

Supreme Court unanimously dismisses appeal finding that a solicitor had waived their entitlement to an equitable lien when they had taken out an additional security, which was inconsistent with that lien, and had not explained to their client that the lien was being retained (*Candey Ltd v Crumpler*)

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In *Candey Ltd v Crumpler*, the Supreme Court unanimously dismissed an appeal from solicitors Candey Ltd that an equitable lien converted into a charge following the insolvency of their client under section 73 of the Solicitors Act 1974 (SA 1974) and therefore was payable in priority to sums due to other creditors. Jeremy McKeown, barrister at 12 King's Bench Walk and James Miller, barrister at 18 St John Street Chambers provide commentary on the case.

This analysis was first published on Lexis®PSL on 21 December 2022 and can be found [here](#) (subscription required):

Candey Ltd v Crumpler (as Joint Liquidators of Peak Hotels and Resorts Ltd (In Liquidation)) [\[2022\] UKSC 35](#)

Background

Candey Ltd ('Candey') acted as a solicitor for Peak Hotels & Resorts Ltd ('PHRL') between April 2014 and March 2016 in respect of worldwide litigation and various other matters. One such matter was an action in the High Court in London, referred to as 'the London Litigation'.

On 21 October 2015, PHRL entered into a fixed fee agreement ('FFA') with Candey, under which Candey agreed to continue to act for PHRL in return for a fixed fee ('Fixed Fee'). Payment of the Fixed Fee was deferred until the handing down of judgment on liability or settlement of the London Litigation, PHRL entering an insolvency process, or PHRL receiving funds. A deed of charge ('Deed of Charge') was entered into on the same day as the FFA, which granted a floating charge (a form of security) over PHRL's assets.

PHRL was placed into liquidation in the British Virgin Islands ('BVI') on 8 February 2016. The Respondents (the 'Liquidators') were appointed by the BVI court as liquidators of PHRL. The Fixed Fee became payable and Candey lodged a proof of debt.

The London Litigation was settled by PHRL shortly before trial and Candey was dis-instructed by the Liquidators on 3 March 2016. The monies PHRL received in relation to the settlement are referred to collectively as the 'Settlement Proceeds'.

Candey contended that its outstanding fees were payable in priority to sums payable to other creditors in PHRL's liquidation and asserted an equitable lien over sums of money recovered or preserved in the course of the London Litigation. This lien is a form of security that arises by operation of equity for solicitors to be paid their proper fees for the successful conduct of litigation out of the money the client recovers or preserves through that litigation (or its settlement). Candey also argued that the lien ought to be converted to a charge over that money under SA 1974, s 73.

The deputy judge, amongst other matters, found that Candey had waived its entitlement to an equitable lien when it renegotiated its retainer and accepted additional security for its fees in October

2015. The Court of Appeal agreed with the deputy judge on this point. Candey appealed to the Supreme Court.

Judgment

The Supreme Court unanimously dismissed the appeal. Lord Kitchin provided the judgment, with which Lord Reed, Lord Briggs, Lord Hamblen and Lord Stephens agreed. According to Lord Kitchin:

Whether a solicitor's equitable lien has been waived depends on the intention of the parties. The question is whether it is to be inferred that it was the intention of the parties that the lien should no longer exist. The intention must be assessed objectively in light of all the circumstances [43]–[46], [63]. Where solicitors take additional security, a relevant factor will be to what extent the taking of new security is inconsistent with the lien. A further relevant factor is whether, considering the professional relationship between solicitors and their clients, the solicitors explained to the clients that they were reserving their rights to an equitable lien [47], [64]–[65]. The authorities illustrate that if solicitors take additional security which is inconsistent with the lien and do not explain that the lien is being retained, then it is likely to be reasonable to infer that the lien is surrendered [48]–[64]. This is particularly so where the solicitors take new security over the same property that the lien would apply to [61].

Applying these principles to the present case, the FFA and the Deed of Charge form a package of rights and obligations and new security arrangements which are inconsistent with the equitable lien [66]–[95]. This is for two reasons. First, the new security created by the Deed of Charge extends over the same property as the equitable lien would do (being the Settlement Proceeds). This is regardless of the fact that the Deed of Charge also covers other property [81]–[87]. Second, the FFA and the Deed of Charge expressly confer priority, in the event of insolvency, to one of PHRL's backers, and therefore create different priorities than that of an equitable lien which would rank first [88]–[92]. However, the provisions in the FFA for the earning and securing of interest on the Fixed Fee are not inconsistent with an equitable lien [93]–[96].

The professional obligation on solicitors to give express notice if they intend to retain an equitable lien where the new security is inconsistent with the lien is not displaced by the client obtaining independent legal advice. Therefore, the fact that Candey required PHRL to take independent legal advice in relation to the FFA and the Deed of Charge does not change the court's conclusion [78]–[80].

There is no express or implied assertion in the FFA or the Deed of Charge that Candey reserved its lien, and evidence of communications between Candey and PHRL take the matter no further [97]–[103].

The Court of Appeal was therefore entitled to find that Candey's equitable lien was waived when the parties entered into the FFA and the Deed of Charge [104].

Accordingly, this appeal was dismissed.

Jeremy McKeown, barrister at 12 King's Bench Walk

Today's unanimous decision of the Supreme Court is a stark reminder of the importance and potentially expensive consequences of steps taken by solicitors in litigation to seek security for their fees.

Unfortunately, the decision offers little in the way of certainty about precisely how a solicitor should go about ensuring that it is clear, when entering an additional security, that they are not impliedly waiving their rights to the existing equitable security for their fees (save that wording contained in the later agreements which purport to supersede all other rights is likely unwise).

Further, it is not clear whether attempts to include unambiguous wording in the FFA or Deed of Charge purporting to preserve an equitable lien would have been effective. To the extent that the forms of security are inconsistent, it is easy to see how the issue of how to reconcile the two might arise. That being the case, satellite litigation to decide that question would have the effect of simply replacing one expensive dispute with another.

James Miller, barrister at 18 St John Street Chambers

After many years of litigation, this is a devastating blow for Candey, whose case centred on the rights of lawyers to be paid first from the fruits of their labour. Candey's argument that the lawyers should take priority, which in turn facilitated access to justice as payment was deferred, was ultimately undermined by the 'inconsistent' additional security taken out.

The failure by Candey to explain that the equitable lien was being retained proved critical and its insistence that PHRL took independent legal advice over the FFA and Deed of Charge could not save them.

Although the court was determining this discrete issue, it took comfort from the recent decision in *Belsner v CAM Legal Services Ltd* [2022] EWCA Civ 1387 about the importance of the professional obligations of solicitors to their existing clients.

The case serves as a crucial reminder about the need for solicitors to give express notice if they intend to retain an equitable lien where the new security is inconsistent with that lien.

Source: [Candey Ltd \(Appellant\) v Crumpler and another \(as Joint Liquidators of Peak Hotels and Resorts Ltd \(In Liquidation\)\) \(Respondents\)](#)

The background and judgment sections of this content are based on the case summary published by the UK Supreme Court and is published with permission. The original summary can be found [here](#).

Jeremy McKeown, barrister at 12 King's Bench Walk, accepts instructions across all of 12KBW's core areas. He has particular experience in claims involving employment and discrimination (with expertise in post-termination restrictions), costs, public/occupiers'/employers' liability, insurance, credit hire and fundamental dishonesty.

James Miller is a specialist costs and litigation funding barrister. He is a qualified costs lawyer, registered mediator and can accept instructions from costs professionals under the Public Access scheme.

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