Neutral Citation Number: [2017] EWHC 3388 (Ch)

Case No: CR-2016-001012

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

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Wednesday, 22nd November 2017

Before:

HIS HONOUR JUDGE MARK RAESIDE QC
(Sitting as a Judge of the High Court)

- -

Between:

RUSSELL CRUMPLER & SARAH BOWER (JOINT LIQUIDATORS OF PEAK HOTELS & RESORTS LIMITED (IN LIQUIDATION))	**Applicants**
- and -	
CANDEY LIMITED	**Respondent**

- -
- -

MR. STEPHEN ROBINS (instructed by **Stephenson Harwood LLP**) for the **Liquidators**
MR. BENJAMIN WILLIAMS QC (instructed by **Candey LLP**) for the **Respondent**

- -

Approved Judgment

Digital Transcription of Marten Walsh Cherer Limited.,
1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Telephone No: 020 7067 2900. Fax No: 020 7831 6864.
Email: info@martenwalshcherer.com

JUDGE MARK RAESIDE QC:

Introduction.

1. This case is between Russell Crumpler and Sarah Bower in their capacity as joint Liquidators of Peak Hotels & Resorts Limited (in Liquidation) and the firm of solicitors, Candey Limited, and concerns the payment of fees for professional services provided to Peak Hotels & Resorts Limited under a Fixed Fee Agreement, which is disputed pursuant to Section 245(2) and (6) of the Insolvency Act 1986. There is apparently no authority on this point.

Procedural background.

2. On 27th September 2016, Russell Crumpler and Sarah Bower, as Joint Liquidators of Peak Hotels & Resorts Limited, issued an application in respect of the liquidation and Cross-Border Insolvency Regulations 2006 against Candey Limited seeking the following relief, so far as material, under paragraph 2(b) of the Application:

> "For the purposes of Section 245 of the 1986 Act (as modified by Article 23 of Schedule I of Regulations) the value of the services supplied to the Company by Candey at or after the creation of a Charge is limited to the lesser of: (1) £1,212,839 (being the time costs recorded during the period from 21st October 2015 including costs recorded after 8th February 2016), together with interest thereon at 8% (simple) p.a. from 2nd March 2016 to the date of payment of such sums; and (2) such amount as is in due course determined or agreed to be properly payable by a Company and/or assessed to be payable in respect of that period following any assessment and together with interest payable at 8% (simple) p.a. from 2nd March 2016 to the date of payment or any sum that is payable."

3. The previous two other issues in the Application were resolved in a judgment of HH Judge Davis-White QC [2017] EWHC 151 (Ch) namely: (1) that the charge was a floating charge (rather than a fixed charge) over the assets of Peak Hotels & Resorts Limited within Section 245(2) of the Act (see paragraph 103-110 of the judgment); and (2) the charge was created at the relevant time when Peak Hotels & Resorts Limited was unable to pay its debts within the meaning of Section 245(3) of the Act (see paragraphs 111-115 of the judgment). Consideration was also given to the Fixed Fee Agreement between Candey Limited and Peak Hotels & Resorts Limited, dated 9th October 2015 and, in particular, clauses 3 to 11 inclusive as cited in the judgment, together with a Charging Deed of the same date as security for the payment and discharge of all liabilities to Candey Limited pursuant to the Fixed Fee Agreement with Peak Hotels & Resorts Limited. Under the heading of "the value of the services supplied" paragraphs 116 to 120 inclusive of the judgment HH Judge Davis-White QC discussed the following:

> "As originally presented to me the submissions of the Liquidators were that the value of the services actually supplied was limited to Candey's time costs in the sum of £1,212,839, or such a lower sum as might be determined in the solicitor own

costs taxation. It appeared to me that whilst they were possible candidates for the valuing services provided, they were not the only ways. First it is increasingly common for solicitors to charge a fixed fee rather than by time costs. The question might therefore be, what on a fixed fee basis is the value of the services provided? I have no evidence of this basis of valuation." (Paragraph 116)

"Mr. Robins accepted at an early stage that a lump sum basis might be an appropriate way of valuing the services provided and I did not have sufficient evidence to assess the value of the services provided. As I understand it, what he had in mind by a lump sum, analogous to a lump sum, reached by way of a summary assessment of the costs by the court, than a detailed assessment. However, in my view and without determining the point, it seems at least arguable the services in fact provided (on the terms of the Fixed Fee Agreement) other than the terms relating to consideration) could be valued on the basis of a lump sum value rather than by way of court assessment. I am not at this stage convinced that the only way of valuing service provided is by way of a detailed assessment of costs as if they had been carried out on the solicitor and own client basis." (Paragraph 117)

"It was, as I understand it, common ground that if the question of value remained in issue in the light of my other findings then the point would have to be adjourned for further evidence and argument." (Paragraph 118)

"The second point on which I heard a certain amount of theoretical argument, was the manner in which the service provided are to be identified. In applying Section 245(6) and valuing the services supplied, how far are terms related to consideration (such as time of payment rather than quantum of payment) to be treated as terms ignored as being terms relating to 'consideration' and how far are they relevant terms for being taken into account? Similarly, and although the value to be identified is the value of the services supplied, how far is that service to include a facility which the company may not be called upon? To take the extreme example, is a repair or advice or bank facility service available for a period and which is provided at a certain cost is a 'service supplied'. Or is this service supplied only when the company calls down the facility (by asking for an actual repair or action advice for drawing on the bank facility). Given these abstract discussions here not tied to any particular facts in this case I decided there is nothing I can usefully say as regards the evaluation process for the purpose of s 245 Insolvency Act 1986. I accept what has been valued is the services supplied to the company and not the service contract to be supplied but that of course does not

> determine what the services were for these purposes 'provided'." (Paragraph 119)
>
> "As envisaged therefore, the question of full valuation under s 245 Insolvency Act 1986 will have to be dealt with separately on further evidence." (Paragraph 120)

4. Accordingly, without evidence available, there were two arguments: (1) whether valuing services can only be done on a time basis without regard to a fixed fee value; and (2) how does one value services when a facility is available but not called upon. I deal with both of these arguments as developed before me based on the evidence now provided. However, there are no findings made by HH Judge Davis-White QC that bind this court.

5. On 17th July 2017, an Order was made by HH Judge Davis-White QC to determine paragraph 2(b) of the Application, namely, the extent of the value of the services supplied by the Company to Candey on or after 21st October 2015. Directions were given for further factual witness evidence, expert reports, and a joint memorandum of the experts and the experts who would attend a one-day trial for cross-examination unless notified otherwise. No provision was made under CPR 35 P.D.11 for concurrent expert evidence.

6. This judgment is concerned with that remaining issue of the Application both for the true and proper meaning of the effect of Section 245 of the Insolvency Act 1986 and as a question of opinion evidence as to the value of the services provided by Candey Limited to Peak Hotels & Resorts Limited.

7. In accordance with that order (and in the event) the following factual and opinion evidence is before this court: (1) the fourth witness statement of Ashkhan Candey dated 7th August 2017, (2) the expert report of Peter Hurst dated 7th August 2017, (3) the fourth affidavit of Russell Crumpler dated 22nd September 2017, (4) the second affidavit of Sarah Bower dated 22nd September 2017, (5) the expert report of Andrew Thomas dated 21st September 2017, (6) The Joint Memorandum of experts dated November 2017, then without court order (7) the fifth witness statement of Ashkhan Candey dated 8th November 2017, (8) A further witness statement of Russell Crumpler dated 13th November 2017. The order is of some significance: Peter Hurst's report preceded that of Andrew Thomas, who, unless instructed by lawyers otherwise, had an opportunity in his opinion to consider all matters raised by Peter Hurst and thus assist the Court with the two arguments raised before HH Judge Davis-White as set out above.

8. The same counsel, Stephen Robins, who appeared before, provided a Skeleton Argument on behalf of the Liquidators dated 14th November 2017, and a new counsel, Benjamin Williams QC, provided the Respondent's Skeleton Argument also dated 14th November 2017.

General background facts.

9. The Confidential Fee Agreement between Candey Limited and Peak Hotels & Resorts Limited, dated 9th October 2015, is signed on 10th October 2015 by Caroline Turnbull, a sole director of Peak Hotels & Resorts Limited, and by Ashkhan Candey on 21st

October 2015, and had attached the standard terms of business of Candey Limited. I will deal with the Fixed Fee Agreement below.

10. On 21st October 2015, the same two parties signed a Deed of Charge and Security on the following basis: "As continuing security of the payment and discharge of all liabilities to Candey Limited pursuant to a fixed fee agreement of today's date (Fixed Fee Agreement)." It was by this means that the Confidential Fixed Fee Agreement came to be redefined in the Deed of Charge and Security as the "Fixed Fee Agreement". That is the term I will use in this judgment.

11. In explaining that fixed fee of £3,860,637.48 the fourth witness statement of Ashkhan Candey (see paragraph 44) says this: "The overall estimate of the cost as at 21st October 2015 across all matters was relatively rough and ready as it was impossible to foresee every cost which would be incurred…and broken down in my mind broadly as follows, giving rise to a total of some £4.7m…", and he proceeded to quantify seven particular elements of that sum.

12. More background is provided in Ashkhan Candey's first witness statement, dated 10th January 2017 (see paragraphs 71 to 100 inclusive) for the Fixed Fee Agreement and Deed of Security and Charge. Caroline Turnbull, the co-signatory to the Fixed Fee Agreement and the Deed of Security and Charge on behalf of Peak Hotels and Resorts Limited, also provided a short witness statement, dated 10th January 2017 (see paragraphs 29 to 32), which indicates in a straightforward way how these documents came about. Russell Crumpler's second affidavit dated 22nd September 2016 also deals with the background to this agreement. (see section B)

13. In support of the Application and the positive assertion as to the value of the services of Candey Limited, that second affidavit of Russell Crumpler served with the Application explains the sum of £1,212,839 as follows: "JLs (joint Liquidators) have performed an analysis of the Narratives and determined that the fees said to have been incurred by Candey on a time cost basis and their standard rates during the period from 1st October 2015 to 8th February 2016 inclusive (i.e. the commencement of liquidation) amount to £704,626. According to the Narratives from the period from 9th February 2016, the fees said to have been incurred by Candey on the time costs basis at their standard rates is in the sum of £508,213. The total fees of the time therefore amount to £1,212,851." (see paragraph 169.) This sum is based on timesheets kept by Candey Limited at the material time which were exhibited to Russell Crumpler's second affidavit.

Test.

14. Section 245(2)(a) of the Insolvency Act 1986 provides as follows:

> "Subject as follows, a floating charge on the company's undertaking or property created, at a relevant time is invalid except to the extent of the aggregate… (a) the value of so much of the consideration of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or afterwards, the creation of the charge."

15. Section 245(6) of the Act provides:

> "For the purposes of subsection (2)(a) the value of any goods or services supplied by way of consideration for a floating charge is the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the goods or services in the ordinary course of business and on the same terms (apart from the consideration) as those on which they were supplied to the company."

16. Assistance as to the true and proper construction of these two sections of the Insolvency Act 1986 is surprisingly thin. The usual textbook commonly referred to, Sealy & Milman, "Annotated Guide to Insolvency Legislation 2017", (2017 edition) states: "This subsection deals with the position when goods or services rather than 'new money' is the consideration provided for the charge. It is made clear that it is the true value of the goods or service that counts not the price or valuation the parties themselves have agreed upon as a consideration for the supply. The chargee cannot defeat the object of the Act by having the company credit him with an unrealistic sum." Peter Hurst cites this comment as being of assistance to his approach to his expert report for the valuation of the services provided by Candey Limited (see paragraph 4.4.4 of the Joint Memorandum of Experts). Stephen Robins' Skeleton Argument (see paragraph 35) also made reference to Armour and Bennett "Vulnerable Transactions in Corporate Insolvency" (2003) which notes this comment: "The search under Section 245 is for the 'value' of so much of the consideration for the creation of the charge as consists of' the specified tasks performed. The value of, for example, money paid is clearly assessed by reference to benefit received, not the amount merely promised. Indeed, in the context of goods or services supplied, Section 245(6) specifically provides that the value is assessed at the time they were supplied." (see paragraph 5.50.) I do not understand that Benjamin Williams QC disagrees with this general statement. No other textbook references or authority have been provided by either counsel on Section 245 of the Insolvency Act 1986. Benjamin Williams QC acknowledges that no authority has been identified to assist the court in determining the correct approach to Section 245 (see paragraph 16 of his Skeleton Argument) and in his oral closing submissions he accepted the quote from Sealy & Milman (supra) as being a correct proposition of law.

Fixed Fee Agreement.

17. The Fixed Fee Agreement contains the following express terms:

> "1. This agreement is made between Candey Limited (Candey) and Peak Hotels & Resorts Limited (PHRL) and is subject to the attached standard terms of business. To the extent that any of those terms conflicts with this agreement the terms of this agreement shall prevail. This agreement supersedes in cases any previous agreement between Candey and PHRL in respect of fees. In signing this agreement PHRL confirms that it has obtained independent legal advice in respect of this agreement and it accepts that Candey is not providing advice to PHRL in respect of this agreement. PHRL also agrees it is not acting under duress and undue influence and waives any rights, having obtained independent legal advice to contend that it is.

2. Subject to the terms of this agreement Candey will continue to provide PHRL in (1) High Court claim…the tariff proceedings (HKIAC arbitrations…(3) proceedings in a BVI Commercial Court…and Eastern Caribbean Supreme Court of Appeals…(4) High Court claims…the power capital proceedings, and (5) other matters expressly agreed from time to time (including ongoing general advice).

3. As a consequence of (5) Pontwelley's foreclosure in New York and anticipating consequential claims in London, BVI, New York, to include injunctive relief and (double) derivative claims (2) the adjournment of a trial in tariff proceedings (3) potential Chapter 11 proceedings (4) the apparent failure of opponents in the arbitration and Tarek proceedings to comply with their disclosure obligations and (5) anticipated security for costs applications in the arbitration and Power Capital proceedings, Candey's previous estimate of costs has been revised to £5m to £6m. The actual figure could be significantly higher or it could be substantially lower if an early settlement was achieved.

4. PHRL does not wish to pay Candey's invoiced and unbilled costs incurred to date to provide further funds advanced 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 obliged to pay the fixed fee subject to judgment on liabilities handed down or a settlement as agreed in the tariff proceedings unless PHRL obtains cash elsewhere set out in this agreement. Interest at 8% per annum would accrue from judgment or settlement.

5. In addition to the fixed fee PHRL will pay Candey's outstanding unpaid invoice costs of £941,358.94 (outstanding costs) as follows: £341,358.94 on signature of this agreement, £300,000 1st December 2015 and the final payment of 300,000 1st February 2016. Time is of the essence in respect of each payment. Thus any delay in receipt of any stage payment shall place PHRL in breach of contract entitling Candey to terminate this agreement. The fixed fee excludes all disbursements for which PHRL will remain liable, including all court fees, HK and IAC fees, reprographic costs, electronic disclosure, posting costs, business costs, travel costs and expenses, transcriber costs, and most significant of all counsel's fees. PHRL will provide money on account for all disbursements as soon as practicable on request and in any event within seven days after request for payment. Counsel's fees have been proposed by 4 Stone Buildings for all work required pursuant to (3) until the end of the trial on liability of the Tarek proceedings to include

> John Brisby QC, Richard Hill QC, Alexander Cook and Tom Gentleman. Candey will attempt to negotiate a reduction.
>
> 5. If Candey's fees are not paid on time counsel will cease working and will take work from elsewhere leaving PHRL without trial counsel. In such circumstances or if any money due to Candey (including disbursements) are not paid on time Candey shall in fact terminate this agreement or cease work and PHRL shall continue to remain liable to Candey for all sums under this agreement. Time is therefore of the essence for all payments.
>
> 7. Any monies recovered from PHRL from the date of this agreement (whether costs or otherwise) will be applied by Candey towards the outstanding costs and/or fixed fee and/or disbursements at Candey's discretion.
>
> 8. 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 fixed fee and/or disbursements subject of course to all its legal rights. The fixed fee and outstanding costs become immediately due and payable in the event that PHRL is subject to any bona fide insolvency proceedings or arrangement or the insolvency related court order.
>
> 10. In the event of the successful outcome of the tariff proceedings, whether by court judgment or settlement or otherwise by way of bonus the lead members of the legal team of Candey's (unclear) Ashkhan Candey, Andrew Dunn, Lara Robson, Leo Nabarro and Tim Wright shall each become entitled to various discounts on the (unclear) set out in the letter or RHGLO dated 31st January 2014 from Omar Amanat as if they were each Directors..."
>
> 11. As continuing security for payment and discharge of all liabilities due to PHRL to Candey pursuant to this agreement PHRL will execute a deed of charge and security in the form annexed to this agreement all parties to this agreement except it is a fundamental term of this agreement that this agreement is kept strictly confidential and only be disclosed as required by operation of rule of law."

18. Attached to the Fixed Fee Agreement was Candey Limited's standard Terms and Conditions. They indicate the hourly rate of a charge between £100 and £700 per hour, plus VAT. The letter referred to of 31st January 2014 is also provided elsewhere in the documents.

Considering the Fixed Fee Agreement as a whole, some of the following matters are apparent: (1) this is an agreement between the parties both of which have received

independent legal advice; (2) the attached standard terms of business which make express reference to hourly rates are not applicable to a fixed fee arrangement; (3) the ongoing services are worldwide and concern international litigation and a duty to give general advice; (4) the estimated costs had been revised to £5 million to £6 million and that could be significantly higher but equally could be lower in the event of an early settlement; (5) the company wish to avoid hourly billing (see (2) above); (6) the consideration was fixed by agreement; (7) the sum is £3,860,637.48; (8) disbursements are payable in addition to the fixed fee; (9) various express references make provision for the date that the fee would be due for payment.

19. Whilst the Skeleton Argument of Stephen Robins makes reference to the background of this dispute (see paragraphs 12 to 18 inclusive of his Skeleton Argument), no specific reliance is placed on any relevant factual matrix for a true and proper construction or understanding of the Fixed Fee Agreement. Benjamin Williamson QC simply relied on the express terms of the Fixed Fee Agreement.

Opinion evidence.

20. Despite both parties providing further factual evidence on the value of the services provided by Candey Limited, no factual witnesses were called or tendered and were cross-examined by either party.

21. Consideration was given at the outset of this case to proceed with concurrent expert evidence as is now commonly adopted. However, in view of the fact the parties had no chance to draw up an agenda, and that the Joint Memorandum of Experts dated November 2017 made it plain that there was little common ground on the central issues in this case and the fact that both counsel proposed only half-an-hour of cross-examination of each of the experts it seemed proportionate to adopt that approach.

22. It is common ground that the experts have made little progress. This is most striking in the Joint Memorandum of Experts. Under the heading, "Fixed Fee" (see paragraph 12) the experts disagree as to whether fixed fees are the appropriate way to value the relevant services. Peter Hurst's opinion remains that a fixed fee in the amount of fixed fee CFA (Conditional Fee Agreement or Fixed Fee Agreement used in this judgment) and is the appropriate way to value relevant services. Andrew Thomas's position is that, pursuant to his instructions, the consideration provided for by way of the CFA is expressly excluded from the valuation of the relevant services under Section 245(6) of the Insolvency Act 1986. Under the heading "hourly rates" (see paragraph 13) the experts disagree as to whether or not hourly rates are the appropriate way to value the relevant services. Peter Hurst is of the opinion that hourly rates would not adequately reflect the value of the relevant services. Andrew Thomas is of the opinion that the hourly rates offer the only viable way to value the relevant services. Under the heading "the time recorded" Peter Hurst's opinion is that hourly rates are not the appropriate way of valuing the relevant services. Andrew Thomas is of the opinion that the appropriate way to value the relevant services is by reference to time properly spent charged on an hourly rate basis. The summary makes plan that the experts disagree fundamentally as to the appropriate way to value the relevant services.

23. Having reviewed the CFA, Peter Hurst's expert report says this (see paragraph 4): "Were this agreement to come before me when I was sitting, I should have no

difficulty in finding that it was in all respects fair and reasonable…The agreement was made between solicitors and a commercial company which was separately advised." And in his conclusion to his expert report he records: "The fixed fee agreement appears to me to be in all respects fair and reasonable and appropriately values the services supplied" (see paragraph 24). When cross-examined Peter Hurst fairly indicated which documents he had seen, which in any event were quite apparent in his report, and when shown some further documents which were contended are relevant for a Fixed Fee Agreement he dealt with them in a straightforward way explaining clearly how he had come to his conclusions. It was, and remained, his opinion, that the value to be attached to professional services in fact provided by Candey Limited should be the very consideration contained in clause 4 of the CFA. Accordingly, there was no reason to revalue that service in a different sum or basis. His view was that should the client solicitor costs be the basis of the review of the value of services on hourly times and rates then he would wish to go further than timesheets and consider the evidence more generally in the usual way when a costs judge carries out such an exercise.

24. Andrew Thomas's report was equally clear having regard to the instructions that he was given on which to proceed, which were as follows: (1) that the value of the services is the amount of money that a hypothetical firm of solicitors would reasonably expect to obtain in the ordinary course of business and a hypothetical client in the payment for the supply of a solicitor for services on the same terms (save for consideration) of the CFA, (2) that services be valued other than actually provided after entering into the Charge Deed as opposed to that contracted, and (3) the hypothetical client is able to pay for consideration when due. (See paragraph 3.2 of the Joint Memorandum of Experts.) Table 3 annexed to his expert report shows the value of all time entries at Candey Limited's stated rates in the sum of £1,194,775, and his valuation of the time entries for the relevant period is £704,145.75. These two figures are of course different from those sums contained in the Application which I have set out above in paragraph 2 of this judgment. Whilst his expert report essentially supports those instructions that he was required to report on, he does give a somewhat brief comment on Peter Hurst's report at Appendix 2 of his expert report in which he concludes: "Whilst, as above, the nature of this retainer is not relevant to the subject matter of my report, in the event that the Court was asked to validate or otherwise the CFA, in my opinion there is a significant prospect the CFA would be set aside and an order made for the costs to be assessed." I reject these conclusions in his expert report and prefer the considered opinion of Peter Hurst. Peter Hurst is an extremely experienced retired costs judge and I am satisfied that should this matter have come before him as he indicated in the report that he was rightly content that the CFA is both fair and reasonable in regard to the value of the services supplied by Candey Limited. I have no doubt that Andrew Thomas gave his expert opinion based on his experience which is also considerable; however, it is clear that the focus of his report, due to his instructions, was time and hourly aspects of the services in fact provided by Candey Limited and he did not give sufficient consideration to the question of whether in the provisions of those services the fair and reasonable value in the way contended for by Peter Hurst. In my judgment, an expert's report, and in particular when an order is made for sequential reports as in this case, it is common practice and helpful to a court that the responding expert reports should deal with all the matters set out in that earlier report. Constriction by instruction leaves experts unable to fully and fairly assist the court in this regard, and I consider that in the

superficial consideration given by Andrew Thomas in his report, he was not given a proper or fair opportunity to deal with this aspect of the disputed case. This could partly explain the somewhat hesitant and nervous approach of Andrew Thomas when he was cross-examined. It is for those reasons that I am in no doubt at all that I prefer the evidence of Peter Hurst. I therefore find that the consideration of £3,860,637.48 in the Fixed Fee Agreement could reasonably have been expected to have been obtained for the services provided by Candey Limited.

Submissions.

25. In his Skeleton Argument and in oral opening Stephen Robins relied upon eleven arguments of which in summary were: (1) Section 245(6) and (2) are concerned with services and values supplied and not the services promised, (2) the important concept is value and not price of those services, (3) Section 245(6) of the Act provides a codified approach that has to be implemented, (4) it is the reasonable expectation of those services supplied and not the subject of approach, (5) it is to be considered the services supplied, not token services supplied, (6) the same terms apply apart from the consideration of services supplied, (7) a consideration is excluded both in terms of money and any term that influences that consideration, (8) these services have to be considered in the ordinary course of business under Section 245(6) and not in the framework of a pending corporate collapse (reliance was placed on Australian authorities on the true and proper construction of the meaning of "ordinary course of business" in similar statutory context of insolvency), (9) the court is concerned with a hypothetical scenario, (10) credit risk is irrelevant, and (11) delay in payment is ignored because it is dealt with under Section 245(2)(c).

26. It was accepted that the Applicant's expert had been engaged on the basis of this construction of the Act (save for Appendix 2 which I have referred to above) and thus Andrew Thomas's report and his input in to the Joint Memorandum of the Experts has been thereby constrained.

27. The Skeleton Argument of Benjamin Williams QC, which was developed in his oral closing essentially made the following submissions in response to those eleven points which were in summary: (1) it is a service supplied; however, the context as a fixed fee service was in fact supplied, (2) it is accepted that the value and not the price is relevant, (3) it is agreed that Section 245(6) of the Act provides a statutory code, (4) the reasonable expectation is the correct approach to the subjective test for the services supplied on terms, (5) it is agreed that it is the same services and not different services, (6) it is agreed that only the price is deleted, (7) consideration is limited to the price and not more broadly, (8) the ordinary course of business is to be taken into account from the supplier and not the receiver's point of view, and whilst hourly rates are common so are fixed fees increasingly common for solicitor charging (reliance on Australian authority is in a different statutory context), (9) a hypothetical situation is not in point, (10) the credit risk requires some value to be allocated, and (11) deferment cannot be ignored as a term and the reference to interest rate poses a different question in this case.

28. His alternative case seeks to challenge the basis of charging as a matter of expert opinion (for which Peter Hurst should be preferred) and by way of comparison to a CFA would normally have a 100% uplift giving rise to fees of £2.43 million.

29. In his oral closing, Stephen Robins maintained his case and in answer to my questions agreed that, despite the Application which sought the figure of £1,212,839, or lesser sum, unquantified in paragraph 2(b)(1)(2), in accordance with the expert report of Andrew Thomas, the Liquidators' case was now under section 2(b)(1) of the Application the lesser sum of £1,194,775 and, alternatively, the lesser sum in paragraph 2(b)(2) of the Application was now the sum of £704,145.75 and not £704,626 contained in Russell Crumpler's second affidavit quoted in paragraph 13 above.

30. In reality and stripped of the division into eleven points, the dispute between counsel largely reflects the disagreement between the experts and the argument before HH Judge Davis-White QC. The essence of the dispute remains: (1) whether according to the Liquidators in valuing the services it is right to carry out a re-measurement of the fees actually provided on a time (and hourly rate) basis, or whether, according to Candey Limited the Fixed Fee Agreement is the basis for valuing those services, and (2) whether one has to value the services in fact provided and not the facility provided by the Fixed Fee Agreement that was available but not called upon.

The Act.

31. Section 245 appears in the part of the Insolvency Act 1986 dealing with "adjustments for prior transactions" and follows on from transactions at under-value, section 238, preferences, section 239, extortionate credit transactions under section 244, and subsequently unenforceability of liens on books under section 246 of that Act (putting aside the Scottish sections). Each have a different set of rules with the intention of capturing transactions within a defined relevant time prior to administration or liquidation. In the case of Section 245 the relevant time is provided under Section 245(3) and this was a second issue dealt with in a binding judgment of his HH Judge Davis-White QC referred to in paragraph 3 above. The extent to which parliament permits what is called "adjustment" to such transactions in a run-up to insolvency of a contracting party is dictated by the particular section in question. Naturally speaking, an adjustment to a transaction will not require a re-writing of that transaction.

32. Section 245(2) provides a bifurcation between the ascertainment of value in respect of "money paid" and "goods or services supplied", and the latter are coupled together to get a synonymous treatment. Plainly, if the value consists of money paid that is a sum certain received by the company subsequently in liquidation and, therefore, there can be no doubt that it would be right to make an exception thereby not invalidating such a charge. When it comes to goods and services supplied, the parties have by agreement, in order to make a binding transaction, to include the consideration or in the absence of such expression an implication would arise under statutory law; thus a transaction of goods would have an implied term of "reasonableness" under the Sale of Goods Act legislation and a similar term for services under the Supply of Goods and Services legislation. In these examples the term to be implied would be at the date of the transaction and judged in all the circumstances of that transaction as appeared reasonable at that time. Conversely, if in the transaction the parties expressly agreed the consideration for the provision of those goods and services, then concern would rightly be expressed as to whether with the impending insolvency that agreed consideration should be sustainable or requires "adjustment" in accordance with the express provisions of the Insolvency Act 1986.

33. It is only with regards to goods and services supplied that Section 245(6) of the Act provides a codification to achieve that adjustment. It is common ground between the parties, and in my judgment is correct, that it is necessary to construe the true and proper meaning of those words within that subsection alone. The purpose is to value those goods and services supplied in an "amount of money" and that will achieve a sum certain as if money had been in fact been paid for a floating charge. That amount of money is not the consideration agreed the parties to the transaction. The section specifically seeks to adjust such consideration and therefore avoid the mischief that would otherwise take place in an impending insolvency. In that respect, a party that provides goods and services could not expect to be preferred to other creditors by agreeing a consideration, which the Act would prohibit. Taking the example of a transaction with no consideration expressed in the agreement but implication as set out above, it would be curious if the section sought to rewrite those terms when considering performance of the services or provision of the goods (of course, assuming that the goods or service were provided in that transaction) because even companies facing insolvency service still require goods or services, and if they are paying only a reasonable sum as agreed by the two statutory regimes, parliament would not wish to set that sort of transaction aside as part of the Insolvency legislation. Hence agreements for a reasonable sum for goods or services in a transaction ought in principle to stand the rigour of subsequent insolvency.

34. Thus, should the Fixed Fee Agreement simply have expressed that Candey Limited were entitled to a fixed fee but not stated the sum, then the law would have fixed a reasonable fee in all the circumstances known at the time of the agreement to reflect the services that were to be supplied in the future. Determination of that sum by implication would not have regard to what in the future was in fact supplied and certainly not allowed the agreement to a fixed fee to be changed to an hourly rate basis on what in fact was provided.

35. There are three particular mandatory matters that the court is required to consider when implementing Section 245(6). First, the mechanism by which this subsection adjusts the value of any goods and services supplied and converts them into an amount of money "at the time they were supplied". Consideration is therefore given not to the date of the transaction itself but to the time of performance of that transaction. In a sense, that fixes the "time" for any adjustment. Secondly, the mechanism in the subsection also adjusts the consideration itself to an amount of money that "could reasonably have been expected to be obtained" for the provision of those goods and services. That, in a sense, fixes the "amount" for any adjustment. Thirdly, the circumstances in which the subsection adjusts the monetary value is "in the ordinary course of business". That, in a sense, answers the question of "how" those goods and services supplied are to be considered. Lastly, in carrying out the exercise the court has to view the matters "on the same terms…on which they were supplied to the company". Naturally, such wording would not require the rewriting of those terms themselves but rather as the subsection that makes perfectly plain "the consideration" only.

36. Reading the Act in this way, in my judgment Section 245(6) is not an express provision for rewriting the parties' transaction itself and simply re-measuring the goods and services supplied as a matter of performance and ignoring the transaction as submitted by Stephen Robins, but rather starting with the transaction and adjusting

only the consideration agreed for the supply of those goods and services having regard to how they were provided as submitted by Benjamin Williams QC.

37. When carrying out this adjustment, the focus under this subsection of the Act which seeks to convert to a money value the supply of those goods and services, it must be based on that money value in the hands of the recipient company that has subsequently become insolvent at the relevant time. As I read this Act, the mischief that is sought to be put right by the adjustment is the unacceptable consideration of the services contained in the transaction by reference to and only by reference to (and these references cannot be ignored) (i) the time they were supplied; (ii) what could reasonably have been expected to have been obtained as an amount of money for that supply; and (iii) on the understanding that this is considered in the ordinary course of business (as opposed to a special situation or extraordinary factor, or some remarkable set of circumstances). None of this requires a rewriting of the transaction generally or a re-measurement of value *ab initio* solely by reference to the performance of the transaction for the supply of those goods and services.

38. In my judgment, the answer to the first fundamental disagreement between the Liquidators and Candey Limited is that there is no basis in law to value the services provided by Candey Limited on a "time" costs basis but that the Fixed Fee Agreement is the basis for valuing those services. Because Peter Hurst's opinion, which I accept, is that the consideration in that Fixed Fee Agreement is "fair and reasonable", this case is on an analogy with a statutory implied term of reasonable sum for services which this Act does not interfere with on liquidation of the company.

39. Turning to the second fundamental disagreement between the Liquidator and Candey Limited, in my judgment it is not correct to value service or lack of it per se, but regard has to be given to the facility that Candey Limited made available to Peak Hotels & Resorts Limited to correctly capture the value. Considering the example raised by HH Judge Davis-White QC (see paragraph 118 of his judgment) as set out above in paragraph 3 of this judgment, if, say, the AA provided a service for a year for repairs and offered year-round cover for such repairs which can be called on at any time, the fact that it was not called on does not make that service "valueless". It is the ability to call upon that service that has to be valued as a reasonable consideration and not the non-use or limited use in fact. Other examples can be considered, including insurance as raised in Benjamin Williams QC's Skeleton Argument and oral submissions, or the example of a barrister's brief fee in a case that subsequently settles. Though subtle distinctions can be made in principle, it is difficult to see why this Act should strike down such arrangements reasonably and fairly made simply because in performance, as pre-agreed and acknowledged by both parties, it was quite possible that it would or could not be called on but the service was available to the company and as such plainly had a value. Accordingly the second argument of Stephen Robins for the Liquidators also fails.

40. Nothing in this judgment is to be taken to undermine the need for a Court on a Section 245(6) application to review the services provided. There are cases, not this case, where parties agree to provide services, but, in fact, do not provide them due to, say, termination of the transaction. In those cases consideration would of necessity have to be given to the performance of the transaction and what a company that subsequently goes into liquidation would be expected to pay for those services in fact supplied.

Conclusions.

41. The starting point is the consideration that is contained in clause 4 of the Fixed Fee Agreement of £3,860,637.48 which is provisionally, so to speak, unenforceable by reason of the provisions of Section 245(6) of the Insolvency Act 1986.

42. The balance of the terms of the Fixed Fee Agreement including the right to be paid a fixed fee and not an hourly rate which give rise to the Deed of Charge and Security and therefore the floating charge for the provision of services under Section 245(2) remain in place.

43. Considering the three mandatory factors set out above under Section 245(6) of the Act, the following have to be considered:

(1) Candey Limited were in fact supplying legal services from 21st October 2015 in respect of one or more of the following: the Tarek proceedings, two arbitrations in Hong Kong, in (Jimpeng Group), the proceedings in BVI Commercial Court and the East Caribbean Supreme Court Civil Appeals, and the Power Capital proceedings, and other matter expressly agreed from time to time including ongoing general advice. This last category was a facility that Peak Hotels & Resorts Limited could call upon as and when whilst the Fixed Fee Agreement was extant.

(2) 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 Limited received no payment whatsoever as this work progressed. The opinion of Peter Hurst, which I accept, was that it was fair and reasonable that they should expect to be paid £3,860,637.48. I have accepted his expert opinion to be sufficient to meet the stated wording in Section 245(6) viz: "could reasonably have been expected to be obtained for supplying…the services".

(3) Provision of a professional service was carried out in the ordinary course of business of a solicitor, who, rather than be paid on an hourly and time basis, which is the most common form of payment to solicitors as work progressed, was to be paid a fair and reasonable sum for those professional services on the basis of a fixed fee, which cannot be considered as other than the ordinary course of modern business. Objectively speaking, it is perfectly ordinary for a solicitor to provide a professional service, under a fixed fee, which is increasingly common, as opposed to charging for those services as they are carried out by hour by hour over the actual time.

Order.

44. I dismiss the Application dated 27 September 2016 of Russell Crumpler and Sarah Bower as joint Liquidators of Peak Hotels & Resorts Limited pursuant to Section 245 of the Insolvency Act 1986, that the value of the service supplied by Candey Limited is in the sum of £1,202,000 (or the lesser sum assessed by the Liquidators' experts as £1,195,775) or the lesser sum though not quantified in the Application of £704,145.75 also provided by the Liquidators' expert.

45. I declare that Candey Limited are entitled to the sum of £3,860,637.48 in respect of the services provided to Peak Hotels & Resorts Limited. pursuant to Section 245 of the Insolvency Act 1986.

46. I am prepared to consider the question of interest on that sum and costs or any other matter.