of the administration (subject to a cap in the sum of the rent payable to the head-lessors).

[52] All of these cases were reviewed by Lewison LJ sitting in the English Court of Appeal in **Jervis v Pillar Denton Ltd**.[38] He held:

> "101. The true extent of the [**Lundy Granite** or salvage] principle, in my judgment, is that the office holder must make payments at the rate of the rent for the duration of any period during which he retains possession of the demised property for the benefit of the winding up or administration (as the case may be). The rent will be treated as accruing from day to day. Those payments are payable as expenses of the winding up or administration. The duration of the period is a question of fact and is not determined merely by reference to which rent days occur before, during or after that period. This, in my judgment, is the way that James LJ formulated the underlying principle in **Re Lundy Granite Co** itself.
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> 102. In my judgment Judge Pelling QC lost sight of the fact that the salvage principle is founded in equity and not on the common law. How the common law would view an instalment of rent payable in advance is not determinative of how equity would treat it. In my judgment **Shackell & Co v Chorlton & Sons** and **In re Atlantic Computer Systems plc** encapsulate the right approach. I would therefore overrule the **Luminar** case and allow the appeal. As noted, in **Shackell & Co v Chorlton & Sons** Kekewich J adopted a 'wait and see' approach to advance *payments falling* due during a period of beneficial retention. That, too, in my judgment, represents the correct application of the salvage principle. In my judgment Judge Purle QC was also wrong to apply the 'adoption principle'. I would therefore also overrule the **Goldacre** case [and] allow the cross-appeal."

[53] In treating the **Lundy Granite** principle as a principle of equity, Lewison LJ was following Lord Hoffmann in **Re Toshuku Finance UK plc**.[39]

[54] The case of **Re Portsmouth City Football Club Ltd**, on which Mr. Haque QC put particular weight, was not cited in **Jervis**. The relevant issue in that case was the liability of administrators to pay solicitors' fees as part of the expenses of the administration. Morgan J treated the issue as "all or nothing", thus following the

[38] [2015] EWCA Civ 189, [2015] Ch 87.
[39] [2002] UKHL 6, [2002] 1 WLR 671 at para [29].

Levi & Co Ltd approach. However, his observations were *obiter*. The solicitors' retainer had been terminated on 12th February 2010. The company only entered administration on 26th February 2010. No question of the administrators' adopting the solicitors' retainer could have arisen. In my judgment, in the light of **Jervis**, **Portsmouth City FC** is no longer good law on the "all or nothing" point.

[55] For completeness, I should also mention that in **Powdrill v Watson**[40] Lord Browne-Wilkinson approved **Levi & Co Ltd**. However, **Powdrill** was a case on the adoption of contracts of employment, where there were specific (and very different) statutory provisions[41] to those of the general law of insolvency. What he said about **Levi** was therefore *obiter*. Lewison LJ in **Jervis** refused to follow it, so Lord Browne-Wilkinson's *dictum* is in my judgment no longer good law: see

Shinners and another v London Trocadero (2015) LLP.[42]

[56] Mr. Haque QC made something of a *cri de coeur* in asserting that, if FFAs were not enforceable on the facts of a case such as the present, access to justice would be severely hampered. Solicitors, he submitted, would refuse to act for impecunious clients, if they could not enforce their FFAs. The difficulty with this argument is that Candey would have had no difficulty enforcing their entitlement under their FFA, if they had not entered the deed of charge. But for the deed of charge, they could have recovered by way of their solicitors' lien. The alleged problem of access to justice only arises because of Candey's own misguided steps to obtain a different security to that given to solicitors by operation of law.

[57] Standing back, therefore, in my judgment the position is this. Even if the liquidators adopted the FFA (and I have held that they did not), the effect would not be that the whole of the fixed fee payable under the FFA would stand to be paid as if it were an expense of the liquidation. Instead, the amount which Candey could recover for three and a half weeks' work between the appointment of the

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[40] [1995] 2 AC 394 at 450.
[41] Insolvency Act 1986 c 45 (UK) section 19(5).
[42] [2019] EWHC 2932 (Ch) (ICC Judge Barber).

liquidators and the substitution of Stephenson Harwood LLP as the solicitors for the company would be the value of the services provided.

[58] We know what the value of those services was, because His Honour Judge Davis-White QC has determined the figure: see para [20] above. Those monies have been paid. Therefore, nothing further would be recoverable by Candey under the **Lundy Granite** principle.

[59] I can turn to the submission of Ms. Toube QC on the "joint benefit" point quite quickly. As was held as early as **Re Progress Assurance Co**, if the liquidators retain the premises not just for the benefit of the insolvent estate, but for the benefit of all parties, including the landlord, then the **Lundy Granite** equity does not arise. Despite the passage of time, there are still some aspects of this principle which have not been fully worked through. In particular, there must be some minimum threshold below which the benefit for a landlord is so small, that it can properly be disregarded. In the current case, however, Candey's continuing work post-winding up was very much for their own benefit. It was the only means of recovering their fixed fee. Accordingly, even if Candey had succeeded on the other points above, they would in my judgment still have lost on this ground.

Conclusion

[60] Accordingly, I refuse paras (a) and (b) of Candey's application. I shall hear counsel on what follows in relation to the balance of the application.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar