

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0021

BETWEEN:

CANDEY LIMITED

Appellant

and

[1] RUSSELL CRUMPLER

[2] CHRISTOPHER FARMER

**(As Joint Liquidators of Peak Hotels and Resorts Limited) (in
liquidation)**

Respondents

Before:

The Hon. Mde. Louise Esther Blenman

The Hon. Mr. Mario Michel

The Hon. Mde. Vicki-Ann Ellis

Justice of Appeal

Justice of Appeal

Justice of Appeal [Ag.]

Appearances:

Mr. Muhammed Haque, QC for the Appellant

Mr. Andrew Willins for the Respondents

2021: February 25;
September 21.

Interlocutory Appeal — Liquidation proceedings — Order of learned judge dismissing application to treat monies owed under agreement as expense of liquidation — Whether order of learned judge final or interlocutory in nature - Application test — Rule 62.1(3) of the Civil Procedure Rules 2000 — Whether Candey Limited required leave to appeal - Application to strike out notice of appeal as nullity — Application for extension of time to seek leave to appeal — Whether Candey Limited satisfied the requirements to be granted an extension of time — Length of delay and whether delay excusable — Whether there was a realistic prospect of success on the appeal — Prejudice to parties — Errors made by legal practitioners in advising clients on matters of law and procedure

Candey Limited applied for certain orders in the liquidation of Peak Hotels and Resorts Limited (hereafter “Peak Hotels”), the principal one being an order that the sum of £3,860,637.48 (together with interest thereon) payable to them by Peak Hotels under a fixed fee agreement (“the FFA”) be paid as an expense of the liquidation. Mr. Russell Crumpler and Mr. Christopher Farmer, the joint liquidators of Peak Hotels, were the respondents to the application.

The application was dismissed by the learned judge on 2nd October 2020. Candey Limited, being dissatisfied with the decision of the learned judge, filed a notice of appeal on 22nd October 2020 by which they sought to appeal the orders contained in the judgment dated 2nd October 2020. The liquidators then filed an application on 31st December 2020 seeking an order that the appeal be struck out as a nullity on the basis that it was an interlocutory appeal filed without leave of the court. Candey Limited contended that, applying the application test, the issue before the learned judge was final and therefore the appeal was as of right and consequently no leave to appeal was required. Nonetheless, they filed an application on 6th January 2021, seeking an order granting them an extension of time to seek leave to appeal if the Court determined that leave was required.

From the oral arguments and written submissions, it became apparent that the two issues which arose for this Court’s determination were: (i) whether the judgment which Candey Limited sought to appeal was a final or interlocutory judgment; and (ii) whether the application for an extension of time within which to seek leave to appeal should be granted. The first issue involves the consideration of whether the appeal lies as of right as an appeal against a final order and therefore the time for filing the notice of appeal would be 42 days from the date of the order, as per rule 62.5(1)(c) of the Civil Procedure Rules 2000 (“the CPR”); or an interlocutory order for which leave to appeal is required and which leave ought to have been applied for within 14 days of the making of the order, in accordance with rule 62.2(1) of the CPR.

Held: striking out the notice of appeal; dismissing the application for an extension of time within which to seek leave to appeal; and ordering that Candey Limited shall bear the costs of the applications in the amount of US\$3,000.00, to be paid to the respondents herein within 14 days of the date of this order, that:

1. The effect of Candey Limited’s application was to obtain an order that by virtue of the ‘adoption’ of the FFA by the liquidators, the sum of £3,860,637.48 under the FFA was an expense of the liquidation and therefore ranked higher in the statutory waterfall and, consequently, ahead of the other creditors. Irrespective of how Candey Limited’s application was decided, it would not have determined all of the issues between the parties. Candey Limited’s application was a part of the broader liquidation action which centered on the winding up of Peak Hotels and was solely focused on Candey Limited’s rank in the insolvency waterfall. This is not determinative of the liquidation proceedings. Accordingly, the order dismissing Candey Limited’s application is interlocutory in nature and is not excepted from the leave requirement outlined in section 30(4) of the Supreme Court Act.

Section 30(4) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**, Cap. 80 of the Laws of the Virgin Islands; Rules 62.1(3), 62.2(1), 62.5(1)(b) of the

Civil Procedure Rules 2000 applied; **Nigel Hamilton-Smith et al v Alexander M. Fundora** ANUHCVP2010/0031 (delivered 31st August 2010, unreported) followed.

2. It is well settled that this Court's jurisdiction to hear and determine appeals is derived from statute. Accordingly, in circumstances where the appeal is an interlocutory appeal for which leave is required in accordance with rule 62.5(1)(b) of the CPR and the notice of appeal is filed without such leave, this Court has no jurisdiction to hear the appeal and the appeal must be struck out as a nullity.

Nevis Island Administration v La Corpproprete du Navire J31 St. Kitts and Nevis Civil Appeal No. 7 of 2005 (delivered 29th December 2005) followed; **Pirate Cove Resorts Limited v Euphemia Stephens** [2003] ECSCJ No. 19 (delivered 5th March 2003) followed; **Oliver McDonna v Benjamin Wilson Richardson** [2007] ECSCJ No. 96 (delivered 29th June 2007) followed; **Antigua Commercial Bank v Louise Martin** [2008] ECSCJ No. 2 (delivered 15th January 2008) followed.

3. The grant of an extension of time involves the exercise of the Court's discretion. In the exercise of its discretion, the Court is guided by a consideration of factors beginning with the length and reason for delay. The Court also considers the prospect of success in the appeal if the extension of time is granted, as well as the degree of prejudice to the parties if the extension is granted or refused. In this case, the 11-week delay in seeking leave to appeal was clearly inordinate and the sole reason advanced by Candey Limited, being the error made by their legal practitioners as to the nature of the order being appealed, does not suffice as a satisfactory explanation. This is so given the clear provisions of the CPR and the Supreme Court Act as to when an order or judgment is interlocutory and requires leave, and the pronouncements of the Court that orders made in the course of liquidation proceedings, whilst the liquidation subsists, are not final orders.

Carleen Pemberton v Mark Brantley SKBHCVAP2011/009 (delivered 14th October 2011, unreported) followed.

4. It is well-settled that an appellate court will not lightly interfere with the factual findings, evaluations and inferences made by the court below. Having perused the judgment of Jack J [Ag.], in particular, the aspects of it that Candey Limited have sought to impugn, there is no basis for this Court to interfere with the judge's findings. Candey Limited has neither demonstrated any flaw, nor has this Court found any demonstrable flaw, in the judge's reasoning and conclusion. The findings of fact made by the learned judge were both reasonable and supported by the evidence, and ought not to be disturbed by this Court. Similarly, there is no discernible issue with the learned judge's appreciation and application of the law. Accordingly, Candey Limited has not crossed the hurdle of satisfying this Court that it has a realistic prospect of success on an appeal.

Watt (or Thomas) v Thomas [1947] A.C. 484 applied; **Yates Associates Construction Company Ltd v Blue Sand Investments Limited** [2016] ECSCJ

No. 63 (delivered 20th April 2016) followed; **Shaista Trading Company Limited v First Caribbean International Bank (Barbados) Ltd** [2021] ECSCJ No. 534 (delivered 26th April 2021) followed.

5. In a 4-year period, Candey Limited has repeatedly litigated to recover the entirety of the amount provided for in the FFA, with the application before the learned judge in the court below being 'the fourth round'. It is evident that the litany of litigation will result in some degree of prejudice being occasioned to the creditors if the liquidators were subjected to another round of litigation on a claim which has been rejected in both the English and the BVI courts.

Carleen Pemberton v Mark Brantley SKBHCVAP2011/009 (delivered 14th October 2011, unreported) followed.

JUDGMENT

Introduction

- [1] **MICHEL JA:** On 7th August 2020, Candey Limited applied for certain orders in the liquidation of Peak Hotels and Resorts Limited (hereafter "Peak Hotels"). The respondents to the application were Mr. Russell Crumpler and Mr. Christopher Farmer, as joint liquidators of Peak Hotels (hereafter "the liquidators"). The principal order which Candey Limited sought was that the sum of £3,860,637.48 (together with interest thereon) payable to them by Peak Hotels under a fixed fee agreement ("the FFA") be paid as an expense of the liquidation pursuant to section 273 of the **Insolvency Act**¹ and rule 199 of the **Insolvency Rules, 2005**² of the Territory of the Virgin Islands ("the BVI").
- [2] The application was heard by Jack J [Ag.] on 16th and 18th September 2020, and on 2nd October 2020 he denied Candey Limited's application for the £3,860,637.48 to be paid to them by Peak Hotels as an expense of the liquidation.

¹ Act No. 5 of 2003.

² S.I No. 45 of 2005.

- [3] On 22nd October 2020, Candey Limited filed what the liquidators refer to as ‘the purported notice of appeal’ appealing against “the decision” of Jack J. [Ag] “contained in the judgment dated 2 October, 2020”.
- [4] On 31st December 2020, the liquidators filed a notice of application seeking an order that the appeal be struck out as a nullity on the basis that it was an interlocutory appeal filed without the leave of the court. The strike out application was accompanied by an affidavit sworn to by one of the two liquidators, with the consent of the other. In the affidavit, the liquidators say that Candey Limited’s application was inherently interlocutory in nature, having been made in liquidation proceedings. The liquidators say too that the interlocutory nature of Candey Limited’s application is also evident from the way the application was commenced, that is, by means of an ordinary application, and not an originating application. They outlined the clear provisions of rule 13 of the **Insolvency Rules** in paragraph 28 of the affidavit in support of this submission.
- [5] According to the liquidators, the purported notice of appeal was filed on 22nd October 2020 without leave of the court and without being accompanied by an application for leave. They say that it is apparent from a letter dated 23rd December 2020 that Candey Limited is claiming to be of the understanding that its appeal exists as of right. They say too that this Court has repeatedly held that applications made within liquidation proceedings are interlocutory in nature, being applications which do not finally resolve the issues in the liquidation. The liquidators accordingly invited this Court to strike out the notice of appeal as being a nullity, having been filed without leave of the court.
- [6] On 6th January 2021, Candey Limited filed a notice of application seeking an order granting them an extension of time to seek leave to appeal, if this Court determines that they require leave to appeal. They also ask that, if an extension of time is granted to them to seek leave to appeal, that leave be granted to them to appeal against ‘the Order of Justice Jack dated 26 October 2020’.

- [7] In their notice of application, Candey Limited sets out several grounds of the application, which are really submissions in support of their application for an extension of time to appeal and for leave to appeal. The notice of application is supported by a witness statement of Ashkhan Darius Candey, the Managing Partner of Candey Limited, which witness statement is a repetition, continuation, and elaboration of the submissions made in the notice of application.
- [8] Candey Limited contends that, applying the ‘application test’ outlined in rule 62.1(3) of the **Civil Procedure Rules of the Eastern Caribbean 2000** (“the CPR”), the issue before Jack J [Ag.] was final, as distinct from interlocutory, and therefore no leave was needed to appeal. The basis for this understanding, they contend, is that the question of whether the monies are recoverable as an expense of the liquidation, whichever way it was decided, finally determines their position in terms of the statutory waterfall and would be conclusive of all issues between them in respect of the present liquidation.
- [9] Candey Limited also avers that Jack J [Ag.] dismissed the application on 26th October 2020. Therefore, and contrary to the liquidators’ assertion that the notice of appeal was out of time, the deadline for filing of an application seeking leave to appeal was 9th November 2020 and their notice of appeal, having been filed on 22nd October 2020, was in time.
- [10] On 15th February 2021, a skeleton argument was filed on behalf of the liquidators in support of their application to strike out the appeal as being a nullity, having been brought without leave of the court. In their skeleton argument, the liquidators submitted that the judgment of Jack J [Ag.] was interlocutory and leave to appeal was therefore required, not sought, or granted, and so the appeal was a nullity and should be struck out as having been instituted without the leave of the court.
- [11] The liquidators also submit that an extension of time to seek leave to appeal should not be granted to Candey Limited because the delay in filing the application for leave

was inordinate, there is no good reason for the delay, and there is prejudice caused by the delay to the liquidators and to the general body of creditors. They also submit that the appeal does not have a realistic prospect of success or, to quote the actual language in their skeleton argument, it is 'an appeal which carries no real conviction'.

- [12] Once it is established that Candey Limited's intended appeal is an interlocutory appeal for which leave is required, then, in accordance with Rule 62.2(1) of the CPR, the application for leave to appeal had to be made within 14 days of the order against which leave to appeal is sought. The order of the court which Candey Limited is seeking to appeal is - as they stated in their purported notice of appeal – 'the judgment dated 2 October, 2020.'
- [13] Candey Limited can make nothing of the fact that Jack J [Ag.] made an order on 26th October 2020 which states that Candey Limited's application stands dismissed, as if to suggest that the order which they are seeking to appeal was made on 26th October 2020 and not on 2nd October 2020. Of course, if that were so, then they could not have filed what they purport to be a notice of appeal 4 days before the making of the order which they are seeking to appeal, and they would not have said in the purported notice of appeal that they were appealing against the decision of the judge "contained in the judgment dated 2 October, 2020". All this is to say that Candey Limited should have made their application for leave to appeal 14 clear days after 2nd October 2020 which, on the calculation of clear days under rule 3.2, sub-rules (3) and (5) of the CPR, would be by 19th October 2020. For the record, Jack J [Ag.]'s order of 26th October 2020 was made in proceedings held - in accordance with the concluding line of his judgment – '[to] hear counsel on what follows in relation to the balance of the application', this after dismissing (on 2nd October 2020) Candey Limited's application for an order that the sum of £3,860,637.48 be paid to them as an expense of the liquidation.

[14] Not only did Candey Limited not make an application for leave to appeal by 19th October 2020, but even if a court might have been minded, upon application, to treat the notice of appeal as an application for leave to appeal, Candey Limited would still have been out of time by 3 days. But what is before this Court is not an application to treat the purported notice of appeal as an application for leave to appeal, rather, it is an application by the liquidators to strike out the notice of appeal on the basis that it is a nullity, having been filed without the leave of the court.

[15] The first issue to be determined is whether the judgment which Candey Limited is seeking to appeal is a final or interlocutory judgment. If it is a final judgment, then no leave is required to appeal it and a notice of appeal can be filed within 42 days of the date of the judgment, as per rule 62.5(1)(c) of the CPR. This would mean that the notice of appeal filed by Candey Limited on 22nd October 2020 would be a valid notice of appeal and the application to strike it out must be dismissed. If the appeal is an interlocutory appeal for which leave is not required, then, in accordance with rule 62.5(1)(a), the notice of appeal can be filed within 21 days of the date of the judgment. This would mean that the notice of appeal filed on 22nd October 2020 is valid and, in this case also, the application to strike it out must be dismissed. If, however, the appeal is an interlocutory one for which leave is required according to rule 62.5(1)(b), the notice of appeal filed on 22nd October 2020 is invalid and must be struck out, because it was filed outside of the time prescribed in the Rules and is therefore a nullity.

Discussion and Analysis

Issue 1

[16] It is convenient to commence the discussion of this issue with reference to the relevant statutory provisions and their application to the circumstances of this case.

[17] Section 30(4) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**³ (hereafter “the Supreme Court Act”) provides that:

³ Cap. 80 of the Laws of the Virgin Islands.

“No appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge except in the following cases—

- (i) where the liberty of the subject or the custody of infants is concerned;
- (ii) where an injunction or the appointment of a receiver is granted or refused;
- (iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability;
- (iv) in such other cases, to be prescribed by rules of court, as may in the opinion of the authority having power to make such rules of court be of the nature of final decisions.” (Underlining supplied)

[18] Rule 62.5(1) of the CPR stipulates that:

“The notice of appeal must be filed at the appropriate court office –

- (a) in the case of an interlocutory appeal where leave is not required, within 21 days of the date the decision appealed against was made;
- (b) in an interlocutory appeal where leave is required, within 21 days of the date when such leave was granted; or
- (c) in the case of any other appeal, within 42 days of the date when judgment is delivered or the order is made, whichever is earlier.”

[19] Where leave is required, rule 62.2(1) stipulates that the applicant must apply for leave within 14 days of the date of the order against which leave to appeal is being sought.

[20] The application test has been accepted in this jurisdiction as the correct test of whether a judgment or order of a court is final or interlocutory for the purposes of determining whether a party requires leave of the court to appeal. Rule 62.1(3) of the CPR reflects this. It states:

“In this Part -

- (a) a determination whether an order or judgment is final or interlocutory is made on the “application test”;
- (b) an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided; and
- (c) an order on an application for disclosure against a person who is not a party is a final order.” (Underlining supplied)

[21] The application test has been consistently applied in a number of decisions of this Court.⁴ In the case of **Nigel Hamilton-Smith et al v Alexander M. Fundora**,⁵ Edwards JA explained the test in this way:

“... it is well established in a plethora of decisions that our courts apply the “application test” to determine whether or not the order or decision is interlocutory. The observations of Vaughan Williams LJ in Herbert Reeves reflect our preferred approach. The “application test” looks at the outcomes that were possible on the application. The test is whether a decision on the application had it been decided in favour of the appellant or the respondent would have brought an end to the proceedings...A final order must generally be one which ends the litigation and leaves nothing for the court to do but execute the judgment. In other words, the final order must conclusively determine the substantive rights of the parties.” (Underlining supplied)

[22] The question to be decided is whether this appeal lies as of right as an appeal against a final order of the court, so that the time for filing a notice of appeal would be 42 days from the date of the order, as per rule 62.5(1)(c) of the CPR; or whether it is an interlocutory appeal for which leave is required and ought to have been applied for within 14 days of the making of the order sought to be appealed, and the notice of appeal filed within 21 days after the date of the order granting permission to appeal. This then engages the preliminary issue of whether or not the decision of Jack J [Ag.] was final or interlocutory, in the resolution of which it is critical to examine whether the determination of Candey Limited’s application, either way, would have been dispositive of the legal issues between the parties.

[23] I find the pronouncement of Edwards JA in **Nigel Hamilton-Smith et al** to be apposite. The issue in that appeal was whether the judgment and order of the court removing the appellants as joint liquidators of a company were interlocutory in nature and therefore required leave in order to appeal. Edwards JA, at paragraph

⁴ See *Oliver McDonna v Benjamin Wilson Richardson*, Anguilla High Court Civil Appeal No. 3 of 2005 (delivered 29th June 2007, unreported); *TSJ Engineering Consulting Limited v Al-Rashaid Petroleum Investment Company et al*, Territory of the Virgin Islands High Court Civil Appeal No. 13 of 2010 (delivered 27th July 2010, unreported).

⁵ ANUHCVP2010/0031 (delivered 31st August 2010, unreported).

12 of the judgment, observed that in addition to looking at the possible outcomes of the application, the court also has 'to consider the form of the proceedings in which the application is brought'.

[24] In this case, the effect of the application made by Candey Limited was to obtain an order or a declaration that by virtue of the 'adoption' of the FFA by the liquidators, the entire sum of £3,860,637.48 under the FFA was an expense of the liquidation and therefore ranked higher in the statutory waterfall and, consequently, ahead of the other creditors. The liquidators have reiterated several times in their submissions, both written and oral, that they are not disputing that Candey Limited is entitled to claim for the monies owed to them, but it is merely a question of priority. Candey Limited's application was a part of the broader liquidation action which centered on the winding up of Peak Hotels and was solely focused on Candey Limited's rank in relation to the other unsecured creditors. This is not determinative of the liquidation process, which involves the distribution of realized assets, the preparation and delivery of the liquidators' report to the Registrar, and the eventual declaration of dissolution and striking off of Peak Hotels from the register of companies.

[25] It is beyond doubt that irrespective of how Candey Limited's application was decided, it would not have determined all of the issues between the parties. If the application was decided in favour of Candey Limited, this would only have determined their priority in the statutory waterfall, as distinct from determining all issues in the winding up of Peak Hotels. Similarly, a determination favourable to the liquidators or, put differently, adverse to Candey Limited, would also not have resolved all issues in the winding up of Peak Hotels. It is also to be noted that none of the exceptions outlined in subparagraphs (i) to (iv) of section 30(4) of the Supreme Court Act is engaged in this appeal and the matter therefore falls squarely within rule 62.5(1)(b). It follows then that the appeal is an interlocutory appeal for which leave to appeal is required.

[26] It is well settled that this Court's jurisdiction to hear and determine appeals is derived from statute. Accordingly, the next issue which requires attention is whether this Court has jurisdiction to hear the purported appeal in circumstances where leave has not been obtained either from this Court or the court below.

[27] It is trite that an appeal which is filed without leave of the court when leave is required will result in the appeal being struck out as a nullity. This has been exemplified in a plethora of decisions of this Court.⁶ It is clear therefore that Candey Limited's purported notice of appeal is a nullity, since no leave had been granted to appeal the judgment of Jack J [Ag].

Issue 2

[28] This takes me to the consideration of whether Candey Limited has made good on its 'protective measure' application for an extension of time within which to seek leave to appeal.

[29] In addressing the question of whether this Court should extend time to apply for leave to appeal, guidance can be sought and obtained from previous decisions of the Court. As stated by Pereira JA (as she then was) in the case of **Carleen Pemberton v Mark Brantley**,⁷ the exercise of this discretionary power ought to be done judicially and with the ultimate aim of giving effect to the overriding objective to ensure that justice is done between the parties. At paragraph 13 of the judgment, Pereira JA discussed the principles which should guide the Court's consideration. She said:

"Much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course the length of the delay, and whether

⁶ See: *Nevis Island Administration v La Corproprete du Navire J31 St. Kitts and Nevis Civil Appeal No. 7 of 2005* (delivered 29th December 2005); *Pirate Cove Resorts Limited v Euphemia Stephens* [2003] ECSCJ No. 19 (delivered 5th March 2003); *Oliver McDonna v Benjamin Wilson Richardson* [2007] ECSCJ No. 96 (delivered 29th June 2007); *Antigua Commercial Bank v Louise Martin* [2008] ECSCJ No. 2 (delivered 15th January 2008)

⁷ SKBHCVAP2011/009 (delivered 14th October 2011, unreported).

there is any good reason for it which makes it excusable. This is by no means an exhaustive list of all the factors which may have to be considered in the exercise. Another very important factor, for example, where the application, as here, is to extend time to appeal, is a consideration of the realistic (as distinct from fanciful) prospect of success.”

[30] The witness statement of Ashkar Darius Candey filed on 6th January 2021 seeks to address the factors which the Court ought to take into account in exercising its discretion. The skeleton argument filed on 29th January 2021 also attempts to do so. I will, at this juncture, specifically address each of these factors.

a. Length and reason for delay

[31] Candey Limited submits that they pursued their appeal expeditiously based on their understanding that the decision was final and consequently required no leave. They contend alternatively, that even if leave were required, it could have been applied for within 14 days of the order dated 26th October 2020. There is nothing to this argument for reasons already outlined in paragraph 13 above. They also argue that the liquidators raised no objection to the notice of appeal until 31st December 2020 when the strike out application was made and they, in response, moved expeditiously to respond.

[32] As I mentioned earlier, an application for leave to appeal the order of Jack J [Ag.] made on 2nd October 2020 should have been filed, by my calculation of clear days, on 19th October 2020. No such application was filed by that date. The application for an extension of time to seek leave to appeal was filed on 6th January 2021, which is 11 weeks after the time by which it ought to have been filed. A delay of 11 weeks in filing an application which should have been filed in 2 weeks is inordinate. This, however, is not determinative of the application, and the reason for the delay ought to be considered.

[33] Candey Limited acknowledged that there was an 11-week delay in filing the application for leave and gave as the reason for the delay the error made by their legal advisors as to the nature of the order sought to be appealed. This was the only

reason advanced for what I have found to be an inordinate delay. Errors made by legal practitioners in advising their clients on matters of law and procedure have been viewed by courts as neither excusing non-compliance with legal process nor meriting punishment of the affected party.

- [34] I am of the view that the nature of the error and the novelty of the issue should guide the court, in the exercise of its discretionary powers, in determining how to treat with the error. In this case, the nature of the error was such as to make it almost inexcusable, considering the very clear provisions of the law, both in the Supreme Court Act and the Civil Procedure Rules, as to the determination of when a judgment or order is interlocutory, requiring leave to appeal, and when it is final, so that no leave is required. Then too the issue of law involved partakes more in the nature of banality than novelty, so often has it been stated that orders made in the course of liquidation proceedings are not final orders whilst the liquidation proceedings subsist. I do not therefore find that there is good or satisfactory reason for the inordinate delay in seeking an extension of time to apply for leave to appeal the order of Jack J [Ag].

b. Prospect of success

- [35] Candey Limited has relied on the grounds outlined in their purported notice of appeal to advance their case of having a realistic prospect of success on the appeal. The grounds outlined essentially challenge the judge's factual and legal conclusions.
- [36] The consideration of this factor requires an expansion of the factual background to provide context.
- [37] The liquidators were appointed in February 2016, approximately 3 months after the FFA and Deed of Charge were entered into. The liquidators were hesitant to adopt the 'London Litigation' (in which Candey Limited represented Peak Hotels) and therefore sought and obtained advice on the merits of the litigation. They also sought funding for the litigation and settlement with the other parties. A settlement was

eventually reached in March 2016 and the liquidators appointed another counsel to represent them in the matter. This meant that Candey Limited remained as counsel on record for approximately 3 weeks following the liquidators' appointment. Essentially, Candey Limited's position before Jack J [Ag.] was that the liquidators 'adopted' the FFA and consequently the full amount provided for in the agreement was to be paid as an expense of the liquidation.

[38] A comprehensive review of the learned judge's carefully reasoned judgment indicated that he rejected this on 3 grounds. Having reviewed the correspondence and additional evidence before him, the judge found as a matter of law and fact that: (i) the question of election is to be determined objectively by the actions of the liquidators; and (ii) there was no such election by the liquidators to adopt the FFA. He then went on to explain that even if there was an adoption, the liquidators would only be liable to pay the fees incurred for the 3-week period between the appointment of the liquidators and when Candey Limited's retainer was terminated. The value of these services was already determined in the second round of litigation. Further, the judge concluded that the work undertaken by Candey Limited was also for their own benefit and excluded from the **Lundy Granite** principle.⁸ Thirdly, the judge also concluded that even if there was an adoption, in view of the decision in **Jervis v Pillar Denton**⁹ rejecting the "all or nothing" approach to the calculation of expenses, Candey Limited was not entitled to the full amount of £3,860,637.48.

[39] It is well-settled that an appellate court will not lightly interfere with the factual findings, evaluations and inferences made by the court below.¹⁰ Candey Limited would therefore have the uphill task of demonstrating that the judge's factual

⁸ Re Lundy Granite Co, Ex parte Heaven (1871) LR 6 Ch App 462. (Under this principle, debts which arise from contracts entered into prior to a liquidation whereby the contract was continued by the liquidator for the benefit of the insolvency can and should be proved and recovered as a liquidation expense).

⁹ [2015] Ch 87 at para [77].

¹⁰ Watt (or Thomas) v Thomas [1947] A.C. 484 applied; Yates Associates Construction Company Ltd v Blue Sand Investments Limited [2016] ECSCJ No. 63 (delivered 20th April 2016); Shaista Trading Company Limited v First Caribbean International Bank (Barbados) Ltd [2021] ECSCJ No. 534 (delivered 26th April 2021)

conclusions and the evaluation of the said facts are unsupported by the evidence or that, in the circumstances, his decision was plainly wrong.

- [40] Having perused the judgment of Jack J [Ag.], especially the aspects of it which Candey Limited has sought to impugn, I can find no basis for this Court to interfere with the judge's findings. Candey Limited has neither demonstrated any flaw, nor have I found any demonstrable flaw, in the judge's reasoning and conclusion. In my estimation, the findings of fact made by the judge were both reasonable and supported by the evidence and ought not to be disturbed by this Court. Similarly, I take no issue with the judge's appreciation and application of the law. To my mind, Candey Limited has not cleared the hurdle of satisfying this Court that it has a realistic prospect of success.

c. Prejudice to the respondent

- [41] On this limb, Candey Limited argues that the greater prejudice would be to them, since they would be unable to pursue their appeal despite acting promptly and in a manner which they thought correct, without any objections from the liquidators. It is plainly obvious though, and unmeriting of discussion, that the striking out of an appeal will disable the intended appellant from pursuing the appeal which has been struck out; and it adds nothing to the discussion to say that, in essence, the prejudice was really occasioned by the error of the intended appellant.
- [42] It is, however, noteworthy that Candey Limited has repeatedly litigated over a period of 4 years to recover the entire amount provided for in the FFA. Jack J [Ag.] observed that the application before him was the 'fourth round' of such a litigation, but this time they have sought an order that the fees were an expense of the liquidation. The learned judge stated that:
- "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."

[43] In the circumstances, I am of the view that there is clearly some degree of real prejudice which would be occasioned to the creditors who, as Mr. Willins has indicated, are entitled to finality. Subjecting the liquidators to another round of litigation on a claim which, albeit framed differently, has been rejected in both the English and the BVI courts would undoubtedly prejudice the creditors who are entitled to the proceeds of the company's realized assets.

Disposition and order

[44] In light of the foregoing, I make the following orders:

- (1) The notice of appeal filed on 22nd October 2020 is struck out as a nullity.
- (2) The application seeking an extension of time within which to seek leave to appeal is dismissed.
- (3) Candey Limited shall bear the costs of the applications in the amount of US\$3,000.00 to be paid to the respondents herein within 14 days of the date of this order.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Vicki-Ann Ellis
Justice of Appeal [Ag.]

By the Court

Chief Registrar