

Money paid into court is recoverable, English appeal court says

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The English Court of Appeal has ruled against the liquidators of British Virgin Islands (BVI) company Peak Hotels and Resorts, saying that the company's fixed fee arrangement with its former solicitors had created a floating charge over two sums it had paid into court as security.

In a ruling on 16 October, a three-judge bench at the appeal court upheld the June 2017 decision of **Malcolm Davis-White QC** – a specialist civil circuit judge, then sitting as a judge of the Chancery Court – that Peak retained “sufficient interest” in the two sums to create a charge over the money.

Peak has been in liquidation since February 2016, when a BVI court ordered it should be wound up on the application of another BVI entity Jinpeng Group, which had lent Peak US\$35 million shortly after the latter's incorporation in 2014. Peak used the money to acquire a 32.5% holding in ARGL, a joint venture that controlled luxury hotel chain Aman Resorts.

But when a complex US\$368 million litigation ensued with its joint venture partners over the control of Aman, Peak paid the funds into the English High Court – firstly in 2014 paying US\$10 million as fortification for a cross-undertaking in one litigation, and then in 2015 paying £3.14 million (US\$4.1 million) as security for costs in another.

Peak retained London firm Candey for the shareholders' litigation, but as its cash began to run out the company reached a £3.86 million (US\$5 million) fixed fee agreement with the solicitors, agreeing to pay them following either a judgment or settlement. The agreement charged all Peak's assets and undertakings "including monies in court in all jurisdictions worldwide".

Eight weeks before the trial was set to begin, Peak entered liquidation and its liquidators – **Russell Crumpler** of KPMG BVI and **Sarah Bower** of KPMG China in Hong Kong – dispensed with Candey's services immediately upon settling the litigation three weeks into their term.

Candey sought to recover the fixed fee – in its entirety, despite having incurred only £1.2 million (US\$1.6 million) in notional hourly rates – as a secured creditor under the charge, out of the monies Peak had paid into court. The liquidators disputed this, saying Peak no longer had rights in that money at the time of its liquidation.

In June 2017, Judge Davis-Wright found in Candey's favour, ruling that the firm had a floating charge over the funds paid into court and also over US\$1.5 million it had recovered from Standard Chartered Bank. In its decision this week the Court of Appeal upheld that ruling, dismissing Crumpler and Bower's appeal.

Peak's counsel, **Felicity Toubé QC** instructed by Stephenson Harwood, argued that the fixed fee agreement did not create an immediate charge over the money because it was not Peak's property once it was paid into court. She said it was at most a purported charge over the company's future property – but the judges disagreed.

Writing on behalf of the court, retired appeal court judge **Sir Colin Rimer** said a party "retains its property" in money paid into court for security or to fortify an undertaking. He said it was "counter-intuitive and contrary to principle" that a payer of money into court should part with their equity of redemption. "I do not understand why that should be so and it makes no sense that it should," he said.

"If the payer does so part with his property interest, where does it go?" he asked. Neither Toubé nor Candey's counsel **Robert Miles QC** had argued the court became a trustee for the money, and he would not accept the court, "nor any other emanation of the state", became its beneficial owner.

That interpretation also posed the question of by what right the payer would be entitled to reclaim the money, Rimer said.

As the high court judge noted, Peak was entitled to insist the court properly administer the money, which meant the company had an interest sufficient to grant a charge over it.

But Rimer said it was even simpler: "Peak retained the property in the money that it paid into court, the money thus continued to be one of its existing assets, and so it was able to, and did, charge its interest in it to Candey by the charge."

Candey partner **Ashkhan Candey** tells GRR that Rimer's "very clear judgment has clarified any perceived uncertainty in the law" and calls the ruling "a win for the ordinary person and their ability to fund litigation".

"The liquidators' argument that a claimant loses all right over money they pay into court - the price they pay for access to justice - was found rightly to be fundamentally misconceived. The ability to charge monies in court provides an effective tool for a person to give security to the other side and at the same time to their lawyers."

Candey adds that the UK government should "wake up to the serious unfairness which exists in our judicial system where only the rich can afford to litigate" and allow claimants to recover insurance premiums for the other side's costs.

The English High Court recognised Peak Hotels and Resorts' BVI-based liquidation in February 2016, just weeks before the liquidators settled the shareholders' dispute over joint venture partner ARGL.

Shortly after, two Peak affiliates placed ARGL in Chapter 11 bankruptcy in New York pursuant to a court order from the Eastern Caribbean Supreme Court. The Peak companies were seeking to claw back millions of dollars through the Chapter 11 proceedings allegedly owed to their controller, businessman Omar Amanat.

However, their attempts were cut short when the New York court dismissed the involuntary Chapter 11 petition on the grounds it had been filed in "bad faith-plus" to re-litigate the joint venture dispute.

While the New York proceedings remained open for the determination of fees, costs and sanctions, a small Pennsylvania company filed an involuntary Chapter 7 petition against Peak Hotels itself in Florida and sought permission to start another involuntary Chapter 11 case against ARGL. Despite some initial push back by Peak's Chapter 7 trustee in Florida, the parties consented to the two Florida cases being transferred to New York in September 2017, where the initial involuntary Chapter 11 case remains open.

In the Court of Appeal of England & Wales

Russell Crumpler & Sarah Bower (as joint liquidators of Peak Hotels and Resorts Ltd in liquidation) v Candey Ltd [2018] EWCA Civ 2256

- **Lord Justice Patten**
- **Lord Justice Henderson**
- **Sir Colin Rimer**

Counsel to Crumpler & Bower

- **Felicity Toube QC** and **Stephen Robins** at South Square in London
- Stephenson Harwood

Partner **Susan Moore** in London

Counsel to Candey

- **Robert Miles QC** and **Andrew de Mestre** at 4 Stone Buildings in London
- Candey

Partners **Ashkhan Candey**, **Andrew Dunn**, **Leo Nabarro** and **Nigel McEwen** in London

In the England and Wales High Court (now settled)

Peak Hotels and Resorts Limited v Tarek Investments Ltd et al.

- **Justice Sarah Asplin**

Counsel to Peak Hotels and Resorts Limited

- **John Brisby** and **Alexander Cook** at 4 Stone Buildings in London
- Candey

Partners **Ashkhan Candey** and **Andrew Dunn** in London

Counsel to Tarek Investments Ltd

- **Mark Howard QC**, **David Caplan** and **Richard Eschwege** at Brick Court Chambers in London
- Herbert Smith Freehills

Counsel to Sherway Group Limited and Carl Johan Eliasch

- **Michael Brindle QC** and **Paul Sinclair** at Fountain Court Chambers in London
- Berwin Leighton Paisner

In the Eastern Caribbean Supreme Court Court of Appeal

Jinpeng Group Limited v Peak Hotels and Resorts Limited

- **Justices of Appeal Davidson Kelvin Baptiste, Paul Webster and Joyce Kentish-Egan**

Counsel for Jinpeng Group

- South Square

Antony Zacaroli and **Matthew Abraham** in London

- Walkers BVI

Partner **Jack Husbands** and associate **Lucy Hannett*** in the British Virgin Islands
*Since left the firm

Counsel for Peak Hotels and Resorts Limited

- 4 Stone Buildings

John Brisby and **Alexander Cook** in London

- Candey

Partners **Ashkhan Candey** and **Andrew Dunn** in London