

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0017

BETWEEN:

SUN VESSEL GLOBAL LIMITED

Appellant

and

[1] HQ AVIATION LIMITED

[2] GREAT LAKES INSURANCE (UK) SE

Respondents

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Godfrey Smith SC

Justice of Appeal [Ag.]

The Hon. Mr. Anthony Gonsalves KC

Justice of Appeal [Ag.]

Appearances:

Mr. John Russel KC with him, Mr. Jerry D. Samuel, and Ms. Allana -J. Joseph for
the Appellant

Mr. Matthew Reeve with him, Mr. Joseph England, and Ms. Olga Osadchaya for
the Respondents

2022: October 3;
2023: January 9.

Commercial appeal – Section 404 of the BVI Merchant Shipping Act, 2001 – Pre-Judgment Interest - Limitation fund - Whether Section 404 of the Merchant Shipping Act should be construed as requiring the court (in a case where the shipowner/wrongdoer has elected not to constitute a limitation fund) to apply, to any pre-judgment interest on damages, the same rate of interest as would have been prescribed if a limitation fund had in fact been constituted – Exercise of judicial discretion – Appellate court’s interference with judge’s discretion to award of interest – Statutory interpretation – Section 18(3) of Legal Profession Act, 2015 – Costs – Whether the judge correctly permitted recovery of costs incurred by foreign lawyer who was not enrolled as a legal practitioner in the Territory of the Virgin Islands

On 10th May 2017 a helicopter ditched into the sea while trying to land on the aft leisure deck of a superyacht “BACARELLA” in Bergen, Norway. The deck served as a helipad. The helicopter accident occurred because the cover of the temporary fuel tank was blown off by the down blast of the helicopter’s rotors and became entangled in the rotors. The first respondent was the owner of the helicopter, and the second respondent was its insurer. The appellant was the owner of the yacht. Shortly before the trial the appellant conceded that it was negligent in leaving the fuel tank cover inadequately secured, and thus was liable for the accident. That left two issues for determination at trial. The first was contributory negligence, the second was limitation, the appellant having pleaded as a defence that it was entitled to limit its liability pursuant to the Convention on Limitation of Liability for Maritime Claims 1976 (as amended by a 1996 Protocol) (“the Convention”).

The substantive judgment in the case (“the Main Judgment”) was delivered orally on 29th April 2021, with the written judgment being approved on 17th May, 2021. In the main judgment the judge dismissed the defence of contributory negligence. The judge also held that the appellant was entitled to limit its liability under section 391 of the Territory of the Virgin Islands (the “BVI”) Merchant Shipping Act, 2001. This limited damages to 1.51 million Special Drawing Rights, which converted to US\$2,168,340.79. There was no appeal against any of the findings in the main judgment. This appeal concerns rulings in relation to interest and costs made by the learned judge in a judgment dated 20th January 2022 (“the January Award”). In relation to interest, in the January Award the judge decided that where no limitation fund had been established, the rate established for pre-judgment interest under section 404 of the BVI Merchant Shipping Act, 2001 did not apply. In relation to costs, the judge permitted the respondents to recover pre-commencement costs in respect of legal fees paid to Dr. Trevor Fox (“Dr. Fox”) (An English solicitor and specialist in aviation litigation) who at the time was not qualified and/or admitted to practice as a solicitor or barrister in the BVI. The judge determined that Dr. Fox’s fees would be recoverable under the Civil Procedure Rules 2000 (the “CPR”) 64.3 as pre-action costs as they were related to the proceedings and that CPR 64.3 is essentially backward looking.

The appellant being dissatisfied with the judge’s ruling in the January Award in relation to interest, and costs has appealed. The main issues that arise on this appeal are (i) whether Section 404 of the BVI Merchant Shipping Act, 2001 should be construed as requiring the court (in a case where the shipowner/wrongdoer has elected not to constitute a limitation fund) to apply, to any pre-judgment interest on damages, the same rate of interest as would have been prescribed if a limitation fund had in fact been constituted; (ii) whether the judge erred as a matter of law in permitting the respondents to recover pre-commencement costs in respect of legal fees paid to a legal practitioner who was not called to the BVI bar.

Held: allowing the appeal in part and setting aside the order of the judge allowing recovery of the pre-action costs in relation to Dr. Fox, dismissing grounds 1 and 2 of the appeal and making no order as to costs, that:

1. As a matter of statutory construction, section 404 of the BVI Merchant Shipping Act, 2001 does not expressly apply where a limitation fund has not been established. The assertion by the appellant that the prescribed rate applied as a matter of statutory construction to the case where a limitation defence was pleaded with no fund having been constituted was therefore wrong. With section 404 expressly only covering cases where a fund is constituted, it was for the appellant to provide, by its own words as 'a question of construction or interpretation' a legal basis for the application of the prescribed rate to a case where no fund was constituted. None of the explanations advanced by the appellant achieved this.

Section 404 **BVI Merchant Shipping Act, 2001** No. 13 of 2021, Laws of the Virgin Islands applied.

2. There are relevant practical and legal differences between the two situations (where a limitation fund is constituted and where limits are invoked without a fund). Where a shipowner elects to constitute a limitation fund, the shipowner can fix the currency rate at which limits are converted at the time of constitution and where the applicable national law prescribes the rate of interest to be added to the fund on constitution, the shipowner can secure that rate. Prescribing the rate in advance is of obvious practical assistance for the shipowner in calculating the amount to pay in as the limitation fund. It is a fundamentally different situation where the limit is simply invoked as a defence. Interest will be then assessed in the normal way at the end of the case, fairly taking account of all factors relevant to the assessment. Thus, it is not automatic that a shipowner, who has not provided the actual security of a fund will be entitled to the same interest rate, simply on the basis of entitlement to plead limitation.

AS Fortuna Opco BV and another v Sea Consortium PTE Ltd and others [2021] Lloyd's Law Rep Plus 48 considered; Patrick Griggs, Richard Williams, Jeremy Farr **Limitation of Liability for Maritime Claims** (4th edn, Routledge 2004) considered.

3. A judge has a discretion to award interest at such a rate and in accordance with established principles. An appeal against the use of judicial discretion will not be allowed unless the appellate court is satisfied that the judge erred in principle in the exercise of the discretion or was influenced by irrelevant factors and considerations and that as a result of the error or degree of the error in principle, the judge erred. In this case it cannot be concluded that the judge would have had no legal or factual basis to arrive at and support the decision that he made, and it cannot be said that the judge was plainly or blatantly wrong. No error of law in the approach of the judge has been demonstrated and the conclusion which he reached as to the appropriate rate of interest to be awarded fell within the generous ambit of his discretion.

Michel Dufour and others v Helenair Corporation and others (1996) 52 WIR 188 followed; **Carrasco v Johnson** [2018] EWCA Civ 87 considered.

4. The starting point for dealing with the issue of recoverability of fees claimed by persons who are not admitted to practice law in the BVI is section 18(3) of the Legal Profession Act, 2015. The fees of legally qualified, non-admitted persons are no longer recoverable as disbursements at common law since section 18(3) prevents recovery of costs in relation to anything done by a person whose name is not on the Roll.

Section 18(3) of the **Legal Profession Act**, 2015, Act No. 13 of 2015, Laws of the Virgin Islands applied.

5. Once a legal practitioner was assisting with a BVI matter and the work he produced was being utilised in BVI proceedings, he automatically would be purporting to act as a BVI legal practitioner. What mattered was the function performed by the foreign lawyer, not the capacity in which he or she acted. The broad test of determining functionality is that of any conduct which was broadly deemed to be assisting with the conduct of a BVI matter. Where the court has made a finding that the non-admitted lawyer was acting as a legal practitioner, then there is no need to dissect the work performed, since any administrative task would be incidental to anything done by them to assist with the conduct of the litigation. In a case like this where the judge found that BVI and English aviation law were the same and the determination of where to sue was necessarily bound up in the BVI proceedings, the conclusion is inescapable that Dr. Fox would be seeking to recover costs for assisting with a BVI matter, when he was not registered on the Roll. It would be irrelevant that at the time the work was done it was not then intended to utilise it in BVI proceedings. The learned judge erred in permitting the respondents to recover pre-action costs in respect of legal fees paid to Dr. Fox on the ground that Dr. Fox was, as a legal practitioner, providing assistance with the BVI litigation while his name was not on the Roll.

Dimitry Vladimirovich Garkusha v Ashot Yeghiazaryan BVIHMAP2015/0010 (delivered 6th June 2016, unreported) followed; **Yao Juan v Kwok Kin Kwok and another** BVIHMAP2018/0042 (delivered 1st June 2021, unreported) followed; **John Shrimpton and another v Dominic Scriven and others** BVIHMAP2016/0031 (delivered on 3rd February, 2017, unreported) followed.

JUDGMENT

- [1] **GONSALVES JA [AG]:** This appeal concerns rulings in relation to interest and costs made by the learned judge in the court below in a judgment dated 20th January, 2022 (“the January Award”). The January Award was consequential to the substantive judgment in the case (“the Main Judgment”) which was delivered orally on 29th April 2021, with the written judgment being approved on 17th May, 2021.

Background

- [2] The case arose out of a helicopter accident¹ that occurred on 10th May, 2017. The helicopter ditched into the sea while trying to land on the aft leisure deck of a superyacht “BACARELLA” in Bergen, Norway. The deck served as a helipad. The accident occurred because the cover of the temporary fuel tank was blown off by the down blast of the helicopter’s rotors and became entangled in the rotors.
- [3] The first respondent was the owner of the helicopter, and the second respondent was its insurer. The appellant was the owner of the yacht. Shortly before the trial the appellant conceded that it was negligent in leaving the fuel tank cover inadequately secured, and thus was liable for the accident. That left two issues for determination at trial. The first was contributory negligence, the second was limitation, the appellant having pleaded as a defence that it was entitled to limit its liability pursuant to the Convention on Limitation of Liability for Maritime Claims 1976 (as amended by a 1996 Protocol) (“the Convention”)².
- [4] In the Main Judgment the judge dismissed the defence of contributory negligence. The judge also held that the appellant was entitled to limit its liability under section 391 of the Territory of the Virgin Islands (the “BVI”) **Merchant Shipping Act, 2001**³ (the “MSA”). This limited damages to 1.51 million Special Drawing Rights, which

¹ The facts and determinations made at trial are taken from the appellant’s skeleton arguments with which the respondents agreed generally.

² Treaty Series No.12 (2012).

³ No. 13 of 2021, Laws of the Virgin Islands.

converted to US\$2,168,340.79. There is no appeal against any of the findings in the Main Judgment.

[5] The appellant is however dissatisfied with the judge's ruling in the January Award in relation to interest, and costs.

[6] Before getting into the January Award and the substantive grounds of appeal, it is necessary to set out the regime that permits a ship owner to limit his liability for claims made against the vessel. Under the Convention, a shipowner may limit his liability for claims made against the vessel by constituting a limitation fund in accordance with Article 11. The MSA in this regard reproduces the text of the 1976 Convention. Section 404 of the MSA entitled "Constitution of limitation fund" states:

"(1) Any person alleged to be liable and seeking to limit his liability under this Part may constitute a fund by depositing with the Court an amount at least equivalent to the limit provided for in section 396 or section 401 as appropriate, or by producing a guarantee acceptable by the Court, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund, and the fund so constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked...

(3) The Minister may determine the rate of interest to be applied for the purposes of subsection (1)."

[7] The respondents accepted that the appellant was entitled to limit its liability by way of a pleaded limitation defence, even though no limitation fund was constituted. In the BVI, the decision whether to constitute a fund is a choice of the shipowner and is advantageous to it.⁴

[8] The issue that arises on this appeal in relation to interest, ⁵ is –

"whether Section 404 of the MSA should be construed as requiring the Court (in a case where the shipowner/wrongdoer has elected not to constitute a limitation fund) to apply, to any pre-judgment interest on damages, the same rate of interest as would have been prescribed if a limitation fund had in fact been constituted."

⁴ See *Partnerselkabet Parsifal v The Attorney General of the British Virgin Islands* BVIHCV2014/0151 (delivered on 12th January 2018, unreported).

⁵ See the respondents' skeleton argument at paragraph 6.

[9] In the court below, in relation to pre-judgment interest, the judge agreed with the respondents that section 404 only applied where a defendant sets up a limitation fund, whereas no limitation fund was set up in this case. The respondents' argument was that the claim here was a claim for damages, albeit capped at the limitation sum of 1.51 million Special Drawing Rights.

"Where a limitation fund is created, then the parties need to know what interest rate is applicable, so that the right amount can be paid into the fund. In such a case, there is no scope for the rate of interest to be determined by a court because the fund will usually be set up before any litigation has eventuated, hence the need for a statutory rate of interest. By contrast, where a damages claim is made, pre-judgment interest can be assessed by the Court on the usual principles".⁶

At paragraph 9 of the judgment the judge stated:

"I agree. A damages claim raises different issues to the creation of a limitation fund. Section 404 does not expressly apply to a damages claim and there is no need in my judgment to imply such an extension to the statutory interest provisions. Looking at the appropriate rate of interest, I agree that five per cent per annum is appropriate for a US dollar-based liability owed to a small or medium sized enterprise like the claimant."⁷

[10] In its grounds of appeal on the issue of pre-judgment interest, the appellant asserts that the judge made the following errors:

- (a) The judge erred in awarding pre-judgment interest at the rate of 5%;
- (b) The judge erred as a matter of statutory interpretation: he should have held that he was obliged to award interest at the rate of 1% over Bank of England Base Rate (which was 0.1% at the material time) as set out in the UK Merchant Shipping (Liability of Ship Owners and Others) (New Rate of Interest) Order 2004 ("the 2004 Order"). The 2004 Order has effect in the BVI pursuant to the Merchant Shipping (Adoption of United Kingdom Enactments) Order

⁶ HQ Aviation Ltd. and another v Sun Vessel Global Ltd. BVIHC(COM) 2018/0062 (delivered 20th January, 2022, unreported) at para 8.

⁷ Ibid at para 9.

2005, (the “2005 Order”) and the Validation (Merchant Shipping (Adoption of United Kingdom Enactments) Order 2005) Act 2017.

(c) Alternatively, the judge erred in the exercise of a discretion in relation to interest:

(i) He erred, as a matter of principle, in failing to take into account, or failing to give sufficient weight, to the 2004 Order as aforesaid;

(ii) As a result, and/or in any event, he exceeded the limits of reasonable exercise of his discretion and/or the exercise of his discretion was blatantly wrong.

(d) The judge should have exercised his discretion to award interest at 1% over the Bank of England Base Rate, alternatively, at 1% over the rate fixed by the US Federal Reserve Bank (which was 0.07% at all a material times).

[11] It is the appellant’s submission that the rate of interest applicable to Section 404(1) has in fact been prescribed and amounts to 1.1% and that rate of interest also applies to the case where a limitation defence is pleaded where no fund has been constituted.

[12] The appellant puts its argument this way. As a matter of English law, paragraph 8 of Part II of Schedule 7 to the Merchant Shipping Act 1995 (“the 1995 Act”) provides that the Secretary of State may by order prescribe the rate of interest to be applied for the purposes of Article 11 (“the Prescribed rate”). This has been done in the 2004 Order and the prescribed rate is 1% over base rate. Neither the 1995 Act nor the 2004 Order expressly refers to the calculation on interest where, instead of a fund being constituted under Article 11, limitation is invoked as a defence pursuant to Article 10. However, the correct analysis must be that the prescribed rate applies from the date of the occurrence to either date of payment or judgment, the date of

judgment or payment being treated as if it were the date of the constitution of the fund.

- [13] In support of this submission, the appellant relies on a passage from the editors of the leading textbook on the Convention, **Griggs, Williams and Farr's Limitation of Liability for Maritime Claims ("Griggs")**⁸, in their commentary on Article 11(1) which reads as follows:

"Where there is only one claimant, the defendant may decide to rely upon Article 10(1) and invoke limitation without constituting the fund. In these circumstances the question arises whether, when payment to the claimant eventually takes place, this should include interest on the funds "from the date of the occurrence" as specified in Article 11(1).

The answer is to be found in Article 10(2) which provides that if limitation of liability is to be invoked without the constitution of the limitation fund "the provisions of Article 12 shall apply correspondingly." Article 12, Distribution of the fund, directs that "the fund shall be distributed among the claimants in proportion to their established claims against the fund". In this context "a fund" must mean the fund as defined in Article 11 itself, namely "the amounts set out in Articles 6 and 7...together with interest."

- [14] The appellant seeks to interpret that passage as suggesting that interest should be calculated at the same rate whether a person relies on Article 10 (pleads a limitation defence where no fund is constituted) or Article 11 (constitutes a fund). At paragraph 23 of its skeleton argument the appellant submitted:

"It plainly would make no sense if interest were to be calculated at different rates depending on whether the person entitled to limit relies on the Article 10 or Article 11 route. The limitation amount is the same under both routes, and there is no reason to distinguish between the two routes in relation to interest."

- [15] The respondents in answer submit that the appellant's argument fails on many levels. Firstly, the passage in **Griggs** addresses the question (in a case where no fund is constituted) of whether, when payment to the claimant eventually takes place, this should *include interest on the fund from the date of the occurrence*, and not whether the rate of interest is prescribed. Secondly, Article 10(2) applies the

⁸ Patrick Griggs, Richard Williams, Jeremy Farr (4th edn, Routledge 2004).

provisions of Article 12 where limits are invoked without constituting a fund. However, Article 12 regulates the final *distribution* of the fund, not its constitution nor the calculation of interest to be added to it on constitution. The Convention provision regulating interest is Article 11 (not Article 12) which is not referred to at all in Article 10(2). Article 10(2) is irrelevant. And finally, Article 10(2) was not replicated at all in Chapter II of the MSA - unlike the United Kingdom.⁹ The appellant's argument based on Article 10(2) was snuffed out by the BVI legislature by its exclusion of Article 10(2) from the MSA. And in this case the appellant opted for the BVI and its legislation.

[16] I agree with the respondents. The appellant is seeking to rely on the passage from **Griggs** to support its argument about calculation of interest in the case where no fund is constituted. But the passage has nothing to do with calculation or any applicable rate of interest. The passage is therefore no authority for the appellant's conclusion made at paragraph 24 of its skeleton argument, referring to the suggested approach in **Griggs** that 'This approach that there should be no difference in relation to the interest on the limitation amount whether Article 10 or Article 11 route is taken'. The respondents are also correct that, in any event, Article 10 is not included in the 2001 Act¹⁰.

[17] In further support for its suggested approach, the appellant sought to rely on the Singaporean case of **AS Fortuna Opco BV and another v Sea Consortium PTE Ltd and others**.¹¹ In that case the plaintiffs sought to limit their liability and constitute a limitation fund in respect of claims arising from the running aground of the vessel AS Fortuna. The plaintiffs applied to have the limitation fund constituted by way of a letter of undertaking from a P & I Club, rather than by payment into court. One of the two issues before the court was the applicable rate of interest to be provided for in the Letter of Undertaking ("LOU") in respect of the period after the constitution of

⁹ In the UK, the entire Convention is given the force of law as Schedule 7 to the UK Merchant Shipping Act 1995, including Article 10(2).

¹⁰ The effect of the exclusion of Article 10 limited to this point only.

¹¹ [2021] Lloyd's Law Rep Plus 48.

the limitation fund (“the post constitution interest rate”). The parties agreed, *inter alia*, that a shipowner constituting a limitation fund by payment into court need not concern itself with post-constitution interest, as it is expected that the fund would earn interest while remaining in court, and the interest so earned would be added to the fund for the benefit of the persons claiming against the fund. In determining whether a limitation fund constituted by producing an LOU should provide for post - constitution interest and what should be the applicable rate, the judge stated at paragraphs 17 and 18:

“17. As a starting point, the 1976 Convention is silent on whether a limitation fund constituted by producing a guarantee (or LOU) should provide for post-constitution interest. The only guidance given in the 1976 Convention is that the guarantee (or LOU) should be ‘acceptable under the legislation of the State Party where the funds is constituted and considered to be adequate by the Court or other competent authority’ (article 12)). In this regard the relevant Singapore legislation is Order 70 Rule 36A (1) (b) of the ROC, which provides that the court may allow a limitation fund to be constituted ‘by producing a letter of undertaking from a Protection and Indemnity Club acceptable to the Court’. The question therefore was what provision ought to be made for post constitution interest in order than an LOU may be ‘considered to be adequate by the Court’ and/or ‘acceptable to the Court.’

18. In my view, for an LOU to be adequate or acceptable, it should place the claimants in a position no worse than if the limitation fund had been constituted by payment into court. I therefore considered that an LOU ought to make provision for post-constitution interest at a rate which approximates the interest which could be earned on a limitation fund paid into court during the period that the fund remains in court.”

[18] In its skeleton argument, the appellant suggested that **Fortuna** was authority for the following propositions:

- (a) That there should be no difference in relation to the interest on the limitation amount whether the Article 10 or 11 route was taken¹².

I agree with the respondents that **Fortuna** provides no authority for that proposition. It dealt with the interest rate to be applied to a limitation fund constituted by an LOU. As correctly asserted by the respondents, the very different case of an invocation of

¹² See paragraph 24 of the appellant’s skeleton argument.

limitation (under Article 10) by the shipowner without putting up a limitation fund was not considered at all. The appellant's suggestion at paragraph 28 of its skeleton argument that 'By analogy, the court [in this case] should ensure that the claimant is in the same position regardless of whether a limitation [fund] is invoked by the constitution of a Fund, or by way of a pleaded defence' is not supported by **Fortuna**.

- (b) That after the issue of the LOU in that case, the potential claimants on the fund should be in no better position than if the fund had been constituted by way of a payment into court, and therefore interest would be assessed at 2.5% which was the likely rate that would have been earned on sums paid into court¹³.

I disagree, and this is addressed simply for completeness as I have already determined that **Fortuna** applies to a very different case. The focus of the court there was not to ensure that the claimants would be in no better position than if the fund had been constituted by way of payment into court, but that the claimants would be in no worse position than if the fund had been so constituted¹⁴. At the end of paragraph 19 of **Fortuna** the court explained '[t]he court's role in this regard should be focused on ensuring they the claimants are not made worse off by the shipowner's decision to constitute the limitation fund by production of an LOU'. So, any argument that where a fund had not been constituted, a claimant ought not to be made any better off by obtaining a higher interest rate than would have been applicable if the defendant had in fact constituted a fund, finds no support. And the appellant's statement at paragraph 27 of its skeleton argument that '[t]here, the judge's focus was on ensuring that the claimant was in the same position regardless of which method of constituting the Fund was adopted' is simply unsupportable.

- [19] The respondents, in their skeleton argument in answer, also submitted, in opposition to the proposition that the rate of interest to be applied when limitation is pleaded but no fund is constituted should be the same as when a fund is constituted, what

¹³ See paragraph 25 of the appellant's skeleton argument.

¹⁴ See paragraph 18 of *AS Fortuna Opco BV and another v Sea Consortium PTE Ltd and others*.

they considered to be 'relevant practical and legal differences between the two situations' which were not considered by the court in **Fortuna**. However, considering this court's determinations at paragraph 21 (a) and (b) above, there is no need, at this point¹⁵, to consider these differences.

- [20] The appellant at paragraph 30 of its skeleton argument criticizes the judge for rejecting, in what it describes as 'in the most cursory terms' the argument that the prescribed rate should apply both where limitation is invoked by way of a fund and where it is invoked by way of a pleaded defence. This was a reference to the judge stating at paragraph 9 of the January Award:

"A damages claim raises different issues to the creation of a limitation fund. Section 404 does not expressly apply to a damages claim and there is no need in my judgment to imply such an extension to the statutory interest provisions."

- [21] The appellant proceeded in paragraph 31 of its skeleton to state - 'As to the second sentence, there is no need to imply any extension to the statutory provisions- it is a question of construction or interpretation'.

- [22] I do not consider the criticism that the judge rejected the appellant's argument in 'the most cursory terms' as justified. The rationale for the judge's determination was set out in paragraphs 8 and 9 of the judgment. The judge's conclusion was clearly that, as a matter of statutory construction, section 404 does not expressly apply where a limitation fund has not been established, and none of the arguments mounted by the appellant was successful in convincing him to imply such an extension to the statutory interest provisions. The short way in which the judge dismissed the arguments of the appellant was simply reflective of the lack of substance that he attributed to them. And it was not necessary for the judge to decide whether the rate of interest to be added to a limitation fund under section 404 was not prescribed in BVI law, at least for occurrences coming into effect after

¹⁵ See later in this judgment at paragraph 26.

the coming into force of the MSA in 2001, considering his decision in the main issue.¹⁶

[23] Although the appellant contended before this Court that there was no need for the judge to *imply* any extension to the statutory provision¹⁷ and it was rather a question of construction or interpretation, the appellant was unable to submit to this Court any principle of construction or interpretation applicable to the clear wording of section 404 that would lead to its desired result that where no fund was constituted, interest had to be calculated at the same rate as if a fund had been constituted. The appellant's argument in this regard, was that there is no reason in principle, policy or practice, to have a different interest rate where limitation is invoked by constitution of a fund, or by pleading it as a defence, neither the judgment nor the respondents' skeleton argument sets out any reasons why a different rate should apply, and if one applies different interest rates that would lead to complicated and unjustified anomalies. The appellant further argued that one should apply a purposive approach to the legislation and the approach adopted by the judge gives a claimant an unjustified windfall. However, with section 404 expressly only covering cases where a fund is constituted, it was for the appellant to provide, by its own words as 'a question of construction or interpretation' a legal basis for the application of the prescribed rate to a case where no fund was constituted. None of the explanations advanced by the appellant achieved this.

[24] Clearly as a fallback position, the appellant argues¹⁸ that if it is wrong in relation to the assertion that the prescribed rate applied as a matter of statutory construction to the case where a limitation defence was pleaded with no fund having been constituted, that plainly in the exercise of his discretion as to the award of interest, the judge should have awarded the prescribed rate. In making this argument, the

¹⁶ See paragraph 13 of the respondents' skeleton arguments.

¹⁷ Seeking there to address the words used by the Judge, and to suggest that they were not asking the Judge to imply anything.

¹⁸ See paragraph 36 of the appellant's skeleton argument.

appellant cited the well-known authority of **Michel Dufour and others v Helenair Corporation and others**¹⁹ where Sir Vincent Floissac C.J. stated:

“We are thus concerned with an appeal against a judgment given by a trial judge in the exercise of judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her discretion, the learned judge erred in principle either by failing to take account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or degree of the error in principle, the trial judge’s discretion exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

[25] The appellant developed its argument this way²⁰:

- (a) The judge erred in principle in failing to take the prescribed rate into account when exercising his discretion and/or in any event he exceeded the reasonable exercise of his discretion and/or was blatantly wrong to simply ignore it and reach the conclusion that he did.
- (b) There is no reason whatsoever to distinguish between the total limitation amount depending on whether limitation is invoked as a defence or a fund is constituted.
- (c) The judge did not articulate any such reason. He meekly said gnomically - ‘A damages claim raises different issues to the creation of a limitation fund’.
- (d) The judge did not identify any such differences which would suggest (much less justify) that the rate of interest to be applied to the limitation amount should differ depending on the procedural mechanism by which limitation is invoked. There is none.
- (e) The judge’s reasoning is simply wrong because the constitution of the funds is simply a way to limit damages claims.

¹⁹ (1996) 52 WIR 188 pp 3 to 4.

²⁰ See paragraphs 37 to 47 of the appellant’s skeleton argument.

- (f) That in the final analysis, upon the proper exercise of his discretion the judge had no choice but to apply the prescribed rate.²¹ Mr. John Russel KC for the appellant, in his oral arguments, submitted that the discretion was in fact illusory.

[26] The respondents in answer put their argument this way:

- (a) The appellant's submission is destroyed by its premise as there was no statutory interest rate applicable to the circumstances before the judge (i.e., a no limitation fund claim);
- (b) Absent a statutory prescribed rate, the judge's exercise of his discretion as to interest was impeccable, orthodox and in accordance with the essential principles in **Carrasco v Johnson**²² at paragraph 17.
- (c) The appellant did not challenge the evidence as to the relevant rates of commercial interest and does not now challenge the judge's assessment of the factors relevant to interest, other than the alleged prescribed rate of interest.

[27] For this part, I am prepared to assume without deciding that there was a prescribed rate applicable to cases where a fund was constituted. The judge appears to have accepted that position when at paragraph 4 of the judgment he stated that '[t]he rate payable under the BVI legislation would therefore be 1.1 per cent per annum'. This was a case where no fund was constituted. The immediate question is whether the judge considered the prescribed rate applicable to the cases where a fund was constituted, to be a relevant factor in arriving at an interest rate. The respondent's reply in paragraph 18(1) of their skeleton (that it would have been wrong to take it into account) suggests that they agree the judge did not consider it to be a relevant factor. I proceed on the premise that the judge did not consider the prescribed rate to be a relevant factor.

²¹ That point was made orally before the Court.

²² [2018] EWCA Civ 87.

[28] Firstly, was this an error in principle to satisfy part 1 of the **Michel Dufour** test? I am not convinced that it was. The judge did not consider the prescribed rate because he considered that a claim where no fund had been established (what he described, perhaps loosely, as ‘a damages claim’) raises different issues to the creation of a limitation fund. The judge did not describe what he considered those ‘*different issues*’ to be, but they do exist. An explanation of some of the differences is set out at paragraph 10 (4) of the respondent’s skeleton where the respondent submitted:

“Furthermore, as the Judge correctly recognized there are relevant practical and legal differences between the two situations (where a limitation fund is constituted and where limits are invoked without a fund). So, where a shipowner elects to constitute a limitation fund, (a) the shipowner can fix the currency rate at which limits are converted at the time of constitution, (b) the shipowner gets protection from arrest of its vessel (MSA, s.406), but (c) in return the shipowner surrenders to the claimant the advantage of security for the claim (when typically the shipowner is a “brass plate” company), and (d) where the applicable national law prescribes the rate of interest to be added to the fund on constitution, the shipowner can secure that rate. Prescribing the rate in advance is of obvious practical assistance for the shipowner in calculating the amount to pay in as the limitation fund. These are all fundamental points of difference with the situation where the limit is simply invoked as a defence; then interest will be assessed in the normal way at the end of the case, fairly taking account of all factors relevant to the assessment (as happened in this case)-there is no need to prescribe the rate in advance”

[29] In addition, and quite important to this issue of interest, there is the fundamental difference that a shipowner who does not establish a fund retains the ability to invest monies in the meantime in a manner that may prove advantageous to him from a commercial perspective, as explained in **Fortuna**. Considering the foregoing, it would seem rather odd that a shipowner, who has not provided the actual security of a fund and who retains the right to deal with his monies as he pleases, should automatically be entitled to the same interest rate, simply on the basis of entitlement to plead limitation.

[30] Alternatively, if the judge should have considered the prescribed rate as a relevant factor in the mix when arriving at the appropriate interest rate, I am similarly not

convinced that had he done so, and had he taken into account the various factors mentioned in paragraphs [28] and [29] above, he would have been unable or simply wrong to arrive at the rate of 5% which he described as ‘...appropriate for a US dollar-based liability owed to a small or medium sized enterprise like the claimant’.²³ If the judge commenced his exercise by considering that the prescribed rate provided a base or platform and then went on to consider the various factors mentioned above to determine whether and to what extent he should depart from the prescribed rate, along with the principles set out in **Carrasco v Johnson**, I am unable to conclude that the judge would have had no legal or factual basis to arrive at and support the decision that he made. Consequently part 2 of the **Michel Dufour** test would not be satisfied, in that it cannot be said that the judge was plainly or blatantly wrong. I must in passing comment that I find it strange for the appellant to be arguing that in the final analysis, upon the proper exercise of his discretion, the judge had no choice but to apply the prescribed rate²⁴ when I consider the affidavit filed on behalf of the appellant in the court below. There the appellant submitted that the judge should apply a practical and commercial approach which departed from the strict prescribed rate. The argument there was that since the US dollar is the official currency in the BVI and rates set by the US Federal Reserve determine the rates on interest in the BVI, and given the funds rate set by the US Federal Reserve is analogous to the Bank of England base rate, the appellant submitted that a practical and commercial approach that would give effect to the 2005 Order would be to apply the funds rate.

[31] Consequently, the appellant’s appeal on the interest point fails.

[32] In its grounds of appeal on the costs/Parts 35 Offer issue, Mr. Russel, KC for the appellant accepted that the appeal in relation to the costs issue was parasitic on the appeal in relation to the interest issue and that if the appellant failed on the latter, it

²³ Note both the appellant and the respondents had submitted affidavits in support of their respective factual contentions as to the appropriate interest rate to the judge.

²⁴ That point made orally before the Court.

would automatically fail in relation to the former. This ground therefore automatically falls away.

- [33] The appellant's third ground of appeal is in relation to pre-action costs. At paragraph 14 of the notice of appeal, the appellant stated that:

"The judge erred as a matter of law in permitting the Claimants to recover pre-commencement costs in respect of legal fees paid to Dr. Fox²⁵, on the ground that Dr. Fox is not qualified and/or admitted to practice as a solicitor or barrister in the BVI."

- [34] The appellant argued in the alternative that the judge erred as a matter of principle in exercising his discretion in relation to such costs (a) in failing to take into account, or in failing to give sufficient weight to the fact that Dr. Trevor Fox ("Dr. Fox") is not qualified and/or admitted to practice as a solicitor or barrister in the BVI, and (b) as a result and/or in any event he exceeded the limits of the reasonable exercise of his discretion and/or the exercise of his discretion was blatantly wrong.

- [35] In its skeleton argument, the appellant argued that the judge erred in permitting the respondents to recover pre-action costs of the respondents' English solicitor Dr. Fox, who was not providing expert evidence of foreign law and is not admitted to practice BVI law as a solicitor or barrister, contrary to section 18(3) of the **Legal Profession Act, 2015**²⁶ (the "LPA"). Section 18(3) of the LPA states:

"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."

- [36] In the January Award²⁷ the judge determined that Dr. Fox's fees would be recoverable as pre-action costs as they were related to the proceedings. The appellant submitted that:

"Remarkably, while the judge made the finding that '...there can be no question of the English solicitors acting as anything other than as English

²⁵ An English solicitor and specialist in aviation litigation. The quantum in issue is £28,181.30 pounds sterling or USD\$34,000.00 excluding VAT.

²⁶ Act No. 13 of 2015, Laws of the Virgin Islands.

²⁷ See paragraph 22 of the January Award.

legal practitioners' he determined, without consideration of the effect of section 18(3), that "Dr. Fox's fees are recoverable on the basis that **Civil Procedure Rules ("CPR")** 64.3 is essentially backward looking."

[37] The **Civil Procedure Rules 2000** (the "**CPR**") 64.3 states as follows:

"The court's powers to make orders about costs include powers to make orders requiring a party to pay the costs of another person arising out of or related to all or any part of any proceedings."

[38] According to the appellant, implicit in the judge's conclusion, is that the pre-action costs of instructing English solicitors to advise on where to bring the claim are intimately bound up with the proceedings and therefore within his general discretion to order payment of such costs under **CPR** 64.3. The starting point for dealing with the issue of recoverability of fees claimed by persons who are not admitted to practice law in the BVI is section 18(3) of the LPA. The appellant submits that as a matter of plain construction, section 18(3) leaves the judge with no discretion to award pre-action costs of Dr. Fox under **CPR** 64.3 or otherwise.

[39] In support of its position, the appellant relied on this Court's decisions in **Dimitry Vladimirovich Garkusha v Ashot Yeghiazaryan**²⁸ and **Gany Holdings (PTC) SA and another v Zorin Sachak Khan and Others**²⁹. The appellant submits that these cases make it clear that following the enactment of the LPA, the fees of legally qualified, non-admitted persons are no longer recoverable as disbursements at common law (save in relation to expert evidence of foreign law, which is not relevant here) since section 18(3) prevents recovery of costs in relation to anything done by a person whose name is not on the Roll. The appellant submitted that the judge correctly applied the prohibition imposed by section 18(3) to prevent recoverability of fees incurred by the respondents' counsel in settling pleadings prior to his admission in the BVI and fees incurred by Dr. Fox after BVI proceedings were issued but failed completely to engage section 18(3) in allowing Dr. Fox's pre-action fees. The appellant argued further that the judge failed to provide any explanation as to

²⁸ BVIHMAP2015/0010 (delivered 6th June 2016, unreported).

²⁹ BVIHMAP2018/0048 (delivered 30th March 2020, unreported).

why pre-action costs of a non-admitted lawyer should be treated differently from costs incurred after proceedings are issued.

[40] Moreover, argued the appellant, this Court's ruling in **Yao Juan v Kwok Kin Kwok and another**³⁰ is good authority for the proposition that where the court has made a finding that the non-admitted lawyer was acting as a legal practitioner, then there is no need to dissect the work performed, since any administrative task would be incidental to anything done by them to assist with the conduct of the litigation. This proposition applies to the case at bar a fortiori, since the judge found that Dr. Fox was acting as a legal practitioner and the pre-action work he performed was intimately bound up in the BVI proceedings. Accordingly, the judge erred, and the costs order should be set aside.

[41] In reply, the respondents submitted³¹ that the judge explained clearly why he decided that Dr. Fox had not infringed section 18(3) and why his pre-action costs were recoverable. The pivotal fact was that during the period until 14th March 2018, it was anticipated that the litigation would be conducted in England. There was no question of Dr. Fox acting as a BVI practitioner or assisting in BVI proceedings until, on 14th March 2018, when Clyde & Co performed a volte face causing the switch to the BVI. In paragraph 22 of the January Award the judge stated:

“...In the current case, the insurers of the helicopter and the Baracella were both English. Both instructed English solicitors, Dr. Fox on the claimants' behalves, (sic) Clyde & Co and subsequently Preston Turnbull on the defendant's behalf. Initially it was anticipated that the issues would be litigated in England. It was only when Clyde and Co performed a volte face and insisted that proceedings needed to be litigated in this Territory that BVI practitioners we instructed. **Until that time, there can be no question of the English solicitors acting as anything other than as English legal practitioners.**” (Emphasis added)

[42] The respondents conclude that this part of the appeal should be dismissed for the essential reason given by the judge- Dr. Fox was acting as an English lawyer

³⁰ BVIHMCAP2018/0042 (delivered 1st June 2021, unreported).

³¹ Paragraph 27 of the respondents' skeleton arguments.

preparing for English proceedings and there can be no question of him having acted as a BVI lawyer during this period.

- [43] In the judgment, the judge stated that pre-action costs are related to proceedings and thus in principle recoverable³². He grounded recoverability of Dr. Fox's costs by relying on **CPR 64.3**. At paragraph 23 of the judgment, he stated:

"In my judgment CPR 64.3 is essentially backward looking. The question for the Court is whether the costs of instructing English Solicitors to advise on where to sue for the loss of the helicopter can with hindsight be considered to have been "related to" the BVI proceedings. In my judgment, on the facts of this case they can be. Determination of the jurisdiction in which to sue is a key pre-action step and is ultimately bound up with the proceedings which are ultimately brought. Accordingly, the legal fees of the English lawyers up to Clyde & Co's change of position are recoverable."

- [44] Although not in direct contention here, it is interesting to look at the judge's analysis of the recoverability of the costs of Dr. Fox's fees after the decision to litigate the case in the BVI. The judge proceeded to examine what constitutes 'acting as a legal practitioner' and referred to this Court's decision in **Gany Holdings** where this Court at paragraph 67 held:

"Despite the lack of detailed statutory guidance, it is clear...that...the question of whether a person is acting as a legal practitioner is a question of fact. Such an examination is made upon a close examination of the facts of each case."

- [45] The judge recounted that the Court there noted that the costs draftsman was having to interpret BVI law and practice and concluded that he was therefore 'engaged in a substantive legal capacity in the production of the schedule of costs'. The judge continued by looking at this Court's decision in **Yao Juan** where it was held that a foreign lawyer employed by a BVI firm was equally acting as a BVI practitioner. What mattered, said the judge in referring to that case, was the function performed by the foreign lawyer, not the capacity in which he or she acted. The judge quoted Ellis JA [Ag.] at paragraph 55 who held:

³² Ibid

“A critical component of the **Shrimpton** decision was the Court’s approach to the interpretation of the expression “acting as a legal practitioner” in the context of section 18(3) of the LPA. The panel of judges which heard **Shrimpton** concurred that it was bound by the earlier decision in **Garkusha** which took a wide approach defining the terms as including any conduct which was-broadly deemed to be assisting with the conduct of a BVI matter.” (Emphasis in the original)

- [46] The judge then referred to the submission of Mr. Matthew Reeve, Counsel for the respondents at paragraph 41 (2) of his skeleton arguments, who submitted:

“There is a fine but fundamental difference between a foreign lawyer “assisting with the advice and conduct of a BVI matter (**Garkusha** at [49] and [72], **Gany** at 967] on the one hand, and a foreign lawyer giving advice on his own home law, or...from [a] particular specialism amounting to an expertise, to BVI lawyers, leaving them the responsibility to advise on BVI law and to conduct the BVI litigation on the other hand. The former may be “acting as [BVI] legal practitioner’ (and the Berwin Leighton Paisner fees were disallowed on that basis in **Garkusha**). The latter cannot possibly be. The latter applies to Dr. Fox. He was giving English law advice in England as a specialist English lawyer. That cannot be converted to “acting as a [BVI] lawyer” merely because the advice is useful to the BVI lawyers conducting the litigation.”
Emphasis in the original)

- [47] At paragraph 33 of the judgment the judge went on to find that there was no relevant difference between English aviation law and BVI aviation law and reminded himself that Ellis JA (in **Yao Juan**) had emphasised that ‘any conduct... broadly deemed to be assisting with the conduct of the BVI matter’ fell within the prohibition on the recovery of the foreign lawyer’s fees. He went on to hold on that analysis that the overwhelming majority of the work done by Dr Fox is assisting in his capacity as a lawyer with the BVI proceedings and the prohibition on recovery of his fees applied.
- [48] It is immediately apparent that the judge adopted a different approach in interpreting section 18(3) in relation to Dr. Fox’s pre-action costs, and Dr. Fox’s costs (before his admission to the BVI Bar) once a decision had been made to institute action in the BVI. But I can discern no logical basis why the approach should be different. By the judge’s own analysis:

- (a) In finding Dr. Fox's pre-action costs to be recoverable, he found that determination of the jurisdiction in which to sue is a key pre-action step, and is ultimately bound up with the proceedings which are ultimately brought. This finding was clearly in satisfaction of what the judge considered to be the required degree of proximity or relationship with the BVI proceedings to ground recoverability under **CPR 64**. But this finding must also mean that the determination of where to sue cannot but properly and correctly be seen as assisting with the litigation in the BVI, the place where the proceedings were ultimately brought.
- (b) In finding Dr. Fox's costs after the decision to litigate in the BVI had been made to be unrecoverable, he reminded himself that per Ellis JA in **Yao Juan**, referring to **John Shrimpton and another v Dominic Scriven and others**³³, what mattered was the function performed by the foreign lawyer, not the capacity in which he or she acted. However, he appears to have overlooked that last point when considering the recoverability of the pre-action costs. At paragraph 22, he explained that until the volte face by Clyde & Co, there could be no question of the English solicitors acting as anything other than as English legal practitioners. The explanation that the English solicitors were acting as English Solicitors and not as BVI legal practitioners focuses on the issue of capacity and sidesteps the issue of function. The broad test of determining functionality is that of 'any conduct which was broadly deemed to be assisting with the conduct of a BVI matter'. Once that broad test, established by this Court in **Garkusha** and consistently followed since, is satisfied, the legal practitioner in question performing the function must automatically be considered to be satisfying the requirement of 'acting as a legal practitioner'.

³³ (delivered on 3rd February, 2017, unreported).

- (c) In a case like this where the judge found that BVI and English aviation law were the same and the determination of where to sue was necessarily bound up in the BVI proceedings, the conclusion is inescapable that Dr. Fox would be seeking to recover costs for assisting with a BVI matter, when he was not registered on the Roll. Once Dr. Fox was assisting with a BVI matter, the work he produced was being utilised in BVI proceedings, he would per the wide definition established in **Garkusha**, automatically be purporting to act as a BVI legal practitioner. In **Shrimpton**, after referring to certain passages of Webster JA's judgment in **Garkusha**, the Court held at paragraph [9] line 8, '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'. The fact that it was not the original intention to utilise Dr. Fox's legal work product in the BVI can be of no consequence. In essence, that which the judge used to qualify Dr. Fox for recovery under **CPR 64** (seeking to establish that his legal work was related to the BVI proceedings- see paragraph [43] above) is the very same thing that serves to disqualify him (by virtue of his thereby providing assistance, per **Garkusha**) from recovery under section 18(3) of the LPA. In **Shrimpton** this Court stated at paragraph 44 that to trigger the prohibition against recovery in section 18(3):

"All that is required is that the act in question is done by a person whose name is not on the Roll, and that, that person must be acting as if he were a legal practitioner" ... A foreign lawyer whose name is not on the Roll would be "... a person whose name is not registered on the Roll." This then brings us to a consideration of what is meant by the phrase "acting as a legal practitioner" ... At paragraph 69 of His Lordship's judgment, Webster JA (Ag) held in relation to the BLP Lawyers, "...they are performing the functions of a legal practitioner" and by this His Lordship was referring to the activities of the BLP lawyers assisting G with his defence. By the phrase "they are performing the functions of a legal practitioner" I interpret Webster JA (Ag) to mean "they are performing the functions of a BVI legal practitioner...This determination would have

satisfied the element of “acting as a legal practitioner” contained in section 18(3).”

[49] In the circumstances, I agree with the appellant that the learned judge erred in permitting the respondents to recover pre-action costs in respect of legal fees paid to Dr. Fox on the ground that Dr. Fox was, as a legal practitioner, providing assistance with the BVI litigation while his name was not on the Roll and this ground of appeal therefore succeeds.

[50] The respondents filed a counter-notice of appeal seeking to uphold the judge’s decision on (a) the pre-judgment interest issue, (b) the costs/Part 35 Offer issue, and (c) the pre-action costs issue. The appellant having failed in relation to (a) and (b) for the reasons already set out in this judgment, it is unnecessary to consider the counter-notice on those particular points. In relation to the pre-action costs issue, the respondents did not set out any alternative reason for seeking to uphold the judge’s decision and simply stated that the judge was right for the reasons he gave in the January Award. There is therefore nothing additional in the counter notice on this specific point to address.

[51] In the circumstances, it is ordered that grounds 1 and 2 of the appeal are dismissed. Ground 3 of the appeal is allowed and the order of the judge allowing recovery of the pre-action costs in relation to Dr. Fox is set aside. The respondents have made an application for costs and costs will be dealt with pursuant to the respondents’ Application.

I concur
Mario Michel
Justice of Appeal

I concur
Godfrey Smith SC
Justice of Appeal [Ag.]

By the Court

Chief Registrar