IN THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 0116/2014

BETWEEN:

RUSSELL CRUMPLER and CHRISTOPHER FARMER (as Joint Liquidators of PEAK HOTELS & RESORTS LIMITED (IN LIQUIDATION)

Applicant

and

JINPENG GROUP LIMITED

Respondent

Appearances:

Mr Andrew Willins of Appleby for the Applicant
Mr Robert Levy QC with Oliver Clifton and Rhonda Brown of Walkers for the Respondent
Mr Muhammed Haque QC with Mr Robert Nader of Forbes Hare for Candey Limited, an interested party

---

2019: February 27
2019: April 4

JUDGMENT

The meaning of Rule 199(e) of the Insolvency Rules 2005 – whether certain items of costs are included within the "costs of the application on which the liquidator was appointed" – whether the costs of an appeal are within Rule 199(e) – whether the costs of an arbitration directed by the Court to establish the debt are within Rule 199(e) – whether the costs of foreign lawyers are claimable after the Legal Profession Act 2015 came into force – the appropriate process for determining the quantum of costs within Rule 199(e)

[1] GREEN QC, J (Ag.): This is an application by the Joint Liquidators ("the JLs") of Peak Hotels & Resorts Limited ("the Company") under section 186(5) of the Insolvency Act 2003 ("the Act") in relation to the priority of costs and expenses of the liquidation as specified in Rule 199 of the Insolvency Rules 2005 ("the Rules"). The points in dispute in this application have not been considered before in the British Virgin Islands ("BVI"); nor is there much by way of authority from England and Wales or other relevant jurisdictions. The JLs, represented by Mr Willins, properly adopt a neutral stance but make valuable submissions on the general principles that require to be resolved in their application. In doing so, the JLs have sought to advance all of the arguments that could properly be made on behalf of the Company to ensure that the Court has the benefit of adversarial argument upon the relevant principles.

[2] The application concerns the costs incurred by Jinpeng Group Limited ("Jinpeng"). Jinpeng is the creditor of the Company that made the ultimately successful application for the appointment of the JLs. It claims an enormous sum in respect of the alleged costs of that application, namely $6,270,071.14. Various elements of that sum are in dispute but Jinpeng says that it is all within Rule 199(e) of the Rules ("Rule 199(e)") giving priority over other expenses and floating charge holders to:

> "the costs of the application on which the liquidator was appointed".

[3] Candey Limited ("Candey") is an English law firm that has acted for the Company including in relation to resisting Jinpeng's application for the appointment of the JLs, the Company's application to strike out and the appeal therefrom and the arbitration between the Company and Jinpeng. Candey has, at least, a floating charge over the Company's assets in respect of its fees (it may have more than a floating charge, depending on the outcome of extensive English litigation between Candey and the JLs – see below). Its interest in this application is that the amount of Jinpeng's costs held to be within Rule 199(e) will affect its recovery under the floating charge. Neither the JLs nor Jinpeng object to Candey being heard on this application.

[4] Before turning to the application, I should say that at the start of the hearing, Mr Willins informed me that the JLs had, the previous night, received an offer and reached an agreement

with Jinpeng that they would agree to Jinpeng's offer to accept $3.2m of its claim to priority under Rule 199(e). Their agreement was conditional on sanction to the settlement agreement being given by the Court and for that application to be made at the start of the hearing. Mr Willins did invite the Court to consider that sanction application, and showed me the letter of the JLs to Jinpeng's legal practitioners, Walkers, dated 26 February 2019 setting out the terms of their agreement.

[5] Mr Haque QC on behalf of Candey opposed me considering the oral sanction application. He produced a letter dated 24 April 2018 written by Stephenson Harwood, the JLs' lawyers in England, to Candey following a hearing that day before Hildyard J in which they stated that 21 days notice would be given by the JLs to Candey of any application to the BVI Court by the JLs in respect of, inter alia, the determination by the BVI Court of the quantum of costs of Jinpeng or any other payment out of the liquidation estate. In the light of that letter and Candey not having any notice of the sanction application, I declined to deal with it and we moved to considering the substantive application in relation to Jinpeng's costs.

[6] The issues as to which of Jinpeng's costs are within Rule 199(e) are as follows:

(a) The costs of an arbitration directed to be heard;
(b) The costs of an appeal by Jinpeng on the dismissal of its application;
(c) The costs of the application for Joint Provisional Liquidators ("JPLs");
(d) The costs of Weil Gotshal & Manges LLP ("Weil") incurred after 1 November 2015 when the Legal Profession Act 2015 ("LPA") came into force.

[7] Once these issues have been determined I have also been asked to consider the appropriate route that the JLs should take to have Jinpeng's costs quantified. There are three alternatives:

(a) By the Court, in the same way as a liquidator's remuneration application;
(b) By the JLs as they would in relation to any other debt in the liquidation; or
(c) By the Court, as it would on a detailed assessment following a costs order.

Factual Background

[8] There is quite a complicated history to the various proceedings that are relevant to this application. The background facts are not seriously in dispute. I will set out the factual background in the following order:

(a) The Company's short history and London litigation;

(b) Jinpeng's application for the appointment of the JLs;

(c) The JLs' settlement of the London litigation;

(d) The JLs' litigation with Candey.

(a) The Company's short history and London litigation

[9] The Company was incorporated on 14 January 2014. Its purpose was to act as a holding company for shares in a joint venture vehicle, Peak Hotels and Resorts Group Limited ("PHRGL") which in turn indirectly held Aman Resorts, a boutique luxury hotel group. The principal joint venture parties were:

(a) Mr Omar Amanat, who controlled, directly or indirectly, the Company through a family trust with which he is associated;

(b) Mr Vladislav Doronin, who controls Tarek Investments Limited ("Tarek"); and

(c) Mr Adriaan Zecha who is a minority shareholder in the Company and who founded Aman Resorts over twenty years ago.

[10] On the day the Company was incorporated, it and Tarek agreed to acquire Aman Resorts for $358 million. Following the acquisition, PHRGL held all the shares in Aman Resorts Group Limited which in turn held all the shares in Silverlink Resorts Limited which wholly owned Aman Resorts.

[11] On 24 January 2014, the Company entered into a Memorandum of Understanding with Jinpeng ("MOU") and a loan agreement providing for a loan to the Company of $35 million. The loan was advanced that same day. The MOU contemplated that the loan would be repayable by 24 January 2015 unless the Company and Jinpeng had first agreed to a conversion of the

debt to equity. This formed the basis of the purported dispute on Jinpeng's application to appoint liquidators – see below.

[12] In April 2014, Mr Amanat on behalf of the Company agreed to a loan from Sherway Group Limited ("Sherway") in the sum of $50 million. Related agreements were entered into at the same time which provided for conversion of part of the loan into shares in an intermediate holding company to hold the Company's interest in PHRGL. The Sherway loan was fully drawn down on 2 April 2014.

[13] Almost immediately after the acquisition and the loan agreements, the relationships broke down. On 25 June 2014, the Company issued proceedings in the Chancery Division of the High Court in England and Wales against Tarek, PHRGL and Sherway (amongst others) seeking declaratory and injunctive relief as well as damages for breach of contract. A further set of proceedings was begun by the Company on 17 July 2014 seeking rescission of the Sherway Loan Agreement and other agreements for misrepresentation (together "the London Litigation").

[14] The Company was represented in the London Litigation by Candey or its sister firm, Candey LLP. Various applications for injunctions were made by the Company, the details of which are not relevant to the application before me. By an Order made on 19 September 2014, the Company gave the usual cross undertaking in damages and this was fortified by an undertaking by Candey LLP on behalf of the Company to pay the sum of $10 million into Court to stand as security for any damages ordered to be paid by the Company on its cross-undertaking.

[15] Some of the Defendants in the London Litigation then applied for security for costs against the Company. In a judgment delivered on 20 February 2015, Henderson J (as he then was) decided that the $10 million already paid into Court could not be used by way of security for the Defendants' costs, and therefore that the Company should pay an additional £3,138,000 into Court. The result was that the Company had paid into Court $10 million and £3,138,000 (the "Monies in Court"). In his judgment, Henderson J referred to Mr Amanat as a "*blatant fraudster who had arranged international fraudulent conveyances…and that there was overwhelming evidence that he had acted in bad faith with actual or constructive knowledge of*

a fraudulent scheme". Mr Amanat has subsequently been convicted in the US of involvement in an unrelated fraud.

(b) Jinpeng's Application for the Appointment of Liquidators

[16] On 17 September 2014, Jinpeng applied for the appointment of liquidators on the just and equitable ground under s.162(1)(b) of the Act. On the following day, Jinpeng applied for the appointment of the JPLs on the grounds of the misconduct and fraud of the Company's sole director and shareholder, Mr Amanat. The application was made *ex parte* on notice and on 26 September 2014, Bannister J appointed the JPLs.

[17] The Company then applied to strike out the Originating Application on the basis that Jinpeng had no standing because it was not a creditor. On 17 October 2014, Bannister J partially acceded to the Company's application and made an order conditionally striking out the Originating Application on the basis that the debt was the subject of a genuine and substantial dispute which should be resolved through arbitral proceedings (the MOU had an arbitration agreement). This was an unusual order, the material terms of which were as follows:

(a) If by 29 October 2014, the following conditions had been met, the Originating Application would be dismissed and the appointment of the JPLs discharged. The conditions were:
    (i) The Company commenced arbitral proceedings ("the Arbitration") against Jinpeng in Hong Kong;
    (ii) "*An account has been opened at Power Capital [Financial Trading UK Limited] in [the Company's] name ("the Company Account") and Power Capital has confirmed in writing to the parties hereto and the JPLs that the assets (being USD 35,000,000 US Treasury Bonds ("the Bonds") are held in the Company Account to the Company's order*";
    (iii) Jinpeng and the Company filed a jointly signed written statement confirming that the above two conditions had been met.
(b) A form of freezing order over the Company's assets pending the conclusion of the Arbitration together with a series of undertakings designed to prevent Mr Amanat or any of his companies from having

access to the money in the Company Account. Furthermore, a partner of Candey, Mr Dunn, would be appointed as co-signatory of the Company Account to allay concerns of Jinpeng as to the security of the Company's assets. The clear intention was that there would at least be $35 million worth of assets available to Jinpeng in the event that it was successful in the Arbitration.

(c) Jinpeng was ordered to pay the Company's costs of the Originating Application and the Company's application.

[18] The Arbitration was commenced by the Company before 29 October 2014. Also Power Capital sent to Jinpeng written confirmation that an account had been opened with it in the Company's name and that there was US$35 million in Treasury Bonds in the Company Account and held to the Company's order. Unbeknownst to Jinpeng at the time, the confirmation from Power Capital was totally false and there never was an account in the Company's name with $35 million in it. However because it had the confirmation from Power Capital, Jinpeng itself gave the confirmation required under the Order, the effect of which was that the Originating Application was dismissed and the JPLs were discharged.

[19] On 18 November 2014, the Court of Appeal of the Eastern Caribbean Supreme Court ("Court of Appeal") granted Jinpeng permission to appeal the Order of Bannister J dated 17 October 2014.

[20] On 31 December 2014, Candey wrote to the Court to explain that the Company never actually had $35 million in an account which meant that the undertakings given to Jinpeng and the Court by the Company and Mr Amanat which led to the discharge of the JPLs were false. It also meant the appointment of Mr Dunn as a co-signatory on the Company Account was worthless as the account was empty.

[21] Because of this revelation, Jinpeng applied back to Bannister J for the reinstatement of the JPLs or alternatively for the appointment of receivers in aid of the Arbitration. Jinpeng also sought a freezing order with full disclosure. However, on 2 February 2015, Bannister J granted the freezing order with only limited disclosure but refused Jinpeng other relief. The learned Judge also ordered Jinpeng to pay the Company's costs.

[22] On 21 April 2015, Jinpeng was granted permission to appeal Bannister J's 2 February 2015 Order and this was subsequently consolidated with the appeal from the 17 October 2014 Order and they were heard together on 1 October 2015.

[23] On 8 December 2015, the Court of Appeal handed down judgment in respect of the consolidated appeals. The Court of Appeal allowed both appeals and awarded Jinpeng its costs of the appeal and the proceedings below. Webster JA [AG], with whom the other members of the Court agreed, held that there was no substantial dispute on *bona fide* grounds as to the Company's indebtedness to Jinpeng and it should not have been sent off for the Arbitration. The learned Justice of Appeal further held that Bannister J was wrong to have accepted the Company's proposal that the parties should resolve their dispute by way of the Arbitration and its offer to commence the Arbitration as a condition of having the Originating Application dismissed.

[24] In relation to the condition as to the $35 million in the Company Account at Power Capital, Webster JA [AG] said: "*one of the conditions attached to the discharge of the JPLs has turned out to be baseless and the loan proceeds are still missing; and there is an urgent need to re-appoint the JPLs*". The Court of Appeal therefore re-appointed the JPLs. The Costs Orders that were made were:

(a) In relation to the appeal from the 17 October 2014 Order: "*Costs of the appeal and the proceedings in the court below to the appellant*."
(b) In relation to the appeal from the 2 February 2015 Order: "*Costs of the appeal and in the court below to the appellant*."

[25] On 8 February 2016, the originating application was restored for hearing before Bannister J. The Company continued to argue that the application was an abuse of process but this was rejected by Bannister J and the learned Judge appointed liquidators over the Company. Because of a technical issue around s.168 of the Act, Bannister J gave permission to Jinpeng to present a new Amended Originating Application dated 8 February 2016 with service abridged and advertisement dispensed with. The costs order made by Bannister J was in the following terms:

> "That the costs of these proceedings including the Originating Application filed on 18 September 2014 and the Originating

Application filed on 8 February 2016 be paid out of the Company's assets as costs in the liquidation of the Company."

[26] While the liquidation applications and appeals were being heard, the Arbitration commenced by the Company in Hong Kong was also proceeding. On 26 November 2014, Jinpeng commenced separate arbitration proceedings against Mr Zecha who had provided a guarantee of the loan. The two Arbitrations were consolidated and heard together.

[27] The Company's position was that the loan had been converted into equity, which therefore extinguished the debt, whereas Jinpeng was saying that it was owed $35 million plus interest. The Company also alleged that Jinpeng had colluded with the Company's opponents in the London Litigation and claimed damages for conspiracy and tortious interference. Mr Zecha adopted the Company's arguments and was also represented by Candey.

[28] The Arbitration was very hard fought with extensive disclosure. The hearing of the Arbitration took place in London between 15 and 18 December 2015. Jinpeng's principals flew to London from China to attend the hearing and give evidence. A translator was instructed to attend for their benefit.

[29] The Arbitration was taking place a week after the Court of Appeal had handed down its judgment allowing Jinpeng's appeals. To a certain extent the Arbitration had been rendered redundant and this was probably recognised by the Company as it effectively sought to avoid the Arbitration taking place by conceding that it was liable to repay the loan of $35 million. Mr Brisby QC, leading counsel for the Company, accepted that the Company was effectively "*throwing in the towel*" and he informed the Tribunal that:

(a) The Company had decided to concede the substance of the dispute in relation to the Company's liability to Jinpeng under the loan;

(b) The Company would not be calling evidence in support of its pleaded position despite having confirmed just days before that its witnesses had travelled to London to be available for cross-examination;

(c) The Company did not intend to challenge Jinpeng's evidence or advance any arguments in relation to its conspiracy claims.

[30] However, as the parties were unable to agree the terms of an award (Jinpeng wanted recognition that it was not liable in respect of the conspiracy claims but the Company was unwilling to have this recorded in an agreed award), Jinpeng proceeded to present its case including calling its witnesses to give live testimony. The Tribunal held that, in the circumstances, this was an entirely reasonable course for Jinpeng to have taken.

[31] On 25 February 2016, i.e. after the JLs had been appointed, the Tribunal issued its award in the Arbitration. It found in favour of Jinpeng in all of its claims against the Company and it dismissed all of the Company's and Mr Zecha's counterclaims for conspiracy. The Tribunal awarded Jinpeng costs of $2,389,914.98 which represented approximately 80% of the amount claimed. The Arbitration only happened because of the Order of 17 October 2014 which was subsequently overturned on appeal.

(c) The JLs' settlement of the London litigation

[32] The JLs were appointed on 8 February 2016 and their first task was to investigate the asset position of the Company and to try to resolve the London Litigation. This was listed for a five to six week trial which was due to commence on 5 April 2016. The JLs obtained a line of non-recourse funding to enable them to take independent advice on the relative merits of the London Litigation.

[33] As a result, the London Litigation was quickly settled by the JLs. The principal terms of the settlement were:

(a) The claims of *inter alia* the Company, Tarek and Sherway in the London Litigation were dismissed;
(b) The Company agreed to pay the costs of the Tarek and Sherway parties in agreed sums which would be admitted as unsecured claims in the liquidation (so they would not have any priority over the other costs that I am dealing with);
(c) However, Tarek and Sherway would be paid £1.5 million out of the Monies in Court as some of this was paid in by the Company as security for their costs;

(d) The balance of the Monies in Court plus interest would be paid out to the JLs;

(e) There were funding arrangements entered into between the JLs and Tarek and Sherway (a loan of £750,000 out of total funding of £1.5 million) to enable future legal action to be taken against third parties to maximise recoveries in the liquidation for the benefit of creditors as a whole;

(f) Subject to certain conditions, the JLs and Tarek would cooperate to achieve the release of the sum of $3 million held by Standard Chartered Bank in an account beneficially owned by the Company and Tarek in equal shares to be split equally between them; this sum was however subject to priority of third parties and was not in issue in the London Litigation.

[34] As a result of the above, the Company's realisable assets amounted to approximately $13.7 million.

(d) The JLs' litigation with Candey

[35] The JLs have engaged in considerable litigation in England with Candey regarding their claims to fees and the security taken in respect of those fees. The JLs concluded that the various arrangements with Candey were entered into by the Company at a time when the Company was insolvent and they therefore sought to challenge those arrangements.

[36] In October 2015, because the Company was struggling to meet its legal expenses of all the litigation with which it was then involved, it entered into a fixed fee agreement with Candey whereby Candey was entitled to the arrears of £940,000 and a fixed fee of £3.86 million for legal services to be provided in specified litigation, payable on settlement or judgment in the London Litigation ("Fixed Fee Agreement"). The Fixed Fee Agreement was secured by a Deed of Charge which purportedly granted a fixed and floating charge over the assets of the Company ("the Charge"). The Charge was registered in the BVI and it importantly purported to grant a fixed charge to Candey over the Monies in Court.

[37] There appears to be little dispute that between the date of the Fixed Fee Agreement and the date the JLs were appointed (8 February 2016) Candey carried out legal work for the Company that on a time-cost basis at their usual hourly rates amounted to approximately £1.2 million.

For obvious reasons, Candey is keen to establish that it is entitled to the £3.86 million fixed fee and that that sum is validly secured by the Charge.

[38] The JLs therefore started proceedings in England (after recognition of the BVI liquidation) seeking the determination of various issues related to the validity of the Charge:

(a) that the Charge was a floating rather than fixed charge ("the Fixed or Floating issue");
(b) that it was voidable under s.245 of the Insolvency Act 1986 to the extent that it secured only the value of the services actually supplied by Candey ("the Value of Services issue"); and
(c) that the Charge was ineffective because the Monies in Court had been paid out of Court pursuant to the settlement of the London Litigation and that the replacement fund was the product of the JLs' own skill in securing that settlement ("the New Monies issue").

[39] On 23 June 2017, two of the above issues were decided by His Honour Judge Davis-White QC, sitting as a deputy Judge of the Chancery Division. HH Judge Davis-White QC held as follows:

(a) That the Charge was a floating not a fixed charge – that finding was in favour of the JLs on the Fixed or Floating issue;
(b) That the Monies in Court were capable of being subject to the Charge – that finding was in favour of Candey on the New Monies issue;
(c) That the Charge as a floating charge was granted within the "*relevant time*" for the purposes of s.245 of the Insolvency Act 1986;
(d) Therefore the Charge was a voidable floating charge save to the extent that it secured an amount equal to the value of services supplied by Candey from the date of its execution – i.e. the Value of Services issue; however the learned Judge left open the Value of Services issue to be determined on another occasion, although he considered it arguable that the Value of the Services provided by Candey could be limited to £1.2 million rather than the fixed fee of £3.86 million.

[40] The JLs appealed the New Monies issue but on 16 October 2018, the English Court of Appeal (Patten and Henderson LJJ and Sir Colin Rimer) dismissed the JL's appeal.

[41] The Value of Services issue was heard by His Honour Judge Mark Raeside QC, sitting as a deputy Judge of the Chancery Division. On 22 November 2017, HH Judge Raeside QC decided against the JLs and ordered on 5 December 2017 that the amount secured by the floating Charge was the entire Fixed Fee of £3.86 million plus 8% interest. The JLs appealed that order and the hearing of that appeal took place on 12 and 13 December 2018. At the time of the hearing, the Court of Appeal had not handed down judgment on the appeal. However, on 8 March 2019, the Court of Appeal (Underhill, Henderson and Moylan LJJ) allowed the JLs appeal and remitted the matter back to the High Court to determine the value of services provided by Candey from 21 October 2015, on the basis that it was not entitled to the fixed fee.[1]

[42] That is not the end of the live issues between the JLs and Candey in relation to its fees. On 17 April 2018, Candey issued an application seeking declarations in relation to two further issues:

(a) Candey is arguing that irrespective of its Charge it also has a lien over the Monies in Court pursuant to ss.73 and 168 of the Solicitors Act 1974 ("the Lien issue"); if Candey is correct on this, it claims that it would be entitled to the full Fixed Fee plus interest and as effectively a fixed charge;

(b) Candey is contending that it engaged its sister firm, Candey Law LLP under a conditional fee agreement, in relation to these proceedings with the JLs, which provides for a success fee and that pursuant to the Legal Aid, Sentencing & Punishment of Offenders Act 2012 ("LASPO") a success fee of 100% was recoverable on Candey's fees ("the CFA issue"); if Candey was to succeed on this issue it would also give it priority over Jinpeng's costs claims; the JLs argued that the CFA was a sham and wholly artificial. That issue has not been resolved, but the JLs also took the preliminary point that an exemption within LASPO does not apply to an insolvency proceeding which is not an English insolvency proceeding (the "Exemption Issue").

[1] I am grateful to Mr Willins for forwarding a copy of this Judgment.

[43] The Lien Issue and the Exemption Issue were decided by Mr Andrew Hochhauser QC, sitting as a deputy Judge of the Chancery Division, in a judgment handed down on 19 February 2019. The learned deputy Judge decided that the Lien had been waived and so was unenforceable; he also decided that the success fee was irrecoverable because the exemption within LASPO only applied to companies being wound up in England. Therefore both the Lien issue and the CFA issue were decided in favour of the JLs. Candey have indicated that it intends to appeal this judgment, and since argument has in fact done so.

[44] The present effect is that, subject to any costs orders in Candey's favour (after set off – I do not know what costs order has been made by the Court of Appeal on the Value of Services issue), the Jinpeng costs that are allowed within Rule 199(e) would have priority over the remaining recoverable fees of Candey under its floating charge.

The relevant Statutory and Rules Framework

[45] I now turn to the substantive issues before me. The priority of the costs and expenses of a liquidation and their priority *inter se* are provided for in s.207 of the Act and Rule 199 of the Rules. Care has to be taken in looking at authorities from other jurisdictions which are likely to be based on differently worded provisions. But the clear basis of giving priority to the costs and expenses of the liquidation are that they have been incurred on behalf of and in the interests of the creditors generally. Therefore the unsecured creditors effectively share equally and proportionately in meeting those costs and expenses.

[46] Section 207 of the Act provides as follows (emphasis added):

> "207. (1) Unless and to the extent that this Act or any other enactment provides otherwise, the assets of a company in liquidation shall be applied
>
> (a) In paying, in priority to all other claims, the costs and expenses properly incurred in the liquidation in accordance with the prescribed priority;
> (b) After payment of the costs and expenses of the liquidation, in paying the preferential claims admitted by the liquidator in accordance with the provisions for the payment of preferential claims prescribed;
> (c) After payment of the preferential claims, in paying all other claims admitted by the liquidator; and

(d) After paying all admitted claims, in paying any interest payable under section 215.

(2) Subject to section 151, the claims referred to in subsection (1)(c) rank equally between themselves if the assets are insufficient to meet the claims in full, they shall be paid rateably;

(3) Any surplus assets remaining after payment of the costs, expenses and claims referred to in subsection (1) shall be distributed to the members in accordance with their rights and interests in the company.

(4) For the purposes of this Act, assets held by a company in liquidation on trust for another person are not assets of the company."

[47] Therefore it is only the "*costs and expenses properly incurred in the liquidation*" that have priority over all other claims in the liquidation. They are also given priority, together with preferential claims, over the claims of a floating charge holder, such as Candey. This is provided for in s.208 of the Act:

"208. (1) So far as the assets of a company in liquidation available for payment of the claims of unsecured creditors are insufficient to pay:

(a) The costs and expenses of the liquidation in accordance with the prescribed priority; and
(b) The preferential creditors;

those costs, expenses and claims have priority over the claims of charges in respect of assets that are subject to a floating charge created by the company and shall be paid accordingly out of those assets."

[48] The "*prescribed priority*" referred to in s.207(1)(a) is that set out in Rule 199 of the Rules. This provides as follows (emphasis added):

"199. The following costs and expenses of the liquidation shall be paid in the order of priority in which they are listed (the "prescribed priority")

(a) The costs and expenses properly incurred by the liquidator in preserving, realising or getting in the property of the company or in carrying on the company's business, including
(i) The costs and expenses of any legal proceedings which the liquidator has brought or defended

whether in his own name or in the name of the company; and

(ii) The costs of or in connection with an examination ordered under section 285.

(b) The costs and expenses of complying with a notice issued by the Official Receiver under section 271(2);

(c) The remuneration of the provisional liquidator;

(d) The deposit lodged on an application for the appointment of a provisional liquidator;

(e) The costs of the application on which the liquidator was appointed, including the costs of any person appearing on the application whose costs are allowed by the Court;

(f) Any costs allowed in respect of the preparation of a statement of affairs;

(g) The costs of and in respect of any creditors' committee appointed in the liquidation;

(h) Any disbursements properly paid by the liquidator;

(i) The remuneration of anyone employed by the liquidator;

(j) The remuneration of the liquidator;

(k) Any other fees, costs, charges or expenses properly incurred in the course of the liquidation or properly chargeable by the liquidator in carrying out his functions in the liquidation."

[49] A few general points can be made on Rule 199 at this stage:

(1) The priority set out in Rule 199 is mandatory, unlike in England where the Court retains a discretion to adjust the order – see s.156 of the Insolvency Act 1986 and Rule 7.110 of the Insolvency Rules 2016;

(2) Each of sub-rules (a)-(k) are said to be a category of "*costs and expenses of the liquidation*"; however sub-rules (e) (and possibly (c) and (d)) pre-date the liquidation;

(3) Indeed apart from sub-rules (d) and (e), and possibly (f), they all relate to costs and expenses incurred by the liquidator or provisional liquidator;

(4) It is perhaps curious that the remuneration of provisional liquidators is given priority over the liquidator's remuneration, but I suppose it could be said that provisional liquidators are taking more of a risk with their appointment (and historically they have always been in that order).

[50] Mr Robert Levy QC on behalf of Jinpeng emphasised that an application for the appointment of liquidators is a class remedy and that the applicant is acting for the benefit of all creditors in seeking a winding up. That is why the costs of the application are given priority in Rule 199. Mr

Levy QC referred me to In Re New York Exchange Company [1893] 1 Ch 371 in which Kekewich J referred to the priority of the "*costs of the petition*"[2] and said:

> "Why has the rule been established? It seems to me that the reason is that which has been stated by Mr Douglas. A petitioning creditor is supposed to commence his proceedings on behalf of all the creditors, to insist upon and obtain a winding-up order for their benefit, and therefore, as the representative of a class, it is only right that he should be paid in priority, and in full, the costs which he incurs in doing that which is for the benefit of all."

[51] This perhaps explains why such costs are, even though they pre-date the liquidation, considered to be "*costs and expenses of the liquidation*" – they are regarded as having been incurred by or on behalf of all the creditors of the company. That is also the case in respect of the provisional liquidators whose appointment will have benefited the creditors as a whole in safeguarding assets. It is perhaps odd, however, that the application for the appointment of provisional liquidators is not expressly referred to in Rule 199, save in respect of the deposit lodged on such an application. That could be because it will, of necessity, be within an application for the appointment of liquidators.

The Meaning of Rule 199(e)

[52] There appears to be a dearth of authority on the meaning of this category of costs in the statutory waterfall. There is no relevant BVI authority on the meaning of Rule 199(e). It seems to me that this needs to be approached as a question of pure statutory construction and there is no discretion in the Court to decide that the justice of the case should entitle a particular category of costs to priority. The prescribed priority is mandatory and there is no room therefore for allowing external considerations to enter the analysis; the particular category of costs is either within Rule 199(e) or it is not.

[53] As Mr Levy QC pointed out there are two sets of costs included in Rule 199(e): (i) the costs of the application on which the liquidator was appointed – this appears on its face to be automatic not requiring a Court order; and (ii) the costs of any persons appearing on the application

[2] This was derived from a passage of Lindley on Companies 5th Ed in which was stated "*Where the assets are deficient, even for the payment of costs, the costs of the petition to wind up are entitled to priority over the other costs, and even over those of the liquidator*." This was not, at the time, derived from a Winding Up Rule but was the way the priority rules had developed by the Court which had a discretion as to the order. It is clear that the "*costs of the petition*" had been interpreted to be the "*costs of the petitioner*" which later became the Rule in England.

whose costs are allowed by the Court – these do require the Court to order. Mr Levy QC says that this latter category most obviously would cover creditors who appear on the application to support it and possibly get substituted as the applicant, if the original applicant is paid off. While I can see that this is a potential situation (even though a substituted applicant could be said to be within the first category from the time of the substitution), from a review of the English authorities, the most likely candidate for the second category is the company itself, as is provided for in the "*usual compulsory order*" made on a creditor's petition in England which I discuss below.

[54] This highlights an oddity about the wording of Rule 199(e): it does not refer to the costs of the "*applicant*"; rather it refers to the costs of the "*application*". It is clearly intended to cover the costs of the applicant on a successful application but by referring to the specific application it could be limiting the scope to the costs of the originating application and no other costs of the applicant incurred in pursuit of the liquidation. The wording is different to the equivalent rule in England and Wales. There, Rule 7.108(4)(h)[3] provides similar priority to (emphasis added):

> "the costs of the petitioner, and of any person appearing on the petition whose costs are allowed by the court;"

The same two categories of costs are included but there is a perhaps significant change to the first category in that it refers to the "*petitioner*", the equivalent of the applicant in the BVI, and not the "*petition*". Those costs are potentially wider than Rule 199(e).

[55] Mr Levy QC encourages me to apply a purposive construction to Rule 199(e). He says that the first category cannot sensibly be said to be literally the "*costs of the application*" which could be read as simply the costs of issuing an originating application. Mr Haque QC on behalf of Candey did submit that the use of the word "*including*" meant that a possible construction could be that Rule 199(e) contemplates not two or more possible costs' claimants but only one and that one is in the second category and requires a positive order of the Court in their favour. By contrast, Mr Haque QC submits, the English provision contemplates two or more costs' claimants because of its express reference to the "*petitioner*" and "*any person*".

[3] Which is the same as its predecessor in Rule 4.218(3)(h) Insolvency Rules 1986

[56] Mr Willins drew my attention to the comments of Carrington JA [Ag] in Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited BVIHCVAP13/2016 at para. 24:

> "[24] Parliament is expected to say what it means and mean what it says. The first recourse in determining the meaning of a statutory provision should be to the grammatical meaning of the words used and their context. If the grammatical meaning of the words used is clear and the context does not lead to the conclusion that the words used may have more than one meaning or a different meaning from the natural grammatical meaning, then effect should be given to the clear grammatical meaning as disclosing the intention of Parliament in using them."

[57] The context, as I have stated above, is that Parliament intended to give priority to those costs that were incurred by one or more persons for the benefit of the creditors as a whole, not just for their own personal benefit. As such I do not believe that Parliament could sensibly have intended to limit the "*costs of the application*" to the issuing fees. In my judgment, it was intended to cover all the applicant's costs of the application to put the company into liquidation. That still leaves open whether all or some of the categories of costs that I am considering (the appeal, Arbitration and JPLs' appointment) can properly be classed as "*costs of the application*" but it removes the suggestion that only the issue fees are recoverable under the first category in Rule 199(e).

[58] It is important to focus on what is meant by "*the application on which the liquidator was appointed*". Mr Willins pointed me to Rule 13 of the Rules which provides as follows:

> "13. (1) An application to the Court which is not an application made in insolvency proceedings already before the Court shall be made as an "originating application".
>
> (2) An application to the Court made in insolvency proceedings already before the Court shall be made by way of an "ordinary application".
>
> (3) For the purposes of applying the CPR, an application made in insolvency proceedings, whether originating or ordinary, shall be regarded as a fixed date claim."

[59] While I agree that, by Rule 13, an application for liquidators to be appointed has to be by way of originating application, the Rule is not defining what "*application*" means in other Rules. It is not a definition Rule. For example, an application for the appointment of JPLs would be by

ordinary application within the "*insolvency proceedings*"[4] constituted by the originating application for the appointment of liquidators. Those insolvency proceedings continue throughout the liquidation and there could be numerous applications within the insolvency proceedings that have nothing whatsoever to do with the appointment of the liquidators.

[60] Even though this was not part of any of the submissions to me, I also take comfort from having looked at the history of the current Rule in England – rule 7.108(4)(h) as set out above. As I said above the immediate predecessor was Rule 4.208(3)(h) which was in the same terms. Before then, it was Rule 195 of the Companies (Winding Up) Rules 1949 ("1949 Rules" - which I believe was in same terms as Rule 192 of the Companies Winding-Up Rules 1929)[5] providing for the first priority to be for:

> "The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the Court."

This appears to be a statutory incorporation of the rule developed by the Courts as referred to in Kekewich J's judgment in Re New York Exchange Company, supra. I imagine that this is the reason that Rule 199(e) is in the form it is.

[61] The reference to "*taxed costs*" makes it clear that the Rule is talking about the costs of the petitioner and that is what is provided for in the "*usual compulsory order*" that is made in England on a creditor's petition (which I do not believe changed when the Rules changed). If confirmation of this were needed it is provided by the well-known decision of Brightman J (as he then was) in In Re Bathampton Properties Ltd [1976] 1 WLR 168. That case, which gave rise to the concept of a "*Bathampton Order*" referred to the usual order in respect of the successful petitioner's costs being that they should be paid out of the assets of the company and this was pursuant to Rule 195. It is also clear that the usual order in respect of the company's costs of appearing on the petition will normally be allowed under the second part of Rule 195 (i.e. allowed by the Court) if it appears on the first hearing of the petition but possibly not if it goes on to oppose the petition substantively. (The position of the company's costs of opposing a petition was comprehensively reviewed by Morgan J in Re Portsmouth City Football Club Ltd, Neumans LLP v Andronikou [2013] Bus LR 374 at paras. 113-136[6] and he held that the company could be entitled to priority for its costs of unsuccessfully applying to

[4] This is a defined term in Rule 2 as "any proceeding under the Act or the Rules…"
[5] These seem to be different to the equivalent Bankruptcy Rules – see below
[6] Upheld by the Court of Appeal – [2013] Bus LR 1152 – describing Morgan J's judgment as "impeccable" and not requiring further elaboration by the Court of Appeal

strike out a petition if its directors were acting in the best interests of the company in deciding to pursue the strike out.)

[62] In my judgment Rule 199(e) is to be interpreted in the same way as Rule 195 of the 1949 Rules in England, namely to incorporate within the first category – "*the costs of the application on which the liquidator was appointed*" – all the costs of the applicant in respect of its application for liquidators to be appointed. It is therefore not substantively different from the current English Rule 7.108(4)(h) despite the reference in the English Rule of "*the costs of the petitioner*".

Relevant English Authorities

[63] As stated above, there is no relevant authority in the BVI. There is also a dearth of authority in England. In the textbooks that I have been referred to, there are only two cases cited as dealing with issues arising out of the equivalent English rule. Those two cases, both over 100 years old, are:

(a) Re Bright, ex p Wingfield and Blew [1903] 1 KB 735 ("Re Bright"); and

(b) Re Universal Non-Tariff Fire Assurance Co Ex p. Forbes & Co (1875) 23 WR 464[7] ("Re Universal").

[64] Looking first at what the textbooks had to say:

(a) Palmers Company Law at para. 15.445 refers to English Rule 7.108(4)(h) and footnotes Re Bright without comment;

(b) **Bailey and Groves' Corporate Insolvency Law and Practice** 5th Ed says at para.28.3[8] note 9:

> "The petitioner's costs will include any costs incurred in establishing his debt ([Re Universal]) and any costs incurred on appeal ([Re Bright]). Unless expressly allowed by the court it is only the petitioner who benefits from this priority…"

(c) **Halsbury's Laws of England, Company and Partnership** Insolvency Vol 17, note 23 is practically the same:

[7] There was some confusion over the fact that there are two reports of this case. The one stated above is the correct one for the purposes of the issue to be considered. The other report is at (1874-75) LR 19 Eq 485

[8] Which quotes English Rule 7.108(4)(h)

> "The petitioner's costs include the costs of establishing his debt ([Re Universal]) and costs on appeal ([Re Bright])."

[65] Mr Levy QC relied quite heavily on these cases because of the way they have been cited in the textbooks but it is necessary to look closely at what they were actually deciding.

(a) Re Universal

[66] This was a decision of Malins V-C. The facts are fairly straightforward. The claimant, Peter Forbes and Co, had an insurance policy with the Defendant insurers, Universal Non-Tariff Fire Insurance Company. Following a fire at its premises, the insured claimed against the insurer for £1,350. The company insurer disputed the validity of the policy because of an alleged misdescription of the property. The insured presented a winding up petition on the basis of its unpaid debt but the petition was opposed by the company insurer on the grounds that the debt was disputed and that in any event it was not insolvent and would be able to pay the debt if it was found to be due. The winding up petition was ordered to be stood over until the debt was proved. (There does not appear to have been an application to strike out the petition because the debt was disputed.)

[67] In July 1872, the insured started proceedings against the company insurer in the Hertford Assizes. The judge in that case ordered the company insurer to pay £1000 into Court and, as there was not time to try the case, the Court awarded the insured the full amount of its claim, £1350 "*subject to a special case*".

[68] In November 1872, the company insurer resolved to enter a voluntary winding-up. In December 1872, on a petition of another creditor, an order was made continuing the voluntary winding-up under the supervision of the Court. Under this winding up, the insured put in a claim for the £1350 due under the policy. In other words, the insured effectively put in a proof of debt in the liquidation.

[69] It appears from the other report of the decision – (1874-75) LR 19 Eq 484 – that the matter came back before Malins V-C on an application for leave to proceed on the special case ordered by the Hertford Assizes. However this application was refused and "*the claimants were directed to establish their claim before the Vice-Chancellor*". I take this to mean that the insured was being asked to make good its proof of debt. As Malins V-C said at p.493:

> "Under this Order[9], [the insured] have claimed £1350, which they say is due to them under the policy, as a debt against the company; and their demand being resisted by the liquidator, I have to decide the question which has been raised as to the validity of the policy."

In other words, Malins V-C was deciding whether the insured's claim should be admitted to proof in the liquidation. The learned Vice-Chancellor was not deciding whether the insured was a creditor entitled to proceed with their petition.

[70] In his decision on 20 February 1873, Malins V-C found in favour of the insured that the policy was not avoided on the grounds of misdescription. Before that order was drawn up, an issue of costs arose, and this is the judgment reported in the Weekly Reporter. On 6 March 1873, Malins V-C said this:

> "The assured were entitled to their money in 1872. They were put off. They proved that the reason they were put off was that the company had no money to meet the claim. There never was a case in which directors were more imperatively called on to indemnify just creditors. It is perfectly plain these costs were incurred by the unjustifiable resistance of the liquidator. And if other creditors do not take steps to control such resistance, they must suffer the consequences. The liquidator should see what are the assets of the company, what the state of its litigation. If he allows litigation to go on vexatiously, he must bear the consequences also. The whole question is decided by the case of *In re Trent and Humber Ship-building Company*. Therefore, the costs of the petition and the action at law must obtain priority over the costs of the liquidator and all others."

[71] It is a little difficult to understand exactly what is being decided in Re Universal. My conclusions in relation to this decision are as follows:

(1) This was not a decision in relation to the equivalent of Rule 199(e);
(2) Furthermore, this was not about the costs of the petition; the insured's petition was not live by the time of the decision as it had been overtaken first by the voluntary winding up and then by the other petition on which an order had been made;
(3) The issue that Malins V-C was deciding was whether the liquidators had acted reasonably in continuing to resist the insured's claim;

[9] The winding up order made in December 1872

(4) This was therefore a post-liquidation expense, essentially as part of the process of proving the debt and the liquidators comprehensively lost and were held to have acted vexatiously in allowing the litigation to continue;

(5) It is therefore unsurprising that Malins V-C decided that the insured's costs should have priority over the liquidator's costs;

(6) Included in those costs does appear to be the costs "*of the action at law*" which I take to mean the Hertford Assizes case, but these were effectively aborted and subsumed within the proof of debt application.

[72] Accordingly I do not regard Re Universal as authority for the proposition that costs of establishing a petitioner's debt are recoverable under Rule 199(e) or equivalent. I should add that if this was the effect of Re Universal one would have expected there to be a later authority where a petitioner successfully recovered its costs of separate proceedings, as it is not uncommon that a petitioner has to do this.

(b) Re Bright

[73] Mr Levy QC relies on Re Bright as authority for the recovery of successful appeal costs. In fact, it was about the recovery of rehearing costs but it does also concern appeals and the principles appear to be the same.

[74] Re Bright was a bankruptcy, rather than winding-up case. Interestingly the relevant Rule 125 of the Bankruptcy Rules 1866 gave priority to the "*taxed costs of the petitioner*". A receiving order was made against the debtor in 1901 and four months later the debtor's appeal against that order was dismissed. In the meantime, the debtor had been adjudicated bankrupt and a trustee appointed. The petitioner's "*costs of the petition and the appeal were paid out of the estate*", apparently without objection.

[75] In July 1902, the debtor applied to the registrar to rescind the receiving order and to rehear the petition. This was refused and the debtor appealed to the Court of Appeal. The Court of Appeal in November 1902 refused to rescind the receiving order but did direct the petition to be reheard and "*ordered the costs of the petitioning creditor to be paid out of the estate*." The petition was then reheard by the registrar who confirmed the receiving order. The debtor appealed that to the Court of Appeal and this appeal was dismissed and an order was made

that "*the costs of the petitioning creditor of the rehearing in the Court below and in the Court of Appeal be paid out of the estate.*" It seems that there were three appeals to the Court of Appeal in all of which the petitioner's costs were ordered to be paid out of the estate.

[76] An issue then arose as to priority of the solicitors' costs incurred by the trustee in dealing with the estate while the various rehearings and appeals were going on. As part of the argument in relation to this, the petitioner argued that the Rule 125 priority to "*the taxed costs of the petitioner*" included the costs of the rehearing and the appeal therefrom. There seems to have been no issue that the first appeal from the receiving order and the second appeal from the application to rescind were within the "*taxed costs of the petitioner*". Wright J held as follows:

> "Then there remains the question, which is perhaps not free from difficulty, whether under the peculiar circumstances of this case the words in rule 125, "the taxed costs of the petitioner", include the costs incurred in the rehearing of the receiving order. It seems to me that on principle I ought to hold that "the taxed costs of the petitioner" do include costs to which he is subjected by a rehearing, both in the Court below and on appeal, against the receiving order. They are all part of the necessary expenses to which he is subjected in retaining the receiving order. I do not consider that these are to be treated in any other way than as costs of the petitioner. I must make a declaration that the words "taxed costs of the petitioner" include for the purposes of this case the costs of the rehearing and of the appeal against the registrar's order thereon."

[77] It could be said that the case before me is stronger than Re Bright in that it only concerns one appeal rather than a rehearing and three appeals. It is of no significance that these were appeals by the debtor whereas the appeal in this case was by Jinpeng. They are still part of the "*necessary expenses*" to retain or obtain the order. The orders that were made in Re Bright by the Court of Appeal ordering the petitioner's costs to be paid out of the estate did not themselves determine that they were the "taxed costs of the petitioner" entitled to priority under Rule 125.

[78] Accordingly, I consider that Re Bright is a case of some significance, more in respect of the fact that there was no question that the first appeal from the receiving order was undoubtedly within the "*taxed costs of the petitioner*". I have held above that the difference in wording between the English rule referring to the "*petitioner*" and Rule 199(e) and Rule 195 of the 1949 Rules referring to the "*application*" or "*petition*" does not affect their interpretation.

The Costs of the Appeal

[79] I now turn to consider the particular categories of costs that Jinpeng claim are within Rule 199(e), starting with the costs of its successful appeal from Bannister J's conditional Order on the strike out application dismissing the application for the appointment of the JLs and discharging the JPLs.

[80] It is of course deeply unmeritorious for either the Company or Candey to suggest that Jinpeng should not have priority for its costs of an appeal from an order that was wrongly obtained in that the learned Judge and Jinpeng were seriously misled. I am not saying that Candey knew about the non-existence of the Company Account but the Company certainly did.

[81] The Court of Appeal ordered that Jinpeng should have its costs of the appeal and of the Court below. When the matter went back to Bannister J on 8 February 2016, the learned Judge ordered that:

> "the costs of these proceedings including the Originating Application filed on 18 September 2014 and the Originating Application filed on 8 February 2016 be paid out of the Company's assets as costs in the liquidation of the Company."

While Mr Levy QC is correct to say that these orders do not affect the statutory priority, they are a fairly clear indication that both Courts considered that those costs should have priority.

[82] Mr Haque QC sought to make some points about the two originating applications that had to be issued in this case and it was only the latter one "*on which the liquidator was appointed*" as per Rule 199(e). Furthermore an issue was taken as to the fact that an appeal is a separate proceeding under the CPR from the originating application (it has a different case number for example) and that this was an appeal on the Company's strike out application.

[83] In my view there is nothing in these overly technical points and they do not detract from the substantive principle in Re Bright that these were "*necessary expenses*" which had to be incurred in order to succeed on the application on which the JLs were appointed, something which should have happened before Bannister J at the original hearing on 17 October 2014. The appeal was all part of the "*application*" referred to in Rule 199(e) and I am in no doubt that Jinpeng's costs of the appeal are within the priority afforded to them in Rule 199(e). It was acting to enforce a class remedy for the benefit of all the Company's creditors.

The costs of the application to appoint JPLs

[84] The position is similar in my view in relation to the costs of the application to appoint the JPLs. This too was clearly made for the benefit of the creditors as a whole to protect the assets of the Company. The Court of Appeal immediately re-appointed the JPLs on delivering judgment on 8 December 2015. It clearly saw the application as live before it even though it was necessary to issue a new originating application on 8 February 2016 because of a technical concern as to the validity of the first one.

[85] One aspect that has slightly troubled me on this was noted above. This is that while there are specific sub-rules in Rule 199 dealing with the JPLs remuneration and the deposit paid on their appointment, there is nothing dealing specifically with the application for their appointment. Whether this was accidental or deliberate I do not know but it has been the position throughout all the various iterations of the Rules, both here and in England and Wales.

[86] On further reflection, I do not see this as a problem. An application for JPLs is made under s.170 of the Act by ordinary application within the originating application to appoint JLs. It is not self-standing. It is in the same "*insolvency proceedings*" and will have the same case number (not that that is significant in my view). I consider that the logicality of not referring to an application to appoint JPLs when their very appointment is assumed in Rules 199(c) and (d) is because it is assumed to be within Rule 199(e). If the application for JLs to be appointed ultimately succeeds, then the earlier application for JPLs will have been justified and the costs of doing so added to the costs of the originating application. Again, these costs are very clearly within the principles set out in Re Bright and in my judgment are therefore within Rule 199(e).

Costs of the Arbitration

[87] I do not believe there could be a much stronger case for including the costs of the Arbitration as the costs of the application than this one. Jinpeng was forced to fight the Arbitration because of the wrongly obtained Order of Bannister J dated 17 October 2014. Furthermore the Court of Appeal held that Bannister J was wrong to have considered that there was a *bona fide* dispute on substantial grounds and should not have required Jinpeng's debt to be established in the Arbitration. And when they got to the Arbitration, the Company just "*threw in the towel*".

[88] Nevertheless, while the justice of the case may demand that Jinpeng's costs of the forced Arbitration which were potentially necessary to found the application to appoint the JLs should be given priority, I do not consider that they are properly within Rule 199(e). Mr Levy QC conceded that the costs of establishing a debt prior to issuing an application to appoint liquidators would not be claimable as the "*costs of the application*". He says however that it is different where the applicant is forced to establish its debt after and within the application to appoint the JLs. I do not consider either that this is a valid distinction or that the Arbitration was in some way within the application to appoint the JLs.

[89] Mr Levy QC relied on cases such as Re Claybridge Shipping Co SA [1997] 1 BCLC 572 and In the matter of GFN Corporation Ltd [2009] CILR 650 to argue that it would have been open to the Court hearing the application to appoint the JLs to actually determine the alleged dispute as to the existence of the debt. If it was able to do that and if JLs were ultimately appointed, the applicant would get its costs of the application which would include the establishment of the debt. I agree that that is the course that Bannister J should have taken in this case as was decided by the Court of Appeal. But if he had done so, it would have been part of the process of deciding whether there is a dispute on substantial grounds that should not be part of the application to appoint JLs. If, for whatever reason (and by that I mean whether a good or bad reason), the debt has to be established in other proceedings outside of the application to appoint JLs, it is clear that those other proceedings are not within "*the application*" in Rule 199(e).

[90] I have explained above why I think that Re Universal does not help in resolving this issue and it is not an analogous situation. It is fairly remarkable that if a petitioner was able to include within its priority claim the costs of "*establishing his debt*" that there has not been any reported case since Re Universal in which that has happened. That is because that is not what was in issue in Re Universal and properly understood it was a proof of debt case.

[91] Accordingly I hold that Jinpeng is not entitled to its costs of the Arbitration.

The LPA Issues

[92] That leaves the issues concerning whether Jinpeng can properly include Weil's fees from 1 November 2015 (the coming into force of the LPA) within its costs' claims. I have decided that

the Arbitration costs, which included Weil's fees, are outside Rule 199(e). So this now only concerns Weil's fees in respect of the application to appoint JLs and JPLs and the appeal.

[93] Prior to the coming into force of the LPA, the recovery of foreign lawyers' fees was generally permitted by the Court so long as they were properly to be regarded as a disbursement on the invoices of the BVI legal practitioners – see Finecroft v Lamane BVIHCV2005/0264; and Grand Pacific Holdings v Pacific China Holdings BVIHCV2009/0399. Because these are hard-fought proceedings across multiple jurisdictions it was considered justified to appoint an international firm to co-ordinate all aspects of the global litigation.

[94] I am satisfied, based on what Ms Miranda Schiller, a partner of Weil, said principally in paragraph 67 of her Twelfth Affirmation in these proceedings that the engagement of Weil to act in relation to the BVI litigation was justified. Mr Haque QC has submitted that the extent of Weil's involvement cannot be justified but it seems to me that that is really a question of the reasonableness of their costs, which is still to be determined. At this stage, I am prepared to accept that the fees of Weil prior to 1 November 2015 in respect of the application for the appointment of the JLs and JPLs and the appeal are properly to be included in the assessment that is to take place.

[95] In relation to the period from 1 November 2015 I can be quite short because I appear to be bound by Court of Appeal authority on the recovery of foreign lawyers' fees. (I should record that Mr Levy QC expressly reserved Jinpeng's right to argue in a higher Court that the Court of Appeal decisions to which I am about to refer were wrongly decided.)

[96] Before turning to those cases I should set out s.18 of the LPA which provides as follows:

> "18. (1) Subject to this Act, where a person whose name is not registered on the Roll
>
> (a) practises Law;
> (b) wilfully pretends to be a legal practitioner; or
> (c) makes use of any name, title or description implying that he or she is entitled to be registered or to act as a legal practitioner,
>
> he or she commits an offence and is liable on summary conviction to a fine of not less than fifteen thousand dollars or to imprisonment for a term of not less than three years, or both;
>
> (2) A person who, not being entitled to act as a legal practitioner, acts in any respect as a legal practitioner in any action or

> matter or in any court in the name or through the agency of a legal practitioner entitled to so act, commits an offence and is liable on summary conviction to a fine of not less than ten thousand dollars or to a term of imprisonment of not less than two years, or both;
>
> (3) No fee in respect of anything done by a person whose name is not registered on the Roll or to whom subsection (2) relates, acting as a legal practitioner, is recoverable in any action, suit or matter by any person."

[97] In Gargusha v Yegiazarayan BVIHCMAP2015/0010 ("Gargusha") the Court of Appeal appeared to decide that mere assistance in BVI litigation by a foreign lawyer was a criminal offence under s.18(1) LPA. Webster JA's judgment on this aspect was concerned with establishing whether the pre-enactment common law rule as to recovery of foreign lawyers' fees had been abrogated by the LPA. The learned Justice of Appeal held that a combination of ss.2 and 18 had abrogated the common law rule where a person acts "*as a legal practitioner*". In para. 70 Webster JA said that: "*an overseas lawyer who assists local lawyers with the advice and conduct in a BVI matter must be regarded, as a matter of BVI law, as practising BVI law, albeit from outside the BVI.*" This was held to be the commission of a criminal offence under s.18(1).

[98] However, one of the subsections relied upon by Webster JA was s.2(2) which extended the definition of "*practising law*" to practising BVI law outside the BVI. That subsection, at the time of the judgment, had not been brought into force and it was subsequently repealed. Therefore when the issue came back before the Court of Appeal in Shrimpton v Scriven BVIHCMAP2016/0031 ("Shrimpton") it was argued that Garkusha had been decided *per incuriam* and should not be followed. The Court of Appeal disagreed that Garkusha was decided *per incuriam* but approached the question a little differently. The judgment of Gonsalves JA [Ag] concentrates far more on the terms of s.18(3), which deals specifically with the recovery of fees, and which the learned Justice of Appeal said should be read disjunctively from s.18(1).

[99] On the important issue as to what constitutes practising BVI law or acting as a legal practitioner, the Court of Appeal followed (as it was bound to) the conclusions reached in Garkusha. Thus at para. 9, Gonsalves JA said: "*His Lordship's conclusion in this regard was general, that is, that assisting a BVI attorney with a BVI case would constitute practicing BVI law*". Then in para.44, Gonsalves JA said:

> "Alternatively, an examination might have revealed that the BLP lawyers were carrying on activities that, although related to the BVI case, could not properly have been carried out by a BVI lawyer. Such activities might not have been captured by a narrower interpretation of "acting as a legal practitioner" if that phrase was restrictively interpreted to mean carrying on such activities as a BVI lawyer could be expected to carry on in the BVI. Such an interpretation might have left the common law right as defined by Webster JA [Ag] intact in that it might have allowed for the recoverability of foreign lawyers' fees as disbursements in relation to activities that were necessary and proper for a foreign lawyer to carry out in relation to a BVI case. But Webster JA [Ag] found that by assisting G with his defence, the foreign lawyers were "performing the functions of a legal practitioner". This determination would have satisfied the element of "acting as a legal practitioner" contained in section 18(3). Importantly this conclusion would not have been affected by the inoperability of section 2(2). This Court is not entitled to interfere with that finding even if it considers that the phrase "acting as a legal practitioner" could have narrowly defined so as to admit an approach that might have required an examination of the particular work carried out by the foreign lawyer to determine what parts if any constituted carrying on activities that could or could not have been carried out by a BVI lawyer, that is activities that were reasonable and necessary for a foreign lawyer to have carried on."

[100] As I read that passage from Shrimpton, Gonsalves JA [Ag] was basically saying that Webster JA [Ag] in Garshuka adopted a wide definition of what constitutes "*acting as a legal practitioner*" and that that finding is binding on the Court in Shrimpton. It is similarly binding on me and therefore the involvement of Weil in assisting in the BVI litigation is irrecoverable under s.18(3) LPA. I was also referred to the decision in Re Unicorn Worldwide Holdings Limited BVIHCM120/2017 in which Adderley J dealt shortly with Garkusha and Shrimpton in the course of a liquidator's remuneration application. Interestingly the learned Judge drew attention to the width of s.18(2) which also applies to s.18(3) and includes a person "*who acts in any respect as a legal practitioner in any action or matter or in any court"* – see para. 146.

[101] Mr Levy QC submitted that Ms Schiller's evidence shows that Weil were not acting as BVI lawyers and were not practising BVI law. However, Garshuka and Shrimpton adopted a much wider definition and I am bound by that. Mr Levy QC also relied on a Cayman Islands case called In the matter of Wyser-Pratte Eurovalue Fund Limited [2010] (2) CILR 233 for the proposition that a liquidator is entitled to be reimbursed for his costs out of the assets of the estate in the same way as a trustee is entitled to an indemnity from the trust fund. He then

makes the bold submission that the LPA has no application to claims to be reimbursed out of a fund. However, the issue before the Court on this application is whether Jinpeng should recover its "*costs of the application*" in priority to other costs – those costs are the legal costs of pursuing the application. That engages s.18(3) LPA.

[102] I therefore rule that Jinpeng cannot recover under Rule 199(e) the fees paid to Weil in respect of work done in relation to assisting on the applications and appeal after 1 November 2015.

The Process for Quantifying Jinpeng's allowable costs

[103] Having now decided the general principles applicable to Jinpeng's costs claims within Rule 199(e), I am now asked to decide how the allowable quantum of such costs should be determined. As I stated in paragraph 7 above there are three potential options that Mr Willins has suggested:

(a) To treat the costs as an expense of the JLs, the quantum of which can be determined by the Court as though it is an application under s.430 of the Act to fix the JL's remuneration;

(b) To allow the JLs to perform their quasi-judicial role of adjudicating on claims made in the liquidation; this would be treating Jinpeng's claims as though it was an unsecured creditor under s.209 of the Act; and any decision would be challengeable by Jinpeng and by any other creditor under s.273 of the Act;

(c) To treat the costs as payable pursuant to a Court order which can be subject to a detailed assessment if not agreed between the JLs and Jinpeng.

[104] The JLs marginally favour (b) but their overriding concern is for this to be resolved as expeditiously as possible. Jinpeng strongly prefers (b), which has the added advantage as it sees it of preserving confidentiality in the detail of its costs (particularly from Candey). Candey prefers (a) as it says that, given the hostility and history between the parties, the quantum, like the issues before me, should be scrutinised by the Court and that it should be allowed to be heard on any such application.

[105] In my judgment, option (c) is the appropriate way for Jinpeng's costs to be determined. It is clear from the earlier Rules, such as Rule 195 of the 1949 Rules, that it was the "*taxed costs*" that were given priority and that those costs would be assessed on a party and party basis (although the solicitors could claim solicitor and client costs if there was a surplus in the liquidation – see In Re C.B. & M. (Tailors) Ltd [1932] 1 Ch 17). Rule 199(e) provides for the priority of Jinpeng's costs but the costs are actually payable pursuant to the costs orders made by Bannister J and the Court of Appeal (as set out above). As such they should be resolved as between the Company and Jinpeng in the usual way, either by agreement or in default by assessment of the Court. I do not consider that Candey would have standing to appear and be heard on any such assessment, as it was not a party to that litigation.

[106] As to the other options: I consider that option (a) and s.430 of the Act is limited to the JLs' remuneration, including their properly incurred expenses (which can be scrutinised by the Court – see Re Unicorn Worldwide, supra) and this cannot sensibly include Jinpeng's costs incurred prior to the appointment of the JLs; and in relation to option (b), I do not see that Jinpeng's costs can be squeezed into s.209 of the Act as though they are an unsecured claim in the liquidation.

[107] Accordingly I direct that the quantum of Jinpeng's costs, based on my resolution of the general principles in this judgment, should be determined as though they were the costs ordered by the Court to be paid by the Company to Jinpeng and in the absence of agreement being reached between the JLs and Jinpeng, they should be subject to a detailed assessment by the Court.

Conclusion

[108] As appears from my perhaps over long judgment, I have concluded that Jinpeng's costs of its appeal to the Court of Appeal and of its application to appoint JPLs, together with its costs of the application itself are within Rule 199(e). However, I have decided that the costs of the Arbitration and of Weil after 1 November 2015 are not within Rule 199(e). I have directed that the quantum of those costs should be subject to detailed assessment by the Court if they are not agreed between the JLs and Jinpeng.

[109] Finally I am grateful to all Counsel for their helpful submissions on the interesting issues with which this application has been concerned.

Hon Mr Justice Michael Green QC
Commercial Court Judge [Ag]

By the Court

Registrar