

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO: BVIHC (COM) 162 of 2013

BETWEEN:

YAO JUAN

Claimant/Respondent

And

KWOK KIN KWOK

First Defendant/Applicant

CROWN TREASURE GROUP LTD

Second Defendant

Appearances:

Mr. Richard Evans and Dr. Alecia Johns of Conyers, Dill and Pearman for the first defendant
Mr. Christopher Bromilow and Ms. Sophie Christodoulou of Forbes Hare for the claimant
No appearance for the second defendant

2020: April 6, 7, 8;
April 23.

JUDGMENT

[1] **JACK, J [Ag.]:** Over three days I heard a detailed assessment of the costs of this matter payable by the claimant (“Madam Yao”) to the first defendant (“Madam Kwok”). I assessed the costs at first instance in the sum of US\$3,300,000.18, as set out in the Schedule to this judgment. I also certify that the costs of the appeal are to be paid in the sum of US\$2,200,000.12 (two-thirds of the sum assessed at first instance). I delivered judgments orally on most of the points which arose, but I indicated that I would give written reasons on two matters: first, the interpretation of the Court of

Appeal order on costs, and second, the recoverability of costs in respect of legal work carried out after 11th November 2015 by in-house lawyers employed by Conyers Dill and Pearman (“Conyers”) but who were not the roll of legal practitioners in this Territory.

Costs in the Court of Appeal

[2] Madam Yao brought a claim for unfair prejudice against Madam Kwok arising out of the management of the second defendant. The second defendant indirectly owns a five-star hotel in the People’s Republic of China. The precise value of the hotel is not in evidence, but is likely to be of the order of US\$100 to 120 million. The claim culminated in a 22 day trial before Adderley J, 18 days in St Lucia at the end of 2017 following the evacuation of the Commercial Division in consequence of Hurricane Irma, and four days on Tortola in early 2018. On 13th March 2018 Adderley J gave judgment for Madam Yao.

[3] Madam Kwok appealed to the Court of Appeal, who on 14th March 2019 allowed her appeal. An appeal is currently pending to the Privy Council. Para 6 of the Court of Appeal’s order provides:

“Costs are awarded to the appellant in the court below to be assessed if not agreed within 21 days. Costs are awarded to the appellant in this Court on the substantive appeal at 2/3 of the costs in the Court below.”

It is the assessment in “the court below”, i.e. this Court, which I have been conducting, but it is necessary for me also to consider the meaning of the order as regards the costs of the appeal, since Madam Kwok wants an order which she can enforce for the costs of the appeal.

[4] Rule 65.13 of the Civil Procedure Rules provides:

(1) The general rule is that the costs of any appeal must be determined in accordance with rules 65.5, 65.6 and 65.7 and Appendix B but the costs must be limited to two thirds of the amount that would otherwise be allowed.

(2) The Court of Appeal may, if the circumstances of the appeal or the justice of the case require, depart from the general rule and, in such a case, it may—

(a) make an order for budgeted costs whether on an application made in accordance with rules 65.8 and 65.9 or otherwise; or

(b) make such other order as it sees fit.”

- [5] CPR 65.5, 65.6 and 65.7 and Appendix B deal with “prescribed costs”, a system whereby legal costs are recoverable on a fixed scale depending on the value of the claim. Where costs in the Court of first instance are subject to the prescribed costs regime, it is very common for the Court of Appeal to award two-thirds of those costs as costs of the appeal. Where the costs at first instance are assessed (as the Court of Appeal ordered in the current case), such an order may be less common. This is because it may lead to a windfall for the successful party on appeal.
- [6] The current case is likely to be such a case. The case at first instance was bitterly contested from 2014 to 2018 with many interlocutory skirmishes culminating in a twenty-two-day trial. The costs claimed by Madam Kwok amounted to some US\$3.5 million. The appeal, by contrast, lasted one year and was decided after one day’s argument.
- [7] Mr. Bromilow, appearing for Madam Yao, submits that what the Court of Appeal really wanted to do was award Madam Kwok two thirds of the assessed costs in the Court of Appeal. They were entitled, he said, to reduce the costs payable because Madam Kwok had not won on everything in the Court of Appeal. Mr. Evans, appearing for Madam Kwok, said that no submissions had been made to the Court of Appeal on Madam Yao’s behalf that the costs order should be reduced for that reason. He submitted that on a plain reading of the order Madam Yao’s costs of the appeal were to be two-thirds of her costs at first instance.
- [8] In my judgment the order of the Court of Appeal has to be construed on the ordinary principles of construction. Thus I start with the plain meaning of the order and consider that potential construction against the factual matrix and the likely intention of the maker of the order. The plain meaning of the order is in my judgment straightforward: Madam Kwok gets two-thirds of whatever she gets at first instance. Are the other considerations sufficient for me to prefer a different construction of the order? In my judgment, they are not. Mr. Bromilow’s suggested construction does complete violence to the language of the order. If he is right that the Court of Appeal intended to award Madam Kwok two-thirds of her assessed costs of the appeal, then the order could have said that. If that was the Court of Appeal’s intention, then Madam Yao should be asking the Court of Appeal to rectify the order under the slip rule, CPR 42.10, not asking me to construe the order in a manner which does not reflect the language of the order.

[9] The only issue as to the factual matrix is the extent to which the Court of Appeal realized that the order would give a windfall, possibly in seven figures, to Madam Kwok. I have no evidence about what the Court of Appeal was told about the likely costs at first instance. An order that the costs of an appeal be two-thirds of the *prescribed* costs at first instance is a rough and ready means of finding an appropriate award of costs. An order that the costs of an appeal be two-thirds of the *assessed* costs at first instance may in some — and perhaps many — cases also be a rough and ready means of fixing an appropriate award for the appeal costs. It was the order made most recently in **Convoy Collateral Ltd v Broad Idea International Ltd and another**¹ and **Ng v Peckson Ltd and Chen**². The fact that such an order might give a big windfall to Madam Kwok in this case may not have been part of the Court of Appeal's considerations. In any event, however, the meaning of the order in my judgment is so clear that there is no scope for interpreting it in any other way.

[10] I therefore certify the costs of the appeal in the sum of two-thirds of the costs at first instance.

[11] Mr. Bromilow tells me that there is an appeal pending to the Privy Council . It may thus be that, even if there is no scope for the Court of Appeal to vary its costs order, Madam Yao will have a remedy at third instance.

In-house lawyers

[12] I turn then to the second point, the recoverability of fees in respect of Conyers' in-house lawyers, at a time when these were not admitted to the BVI Roll of legal practitioners. There have been a number of cases dealing with the use of non-admitted lawyers, but, as I shall discuss, these all concern external lawyers, in other words lawyers practising on their own account outside the BVI law firm, whose fees the BVI law firm seeks to recover as a disbursement. None concern lawyers internal to the BVI law firm, whose work the BVI firm seeks to recover as fees of the BVI firm itself.

[13] The two lawyers whose work is substantially in question on the current assessment are Ms. Michaela Lam and Ms. Emily So.³ When they were doing the work, both were associates in Conyers' Hong Kong office. Neither were at that time admitted in this jurisdiction. Ms. Lam was

¹ BVIHMAP 2016/0030 (delivered 30th March 2020, unreported) at para [45].

² BVIHMAP 2019/0011 (delivered 8th April 2020, unreported) at para [158(2)].

³ There is also one item for 8th July 2016 for Anna Lin, who was not admitted either. The amount claimed for this item is \$195.89.

admitted here in 2019, long after the costs at first instance had been incurred. Madam Kwok sought to recover US\$395,161.00 in respect of Ms. Lam's time and US\$291,790.99 in respect of Ms. So's. It is common ground that this point does not arise in respect of any work done prior to 11th November 2015, when the **Legal Practitioners Act 2015**⁴ came into force.

[14] Before the coming into effect of the **Legal Practitioners Act 2015** it was common for some of the work in the Commercial Division to be carried out by overseas, predominantly London-based, firms of solicitors. The practice was for the fees of the overseas firms to be claimed as a disbursement of the BVI firm, who acted for a party in whose favour a costs order was made: **Grand Pacific Holdings Ltd v Pacific China Holdings Ltd**.⁵ This led to abuses, in that some overseas firms treated the BVI firm which was on the record as a mere front or letterbox. One of the effects was that the economic benefit of having a Commercial Court in this Territory was being harvested by overseas firms. The gain to the Virgin Islands of having a flourishing Commercial Court was being lost to the local economy. One of the purposes of the 2015 Act was to remedy this.

[15] So far as material, the 2015 Act provides:

“2(1) In this Act, unless the context otherwise requires,

...

‘costs’ includes fees for any legal business done by a legal practitioner;

...

‘fees’ includes charges, disbursements, expenses and remuneration;

...

‘legal practitioner’... means a person whose name is entered on the Roll in accordance with this Act;

‘practise law’ means to practise as a legal practitioner or to undertake or perform the functions of a legal practitioner, as recognised by any law whether before or after the commencement of this Act;

...

13(1) Every person whose name is entered on the Roll in accordance with this Act shall be known as a legal practitioner and,

(a) subject to subsection (2), is entitled to practise law and sue for and recover his or her fees for services rendered in that respect;

(b) subject to subsection (2), has the right of audience before any court;

(c) is an officer of the Supreme Court.

⁴ No 13 of 2015, Laws of the Territory of the Virgin Islands.

⁵ BVIHC 2009/389 (delivered 3rd December 2010) *per* Bannister J at para [22]. There was prior case-law less favourable to recoverability.

(2) No person may practise Virgin Islands law unless his or her name is entered on the Roll in accordance with this Act.

(3) A person who practises law in contravention of subsection (2) or section 15(1) is not entitled to institute or maintain any action for recovery of any fee on account of or in relation to any legal business done by him or her in the course of such practice

...

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 recognised 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 so to 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."

[16] The first case dealing with these provisions in the Court of Appeal is **Demitry Vladivirovich Garkusha v Ashot Yegiazaryan and others**.⁶ This concerned the recoverability as *disbursements* of the costs of an English firm of solicitors, Berwin Leighton Paisner, who did work from their Moscow office. Webster JA (Ag) said:

"[68] It is therefore important to consider section 18 to see if it has the effect of abrogating the right of a litigant before the courts of the BVI to recover fees paid to overseas lawyers as a disbursement of the local practitioner's costs...

[70] On a plain reading of the sections 2 and 18 I am satisfied 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. Such practice is contrary to section 18 of the Act and is unlawful unless he or she is registered on the Roll. The Berwin Leighton Paisner lawyers are not registered on the Roll and so they were engaged in an unlawful practice of BVI law when they were assisting Mr. Garkusha.

⁶ BVIHCMAP2015/0010 (delivered 6th June 2016, unreported).

[71] The next step in the interpretive process is to decide if the prohibition in section 18 of the Act against practising BVI law by persons who are not on the Roll and recovering the fees for such practice is sufficiently wide to have the effect of abrogating the common law right to recover such fees.

[72] The relevant rule of interpretation is... that Parliament is presumed not to take away an established common law right except by clear words or by necessary implication. There is nothing in the Act that amounts to an express abrogation of the right of a litigant to recover the fees of overseas lawyers as a disbursement of the local practitioner. However, the Act has provisions that show a clear intention to regulate the persons who can practise BVI law in the BVI and overseas, and charge fees for such practice. The analysis above shows that overseas lawyers assisting in a BVI matter are performing the functions of a legal practitioner and therefore are practising BVI law for the purposes of the Act. The Act, and in particular section 18, make the practice unlawful.

[73] In the circumstances I find that the Act, by necessary implication, intended to do away with the practice of litigants being able to recover the fees of overseas lawyers in costs recovery proceedings. The right could not survive the passing of sections 2 and 18 which have the effect of making the practice of BVI law by overseas lawyers without being on the Roll unlawful, and still allow the recovery of the fees of those lawyers in assessment proceedings in the BVI. The two things cannot stand together.”

[17] Unfortunately, the Court of Appeal in **Garkusha** was misled as to the applicable legislation. The 2015 Act, when originally enacted, contained a provision, section 2(2) that “any reference in this Act to practising law, shall be construed to include a reference to practising Virgin Islands law outside the Virgin Islands.” That provision was never brought into force⁷ and was subsequently repealed.⁸ This was probably from a concern as to the *vires* of the 2015 Act, insofar as it potentially sought to criminalise behaviour outside the jurisdiction. Section 71 of the **Constitution of the Virgin Islands 2007**⁹ provides that “the Legislature shall have power to make laws for the peace, order and good government of the Virgin Islands”. It is only legislation concerning the Virgin Islands which the **Constitution** gives the legislature the power to pass.¹⁰ The words Lord Scarman in **Air India v Wiggins**¹¹ apply when construing the **Constitution**:

⁷ Proclamation gazetted 19th November 2015, Statutory Instrument 2015 No 84, Laws of the Territory of the Virgin Islands.

⁸ Legal Practitioners (Amendment) Act 2016 (No 1 of 2016, Laws of the Territory of the Virgin Islands) section 2.

⁹ Virgin Islands Constitution Order 2007 (SI 2007 No 1678).

¹⁰ See *Regina (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 at para [50] *per* Lord Hoffman and the discussion in Hendry and Dickson on British Overseas Territories Law (2nd Ed, 2018) at p 78.

¹¹ [1980] 1 WLR 815 at p 821.

“There are... two canons of construction to be observed when interpreting a statute alleged to have extra-territorial effect. The first is a presumption that an offence-creating section was not intended by Parliament to cover conduct outside the territorial jurisdiction of the Crown: **Cox v. Army Council**.¹² The second is a presumption that a statute will not be construed as applying to foreigners in respect of acts done by them abroad: **Reg. v. Jameson**.¹³”

- [18] Whatever the reasons for the repeal, it led to the Court of Appeal in **John Shrimpton and another v Dominic Scriven and another**,¹⁴ having to consider whether **Garkusha** was decided *per incuriam* and should not therefore be followed. Gonsalves JA (Ag) held that **Garkusha** would only cease to be binding, if the error in relation to section 2(2) of the 2015 Act would have affected the decision of the Court in the earlier case. He held that it would not have done so:

“[44] Leaving aside the reference to section 18(2), on a literal interpretation, in order to trigger the prohibition against recovery contained in section 18(3), there is no requirement that an illegal act should have occurred. All that is required is that the act in question is done by a person whose name is not registered on the Roll, and that that person must have been acting as if he were a legal practitioner. Disbursements would be caught as under section 2(1) ‘fees’ is defined to include, inter alia, disbursements. 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.’ ...[I]n determining whether the decision was rendered *per incuriam*, I would have to consider myself bound by the findings of the Court that were not predicated on section 2(2). At para [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 [the defendant] 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.’ The phrase ‘assisting with his defence’ which describes the questioned activity is undeniably wide and general and may incorporate any number of activities. That conclusion by Webster JA (Ag) did not permit for an examination of how exactly the BLP lawyers were assisting [the defendant] with his defence. An examination might have revealed that they were conducting activities that a BVI attorney could and should do (in which case it is arguable that the applicable fees might very well not have been recoverable as proper disbursements of the local attorney even based on common law principles). 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

¹² [1963] AC 48.

¹³ [1896] 2 QB 425.

¹⁴ BVIHCMAP 2016/0031 (delivered 3rd February 2017).

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 [the defendant] 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 been 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.

[45] Consequently, the foregoing interpretation of section 18(3) could have led the Court to the same conclusion in **Garkusha**, that is, that the fees of a foreign lawyer (whose name is not on the Roll) can no longer be recovered as a disbursement of the local lawyer, as such recovery is prohibited under 18(3). The decision in **Garkusha** that the common law right would necessarily be abrogated would still be the same. Further, a reading of section 18(3) shows that it is not concerned simply to deny a person whose name is not registered on the Roll from recovering any fee in respect of anything done by him acting as a legal practitioner, but to deny anyone from so recovering. It would appear therefore to contemplate a claim to recovery by a winning party against a losing party of any such fee, which is precisely the situation in **Garkusha**."

[19] The most recent Court of Appeal authority on this issue is **Gany Holdings (PTC) SA and another v Zorin Sachak Khan and others**.¹⁵ This concerned a costs draftsman, who practised independently in England. The judgment says the draftsman was admitted as a legal practitioner there, but does not state whether he was as a member of the Association of Costs Lawyers (which gives some statutory rights of audience in England) or as a solicitor or chartered legal executive. The draftsman prepared the bill of costs and an issue arose as to whether the fees of the draftsman could be recovered as part of the costs of the detailed assessment of costs. The Court of Appeal held:

"[67] 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 a determination is to be made upon a close examination of the facts of each case.

¹⁵ BVIHMAP2018/0045 and BVIHMAP2018/0048 (delivered 30th March 2020, unreported).

Furthermore, and being cognizant of the definition of ‘practise law’ contained in section 2 of the Act, it appears to me that, when faced with an allegation that costs are irrecoverable under section 18(3), the court is required to examine the work done by the person whose costs are claimed, against the roles and functions of a legal practitioner, or what amounts to — in the words of Webster JA [Ag.] in **Garkusha** — ‘assisting...with the *advice* and *conduct* of a matter’. [The Court of Appeal’s emphasis.]

...

[69] I agree with the appellants that the fact that the costs draftsman is a UK qualified legal practitioner is not, itself, determinative of the question — whether or not the costs draftsman was acting as a legal practitioner. The focus of section 18(3) is not that the costs claimed pertain to work done by someone who is in fact a lawyer; but whether the work done amounts to acting as a legal practitioner...

[70] I recognise that this description [in the schedule of costs] of the costs draftsman’s work was framed in very broad and general terms. In my view, the broad description of the work done by the costs draftsman lends itself to the view that the costs draftsman was engaged in a substantive legal capacity in the production of the schedule of costs. Specifically, the words ‘in accordance with the ECSC Rules and Practice Directions’ are telling and give the strong impression that the costs draftsman’s work was more than clerical and involved some consideration of the law and practice on costs; this is inherently the function of a legal practitioner...

[71] Having examined the description of the costs draftsman’s work, alongside the work done by the respondents’ legal practitioners, one cannot help but conclude that the costs draftsman was acting as a legal practitioner. Accordingly, I find that the costs draftsman was acting as a legal practitioner within the terms of section 18(3), that the costs incurred by the respondents’ use of the costs draftsman are not recoverable, and that the learned judge erred by finding to the contrary.

[72] Of course, and for the avoidance of doubt, it is not my finding that once a costs draftsman is retained, and the costs draftsman is not enrolled as a BVI legal practitioner, it will necessarily follow that the costs thereby incurred are not recoverable. As I have stated, and it bears repeating, whether costs are recoverable under section 18(3) is a determination made on the facts of the case before the court, as recoverability under section 18(3) directly relates to the nature of the work done. If it is that the costs draftsman’s work is to be deemed recoverable as a general rule, as the judge and the respondents seemed to suggest is the proper approach, that appears, to my mind, to be a matter for consideration by Parliament.

[73] I note that in the United Kingdom, the use of costs draftsmen (sometimes referred to as costs draftspersons, costs consultants or costs professionals) has become relatively common place. This is so much so that the relevant rule making body has made express provision for the recovery of costs for the use of costs draftsmen in at least one practice direction to the UK Civil Procedure Rules.¹⁶ Notwithstanding the provision made for the use of costs draftsmen and their widespread use in the United Kingdom, it has been noted

¹⁶ See (the English) Civil Procedure Rules Part 46 Practice Direction para 3.1(d), (e) and (f).

that the work of a costs draftsman is ‘solicitor’s work’, whether or not the costs draftsman is in fact qualified to practise law.¹⁷ It has also been stated that costs draftsmen are often able to recover costs which are comparable and sometimes equivalent to the costs recovered by lawyers with conduct of the case.¹⁸ These are exactly the circumstances against which section 18(3) was intended to militate, that: (i) persons who are not enrolled as legal practitioners in the BVI would be performing the role of a legal practitioner and; (ii) litigants would be visited with large costs.”

- [20] **Garkusha** and **Scriven** are authorities for the irrecoverability *as a disbursement* of a non-enrolled lawyer’s fees. In order to consider their applicability to the case of Ms. Lam and Ms So, it is useful to consider the way English law and practice has developed. **Gany** is not inconsistent with either of those authorities, but its emphasis is more on the nature of the work rather than whether the fees of the costs draftsman were claimed as a disbursement or otherwise. “[A] judge is required to examine the activities undertaken by the person in question to determine whether costs in relation to that person were irrecoverable by virtue of section 18(3).”¹⁹ **Gany** therefore raises the question as to whether an in-house lawyer’s work needs to be examined in the same way as the costs draftsman’s work was. In particular, if the costs draftsman in **Gany** had been an employee of the BVI law firm, would the same conclusion have been reached? To determine this point, it is useful to look at the English authorities on the recoverability of non-qualified persons.

The English background

- [21] Section 18(1)(a) of the BVI Act criminalises “a person whose name is not...on the Roll” who “practises law.” Inserting the definition of “practise law” from section 2(1), the paragraph can be recast as providing that “a person... not... on the Roll [may not] practise as a legal practitioner or... undertake or perform the functions of a legal practitioner.” This formulation of section 18(1)(a) is not materially different from section 20(1) of the English **Solicitors Act 1974**²⁰. The current version²¹ of section 20(1) provides: “No unqualified person is to act as a solicitor.” The original version, in a form which goes back at least to the first **Solicitors Act 1843**²², provided:

¹⁷ Crane v Canons Leisure Centre [2007] EWCA Civ 1352.

¹⁸ See for example Motto v Trafigura Ltd [2011] EWHC 90201 (Costs) (15 February 2011); and Cook on Costs wherein the learned authors stated: “in heavy bills involving amounts considerably in excess of the fast track... the use of a Grade A or B draftsman would be reasonable and proportionate.”

¹⁹ Gany at para [65].

²⁰ 1974 c 47.

²¹ As amended by the Legal Services Act 2007 (c 29), section 177 and Schedule 16, Part 1, paras 1 and 25.

²² 6 & 7 Vict c 73, section 2.

“(1) No unqualified person shall—

- (a) act as a solicitor, or as such issue any writ or process, or commence, prosecute or defend any action, suit or other proceeding, in his own name or in the name of any other person, in any court of civil or criminal jurisdiction; or
- (b) act as a solicitor in any cause or matter, civil or criminal, to be heard or determined before any justice or justices or any commissioners of Her Majesty's revenue.”

Section 25 of the 1974 Act is in similar terms to section 18(3) of the 2015 Act. The approach of the English courts is thus relevant to the interpretation of the BVI legislation.

[22] In **Law Society of the United Kingdom v Waterlow Bros and Layton**²³ the House of Lords was considering a similar prohibition on a non-solicitor applying for probate of a will. Waterlow's, who are still a well-known firm of legal stationers, had a side-line whereby solicitors (particularly country solicitors) would send them a will together with an application for probate and a sworn affidavit in support. Waterlow's would engross the will (this was pre-typewriting) and then take all the documents to Somerset House on the Strand where the Probate Registry was housed. There the Registry would give Waterlow's clerk a receipt for the documents. A day or so later Waterlow's would collect the grant of probate and send it back to the instructing solicitor. If the Registry had any query to raise in respect of the application, Waterlow's would refer the matter back to the solicitor.

[23] The Earl of Selbourne LC said²⁴ that:

“the question is, whether that person [someone in Waterlow's position] has incurred a penalty; and to bring him under the penalty in a case in which it is clear that a qualified solicitor may act *per alium* and is not bound necessarily to act *per se*, it must be shewn that some law or authority has restricted the solicitor to the use of a kind of agency different from that which he has actually employed, and has made the particular agent whom he has employed subject to the penalty. No such law has been shewn, and the facts of this case, to my mind, exclude the notion of any of those things having been done from which it ought properly to be inferred that Messrs. Waterlow have been practising as solicitors or proctors for themselves. The existence of a real solicitor in every one of these cases, really applying for probate, initiating the whole matter, carrying on the whole business in his own name, although not personally going to the office, is a fundamental

²³ (1883) 8 App Cas 407.

²⁴ At pp 411-412.

fact in the case; and secondly there is the fact that all the charges as between solicitor and client are made by the real solicitor, and that what Messrs. Waterlow do, by their own clerks and their own messengers, is what they are simply paid for as the agents, for that purpose, of the solicitor.

...

I say that the question is one of substance and not of form. It being a case in which the true solicitor was at liberty to employ some other agency, no statute being shewn which enacts that he might not for those purposes employ this agency, there being nothing whatever in the rules which prevents the employment of such an agency, as I read them, the question is, Who has been really practising as a solicitor in this case? It is impossible to say that Messrs. Waterlow have been practising as solicitors — the whole proceedings have been in the name of the real solicitor who has employed Messrs. Waterlow.”

- [24] Lord Blackburn pointed out²⁵ that the solicitor could send one of his own clerks, or indeed (in Lord Blackburn’s words) his dull office boy on five shillings a week.

“It does not appear to me that Messrs. Waterlow were acting as solicitors at all, but they were doing for the solicitor something which the solicitor might and should delegate to somebody to do for him.”

- [25] Their lordships were clear that there had to be a real solicitor who had ultimate conduct of the case. This was followed shortly afterwards by the Queen’s Bench Divisional Court in **Re Walter Simmons**²⁶. Simmons was an unqualified person. He issued a writ on behalf of one Evans. Simmons when issuing the writ purported to act as clerk for a solicitor, Kirkby. This faced two difficulties. Firstly, Kirkby had never authorised him to issue the writ. Secondly, Kirkby did not have a practising certificate. The Court had little difficulty finding that Simmons had acted as a solicitor whilst unqualified to do so. In other words, there has to be a properly qualified solicitor who has genuine conduct of the matter for the unqualified person to escape punishment. Although not stated, it can be inferred from the judgment that if there had been a properly qualified solicitor for whom the clerk was acting, he would have escaped liability.

- [26] There are cases, however, where non-qualified persons can act, so long as those persons do not pass themselves off as solicitors. In **Piper Double Glazing Ltd v DC Contracts (A Firm)**²⁷ the

²⁵ At p 415.

²⁶ (1885) 15 QBD 348.

²⁷ [1994] 1 WLR 777 at p 786

plaintiff had won a substantial arbitration award. It was represented in the arbitration by a firm of “claims advisors”, who never purported to be solicitors. It was argued that using a non-qualified person debarred the plaintiff from recovering any costs in respect of the claims advisor.

[27] Potter J disagreed:

“While I do not doubt that costs incurred in an arbitration are indeed costs incurred ‘in any action, suit or matter,’ and while it also appears to be the position that acts done by representatives of the claims consultants in this context were acts by ‘unqualified persons’ so far as the **Solicitors Act 1974** is concerned, it does not appear to me that they were ‘anything done by... [such persons] ... *acting as a solicitor*.’ [Potter J’s emphasis.]

So far as I am aware, the claim consultants have not at any stage held themselves out as solicitors, but have at all times acted specifically as ‘claims consultants’ in relation to their representation of the claimant. Section 25 of the **Solicitors Act 1974** [corresponding to our section 18(3)] is linked and, in my view, falls to be construed with the sections which precede it. Those sections are penal in nature and relate to unqualified persons acting as solicitors (section 20), pretending to be solicitors (section 21), drawing or preparing instruments of transfer or charge etc., the drawing of which is limited to solicitors and certain other exempted professions (section 22) and preparing papers for probate, etc.: section 23. By section 24 of the Act of 1974 those penal provisions are applied to bodies corporate. In these circumstances, it seems clear to me that the words ‘acting as a solicitor’ are limited to the doing of acts which only a solicitor may perform and/or the doing of acts by a person pretending or holding himself out to be a solicitor. Such acts are not to be confused with the doing of acts of a kind commonly done by solicitors, but which involve no representation that the actor is acting as such. On that basis it seems plain to me that the claims consultants did not ‘act as a solicitor’ in conducting the arbitration on behalf of the claimant.”

[28] Accordingly, the plaintiff was entitled to the costs incurred in employing the claims consultant. This contrasts with the earlier case of **Fowler v Monmouthshire Railway and Canal Co**²⁸. There Fowler was represented in an arbitration by a solicitor who held himself out as such. The solicitor, however, did not have a valid practising certificate. The Queen’s Bench Divisional Court held that the lack of a practising certificate debarred both Fowler and the solicitor from claiming against the railway company the costs of his representation in the arbitration, because the solicitor was purporting to act as such, even though holding no valid certificate.

²⁸ (1879) 4 QBD 334.

[29] Potter J's approach (just as that of the Divisional Court in **Fowler**) is close to that in **Gany**. The test is whether as a *matter of fact* the person whose fees it is sought to recover is "acting as a solicitor" or "practising law as a BVI legal practitioner".

[30] In **Agassi v Robinson (Inspector of Taxes) (No 2)**²⁹, André Agassi, the famous tennis player, was represented before the tax tribunals by a firm of tax advisors, Tenon. Tenon had rights of audience before those tribunals, but were not solicitors. The tax case went to the English Court of Appeal, where Tenon instructed counsel on a direct access basis. Agassi won the appeal and had a costs order in his favour.

[31] The Court of Appeal held that, since Tenon did not have rights of audience, Agassi was therefore acting as a litigant-in-person. Could he nonetheless recover the sums he paid Tenon for its rôle in the Court of Appeal as a disbursement?

"69... The right to payment in respect of disbursements is... the right to be allowed costs for the same categories of disbursements which would have been allowed if the disbursements had been made by a legal representative on the litigant-in-person's behalf. To take an obvious example: counsel's fees are a category of disbursement which would have been allowed if counsel had been instructed by a legal representative on behalf of the litigant in person. So too would the fees payable to an expert witness. But what about someone whose fees are in respect of the very services that would have been rendered by the legal representative if one had been appointed?"

[32] It concluded:

"73... The rule contemplates allowing as costs only those categories of disbursements which would normally have been made by a legal representative. If the expenditure is for work which a legal representative would normally have done himself, it is not a disbursement within the language of [the relevant rule].

74 A clear distinction has always been recognised between disbursements made and work done by a legal representative. The fact that an element of the legal representative's work is delegated to a third party does not mean that it may be regarded as a disbursement. The point can be illustrated by reference to the treatment of solicitors who employ the services of other solicitors to act as their agents. The charges of such agents are not allowable as disbursements, and must always be itemised as part of the principal

²⁹ [2005] EWCA Civ 1507, [2006] 1 WLR 2126.

solicitor's bill of costs. This was made clear, for example, in **Re Pomeroy & Tanner**.³⁰ A country solicitor had employed a London agent. The country solicitor delivered a bill of costs to his client. It included a lump sum for the agent's fees. It was contended that they were recoverable as a disbursement and there was no need to deliver a detailed statement of the agent's charges. This contention was rejected by Stirling J. He said at p 287:

'What is done by the London agent is part of the work done by the country solicitor for the client. The country solicitor does or may do part of the work personally. He does or may do part of his work through clerks whom he employs in the country. Or, if necessary — and the necessity occurred in this case — he may do part of his work through a London agent. But as between the country solicitor and the client, the whole of the work is done by the country solicitor. It follows, therefore, that the items which make up the London agent's bill are not mere disbursements, but are items taxable in the strictest sense as between the client and the country solicitor, just as much as items in respect of work done by the country solicitor personally, or by the clerk whom he employs in the country.'

75 It follows in our view that the appellant is not entitled to recover costs as a disbursement in respect of work done by Tenon which would normally have been done by a solicitor who had been instructed to conduct the appeal. This means that the appellant is not entitled to recover for the cost of Tenon providing general assistance to counsel in the conduct of the appeals."

[33] All these English cases need to be read against the way in which solicitors have, certainly since the nineteenth century and probably before, employed and claimed costs in respect of non-qualified persons. Solicitors have always employed clerks. These used to be of three types: articled clerks, outdoor clerks and managing clerks. Articled clerks were training to be admitted as solicitors (and are now called trainee solicitors). Outdoor clerks were used to issue writs and to attend counsel in Court. Managing clerks, despite having no academic or vocational qualifications, often had their own caseload and were often by dint of a wealth of practical experience specialists in conveyancing or litigation. Indeed a common model for litigation was for the managing clerk with little input from his supervising solicitor to instruct counsel on issues of law or to settle pleadings.

[34] Since at least the 1970's, there has been a steady professionalisation of many of these rôles. Managing clerks are now often members or fellows of the Chartered Institute of Legal Executives (although there is no requirement to be). Some are licensed conveyancers. Costs draftsmen are now costs lawyers (a professional title). The position of solicitors has also changed. Newly

³⁰ [1897] 1 Ch 284.

qualified solicitors are no longer able to set up their own firms until they have three years post-qualifying experience. They have to work as associates or senior associates before becoming partners.

- [35] What is important about all these changes is that there has *never* been any suggestion that the costs of people occupying these rôles are not recoverable as part of the costs. The costs of non-solicitors employed by a law firm were (subject to the usual rules of reasonableness etc) *always* recoverable on a taxation or detailed assessment. The only relevance of the precise status of the employee was to the hourly rate which might reasonably be charged for his (or in later days her) work.

The position in the Virgin Islands

- [36] Is the position any different in the Virgin Islands? The starting point in considering this is necessarily section 18(3) of the BVI legislation. So far as material it will be recalled that this provides: “No fee in respect of anything done by a person whose name is not registered on the Roll..., acting as a legal practitioner, is recoverable...” Suppose Ms. Lam does an hour’s work on the case and Conyers bill \$459 for it as part of the costs which I have assessed. Whose fee is it which is claimed? In my judgment, it is necessarily Conyers’ fee which is being claimed. Ms. Lam will not be receiving the \$459; she will be receiving her salary (typically one third of her billings).
- [37] That is not the end of the matter. There is first a question as to whether Conyers’ fee is “in respect of [work] done by [Ms. Lam] whose name is not registered on the Roll.” The answer to this is Yes. However, the next question is whether the work done by Ms. Lam was whilst *she* was “acting as a [BVI] legal practitioner”. This in my judgment is at the heart of the issue before me.
- [38] In my judgment, the answer is No. Ms. Lam was always acting as a non-qualified person. She was a Hong Kong-admitted associate solicitor. She was doing work for a BVI legal practitioner (Conyers). She was not herself acting as the BVI legal practitioner. I find as a fact that she was not holding herself out as being a BVI legal practitioner. She was doing work, perfectly properly delegated to her by a BVI legal practitioner, but doing that work did not and does not *ipso facto* mean she was acting as a BVI legal practitioner herself, any more than Lord Blackburn’s “dull office

boy” was transmogrified into a solicitor when he delivered an application for probate to the Registry in Somerset House.

[39] Just as the claims advisor was not acting as a solicitor in **Piper Double Glazing**, so too Ms. Lam was not acting as a BVI legal practitioner. She was doing what she was employed to do: working as an Hong Kong-admitted associate solicitor assisting with a BVI case. Just as in **Agassi** there would have been no difficulty in recovering for the tax advisors’ work, if they had been in-house employees of a solicitor’s firm, so too here there is no difficulty in my judgment, a BVI law firm recovering in respect of a non-qualified person’s work when working in-house.

[40] This conclusion is shared by Leon J in **Inna Gudavadz and others v Carlina Overseas Corporation and others**.³¹ He held that:

“**Garkusha** makes clear that in relation to the assessment with which this Court is concerned in this judgment, a foreign legal practitioner — as well as a BVI paralegal, law clerk or legal assistant, a lay person, or anyone else, wherever located — can assist by doing work under the ultimate supervision of a BVI legal practitioner who is ultimately responsible for the final work product.”

[41] That in my judgment is precisely this case. It is important to remember that the 2015 Act creates criminal sanctions on non-enrolled persons practising BVI law (as defined) in the BVI. Moreover the BVI law firm employing such persons would be participating equally in the crime by aiding and abetting it and probably counselling and procuring it. If the BVI legislature intended to criminalise employees of BVI law firms and the firms themselves, it needed to express that in clear language. The language of section 18(1) is not in my judgment sufficiently clear to allow such a conclusion to be drawn.

[42] I should add that CPR 69B.11(3) expressly recognises the recoverability of time charges of “the relevant legal practitioner, partner or employee”. However, since this Rule predates the 2015 Act, only limited assistance can be drawn from it in construing the 2015 Act. It is mere background.

³¹ Claim No. BVIHC (Com) 2012/0011 (delivered 21st July 2016) at para [44].

- [43] It should, however, be noted that the 2015 Act applies equally to cases in the Territory which are not tried in the Commercial Division. In cases in the Civil Division, costs are very often awarded on the prescribed basis: CPR 65.5(1). Where prescribed costs are awarded, there is no provision for challenging the work actually done by the lawyers for the receiving party. So long as a BVI legal practitioner presents a bill of costs for the prescribed amount, it is irrelevant if some of the work was done by a non-enrolled person. This reinforces my view that the legislator, when enacting the 2015 Act, did not consider it improper for a BVI legal practitioner to employ a non-enrolled person to do some of the work, subject of course to the BVI practitioner having “ultimate responsibility” for the work product: **Gudavadz** at para [35]. If the legislator had taken a different view, one would have expected the legislation to make a special provision for prescribed costs.
- [44] Accordingly, in my judgment the fees referable to the work of Ms. Lam and Ms. So are recoverable on the detailed assessment.

Justice Adrian Jack (Ag)
Judge of the Commercial Division

By the Court

Registrar

SCHEDULE

Costs Assessed (6 – 8 April 2020)

Stage	Amount Claimed	Amount Recovered
Receivership Application (December 2013 - February 2014)	\$180,833.44	\$175,915.40
Defence (February 2014 - April 2014)	\$83,421.84	\$83,421.84
Claimant's Request for Further Information, considering Reply, client meeting (April 2014 - June 2014)	\$144,492.09	
<i>RFI Costs</i>	\$25,565.54	\$17,500
<i>Reply Costs</i>	\$19,989.75	\$17,000
<i>Client Meeting (Xiamen, China)</i>	\$90,692.38	\$90,692.38
<i>Remaining costs</i>	\$8,244.32	\$5,550
Case Management Conference (June 2014 - October 2014)	\$120,818.87	\$120,818.87
Disclosure (October 2014 - November 2014)	\$70,660.80	\$70,660.80
Witness statements and continuing disclosure (November 2014 - April 2015)	\$232,298.78	\$210,000
Further disclosure issues, amended Defence (April 2015 - April 2017)	\$532,157.40	
<i>Prep for interlocutory apps heard in May 2015</i>	\$118,733.63	\$108,000
<i>May 2015 – Judgment in Nov 2015</i>	\$51,370.88	\$47,000
<i>Nov 2015 – May 2016 (when order drawn up)</i>	\$117,741.38	\$70,000
<i>Post May 2016 disclosure</i>	\$108,214.98	\$105,000
<i>Amended Defence</i>	\$26,419	\$25,000
<i>Amended Reply</i>	\$2,749.83	\$2,500

<i>Replies to RFI in 2016</i>	\$15,691.50	\$15,691.50
<i>Supplemental and Composite WS</i>	\$21,679.88	\$17,500
<i>Remaining costs</i>	\$68,021.64	\$50,000
Composite Witness Statements (April 2017 - August 2017)	\$353,535.76	\$325,000
Trial preparation including PTR (August 2017 - November 2017)	\$379,020.15	\$355,000
Trial (November 2017 - February 2018)	\$346,409.95	\$300,000
Post- trial - Liquidation	\$26,276.93	\$17,750
TOTAL	\$2,469,926.00	\$2,230,001

Disbursements			
	Claimed	Recovered	Notes
Photocopy and printing	39,354.27	39,354.27	Allowed in full
Telephone	1,451.35	1,451.35	Allowed in full
Postage / Courier	3,613.23	3,613.23	Allowed in full
Staff overtime	4,426.21	0.00	Conceded - no longer pursued
Work permit	2,966.67	2,966.67	Agreed
Stamps for court filing	3,313.60	3,313.60	Agreed
Travelling expenses	125,401.58	110,572.58	Ordered that travel expenses allowed barring the USD 14,829 discount conceded by Applicant. This is subject to proviso that the Respondent has the opportunity to raise any issues in writing about any overlap between these and expenses claimed in Mr. Chaisty QC's fee notes before the handing down of judgment.
Court transcript fees	23,982.00	23,982.00	Allowed in full
Fees for avenue (IDRC)	773.46	773.46	Agreed
Miscellaneous	495.00	200.00	
Counsel fees	800,291.80	786,055.80	Reflects discount of 11,500 GBP ordered on brief for closing (14,236 USD)
Peter Foster	6,306.11	6,306.11	Agreed
Transperfect	10,000.00	10,000.00	Allowed in full
Diners Translation	59,741.79	59,741.79	Agreed
DTI Corp Asia	21,668.32	21,668.32	Agreed
Total Recovered		1,069,999.18	
Percentage recovery		96%	

Total Recovery: \$3,300,000.18 (92%)

- (i) Legal Practitioners' fees – Time costs: \$2,230,001.00
- (ii) Disbursements: \$1,069,999.18