Michaelmas Term
[2022] UKSC 35
On appeal from: [2020] EWCA Civ 26

JUDGMENT

Candey Ltd (Appellant) *v* Crumpler and another (as Joint Liquidators of Peak Hotels and Resorts Ltd (In Liquidation)) (Respondents)

before

Lord Reed, President
Lord Briggs
Lord Kitchin
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON
21 December 2022

Heard on 2 and 3 March 2022

Appellant
David Lord KC
Daniel Saoul KC
Stephen Ryan
(Instructed by CANDEY LLP)

Respondents
David Holland KC
Stephen Robins KC
(Instructed by Stephenson Harwood LLP (London))

LORD KITCHIN (with whom Lord Reed, Lord Briggs, Lord Hamblen and Lord Stephens agree):

Introduction

1. This appeal concerns the circumstances in which solicitors may be taken to have waived their equitable lien, that is to say, in its most traditional form, the means by which equity provides a form of security for the recovery by solicitors of their agreed charges for the successful conduct of litigation out of the fruits of that litigation.

2. The nature of the solicitor's equitable lien was explored in the decision of this Court in *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21; [2018] 1 WLR 2052. As Lord Briggs explained, at paras 3 and 4, the solicitor's equitable lien is a security interest and is enforceable against the proceeds of the litigation up to the amount contractually due to the solicitor, in priority to the interest of the successful client, or anyone claiming through the client. The interest is in the nature of an equitable charge and, as such, may be enforced in personam against anyone whose conscience is affected by having notice of it, either to prevent him from dealing inconsistently with it, or by holding him to account if he does.

3. There can be no doubt that an important purpose of the solicitor's equitable lien is to promote access to justice. It enables a client to obtain legal representation in cases and in circumstances where it is likely that payment can only be made out of the proceeds of litigation. Indeed, Lord Briggs made this clear in the first paragraph of his judgment in *Gavin Edmondson*.

4. This same point emerges from the more recent decision of this Court in *Bott & Co Solicitors v Ryanair DAC* [2022] UKSC 8; [2022] 2 WLR 634. There Lord Burrows emphasised, at para 87, that the vindication of clients' legal rights, through the making of claims, is more likely to be effective if solicitors know that they have the security of a lien to recover their costs. Similarly, Lord Briggs reiterated, at para 154, that the animating principle which lies behind the equitable lien is that it promotes access to justice for potential claimants with insufficient means to pay their lawyers in the usual way, by enabling their solicitors to act for them in pursuit of their claims on credit, with reasonable security for their fees, against recoveries.

5. The issue which divided this Court in *Bott* was whether it is a requirement for the creation of an equitable lien that there be a dispute, either existing or reasonably anticipated, in connection with which the services of the solicitor are sought. The

majority decided that it was not and that, assuming the solicitor is acting for a potential claimant, the appropriate test for a solicitor's equitable lien is whether the solicitor provides services (within the scope of the retainer) in relation to the making of the client's claim, with or without legal proceedings, which significantly contribute to the recovery of a fund by the client.

6. The particular questions which must be answered in this appeal were not addressed in *Gavin Henderson* or in *Bott*, however. We are not concerned here with the way or the circumstances in which the solicitor's equitable lien is created but rather with the circumstances in which it may be inferred that the solicitor has waived or surrendered the lien to which he or she would otherwise have been entitled.

7. The appeal arises in proceedings between Candey Ltd ("Candey"), an English company, and the respondent liquidators of Peak Hotels and Resorts Limited ("PHRL"), a company registered in the British Virgin Islands ("the BVI"). Candey acted for PHRL between April 2014 and March 2016 in respect of worldwide litigation and various other matters. PHRL is now being wound up in insolvency proceedings brought in the BVI, and the respondents ("the Liquidators") were appointed by the BVI court as the liquidators of PHRL on 8 February 2016. One of the matters in relation to which Candey acted for PHRL was an action proceeding in the High Court in London. This action, referred to by the parties to this appeal as "the London Litigation", was settled shortly before the trial and Candey was dis-instructed by the Liquidators on 3 March 2016.

8. Candey then sought payment of its outstanding fees, contending that, as PHRL's legal representative, these fees were payable in priority to sums payable to other creditors in PHRL's liquidation, and it asserted for this purpose an equitable lien over sums of money recovered or preserved in the course of the London Litigation. Candey also argued that this lien ought to be converted to a charge over that money under section 73 of the Solicitors Act 1974 ("the 1974 Act") to secure the unpaid fees which it had incurred in the London Litigation in priority to the Liquidators' expenses and all other claims in PHRL's liquidation.

9. In broad terms, section 73 of the 1974 Act provides a mechanism for giving effect to a solicitor's equitable lien in respect of proceedings in this jurisdiction, subject to any limitation issue. It provides, in subsection (1) and so far as relevant, that:

> "… any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceedings may at any time –
>
> > (a) declare the solicitor entitled to a charge on any property recovered or preserved through his instrumentality for his assessed costs in relation to that suit, matter or proceeding; and
> >
> > (b) make such orders for the assessment of those costs and for raising money to pay or for paying them out of the property recovered or preserved as the court thinks fit;
>
> and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor."

10. The Liquidators responded that Candey had waived or in some other way surrendered its right to the equitable lien in accepting additional security for its fees when its retainer was renegotiated in October 2015, or when it submitted a proof of debt in PHRL's liquidation without referring to the lien. The parties have referred to these two arguments as the "pre-liquidation waiver argument" and the "post-liquidation waiver argument", respectively.

11. The Liquidators also gave two other answers to Candey's case. They contended, first, that the funds over which Candey sought a charge under section 73 of the 1974 Act had not been recovered or preserved through Candey's instrumentality; and secondly, that it was an abuse of process for Candey to have raised its lien argument when it did and that, in exercising its discretion under section 73 of the 1974 Act, the court should for that further reason decline to make the declaration that Candey sought.

12. These and other arguments were developed before Mr Andrew Hochhauser QC, sitting as a deputy judge of the Chancery Division, in July 2018. He gave judgment on 15 February 2019 [2019] EWHC 282 (Ch); [2019] Bus LR 1901, accepting the pre-liquidation waiver argument and finding that Candey had indeed waived its entitlement to an equitable lien when renegotiating its retainer and accepting additional security for its fees in October 2015. That was sufficient to dispose of

Candey's application. But the deputy judge went on to reject the other arguments advanced by the Liquidators, holding that the post-liquidation argument would have failed; that there was no basis for denying Candey any rights under section 73 of the 1974 Act on the basis of a lack of instrumentality; and that Candey's application under section 73 did not amount to an abuse of process.

13. On appeal to the Court of Appeal, Candey contended that the deputy judge was wrong to accept the pre-liquidation waiver argument but that his approach to the other issues before him was broadly correct. The Liquidators responded that the deputy judge decided the pre-liquidation waiver argument correctly but that he ought also to have accepted their post-liquidation waiver argument and found that Candey's application was an abuse of process. The Liquidators did not pursue the lack of instrumentality argument before the Court of Appeal and I need say no more about it.

14. The Court of Appeal (McCombe, Moylan and Rose LJJ) gave judgment on 23 January 2020 [2020] EWCA Civ 26; [2020] Bus LR 1452 agreeing with the deputy judge on the first point and upholding his finding as to pre-liquidation waiver. The Court of Appeal went on to hold that the deputy judge had been wrong to reject the post-liquidation waiver argument. In relation to abuse of process, the court would have been minded to agree with the deputy judge, but the Liquidators having succeeded on the first two points, either of which was sufficient to dispose of Candey's appeal, it was not necessary to express a final view upon it.

15. Candey now appeals to this Court against these findings and the consequential order of the Court of Appeal. I will return to the particular issues arising on this appeal in a moment but first I must say a little more about the context in which they arise.

The factual background

16. The proceedings have a long and complicated history. Fortunately, however, there is no longer any dispute as to the factual background relevant to the issues to be decided in this appeal.

17. PHRL was incorporated in the BVI in January 2014. Its purpose was to hold shares in a joint venture vehicle, Peak Hotels and Resorts Group Ltd ("the JVC"), in which the other joint venture party was Tarek Investments Ltd ("Tarek"), another BVI company. The JVC owned, through various intermediary companies, the Aman resorts group of luxury boutique hotels. The funding for the joint venture came from

four sources: a convertible loan to PHRL of about US$ 35 million from Jinpeng Group Ltd ("Jinpeng"); a loan to Aman Resorts Group Ltd ("ARGL"), an Aman group company, of US$ 208 million from Pontwelly Holding Company Ltd; a loan to PHRL of about US$ 50 million from Sherway Group Ltd ("Sherway"); and US$ 95 million paid by Tarek on completion of the acquisition.

18. Unfortunately, the relationship between the joint venture partners broke down and PHRL became involved in legal proceedings in London, Hong Kong, the BVI and New York in which it was represented by Candey.

19. PHRL began the proceedings in London in June 2014 against Tarek and Sherway. In these proceedings, the London Litigation to which I have already referred, PHRL sought and was granted various injunctions but in September 2015 it was required to fortify its cross-undertaking in damages by paying US$ 10 million into court. In the meantime, in February 2015, PHRL was required to give security for the defendants' costs, pursuant to which a further £3,128,000 was paid into court. I will refer to these sums together, that is to say the US$ 10 million and £3,128,000, as the "Monies in Court", as did the Court of Appeal.

20. By August 2015, PHRL was desperately short of funds. It was indebted to Candey for hundreds of thousands of pounds in overdue legal fees and it did not have the resources to pursue the various proceedings and other matters in which it was involved, including the London Litigation. This state of affairs led PHRL and some of its backers to negotiate with Candey a fixed fee to cover all litigation going forward. One of the backers was an American company, Campion Maverick Inc. The negotiations culminated, on 21 October 2015, in a fixed fee agreement ("the FFA") under which Candey agreed to continue to act for PHRL in return for a fixed fee ("the Fixed Fee") of £3,860,637.48, payment of which was deferred until the handing down of judgment on liability or settlement of the London Litigation, or PHRL entered an insolvency process, or PHRL had received other funds enabling it to pay. The Fixed Fee excluded Candey's outstanding invoiced costs of £941,358. 94 and disbursements including court fees and counsel's fees.

21. A deed of charge was entered into on the same day as the FFA, and this purported to grant to Candey a fixed and floating charge over all of the assets and undertakings of PHRL, including the Monies in Court. In fact, however, the charge, referred to as the "Deed of Charge," conferred only a floating charge over PHRL's assets, including the Monies in Court, as subsequently became clear. The Deed of Charge was registered in the BVI.

22. In January 2016, PHRL received further funding of US$ 5 million to meet some of its expenses, that is to say, Candey's outstanding invoiced costs and disbursements and as a result Candey received as a contribution towards those costs and disbursements a sum of just under US$ 2 million on 12 January 2016 and a further sum of nearly US$ 280,000 on 26 February 2016.

23. In the meantime, Jinpeng, having called in its loan, petitioned for PHRL's winding up and in consequence PHRL was placed into liquidation in the BVI on 8 February 2016 and, as I have said, the Liquidators were appointed on that day. The Fixed Fee thereupon became payable and Candey lodged a proof of debt on 19 February 2016, referring to the Deed of Charge as the security it held for its Fixed Fee. Candey made no reference to any pre-existing solicitor's equitable lien.

24. On 22 February 2016 and in the light of the ongoing litigation in London, the Liquidators applied to the English High Court for recognition of the BVI liquidation pursuant to the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) and, on 24 February 2016, Registrar Derrett made an order recognising the BVI liquidation as main foreign proceedings.

25. The trial of the London Litigation was due to begin in April 2016 but on 3 March 2016, the day witness statements were due to be exchanged, the Liquidators notified Candey that they had agreed terms of settlement with the defendants. Candey played no part in the negotiations leading up to this announcement. The settlement agreement was embodied in a consent order made by Asplin J on 7 March 2016.

26. Under the terms of this settlement agreement, PHRL received sums of US$ 10,013,000 and £1,648,000 from the Monies in Court on, respectively, 5 and 10 May 2016. These sums have been referred to in these proceedings as "the Payments Out". The balance of the Monies in Court was paid to the defendants in the London Litigation under the terms of the settlement. PHRL also agreed to assist Tarek in recovering monies held by Standard Chartered Bank, with half going to each party. In consequence, PHRL received a further sum of US$ 1.5 million plus interest ("the SCB Monies"). The Payments Out and the SCB Monies, which have been referred to collectively as the "Settlement Proceeds", are the funds over which Candey has asserted a lien.

27. The Liquidators then investigated the secured claim asserted by Candey in its proof of debt. They formed the view that the Deed of Charge conferred only a floating charge. They also maintained (i) that as PHRL had been unable to pay its debts on the day the charge was created, by operation of section 245 of the

Insolvency Act 1986 ("the 1986 Act") the charge protected only the value of services provided by Candey after that time; and (ii) that the value of those services should be calculated on the basis of the services actually provided and by reference to Candey's recorded time costs.

28. There being no agreement about the nature of the Deed of Charge or its effect, the Liquidators made an application to the court to have these issues decided. This application, referred to in these proceedings as "the Liquidators' Application", came on for hearing before HH Judge Davis-White QC [2017] EWHC 1511 (Ch); [2017] Bus LR 1765, sitting as a judge of the High Court. On 23 June 2017, he held (i) that the Settlement Proceeds were covered by the Deed of Charge; (ii) the Deed of Charge created a floating and not a fixed charge over PHRL's assets; and (iii) that PHRL had been insolvent at the date of the Deed of Charge, so engaging section 245 of the 1986 Act. An appeal by the Liquidators against the first of these findings was dismissed by the Court of Appeal on 16 October 2018 [2018] EWCA Civ 2256; [2019] 1 WLR 2145.

29. It remained to be decided, pursuant to section 245 of the 1986 Act, what value should be attributed to the services Candey had provided. This issue, called the "Value of Services" issue, was decided first by HH Judge Raeside QC, sitting as a judge of the High Court, on 22 November 2017. He accepted Candey's submission that the value of those services was equal to the Fixed Fee on the basis that this was a fair and reasonable fee for the work Candey had done under the FFA. But the Liquidators, concerned the judge had fallen into error, appealed against his order to the Court of Appeal.

30. Meanwhile, in March 2018, Candey asserted that it had an equitable lien in addition to the security conferred by the Deed of Charge; and on 17 April 2018 it issued an application under section 73 of the 1974 Act for a declaration that it was entitled to a charge over the Settlement Proceeds ("the Lien Application"). As I have foreshadowed, it had not previously asserted the existence of such a lien in correspondence, in its proof of debt or in any of the other documents it had filed.

31. The Lien Application was resisted and was heard by Mr Andrew Hochhauser QC, sitting as a deputy judge of the High Court, over four days in July 2018, together with another issue (referred to by the parties as "the Exemption Issue") which had arisen at a consequential hearing before HH Judge Raeside QC, namely whether Candey could recover from the Liquidators an uplift payable to its solicitors, Candey LLP, under a conditional fee agreement.

32. The deputy judge dismissed the Lien Application in his judgment of 15 February 2019 [2019] EWHC 282 (Ch); [2019] Bus LR 1901 for the reason I have mentioned, namely that in accepting the Deed of Charge, Candey must be taken to have waived its lien. However, he rejected the Liquidators' arguments (i) that by failing to refer to the lien in its proof of debt, Candey had waived or otherwise surrendered that lien; (ii) that Candey had not been instrumental in recovering or preserving the Settlement Proceeds; and (iii) that it was an abuse of process for Candey to have raised the lien when it did rather than at an earlier point in the litigation. I should also say that the Exemption Issue was decided in favour of the Liquidators, and this decision was subsequently upheld by the Court of Appeal and its correctness is not an issue on this further appeal.

33. There followed further hearings concerning the Value of Services issue. In summary, on 8 March 2019, the Court of Appeal found that HH Judge Raeside QC had misdirected himself as to how this issue should be resolved and remitted the issue for rehearing. That rehearing took place before HH Judge Davis-White QC, sitting as a judge of the High Court, in October 2019 and, in judgments given on 22 January 2020 and 3 June 2020, he found that the value of the services supplied by Candey after the creation of the floating charge was to be calculated by reference to Candey's time costs and amounted to £1,090,755. Accordingly, this was the sum secured by the floating charge.

34. In the meantime, the Court of Appeal heard the appeal against the decision and order of the deputy judge on the Lien Application. The Court of Appeal gave judgment on 23 January 2020 and dismissed the appeal [2020] EWCA Civ 26; [2020] Bus LR 1452, albeit for reasons which differed in some respects from those of the deputy judge. In broad summary, the Court of Appeal found that by accepting the Deed of Charge, Candey must be taken to have waived its lien because the terms of the charge were inconsistent with it. In particular: (i) the Deed of Charge covered assets which would otherwise be covered by the lien; (ii) the Deed of Charge conferred priority on the third party, Campion Maverick Inc, the American company which had provided litigation funding to PHRL, which the lien did not; and (iii) the FFA provided an interest rate of 8% which would not have been payable under the lien. These inconsistencies gave rise to an inference that Candey intended to waive the lien, and this inference had not been displaced by any express or implied reservation of the lien by Candey when accepting the Deed of Charge.

35. For reasons which will become apparent, it is not necessary to explain in more detail at this stage the reasoning of the Court of Appeal in relation to the other issues before it and, in particular, the importance of PHRL having obtained independent legal advice about the FFA and the Deed of Charge; the issues concerning the alleged

post liquidation waiver; or the allegation, made in the further alternative, that the pursuit of the Lien Application amounted to an abuse of process.

The submissions of the parties

36. Counsel for Candey submit that it now finds itself in an invidious position. It sought to protect itself by taking additional security from its client but has been deemed inadvertently to have waived its equitable lien, with the result that it is worse off than it would have been without the additional security. They continue:

(i) The court should be very cautious before concluding that solicitors have waived their equitable lien by taking additional security since this would have a chilling effect on the willingness of solicitors to act for clients in financial difficulty and thereby impede access to justice.

(ii) The principles by which solicitors may be deemed inadvertently to have waived their equitable lien have no application where, as here, PHRL accepted it was taking independent advice and was not being advised by Candey in relation to the relevant matters.

(iii) In so far as the principles of inadvertent waiver have any application, the court was wrong to find that Candey had waived its equitable lien, and in so doing applied the wrong test and failed properly to consider whether an intention to waive the lien could be inferred or whether the Deed of Charge was simply additional security that was intended to subsist in parallel with the lien. Further, there was nothing inconsistent about the same property being charged by different forms of security; or arising from the Deed of Charge and the lien having different priority rankings; or from the fact that the FFA provided for interest at 8% in some circumstances. These matters, considered individually and collectively, were just as consistent with the retention of the equitable lien.

(iv) In any event, Candey had expressly reserved its equitable lien.

(v) There was no basis for inferring a waiver of the equitable lien from Candey’s failure to mention it in its proof of debt; and the Liquidators’ arguments based on abuse of process should be rejected, essentially for the reasons given by the judge and the Court of Appeal.

37. Counsel for the Liquidators, on the other hand, commend the reasoning of the Court of Appeal. They submit the Court of Appeal was entitled and right to affirm the decision of the deputy judge that the FFA and the Deed of Charge had the effect of terminating the equitable lien. They also submit:

(i) Whether an equitable lien is brought to an end by the creation of new security depends on the intention of the parties, objectively ascertained.

(ii) Various factors may give rise to an inference that the parties intend to replace an equitable lien with a new security, including (a) the fact that the new security covers the same property as the lien; (b) the fact that the new security ranks differently from the lien in the order of priority; and (c) the fact that there are different provisions for interest. Each of these factors, considered on its own, has been held to be inconsistent with an intention to retain a lien but in combination, the inference of such an intention is compelling.

(iii) In the case of a solicitor's equitable lien, the non-disclosure of an intention to retain the lien supports an inference the solicitor intended to waive it.

(iv) The parties did not expressly preserve the equitable lien when entering into the new arrangements. Their intention must therefore be ascertained objectively. The many grounds upon which to infer the parties intended to replace the lien with new arrangements include: the terms of the FFA; the new security under the Deed of Charge covered the same property as the lien; the new security ranked differently from the lien in the order of priority; and the new security secured a right to interest which had not been provided by the lien. In addition, Candey did not disclose to PHRL that it intended to retain the lien, as it would have been obliged to do if that had been its intention.

(v) In the alternative, if the lien was not waived when PHRL and Candey entered into the FFA and the Deed of Charge, it was surrendered pursuant to section 214(1) of the BVI Insolvency Act 2003 when Candey lodged a proof of debt in PHRL's liquidation without mentioning it.

(vi) In the further alternative, it was an abuse of process for Candey to bring the Lien Application following two years of litigation over the Deed of Charge. That litigation would be rendered entirely pointless if the lien were to be upheld. Alternatively, and in all these circumstances, the court should

exercise its discretion under section 73 of the 1974 Act by declining to make any order in favour of Candey.

Further features of the solicitor's equitable lien

38. In assessing these submissions, I think it is helpful to have in mind some of the features of the solicitor's equitable lien which are of particular relevance to the questions arising in this appeal. This lien is one of a number of liens which arise by operation of equity from the relationship between the parties and which take effect as a form of equitable charge upon property until certain claims are satisfied. Other examples include the vendor's lien for the purchase money and the purchaser's lien for the deposit.

39. The creation of the solicitor's equitable lien is underpinned by fairness. It is based on the principle that it is not just that the client should get the benefit of a solicitor's labour without paying for it, as Cotton LJ explained in *Guy v Churchill* (1887) 35 Ch D 489, 491. This fairness has an important further aspect for, as I have explained, the lien encourages solicitors to take on cases which their clients would not otherwise have been able to afford, and so promotes access to justice.

40. Another feature of the solicitor's equitable lien, and one which it shares with other equitable liens, is that does not depend upon possession of the property over which it exists. Instead, it operates by law as a first ranking right of the solicitor to be paid his or her fees out of the proceeds of the litigation, and as a form of equitable charge which binds third parties with notice of it. It is in this sense akin to a right of salvage. But it will not be effective against a purchaser for value of a legal estate without notice of it.

41. Importantly, the solicitor's equitable lien survives insolvency events concerning the client and so solicitors, acting for a liquidator, who recover funds which then form part of the assets falling in the liquidation, will have a lien for their costs (incurred prior to and after the liquidation) on those funds: *In re Born; Curnock v Born* [1900] 2 Ch 433, 435 per Farwell J; *In re Meter Cabs Ltd* [1911] 2 Ch 557, 559 per Swinfen Eady J.

42. Finally, there is no great distinction for the purposes of this appeal between the solicitor's equitable lien and the right solicitors have under section 73 of the 1974 Act to secure a declaration that they are entitled to a charge on any property recovered or preserved through their instrumentality for their assessed costs in relation to the suit or matter in issue. In a real sense, in making a charging order

under section 73 of the 1974 Act, the court is not giving any solicitor a new right but is enabling the solicitor more cheaply and speedily to enforce a right he or she already possesses: *In re Born; Curnock v Born* [1900] 2 Ch 433, 435 per Farwell J (dealing with the equivalent but earlier provision, section 28, of the Solicitors Act 1860 (23 & 24 Vict c 127)). But so too, as counsel for the Liquidators submit and I accept, facts which amount to a waiver of the solicitor's right to an equitable lien will generally amount to a waiver of the right to a declaration under section 73 of the 1974 Act. Similarly, if the right under section 73 has been waived, the position is likely to be the same in respect of the underlying equitable lien.

Assessment of waiver of the lien

43. There is a measure of agreement between counsel that whether a solicitor's equitable lien has been waived depends on the intention of the parties. If they have addressed the issue directly, their intention may be apparent from the words they have used. The more difficult cases are likely to be those, such as the present, in which an intention to waive the lien is sought to be inferred. Here the question will be whether an intention to waive the lien can be inferred taking into account all of the circumstances of the case: *In re Taylor, Stileman & Underwood* [1891] 1 Ch 590, 597, per Lindley LJ; *Bank of Africa v Salisbury Gold Mining Co Ltd* [1892] AC 281, 284-285, per Lord Watson; *In re Morris* [1908] 1 KB 473, 479-480 per Buckley LJ.

44. It is convenient at this point to address a far reaching argument advanced by counsel for Candey. They submit that with the demise of legal aid, an increase in multi-jurisdictional litigation and an increase in the number of commercial litigation funders and adverse costs insurance providers, it has never been more important to maintain access to justice and for that purpose the willingness of solicitors to act on the basis that, if their client is successful, they will recover their costs when the fruits of the litigation become available. In these circumstances, so the submission continues, it would be highly undesirable for the court too readily to conclude that solicitors have waived their equitable lien, and particularly so where that waiver can only have been inadvertent. Accordingly, the waiver by solicitors of their equitable lien ought to require an unequivocal representation by the solicitors that they are abandoning their equitable right, and that they have made that representation with full knowledge of the relevant facts.

45. I readily accept the importance of maintaining access to justice, and particularly so at the present time but, in my view, it provides no proper foundation for the submission which counsel for Candey advance. They draw an analogy with the doctrine of election. But that analogy is not a good one. The doctrine of election is applicable where the putative elector is faced with two alternative rights which are

inconsistent with each other, and where he or she has to make a choice between them. We are not concerned with such a case. The question we have to consider is whether solicitors, in taking new security, have waived their equitable lien. That does not involve giving up one of two rights which exist at the same time, and it is not something solicitors can decide unilaterally. It depends upon the intention of both parties and that must be ascertained in the way I now turn to consider.

46. There can be no doubt that an objective approach must be adopted. This follows from the authorities to which I have already referred but also has been made clear in countless decisions concerning various kinds of lien over very many years. In one of the early cases, *Mackreth v Symmons* (1808) 15 Ves Jr 329; 342, 348; 33 ER 778, 783, 785, Lord Eldon LC explained that, depending on the circumstances, another security may constitute evidence that an equitable interest has been relinquished. In *Winter v Lord Anson* (1827) 3 Russ 488, 492, 38 ER 658, 660, Lord Lyndhurst LC concluded that a lien had not been waived because there was nothing in the transaction itself, as evidenced by the instruments, leading to a clear and manifest inference that this was the intention of the parties. More recently, in *Barclays Bank plc v Estates and Commercial Ltd* [1997] 1 WLR 415, concerning a vendor's lien, Millett LJ again approached the issue as an objective one. The question, he explained, at pp 420 – 422, was what intention was to be attributed to the parties from the transaction into which they had entered? He continued that a lien such as this arises by operation of law unless its exclusion can be inferred objectively from the terms of the documents and the nature of the transaction. In this context, it was not appropriate to speculate about the actual intention of the parties and evidence of subjective intention was not relevant and was inadmissible. So too, in *Twigg Farnell v Wildblood* [1998] PNLR 211, concerning a solicitor's lien over title deeds, Mummery LJ said, at p 214, "the court may infer, from all the circumstances of the case, that the taking of the security by the solicitor who has a lien amounts to an abandonment of his lien."

47. It is not possible to identify in the abstract all the factors which may prove relevant in assessing whether solicitors have abandoned their equitable lien for this must depend on the features and circumstances of the particular case. But some factors have tended to recur as bearing on this question. One is the taking of new security and whether and to what extent this is inconsistent with solicitors' rights in equity and under section 73 of the 1974 Act; another is whether, in light of the professional relationship between them, the solicitors explained to the client that they were reserving their earlier rights.

48. The relevance and interrelationship of these factors was explored by the Court of Appeal in *In re Taylor Stileman & Underwood* [1891] 1 Ch 590. The principal issue before the court was whether a solicitor had lost his retaining lien over his client's

papers by taking a promissory note from the client and her husband with interest at 5%, together with a charge on a life assurance policy. There was no evidence the solicitor had explained the impact of the new security on the solicitor's retaining lien; nor had the solicitor expressly reserved that lien. The Court of Appeal had no doubt the retaining lien had been waived. Lindley LJ said, at p 597:

> "In considering this point, we must be careful. Whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case. In this particular instance we are dealing with a solicitor and his client. It strikes me that if a solicitor takes from his client such a security as this solicitor took the prima facie inference is that he waives his lien. That appears to me the right and proper conclusion to come to, bearing in mind that it is the solicitor's duty to explain to his client the effect of what he is about to do. In the case of a banker, I should not draw the same inference, since a banker has not a similar duty towards his customer. Bearing in mind the position of the parties, and having regard to the decision of Sir John Leach in *Robarts v Jefferys*, we are justified in saying that in the absence of evidence to the contrary, the true inference from the circumstances is that the lien was waived."

49. Lopes LJ agreed and emphasised that regard must be had to all the circumstances, saying at p 598:

> "It appears to me that in each case the question whether the lien is waived by taking security must be decided according to the particular circumstances. I do not mean to say that taking a security necessarily imports an abandonment of the lien; but if there are circumstances in the taking of the security which are inconsistent with the continuance of the old security, it is to be inferred that the solicitor intended to abandon his lien."

50. Lopes LJ concluded that the promissory note payable on demand with interest at 5% together with the charge on the policy meant the only fair inference to draw was that the parties' intention was to give up the lien and rely only on the new security.

51. Kay LJ expressed himself in similar terms at pp 600-601:

> “I take it that the true rule is that stated by Lord Justice Lindley, that in every case where you have to consider whether a lien has been waived you must weigh all the circumstances of that particular case, and it is an important consideration that we are here dealing with a transaction between a solicitor and his own client. A solicitor has a duty to perform towards his client to represent to his client all the facts of the case in a clear and intelligible manner and to inform him of his rights and liabilities, and where you find a solicitor dealing with his client and taking from him such a security as was given in this case, not expressly reserving his right of lien, I quite agree that the inference ought to be against the continuance of the lien.”

52. Each member of the court referred to the decision of the Court of Appeal in *Robarts v Jefferys* (1830) 8 LJ (OS) (Ch) 137 as being to the same effect. There too, a solicitor was found to have waived his lien by taking a promissory note, payable on demand and bearing interest from the time of demand. Sir John Leach MR explained (at pp 140-141):

> “I am of opinion that the taking of this promissory note was altogether a waiver of the lien of the solicitor; I am of opinion it would have been a waiver, if it had been a promissory note of the client alone, and upon this principle –a promissory note, payable on demand, bears interest from the time of the demand; the demand might have been made the moment after the promissory note was received, and interest would have run therefore upon the promissory note from that day. Now, my opinion is, that, inasmuch as a solicitor has no claim to interest upon the amount of his bill of costs, if he takes a security for the amount of his bill of costs, which will, in fact, give him interest, as here, that security is a waiver of his lien; and upon that ground I am of opinion, that Mr Jefferys taking the promissory note did lose his lien, as solicitor, upon these deeds."

53. The decision of the Court of Appeal a short time later in *Bissill v Bradford and District Tramways Co Ltd* (1893) 9 TLR 337 is also instructive. Here solicitors to the tramways company had a retaining lien on the company’s papers and took a charge

on the interest held by the company in a provisional order cited as the Bradford and District Tramways (Extension) Order, 1890 for payment of the costs then due with interest at 5%. Lord Esher MR, with whom Lindley LJ agreed, applied what he discerned to be the rule laid down in *In re Taylor Stileman & Underwood*: the solicitors having taken security of substance and value, without intimating to the client that they meant to insist on their lien, it was to be inferred that the lien had been done away with.

54. These cases illustrate and confirm that in ascertaining whether a solicitor has waived the equitable lien, all of the circumstances must be taken into account; and further, if the solicitor takes additional security which is inconsistent with the existing lien and does so without explaining that the lien is being retained, then it may well be reasonable to infer that the lien is surrendered. Indeed, that is very likely to be the correct prima facie conclusion. They are less clear, however, on the question whether such a surrender may properly be inferred if the solicitor takes *any* additional security, even if consistent with the lien, and does so without making his or her intention to retain the lien clear to the client.

55. This question was addressed by the Court of Appeal in *In re Morris* [1908] 1 KB 473, and the majority, Lord Alverstone CJ and Buckley LJ, answered it (albeit obiter) in the negative. The solicitors had acted for the client in various actions for about two years. Some of those actions were still pending and others had been completed. The client then deposited with his solicitors share certificates in various companies as security for costs. He contended the certificates were deposited as security in respect of general costs and that by accepting them the solicitors had waived their lien on his papers and other documents. The solicitors responded that the certificates had been deposited as security in respect of counsel's fees and out of pocket expenses in respect of particular matters and that they had retained their lien. The Court of Appeal, agreeing with the judge, held that the solicitors had not waived their lien, and that the certificates had been lodged and accepted for the limited purposes described and recognised by the solicitors. Nevertheless, the court also considered the more general question. Lord Alverstone CJ explained the relevant principles in these terms (at p 475):

> "Prima facie a solicitor has a lien for his charges upon the papers of his client. This lien may be lost, released, or waived in the same way as the liens which other persons possess. The main difference between the case of a solicitor's lien and those other liens is that, where a solicitor takes any security which is in any degree inconsistent with the retention of a lien, it is his duty to give express notice to the client if he intends to retain the lien,

> and that, should he not do so, his lien will be taken to be abandoned."

56. Buckley LJ began (at p 477):

> "Where a solicitor entitled to a lien takes from his client security upon property already included in the lien, or where such a one takes a security which gives time (say for a period of three years), or which gives a right to interest which would not otherwise be payable, it may well be that the lien is gone. In such case there is a new arrangement between creditor and debtor which, within Lord Watson's words in *Bank of Africa v Salisbury Gold Mining Co*, is incompatible with the retention of the lien. The existence of the security is inconsistent with the continued existence of the lien."

57. Buckley LJ went on to explain (at p 479) that the facts of the case have to be looked at to see whether the solicitor has taken a security incompatible with the retention of the lien, or has made an arrangement with the client which sufficiently indicates the intention of the parties that the right shall no longer be enforced.

58. Kennedy LJ agreed in the result but would have applied a broader principle, saying (at p 481):

> "I should be inclined to hold that, if, when taking from his client any security for costs generally, a solicitor intends to retain the security of his lien, he ought not to be silent, but either by express words or by necessary implication to make that intention known to his client; and that if he fails to prove such a reservation he ought, whatever be the nature of the security he takes, to be treated as having waived or abandoned his right of lien."

59. Thus far I have been considering a case where the solicitor takes new security over different property, and here it is now well established that, if the new security is in any way inconsistent with the existing equitable lien and the solicitor takes it without explaining to the client that the existing lien is retained, then it is likely to be reasonable to infer that the new security is intended to replace the lien, and that the lien is surrendered.

60. The authorities also indicate that a new security with a right to interest is inherently likely to be inconsistent with the retention of an equitable lien which carries no such right. This may be seen from a number of the cases to which I have already referred. So, for example, in *Robarts v Jefferys*, the new right to interest on the promissory note, payable on demand, was in and of itself inconsistent with an intention that the equitable lien should continue. The same point is made in the judgment of Lindley LJ in *In re Taylor Stileman & Underwood*, at p 597; and it was reiterated by Buckley LJ in *In re Morris* at p 477, in each case in the passage I have cited.

61. The position where the solicitor takes new security over the asset covered by the original lien is in my view still clearer. An agreement to take such a charge will, on the face of it, displace that lien. Buckley LJ expressed this view in *In re Morris* (at p 477), observing that where a solicitor entitled to a lien takes security from his or her client on property already included in the lien, or which gives a right to interest which is not otherwise payable, it may well be that the lien is gone. There is from that moment a new arrangement between creditor and debtor which is, on the face of it, incompatible with the retention of the lien. Similarly, as David Richards J explained in *Clifford Harris & Co v Solland International Ltd* [2004] EWHC 2488 (Ch), para 23, there is an obvious inconsistency between an express charge and a lien or right to apply to the court (under section 73 of the 1974 Act) for a charge on the same asset.

62. If the new security over the same property has a priority different from that of the equitable lien, the inference in favour of a waiver of the lien may be strengthened still further. As I have said, the lien is a first charge on the fund, in the nature of salvage and it will rank ahead of other encumbrances. Hence acceptance by the solicitor of new security over the same property which is, for example, of lower priority may be a strong indication that the parties intended the abandonment of the lien. In *Groom v Cheesewright* [1895] 1 Ch 730 a solicitor accepted from his client security for his costs in a pending action to which the client was a party, and which put the solicitor in second place, behind the security trustee. He was then unable to obtain a charging order for his costs under what was then section 28 of the Solicitors Act, 1860. He had put it out of his power to secure the charging order he sought because that would have been to secure the benefit of a charge which would rank above the security trustee.

63. There are two further points which merit emphasis. The first is that proceedings of this kind are at risk of becoming overly complex and technical. There is at the end of the day one question to be asked and answered: whether, in all the circumstances, considered together, it is to be inferred that it was the intention of the parties that the solicitor's lien should no longer exist. Put another way, the

question is whether in light of all the circumstances the new security was intended to supplement the solicitor's lien or to replace it, and thus whether the lien has survived or been extinguished. Here, of course, when speaking of intention, we are not concerned to decide what the intentions of the parties actually were but with what a reasonable observer would have understood them to have been.

64. The second concerns what is now a well-established incident of the professional relationship between solicitors and their clients. In this connection, I would respectfully endorse the observations of Lord Alverstone CJ in *In re Morris* at p 475 to the effect that if solicitors take any security which is in any degree inconsistent with the retention of the lien, it is their duty to give express notice to the client if they wish and intend to retain the lien, and that if they do not do so, it is very likely that the lien will be taken to have been abandoned.

65. Before dealing with the application of these principles in the context of this appeal, I must also mention the recent decision of the Court of Appeal in *Belsner v CAM Legal Services Ltd* [2022] EWCA Civ 1387 upon which we have given the parties an opportunity to make concise submissions in writing. I have given careful consideration to those submissions and to the decision itself. It would not be appropriate in the context of this appeal to consider the correctness of the decision. I am, however, in no doubt that it does not affect the outcome of this appeal for it concerns the question whether solicitors owe a fiduciary duty to an actual or potential client when negotiating the terms of their retainer. The Court of Appeal held they do not. As Sir Geoffrey Vos MR explained, at para 74, when solicitors and a client are negotiating the terms of the solicitors' retainer, the client does not have any reasonable expectation that the solicitors will not be acting in the negotiation in their own interests. He continued, at para 79, that solicitors have the freedom to negotiate the retainer in their own interests, but that does not mean that the negotiations can be conducted in breach of any other duties the solicitors may owe professionally or by statute. In this appeal we are concerned with a distinct and more specific question, namely whether and if so when it may be inferred that solicitors have waived the equitable lien to which they would otherwise have been entitled. The obligation of a solicitor to an existing client, when taking security which is inconsistent with his or her equitable lien, to notify the client expressly if he or she wishes to retain the lien, is a professional duty which has been judicially recognised for over a century. I cannot trace any indication in the *Belsner* case that the Court of Appeal intended to cast doubt on it.

Application of these principles

66. PHRL originally retained Candey on the basis of Candey's standard terms and conditions. They contained no express security arrangements and it is accepted that at this point Candey had and retained its equitable lien and its rights under section 73 of the 1974 Act.

67. On 21 October 2015 the position changed. The FFA and the Deed of Charge took effect. These new arrangements cross refer to each other and form a new package of rights and obligations. It is necessary at this stage to identify the most relevant provisions of the FFA and the Deed of Charge so they can be considered together and in context.

The terms of the FFA and the Deed of Charge

68. I begin with the FFA. Clause 1 dealt with the relationship between the FFA and any earlier agreement between Candey and PHRL in respect of fees. It also recorded that PHRL had obtained independent legal advice. It provided, so far as material:

> "… This agreement supersedes and replaces any previous agreement between CANDEY and PHRL in respect of fees. By 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."

69. Clause 4 introduced the Fixed Fee and when it was payable. It also provided for the payment of interest on the Fixed Fee from the date of judgment or settlement:

> "PHRL does not wish to pay CANDEY's invoiced and unbilled costs incurred to date or provide further funds in advance on account on a weekly basis and wishes instead to agree a fixed liability fee payable at a future date. It is therefore agreed that PHRL will pay CANDEY a fixed fee of £3,860,637.48 ('the Fixed Fee'). It is agreed that to assist PHRL's cash flow PHRL is not obliged to pay the Fixed Fee before judgment on liability is handed down or a

> settlement is agreed in the Tarek proceedings unless PHRL obtains cash from elsewhere as set out in this agreement. Interest at 8% per annum will accrue from judgment or settlement."

70. Clause 5 dealt with the outstanding costs invoiced by Candey to PHRL and with future disbursements.

71. Clause 7 provided:

> "Any monies recovered by PHRL from the date of this agreement (whether for costs or otherwise) will be applied by CANDEY towards the Outstanding Costs and/or the Fixed Fee and/or disbursements at CANDEY's discretion."

72. Clause 11 required PHRL to execute the Deed of Charge, confirming the close interrelationship between the FFA and the deed:

> "As continuing security for the payment and discharge of all liabilities due from PHRL to CANDEY pursuant to this agreement PHRL shall execute a Deed of Charge and Security in the form annexed to this agreement …"

73. The Deed of Charge was annexed to the FFA and provided and recorded at the outset:

> "As continuing security for the payment and discharge of all liabilities to CANDEY Limited ('CANDEY') pursuant to the fixed fee agreement of today's date ('the Fixed Fee Agreement') PHRL hereby charges to CANDEY …."

74. It continued, in paragraph 1:

> ".. by way of fixed charge, all assets and undertakings of PHRL, including shares, present or future, and including all monies in Court in all jurisdictions worldwide;"

75. The Deed of Charge also contained the following relevant provisions. In paragraph 4:

> "Save for the Deed of Charge dated 25 March 2015 (and related security) in favour of Campion Maverick, PHRL warrants and agrees that it has not created, and will not create or permit to subsist, any other security or charge over the rights and monies protected by this Deed."

76. In paragraph 5:

> "PHRL irrevocably agrees and instructs CANDEY to act with full powers (and shall instruct any other and or future lawyers to use their best endeavours to assist CANDEY) to ensure that any monies or benefits arising or payable in any Court proceedings in any jurisdiction shall be paid directly to CANDEY towards payment and discharge of any liability pursuant to the Fixed Fee Agreement prior to anyone else save for repayment of any bona fide liability due to Campion Maverick."

77. In paragraph 6:

> "In the event that any of PHRL's rights title or interest in or to any monies or benefits covered by this Deed are assigned (which assignment shall require CANDEY's prior written consent) or awarded to a third party by Court order, or such monies are otherwise paid (contrary to the irrevocable instructions above) to a third party, that third party shall receive such monies subject to this Deed and subject to the discharge of all liabilities to CANDEY pursuant to the Fixed Fee Agreement."

The relevance of independent legal advice

78. Counsel for Candey submit that there is a significant feature of this case which the judge and the Court of Appeal failed properly to appreciate, namely that, as recorded in clause 1 of the FFA, Candey required PHRL to take independent legal advice in relation to the FFA and the Deed of Charge. What is more, they continue,

PHRL expressly confirmed, as recorded in that clause, that it had actually obtained independent legal advice. In these circumstances, the principle whereby an intention by a solicitor to waive the equitable lien can be inferred simply from the nature of the additional security taken is not and cannot be engaged. Counsel for Candey also submit that a solicitor has no duty to advise his or her client of the effect of taking the additional security if, as here, the client has accepted that the solicitor is not providing legal advice in relation to these matters. There must instead be an unequivocal representation that the solicitor is waiving the equitable lien and it is common ground that there was no such representation in this case; nor can such an unequivocal representation be inferred from any minor inconsistencies between the Deed of Charge and the equitable lien.

79. I am not persuaded by these submissions and in my opinion the Court of Appeal was right to reject them. They pay insufficient regard to the nature of the exercise the court is undertaking and the continuing professional relationship between solicitors and clients. As I have explained, the fundamental question is whether, in the light of all the circumstances, the new security is intended to supplement the solicitor's lien or to replace it, and thus whether the lien has survived or been extinguished. But that is not all. If the new security is inconsistent with the retention of the equitable lien, it is incumbent on the solicitor to give express notice to the client if he or she intends to retain the lien. A solicitor is not absolved of that obligation simply because the client has agreed to take independent legal advice in relation to the new security and that is because the independent adviser is not in a better position than the client to discern the solicitor's intention. Accordingly, if, despite the apparent inconsistency between the new security and the lien, the solicitor does not make clear his or her intention to retain the lien, it remains reasonable to infer an intention to surrender it.

80. That was the position in this case. The relationship between Candey and PHRL was a continuing one. In so far as there were material inconsistencies between the lien and the new security, it was incumbent on Candey to make clear that it intended to retain the equitable lien if that was what it wanted to do. This is not affected by its insistence that PHRL should take independent advice about the proposed new fee agreement and new charge.

Incompatibility of the new arrangements with the lien

81. The next question is whether there are indeed inconsistencies between, on the one hand, the FFA and the Deed of Charge and, on the other hand, the solicitor's equitable lien. The Liquidators have relied upon three particular matters: the new security which extends over the same property as the equitable lien; the different

priorities created by the FFA and the Deed of Charge; and the provisions in the FFA and the Deed of Charge for the earning and securing of interest.

New security over the same property

82. The first is that the new security, that is to say the Deed of Charge, extends over the same property as the equitable lien. Candey contends that the lien extends to the Settlement Proceeds in the form of the Payments Out made to PHRL on 5 and 10 May 2016 and the SCB Monies to which I have referred. Similarly, the Deed of Charge conferred a floating charge over PHRL's assets including the Settlement Proceeds. But of course, the Deed of Charge went further. It also covered any recoveries made by PHRL in other litigation.

83. The judge held that this overlap, together with a point on priority to which I will come in a moment, created a clear inconsistency from which it was to be inferred that the parties did not intend the lien and the new security to subsist side by side. The Court of Appeal agreed.

84. Counsel for Candey submit that the courts below fell into error in approaching the issue in this way, and that they failed to ask themselves whether the fact that the additional security, that is to say, the Deed of Charge, covered the same property as the lien gave rise to any inconsistency at all. They continue that there was no analysis of this key issue by the Court of Appeal; nor was there any analysis of why the presence of a mere overlap in the property secured (as between the Deed of Charge and the lien) meant that Candey should be deemed to have intended to waive the lien.

85. Counsel for Candey also submit that if the courts below had considered the matter properly, they would have reasoned in the following way. A mere overlap cannot, without more, amount to an inconsistency. That is certainly so in this case where Candey acted as PHRL's legal representative for nearly two years from April 2014 until 2 March 2016 in relation to a plethora of international litigation in London, Hong Kong, the BVI and New York; and that the Deed of Charge was intended to secure PHRL's obligations under the FFA which was entered into because PHRL did not have the money to continue to finance the proceedings, worldwide, in which it was involved. To assist PHRL, Candey agreed to continue acting for PHRL in return for the fixed fee under the FFA, payment of which was deferred. The additional security Candey took in the form of the Deed of Charge was intended to cover Candey's fees incurred in a far wider set of proceedings in various jurisdictions using what was intended to be (but did not turn out to be) a combination of fixed and floating charges. Properly analysed, there is no inconsistency between the lien and the Deed

of Charge and there is no basis for inferring that the parties intended that the lien should come to an end.

86. There is in my view a complete answer to these submissions. The Deed of Charge makes clear, in paragraph 1, that it covers all assets and undertakings of PHRL, including all monies in Court in all jurisdictions worldwide. It therefore covers the Settlement Proceeds. If it had not come to an end, the lien would also have covered the Settlement Proceeds and conferred a statutory right to ask the court to make an order for security under section 73 of the 1974 Act. There would have been an obvious inconsistency between the creation of consensual security over certain property and the retention of a statutory right to ask the court to impose non-consensual security over that same property. In my opinion, it is no answer to say that the consensual security also covers other property, whether in this or another jurisdiction. The important point here is that the Deed of Charge and the lien cover the Settlement Proceeds and it is reasonable to infer from this that the lien (which only covers the Settlement Proceeds) was abandoned.

87. This point is in my view reinforced by clause 1 of the FFA which says in terms that it supersedes and replaces any previous agreement between Candey and PHRL in respect of fees. The FFA and the Deed of Charge form part of a single transaction which was intended to provide a new package of rights and obligations and new security arrangements. This supports the inference that this package was indeed intended to replace the equitable lien, and the Court of Appeal was entitled and right so to find.

Different priority

88. As we have seen, the solicitor's equitable lien, which is akin to a right of salvage, ranks first in priority and ahead of other encumbrances.

89. The FFA and the Deed of Charge substantially altered this position. Paragraphs 4 and 5 of the Deed of Charge expressly confer priority on a charge in favour of Campion Maverick. But so too, Candey's security now extends over a much wider range of assets than the original lien. It appears, therefore, that Candey has accepted that its security under the Deed of Charge, which covers but extends beyond the assets the subject of the lien, ranks below the Campion Maverick charge.

90. In my view the judge and the Court of Appeal were right to say that this creates a further incompatibility between the equitable lien and the new arrangements embodied in the Deed of Charge and FFA, and that this reinforces the

inference that the lien has been abandoned. Any suggestion that the lien survives and has priority would undermine the express agreement in the FFA and the Deed of Charge that the Campion Maverick charge has priority over all of PHRL's assets including the Settlement Proceeds.

91. Candey nevertheless contends that the FFA and the Deed of Charge preserve the lien but in a modified form. Counsel for Candey have developed this argument in the following way. They submit that the lien ranks first, as it always did. The additional security, on the other hand, has a ranking below that of the lien but this does not itself give rise to an inconsistency. Further, although it is true that the additional security ranks behind Campion Maverick, that is neither here nor there because the lien is untouched. As for the lien, Campion Maverick's charge amounts to a qualification of Candey's right to be paid first, but this is not an indication that the lien has been waived. In summary, say counsel for Candey, paragraph 5 of the Deed of Charge, properly construed, involves Candey reserving its position and its lien by providing that (1) Candey retains its right to have any recoveries in the litigation paid to it, and for Candey to use those moneys to discharge sums owing to it by PHRL prior to anyone else; but (2) this is subject to Candey's agreement that any *bona fide* liabilities to Campion Maverick, as a litigation funder, will be paid.

92. This is an ingenious argument but I cannot accept it. There is no basis in the FFA and the Deed of Charge for dividing up PHRL's assets and treating the Settlement Proceeds any differently from the other assets or for inferring that the parties intended to retain the equitable lien. The much more straightforward interpretation of the FFA and the Deed of Charge, based on the language the parties have used in the context I have related, is that the FFA supersedes any previous arrangement between Candey and PHRL in respect of fees and that, by the Deed of Charge, PHRL has charged to Candey all of its assets in all jurisdictions as security for the payment and discharge of its liabilities under the FFA subject only to the earlier charge in favour of Campion Maverick and the payment of any bona fide liabilities to that firm. In my opinion this is inconsistent with the continuing existence and operation of the lien, and it amounts to another indication that the lien has been abandoned.

Right to interest

93. The third feature of the new arrangements upon which the Liquidators rely is the right to interest they confer. The equitable lien did not secure any right to interest, and no interest was payable under the original retainer. By contrast, the FFA confers a right to interest at 8% per annum and this is secured by the Deed of Charge.

94. The Court of Appeal held that this did indeed amount to an inconsistency which further supported the inference that the new arrangements were intended to replace the old arrangements in their entirely. Rose LJ explained, at para 77, "the new arrangement to secure the payment of fees did … provide for the payment of interest … when none had been payable under the pre-existing retainer and hence for the purposes of the pre-existing lien."

95. Counsel for Candey submit that here too the Court of Appeal fell into error. In particular, they continue, the Court of Appeal failed properly to appreciate and recognise that it is the FFA and not the additional security that makes provision for interest. The FFA is the retainer and sets out the basis on which Candey is instructed by PHRL. The Deed of Charge, on the other hand, provides the security.

96. This point has some merit, in my view. It is of course true that the Deed of Charge and the FFA are closely interrelated. But in this context, that is neither here nor there. The question here is whether the agreement of an interest rate of 8% in the FFA creates an inconsistency which implies that the parties have agreed that the lien should no longer be effective. I am very doubtful that it does. In my view the judge approached this matter in a reasonable way at para 116(2) of his judgment. He tested the matter by asking himself what the position would have been if there had been a fixed fee agreement with a provision for interest but no Deed of Charge. In those circumstances the lien would have applied to the retainer which would have included the interest rate under the fixed fee agreement. That would not itself have created an inconsistency. I think this illustrates very neatly why the argument based upon the inclusion in the FFA of a right to interest does not of itself improve the Liquidators' case.

Did Candey expressly or impliedly reserve the equitable lien when entering into the FFA and the Deed of Charge?

97. Thus far I am satisfied that the retention of the lien appears to be inconsistent with the Deed of Charge and the FFA in at least two ways: the Deed of Charge extends over the same property as the lien; and the Deed of Charge recognises that it ranks below the Campion Maverick charge. The next question is whether Candey nevertheless reserved its lien, whether expressly or impliedly, so displacing any possible inference to the contrary. Here Candey relies on (i) clause 7 of the FFA; (ii) paras 4, 5 and 6 of the Deed of Charge; and (iii) the evidence of what Mr Ashkhan Candey said to Ms Turnbull of PHRL.

98. Focusing first on clause 7 of the FFA, counsel for Candey submit that this recognises and reserves to Candey an unrestricted right by Candey to use monies

recovered by PHRL towards sums owing to Candey (whether as "Outstanding Costs", the Fixed Fee or the disbursements), and to do so at Candey's discretion. Counsel continue that this is a straightforward statement in simple terms of the operation of the equitable lien. It is not a right under the Deed of Charge because no such right was given to Candey under that charge.

99. Turning next to paragraphs 4, 5 and 6 of the Deed of Charge, these are said to amount to a further reservation of Candey's lien, albeit in qualified terms. Here counsel for Candey reiterate and rely on the arguments they have advanced in relation to the proper interpretation of these paragraphs and to which I have already referred; and they submit that they contemplate the retention of the lien in parallel with the FFA and the Deed of Charge.

100. As for the communication between Mr Ashkhan Candey and Ms Turnbull, a director of PHRL, the gist of this, according to Mr Candey, was that Candey would be paid first out of the fruits of any litigation.

101. The Court of Appeal considered all of these provisions and the substance of the communications between Mr Candey and Ms Turnbull of PHRL but was not persuaded that, separately or together, they amounted to a reservation of the equitable lien. I entirely agree with that conclusion and, in my view, it was amply supported by the wording of the provisions themselves and the wider context. Clause 1 of the FFA says in terms that the agreement supersedes and replaces any previous agreement between the parties in respect of fees. The FFA and the Deed of Charge together provide a new package of arrangements for fees and their payment. More specifically, the FFA details the litigation ongoing in various different jurisdictions and sets out the basis on which Candey would continue to act for PHRL. In clauses 4, 5, 6 and 7, the FFA deals with fees and records that PHRL will pay Candey the Fixed Fee and the outstanding costs, as defined, and, in clause 7, that the monies recovered by PHRL from the date of the agreement will be applied by Candey towards the Outstanding Costs, the Fixed Fee and the disbursements, but all at Candey's discretion. Clause 7 in this way reverses the usual right of appropriation that PHRL, as debtor, would otherwise have had to decide which of the debts owed under the FFA should be treated as having been reduced by any payments made by PHRL to Candey. There is no express or implied assertion anywhere in the FFA that the equitable lien is being retained.

102. The position under the Deed of Charge is just the same. It contains no statement by PHRL that it intends to retain the equitable lien. To the contrary, it says in paragraph 4 that save for the deed of charge in favour of Campion Maverick, PHRL warrants and agrees that it has not created and will not create or even permit to

subsist any other security or charge over the rights and moneys protected by the Deed of Charge. I cannot detect here any suggestion that the lien is being retained and, having regard to the fact that the rights and moneys protected by the Deed of Charge include the fruits of the London Litigation, it would have been contrary to the terms of the Deed of Charge, and in particular paragraph 4, were it to have done so.

103. Mr Candey's evidence of his communications and conversations with Ms Turnbull of PHRL takes the matter no further. This evidence cannot possibly provide a basis for the retention of the lien in the face of the express terms and paragraphs of, respectively, the FFA and the Deed of Charge which I have already summarised.

Conclusion

104. The Court of Appeal was entitled to find that Candey's equitable lien was waived when the parties entered into the FFA and the Deed of Charge in October 2015. The lien was not expressly reserved and there were ample grounds to infer that the parties intended the lien to be replaced by the Deed of Charge in conjunction with the FFA.

105. In these circumstances it is not necessary or appropriate to deal with the alternative argument advanced by PHRL, namely that if the lien was not waived when PHRL and Candey entered into the FFA and the Deed of Charge, it was surrendered under section 214(1) of the BVI Insolvency Act 2003 when Candey lodged a proof of debt in PHRL's liquidation without mentioning the lien. Nor is it necessary to decide whether it was an abuse of process for Candey to bring the Lien Application after two years of litigation over the Deed of Charge. The questions raised by these further arguments should be addressed in an appeal in which it is necessary to do so.

106. For all of these reasons, I would dismiss this appeal.