Lessons from *Candey*

A series of recent decisions provide important guidance for litigators over securing fees when a client goes bust, says Grania Langdon-Down

London litigation boutique CANDEY (Candey) acted for Peak Hotels and Resorts Limited (Peak) in a highly charged takeover battle in the luxury hotel industry running across four jurisdictions. When Peak subsequently went into liquidation, the law firm found itself in dispute with the liquidators at KPMG, Russell Crumpler and Sarah Bower, over its fees.

Ashkhan Candey, the law firm's managing partner and head of corporate and commercial disputes, says: 'The question what to do when your client goes bust is a critical issue for law firms, whether the case is being funded by fixed fees, conditional fee agreements (CFAs) or damages-based agreements (DBAs).'

His firm had agreed a fixed fee of £3.8m to help Peak's cash flow halfway through the litigation. By the time the hotel company went into liquidation, Candey had done about £1.2m of work based on its usual hourly rates. The law firm claimed to be a secured creditor for the full amount of the fixed fee but the liquidators challenged the asserted security. In his judgment in June 2017 (*Russell Crumpler & Anr (as joint liquidators of Peak Hotels and Resorts Limited) v CANDEY Limited* [2017] EWHC 1511 (Ch)), Judge Davis-White QC ruled that the law firm had a floating charge over the US$12m in funds paid into court and a further US$1.5m recovered from Standard Chartered Bank.

Last month the Court of Appeal unanimously upheld that decision, saying the ultimate destination of money paid into court should not depend on an 'unpredictable judicial lottery'.

Giving the lead judgment, Sir Colin Rimer said: 'I regard it as counter-intuitive and contrary to principle that, upon the making of a payment into court by way of security for costs or by way of a fortification of a cross-undertaking in damages, the court should regard the party in whose favour such payment is made as obtaining a security interest in the money whilst regarding the payer as parting with his property in it, namely his equity of redemption.'

Candey says the judgment clarified the law as there were, arguably, previously conflicting authorities: 'The liquidators had argued that the payor has no interest in the monies of any kind, with not even a bare right to apply to have the monies returned to you. But the Court of Appeal supported our argument that those monies were paid as a condition of the claimant's access to justice, and, if they succeed, they must have a right to apply for those monies to come back to them. Thus they can grant a charge over those monies.'

The question how the services provided by the law firm should be valued has still to be decided. This aspect was considered in November 2017 by HHJ Judge Raeside QC (*Russell Crumpler & Anr (as joint liquidators of Peak Hotels and Resorts Limited) v CANDEY Limited* [2017] EWHC 3388 (Ch)).

Floating charge

This is the first case on the value of legal services provided pursuant to a floating charge. Judge Raeside found Candey was entitled to its full fixed fee. KPMG has appealed and the hearing is listed for mid-December.

In a further development, the High Court was asked in July to consider who should be first in line to be paid in this case, pursuant to a solicitor's lien. As this was a British Virgin Islands (BVI) liquidation, the order of priorities for being paid were the petitioning creditor, then the liquidators and then the floating charge holder.

The liquidators in the BVI had brought the proceedings in the English High Court under the insolvency cross-border regulations and sought directions under s 168 of the Insolvency Act 1986 as if this were an English company. Candey says: 'We argued before Deputy High Court Judge Andrew Hochhauser QC that we had a solicitor's lien in respect of those monies. We took the floating charge because we were acting in foreign proceedings in the BVI, Hong Kong and New York, as well as London, but we expressly reserved our right to be paid first as solicitors from any cash recovered in the English proceedings.'

KPMG argued that Candey had waived its right. Having acted in the proceedings for some two years, the firm was not instrumental in the settlement, which KPMG negotiated after three weeks of being in office. 'The lien is an area of law that a lot of solicitors aren't overly familiar with,' Candey says. 'They assume that, when a company goes into liquidation, they are stuffed but actually the solicitor is first in line to be paid from any litigation recoveries according to authorities going back to the 19th century.'

There is one final twist to the tale. Candey Limited instructed its daughter firm Candey LLP in these cases on a CFA and is seeking an uplift on the LLP's fees. 'The liquidators argued this was a sham,' says Candey. 'But we say it is just the same as if I, as an individual, instructed Candey LLP on a CFA. 'The other side argues that payment of the uplift only applies to an English liquidator. We acknowledged that we were pushing at the boundaries, but that is what we do and what the law does.

'The legislation is clear that uplifts on pre-2016 insolvency CFAs apply to anyone "acting in the capacity" of a liquidator of an English company. The liquidators brought their application on the basis that this was an English liquidation. It can't be right that the foreign liquidator would otherwise have an advantage over his English counterpart in an English Court.'

The judge's decision on the issue of the solicitor's lien and the uplift is due soon—whoever loses is likely to appeal.

A spokesperson for KPMG says they are unable to comment for reasons of client confidentiality. NLJ

Grania Langdon-Down is a freelance journalist.