

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0042

BETWEEN:

YAO JUAN

Appellant

and

[1] KWOK KIN KWOK

[2] CROWN TREASURE GROUP LIMITED

Respondents

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal [Ag.]

Appearances:

Mr. James Willan, QC with him, Ms. Claire Goldstein, for the Appellant

Mr. Paul Chaisty, QC with him, Mr. Richard Evans and Dr. Alecia Johns for the Respondents

2021: February 25.
June 1.

Commercial appeal – Costs – Interpretation of previous court order – Whether learned judge erred in his interpretation of Court of Appeal costs order – Costs of in-house foreign lawyers – Section 18(3) of Legal Profession Act, 2015 – Whether learned judge correctly permitted recovery of costs incurred by in-house foreign lawyers who were not enrolled as legal practitioners in the Territory of the Virgin Islands

The first respondent, Kwok Kin Kwok (“Madam Kwok”) is a shareholder of the second respondent Crown Treasure Group Limited. In March 2019, the Court of Appeal allowed an appeal by Madam Kwok against Yao Juan (“Madam Yao”), who is the appellant in this appeal. In allowing Madam Kwok’s appeal, the Court of Appeal made an order that- ‘Costs

are awarded to [Madam Kwok] in the court below to be assessed if not agreed within 21 days. Costs are awarded to [Madam Kwok] in this Court on the substantive appeal at 2/3 of the costs in the Court below.'

Madam Kwok applied to the Commercial Court in the Territory of the Virgin Islands (the "BVI") to have her costs assessed in accordance with the Court of Appeal's order. The learned judge delivered a written judgment on the assessment application and determined that the Court of Appeal's costs order meant that Madam Kwok was also entitled to two-thirds of any the assessed costs for the proceedings in the Commercial Court. The learned judge also determined that the costs recoverable by Madam Kwok should include the fees claimed by her in relation to work done by two in-house lawyers ("the foreign lawyers") who were employed by her legal practitioner's law firm (Conyers, Dill and Pearman). The foreign lawyers worked from the firm's Hong Kong office, but were not enrolled as legal practitioners in the BVI.

Madam Yao appealed the learned judge's judgment, arguing that the judge erred in interpreting the Court of Appeal's costs order as entitling Madam Kwok to two-thirds of the assessed costs in the Commercial Court; and that, in light the section 18(3) of the Legal Profession Act, 2015 ("the LPA"), the learned judge was wrong to allow Madam Kwok to recover costs incurred by the use of the foreign lawyers. Madam Kwok counter appealed, arguing that the learned judge was correct to allow her to recover costs associated with the work done by the foreign lawyers.

Held: allowing the appeal and counter appeal in part; affirming the learned judge's assessment of Madam Kwok's costs in the earlier Court of Appeal proceedings; setting aside the decision of the learned judge to allow the costs incurred by the use of the foreign lawyers; and making no order as to costs in this appeal, that:

1. The starting point to interpreting the words of a court order is its natural and ordinary meaning, considered in light of its syntax and the background and context in which the order was made. The Court of Appeal's costs order was not ambiguous. The order was clear, the syntax simple and terms of the order itself, were uncomplicated. There is nothing in the background to the proceedings or anything before the learned judge which ought to have caused him to depart from the natural and ordinary meaning of the costs order. In the circumstances, the learned judge did not err in assessing Madam Yao's costs in her appeal at two-thirds of the costs of the previous Commercial Court proceedings, in accordance with the natural and ordinary meaning of the Court of Appeal's order.

R v Evans [2004] EWCA Crim 3102 applied; **Feld v The Secretary of State for Business, Innovation and Skills** [2014] EWHC 1383 (Ch) considered; **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6 applied; **Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd** [2017] EWCA Civ 1525 applied; **Emmerson International Corporation v ABC Grandeservus Limited** [2020] ECSCJ No. 321 (delivered 30th September 2020) followed; Rule 65.13 and Part 69B of the **Civil Procedure Rules 2000** considered;

2. Section 18(3) of the LPA provides that no costs shall be recoverable in respect of any person who is acting as a legal practitioner while not registered on the Roll as a legal practitioner in the BVI. Section 18(3) is underpinned by the obvious public interest in preventing damage to the public by unregistered persons who are not regulated by the LPA, are not bound by the Code of Ethics, cannot be the subject of complaint or disciplinary proceedings under the LPA, and are outside the BVI courts' wasted costs jurisdiction under the **Civil Procedure Rules 2000**. For the purposes of section 18(3), it does not therefore matter that a foreign lawyer was working under the supervision of a BVI legal practitioner. The essential question under section 18(3) is whether the foreign lawyer was 'acting as a legal practitioner' within the meaning that is given to that expression, while not enrolled as a legal practitioner in the BVI.

Section 18(3) of the Legal Profession Act, 2015 interpreted; **Dimitry Vladimirovich Garkusha v Ashot Yegiazaryan et al** [2016] ECSCJ No. 104 (delivered 6th June 2016) followed; **John Shrimpton et al v Dominic Scriven et al** [2017] ECSCJ No. 15 (delivered 3rd February 2017) followed; **Gany Holdings (PTC) SA and Anor v Zorin Sachak Khan and Others** (2020) 96 WIR 378 followed; **Piper Double Glazing v DC Contracts** [1994] 1 WLR 777 distinguished; **Agassi v Robinson** [2005] EWCA Civ. 1507 distinguished.

3. It is clear that the foreign lawyers utilised by Conyers, Dill & Pearman were intricately involved in the conduct of Madam Kwok's case by, among other things, considering, reviewing and drafting pleadings, assessing the strength of arguments, conducting research, instructing counsel and briefing paralegals. The foreign lawyers were active members of Madam Kwok's litigation team and were clearly acting as legal practitioners while not enrolled as such under BVI law. The fact that the foreign lawyers may have been operating under the direction and supervision of a BVI qualified practitioner raises no real point of distinction. In the circumstances therefore, the learned judge erred in his interpretation and application of the law to the facts before him and in concluding that the costs incurred by Madam Yao in relation to the work of the foreign lawyers were recoverable. Applying the correct principles, in light of the clear legislative intent of section 18(3), costs associated with the use of foreign lawyers were irrecoverable as a matter of law.

JUDGMENT

- [1] **ELLIS JA [AG.]**: The appellant, Yao Juan ("Madam Yao"), appeals against the judgment of a learned judge of the Commercial Division of the High Court in the Territory of the Virgin Islands ("the BVI") by which he held that- (1) the order of the Court of Appeal in BVIHCVAP2018/0042 should be interpreted as granting the first respondent, Kwok Kin Kwok ("Madam Kwok"), her costs in the Court of Appeal at

two-thirds of the costs assessed in the court of first instance; and (2) the fees claimed by Madam Kwok in respect of work done by two in-house lawyers employed by her legal practitioners in their Hong Kong office, but who are not qualified as legal practitioners in the BVI, are recoverable.

Background

- [2] In December 2013, Madam Yao issued a claim against Madam Kwok alleging wide-ranging unfairly prejudicial and oppressive conduct on the part of the Madam Kwok towards Madam Yao in her capacity as a shareholder of the second respondent to this appeal, Crown Treasure Group Limited (“Crown Treasure”). Madam Yao sought, *inter alia*, an order that Madam Kwok’s shares in Crown Treasure be acquired by Madam Yao or alternatively that Crown Treasure be wound up on a just and equitable basis. Crown Treasure 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 USD \$100 to 120 million. The claim before the Commercial Court was bitterly contested from 2014 to 2018 with many interlocutory skirmishes culminating in a 22-day trial before Adderley J, with 18 days of the trial taking place in Saint Lucia at the end of 2017 following the evacuation of the Commercial Division in consequence of Hurricane Irma, and four days in Tortola in early 2018. On 13th March 2018, Adderley J rendered judgment in favour of Madam Yao.
- [3] Madam Kwok appealed to the Court of Appeal, and by a written judgment delivered on 14th March 2019, the Court of Appeal allowed her appeal and set aside the appointment of liquidators over Crown Treasure. The Court also made the following costs orders:
- “6. Costs are awarded to [Madam Kwok] in the court below to be assessed if not agreed within 21 days. Costs are awarded to [Madam Kwok] in this Court on the substantive appeal at 2/3 of the costs in the Court below.
7. Costs are awarded to the appellant on the fresh evidence application to be assessed, if not agreed within 21 days.”

The Costs Assessment

- [4] Madam Kwok applied to the Commercial Division for her costs to be assessed based on the Court of Appeal's order. The learned judge was required to conduct an assessment of the costs of 'the court below', i.e. the Commercial Court. As part of this assessment, he was required to consider the meaning of the Court of Appeal's order as regards the costs of the appeal.
- [5] Counsel who appeared on behalf of Madam Yao before the learned judge, submitted that what the Court of Appeal intended was to award Madam Kwok two-thirds of the assessed costs in the Court of Appeal. He submitted that they were entitled to reduce the costs payable because Madam Kwok had not won on everything in the Court of Appeal. Counsel for Madam Kwok on the other hand argued 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 in the appeal were to be two-thirds of her costs at first instance. Counsel for Madam Yao however submitted that such a construction would do complete violence to the language of the order and would effectively give a substantial windfall to Madam Kwok.
- [6] In his written judgment, the learned judge found that the order of the Court of Appeal should be construed on the ordinary principles of construction. The learned judge commenced with the plain meaning of the order and considered that potential construction against the factual matrix and the likely intention of the Court when it made the order. The learned judge found that the plain meaning of the Court of Appeal's order was straightforward – Madam Kwok would be entitled to recover two-thirds of whatever costs were assessed and awarded at first instance. The learned judge concluded that if the Court of Appeal intended to award Madam Kwok two-thirds of her assessed costs in the appeal, then the order would have said that. He determined that there were no other considerations which would warrant a different construction of the order and consequently certified the costs in the appeal in to be two-thirds of the costs at first instance, assessed in the sum of USD \$2,200,000.¹²

- [7] Forming part of Madam Kwok's costs in the first instance Commercial Court proceedings (assessed in the sum USD \$3,124,084.78) are fees claimed in respect of work done by Ms. Michaela Lam and Ms. Emily So who, at the material time, were lawyers working in the Hong Kong office of Madam Kwok's legal practitioners (Conyers, Dill & Pearman) but were not qualified as legal practitioners within the meaning of section 2 of the **Legal Profession Act, 2015** ("the LPA").

The Appeal and Counter Appeal

- [8] Madam Yao has now appealed the learned judge's decision. Her appeal challenges:

- (1) the learned judge's interpretation of the Court of Appeal's order awarding costs to Madam Kwok 'in the substantive appeal at 2/3 of the costs if the Court below';
- (2) the learned judge's decision to allow, as part of the costs to be paid by Madam Yao, fees incurred from the use of the in-house lawyers of Conyers working from Hong Kong.

- [9] Madam Kwok has filed a counter appeal seeking to have this Court uphold the decision of the learned judge to permit the recovery of fees incurred from the use of the in-house lawyers. I will deal with the issues under appeal in turn.

Issue 1 – Court of Appeal's Costs Order Appellant's Submissions

- [10] Learned Queen's Counsel, Mr. James Willan, on behalf of Madam Yao, first noted that the central principle when it comes to costs recovery in the BVI is that costs ordered to be paid, as between parties to litigation, are given as an indemnity to the person entitled to them. It follows that costs are not imposed as a punishment on the party who pays them or given as a bonus to the party who receives them. This means that the amount which the paying party has to pay cannot exceed the amount which the successful party has to pay to his own solicitor.

- [11] Mr. Willan referred the Court to the judgment in **Gundry v Sainsbury**¹ where Cozen Hardy MR quoted Bramall B in **Harold v Smith**² as follows:

“What are party and party costs? They are not a complete indemnity, but they are only given in the character of an indemnity. I cannot do better than read the opinion expressed by Bramwell B. in *Harold v Smith* (1):

‘Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the indemnification can be found out to the extent to which costs ought to be allowed is also ascertained.’

Now in the face of the evidence which the learned county court judge has accepted, and which he was perfectly justified in accepting, if he had ordered the defendant to pay these costs he would have been giving a bonus to the party receiving them. That is contrary to justice and to common sense and also to the law as laid down in *Harold v Smith*. That is a decision that has remained undisturbed for fifty years, and I am not prepared to depart from it. On that ground alone I think this appeal must fail.”

- [12] Applying this so called ‘indemnity principle’, Mr. Willan argued that where the receiving party is not liable to pay costs to his own solicitor, for example, as in this case because only a certain amount is due and owing, then the receiving party does not need (and is not entitled to) an indemnity with regard to any additional amount. This principle effectively rules out any party in litigation receiving a windfall by way of a costs award.

- [13] Mr. Willan submitted that the indemnity principle forms part of the crucial background against which the Court of Appeal order must be interpreted and he submitted that the learned judge failed to consider or give enough weight to this most important consideration when interpreting the Court of Appeal’s order. Therefore, if the learned judge’s interpretation of the Court of Appeal’s order is correct, then Madam Kwok will achieve a substantial windfall in relation to the Court of Appeal costs. A substantial portion of the award will not need to be utilised to pay

¹ [1910] 1 KB 645.

² [1860] 5 H&N 381 at 649.

solicitors fees and Madam Kwok will be free to spend the money on whatever she likes, effectively receiving a 'bonus'.

[14] Mr. Willan further argued that, as drafted, the Court of Appeal's costs order is ambiguous since it simply does not specify whether Madam Kwok should be awarded, by way of appeal costs, either two-thirds of the assessed first instance costs or two-thirds of the assessed Court of Appeal costs – it simply says 'costs'. The learned judge's interpretation of the wording of the Court of Appeal's order may superficially appear to be the most natural reading of the order when one simply looks at the wording, however it is not the most natural interpretation when consideration is given to the context of the order and, in particular, the importance of the indemnity costs principle. If the indemnity principle is given sufficient consideration, then it becomes clear that the only correct interpretation has to be one that finds that the costs of the appeal should be two-thirds of the assessed Court of Appeal costs rather than two-thirds of the assessed first instance costs.

[15] Learned Queen's Counsel submitted that it was open to the learned judge to apply an entirely different interpretation of the costs order. Bearing in mind that the first instance court often assesses both first instance costs and the costs of any appeal, it could, instead have been interpreted as meaning that the reference to 'in the Court below' simply meant that the costs were being assessed in the court below. According to Counsel, the Court of Appeal would therefore simply be prescribing where the assessment is to take place. The reference to the costs of the appeal being '2/3 of the costs' would then be seen as simply setting out that the full value of costs incurred would not be recoverable.

[16] Finally, Mr. Willan referred the Court to the judgment in **Feld v The Secretary of State for Business, Innovation and Skills**³ in which the English Court held at paragraph 28 that the starting point when interpreting court orders is the natural and ordinary meaning of the words, however, the words have to be considered in light

³ [2014] EWHC 1383 (Ch).

of the syntax, context and background in which those words were used. Counsel submitted that the proper approach to interpretation of a court order is to apply the principles of statutory interpretation in a way which would allow the court to consider the intention of the Legislature. Mr. Willan asserted that this is important in this context because the indemnity principle governs the assessment of costs and there is nothing in the **Civil Procedure Rules 2000** (the “CPR”) that suggests that Court of Appeal costs should be two-thirds of the assessed costs of the proceedings at first instance. Counsel noted that there is not a single rule in the CPR (or any other piece of BVI legislation) that provides for any party to be paid more than they paid to their lawyers if they are successful in a claim. Rather, the emphasis in the CPR is on justice and fairness. In summary, and in relation to the provisions of the CPR, Mr. Willan argued:

- (a) The overriding objective of the CPR (CPR 1.1) which requires the court to deal with cases justly would not be furthered if the Court of Appeal’s order is interpreted in a way which gives a windfall to a party could be in accordance with this principle.
- (b) CPR 65.2 provides that the court has a discretion as to the amount to be awarded when assessing costs and the sum should be an amount that the Court deems to be reasonable and which appears to the court to be fair to both the person paying and the person receiving such costs. It is difficult therefore to see how a costs award could either be ‘reasonable’ or ‘fair’ to both parties if it results in one party having to pay to the other much more than was ever incurred as costs of the proceedings.
- (c) The two-thirds rule is only referred to in the CPR within the ambit of the prescribed costs regime (where it is very unlikely that any party would ever receive a windfall and therefore contravene the indemnity costs principle). If the legislature had intended for this rule also to apply within the assessed costs regime then one would expect this provision to also

be contained within the provisions that deal with the assessment of costs in the CPR.

- [17] Mr. Willan argued that these provisions make it clear that the Legislature never intended for the costs recoverable in the Court of Appeal to be calculated at two-thirds of the costs incurred at first instance in the assessed costs regime.

Respondents' Submissions

- [18] In opposing this appeal, learned Queen's Counsel for Madam Kwok, Mr. Paul Chaisty, submitted that Madam Yao's arguments show no grounds on which the order of the learned judge can be reversed. According to Mr. Chaisty, the judge simply applied the clear and unambiguous meaning of the Court of Appeal's order by awarding Madam Kwok, in respect of the appeal, two-thirds of the costs which he assessed at \$3,124,084.78 (with interest). The judge had no alternative but to comply with the clear and unambiguous terms of the order. This was a straightforward and obvious process of construction and Counsel submitted that the learned judge arrived at the inevitable conclusion.
- [19] Moreover, in the event that Madam Yao is aggrieved by the Court of Appeal's order, she had the recourse of appealing the order or seeking to have it otherwise set aside. Counsel noted that in the ensuing 18 months the costs order has not itself been appealed, neither has there been any other form of application to seek to set it aside. Instead, Madam Yao now seeks to advance arguments which she ought to have made to the Court of Appeal at the relevant time but did not. In fact, Madam Yao made no submissions to the Court of Appeal in respect of the Court of Appeal costs. Instead, in submissions to the judge, Madam Yao sought to argue that what the Court of Appeal wanted to do was order only two-thirds of the assessed costs that would otherwise be ordered in the Court of Appeal. Counsel argued that if the Court of Appeal had intended to do that, the order could easily have been drafted accordingly.

[20] Mr. Chaisty reiterated that the words of the order of 14th March 2019 allow no room for any claim of ambiguity. The judge below was only required to construe the terms of the order. The arguments advanced by Madam Yao in the court below are not ones of construction at all but an attempt to say that the judge should have changed or rectified the Court of Appeal's order because Madam Yao did not like its consequences. Mr. Chaisty concluded that the attempts to construe the Court's Order in the way contended for by Madam Yao is to strangle the plain and obvious meaning and would effectively rewrite the order.

Analysis and Conclusion

[21] Although from time to time courts have been called upon to interpret an order made in the same or some other legal proceedings if the parties later dispute the meaning of its terms, there is a relative dearth of authority on the proper approach to the interpretation of a court order. In **R v Evans**,⁴ the English Court of Appeal determined that the proper approach to interpretation of a court order is, broadly, to apply the principles of statutory interpretation. At paragraphs 15 – 16 of the judgment Dyson LJ noted:

“[15] In our judgment, the observations by Lord Reid and Lord Hoffmann apply equally to the interpretation of a court order as they do to a statute. We can see no basis for drawing a distinction between them. In each case, the question whether a word or phrase is being used in its ordinary sense or in a special sense is a question of law. But if as a matter of law the word or phrase is being used in its ordinary sense, then it is for the tribunal of fact to apply that meaning to the facts as found.

[16] It is inherent in this approach that the application of words which bear their ordinary meaning to the same set of facts by different tribunals can yield different results... ”

[22] This case was later considered and applied by Edward Murray J in **Feld v The Secretary of State for Business, Innovation and Skills**. That case concerned the interpretation of an order granting a disqualified company director permission to act as a director, in circumstances where the director had been involved in the drafting

⁴ 2004 All ER (D) 80 (Dec).

of the order. In April 1997, the claimant was disqualified from acting as a director of a limited company for a period of ten years by order of the Crown Court in criminal proceedings. In 2004, he applied for permission to serve as a director of a company ("ATEL"). In June, permission was granted for him to do so, subject to certain conditions. The draft order had been prepared by the claimant and his co-applicants. ATEL was subsequently placed into liquidation. The statement of affairs showed a total deficiency as regards creditors of £1,103,180.32. The defendant Secretary of State applied for an order disqualifying the claimant, under section 6 of the Company Directors Disqualification Act 1986, in relation to the claimant's conduct as a director of ATEL. The registrar granted the order of disqualification, having concluded that there were a number of breaches of the order of 2004 which formed a sufficient basis for her conclusion that the claimant's conduct as a director of ATEL made him unfit to be concerned in the management of a company. She held that she was, therefore, obliged by section 6(1) of the 1986 Act to make a disqualification order. The disqualification period was one of 12 years. In making her decision, the registrar had relied on the principles for the interpretation of contractual documents outlined in **Investors Compensation Scheme Ltd v West Bromwich Building Society and Others**.⁵ The claimant appealed to the High Court.

- [23] On appeal, the claimant submitted that the judge erred, as a matter of law, in not finding the order of June 2004 to be either obtuse or incoherent. The claimant argued that the judge had erred in her application of the principles of contractual interpretation to the order and in holding that the intention and understanding of the claimant as to the interpretation of the order was relevant to the court's interpretation of the order. The court considered the judgment in **R v Evans** which supported the proposition that the proper approach to interpretation of a court order was, broadly, to apply the principles of statutory interpretation.

⁵ [1998] 1 ALL ER 98.

[24] The court found that the common starting point was the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. What additional principles and factors come into play as part of the court's exercise of interpretation would depend on the nature of the writing to be interpreted and would be highly dependent on the facts of the specific case.

[25] The court further observed that while the reference of the registrar to the principles of contractual interpretation was not entirely apposite to the exercise of interpreting a court order, her actual approach to the interpretation of the order had been entirely consistent with the proper approach to interpretation of a court order as outlined in **R v Evans**.

[26] The critical excerpt from the court's *ratio* is found at paragraphs 27 – 29 of the judgment:

“[27] In a court order, one is concerned with the intention of the court in making the order, and this is closer to the exercise involved in construing the intention of the legislature when enacting a statute than it is to construing the intention of parties to a contract. On the other hand, it would be a rare and unusual case where a person to whom a statutory provision was to be applied (in a civil or criminal proceeding where the meaning of the statutory provision was at issue) had been involved in the drafting of that provision. But where a court order is to be applied to a person, such as Mr Feld, who had a hand in drafting the terms of the order, the court should be entitled to have regard, as part of the exercise of construing the order, to what that person could reasonably have been thought to have intended in drafting the order in a particular way, as far as that may be objectively determined on the basis of the evidence presented to the court.

[28] The interpretation of a court order cannot be entirely assimilated to the exercise of interpreting a contract nor can it be entirely assimilated to the exercise of interpreting a statute. In all three cases, however, the common starting point is the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. What additional principles and factors come into play as part of the court's exercise of interpretation will depend on the nature of the writing to be interpreted (contract, court order or statute) and, of course, will be highly dependent on the facts of the specific case. In the context of statutory interpretation, Lord Reid pointed out in *Cozens v Brutus*, and Lord

Hoffmann in *Moyna*, the importance of interpreting the natural and ordinary meaning of the words used in the relevant statute in light of the 'syntax, context and background' in which those words were used (*Moyna* at 24, quoted by Dyson LJ. In *Evans* at 14).

[29] Dyson LJ, as already noted, confirmed in *Evans* that these observations also apply to interpretation of a court order. It is quintessentially the job of the relevant tribunal to carry out this exercise based on its findings of fact on the basis of the evidence it accepts. It seems to me that, while the reference of Registrar Derrett to the principles of contractual interpretation in *West Bromwich Building Society* is not entirely apposite to the exercise of interpreting a court order, for the reasons given above, her actual approach to the interpretation of the order is entirely consistent with the proper approach to interpretation of a court order as outlined by Dyson LJ in *Evans*. In other words, she applies the principles that she draws from *West Bromwich Building Society* that are also relevant to interpretation of a court order to interpretation of the order in this case, namely, what she refers to (at 115 to 117) as the first, fourth and fifth principles of interpretation set out by Lord Hoffmann (in *West Bromwich Building Society* at pp 912H-913E). Of course, to do so in relation to a court order one must read the references in those principles to 'the parties' as a reference to the court making the relevant order. Lord Hoffmann's second principle would also apply. The third principle would not be relevant, but there is no indication in Registrar Derrett's judgment that she considered Lord Hoffmann's third principle as somehow relevant to her exercise." (Emphasis mine)

[27] The approach of the Privy Council in the case of **Sans Souci Limited v VRL Services Limited**⁶ is also instructive on this point. In that case, Lord Sumption described the correct approach to the construction of a judicial order as follows:

"...the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."

⁶ [2012] UKPC 6.

[28] In **Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd**,⁷ Flaux LJ, drawing in particular on the judgment of Lord Clarke of Stone-cum-Ebony JSC in the Supreme Court in **JSC BTA Bank v Ablyazov (No.10)**,⁸ summarised the relevant principles as follows:

“(1) The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction;

(2) In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court;

(3) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order.”⁹

[29] From these decisions, it is clear that the starting point when interpreting a court order is the natural and ordinary meaning of words which must be considered in light of the syntax, context and background in which those words were used. The same approach has been adopted by this Court in **Emmerson International Corporation v ABC Grandeservus Limited**.¹⁰ In this appeal, I can find no basis to depart from this approach. Having considered the precise wording of the Court of Appeal’s order, I find that there is no ambiguity in the order when it is interpreted against the relevant background. The terms are perfectly clear, the syntax simple and terms of the order itself, are uncomplicated.

[30] The relevant background to the order was helpfully summarised in the parties’ submissions and in the judgment of the learned judge and need not be recited here in detail. Suffice it to say that the judge was fully apprised of the fact that, among the orders sought by Madam Kwok in the proceedings before the Court of Appeal, was an order for Madam Yao to pay Madam Kwok’s costs in the proceedings below

⁷ [2017] EWCA Civ 1525; considered in *SDI Retail Services Limited v The Rangers Football Club Limited* [2021] EWCA Civ 790.

⁸ [2015] UKSC 64.

⁹ [2015] 1 WLR 4754.

¹⁰ [2020] ECSCJ No. 321 (delivered 30th September 2020).

and on the appeal. What is clear also is that there was never any suggestion in the submissions before the Court of Appeal that Madam Kwok's recovery of costs on the appeal should be limited in the manner suggested by the Madam Yao. Indeed, there is no indication that any of the matters raised in submissions before the learned judge or before this Court were advanced before the Court of Appeal in 2018. These matters therefore could not properly be taken into account by the learned judge in his determination of the meaning of the Court of Appeal's costs order. In other words, these matters raised by Madam Yao could not be considered to be a part of the relevant background of the case before the Court of Appeal which could have caused the learned judge to abandon the natural and ordinary meaning of the words used by the Court of Appeal in its order.

- [31] Also of critical importance, in my view, is the legislative context which undergirds the Court of Appeal's costs order. CPR 65.13(1) provides that:

“(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.”

CPR 65.5 – 65.7 and Appendix B regulate the quantification of costs on a prescribed costs basis.

- [32] Critically, CPR 65.13(2) goes on to provide that:

“(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.”

- [33] It follows that the Court of Appeal has a wide discretion to award costs on an appeal. This broad remit would take into account the varying categories of matters which may come before this Court by way of an appeal. Included among these, are matters which arise from the Commercial Division of the High Court, which has an entirely separate regulatory regime for commercial claims under CPR Part 69B. Part

69B in summary provides for costs in Commercial Court proceedings to be quantified by way of assessment taking into account all the relevant factors, following a determination by the court as to which party (if any) should be liable to pay costs. It seems to me then, having regard to the relevant procedural rules, that the terms of the order were entirely within the jurisdictional remit of the Court of Appeal. Indeed, and as the learned judge observed, the terms of the order are not unusual and are in fact consistent with previous orders made by this Court in cases such as **Convoy Collateral Ltd v Broad Idea International Ltd and Another**,¹¹ **NG Man Sun v Peckson Ltd**¹² and **Reniston Limited v Nedlands Overseas Inc.**¹³

- [34] In circumstances where Madam Yao has failed to demonstrate that the natural and ordinary meaning should not be applied or that the terms of the order are in any way ambiguous or unclear, the matters of construction and interpretation raised on this appeal could have no relevance to the determination which needed to be made by the learned judge, who was simply required to apply the terms of the order. If the effect of an order is unfair or unjust, but an order is clear in its terms, the obvious recourse to the aggrieved party is to appeal. The fact that the order could effectively result in a windfall to Madam Kwok could perhaps have justified an appeal of the order. Certainly, courts have an inherent power to make additional orders or to amend orders if they do not reflect the intention of the court. However, it could not be a basis upon which Madam Yao could seek to effectively re-litigate the appellate court's finding on costs before a judge who in his original jurisdiction is required to give effect to the order. This is especially so when it is clear that the matters sought to be raised before the judge in his original jurisdiction were not raised or argued before or determined by the Court of Appeal which heard the original appeal and which made the order in question.

¹¹ [2020] ECSCJ No. 174 (delivered 29th May 2020).

¹² [2020] ECSCJ No. 11 (delivered 8th April 2020).

¹³ [2021] 2 LRC 632.

[35] I am satisfied that the learned judge correctly interpreted the Court of Appeal's order and applied the clear and unambiguous meaning of the order by awarding Madam Kwok two-thirds of the costs which he assessed at \$3,124,084.78. The learned judge in my view had no alternative but to comply with the clear terms of the Court of Appeal's order which had not been appealed or set aside or varied. In all the circumstances, I find no merit in Madam Yao's contention that the learned judge erred in making an award which was consistent with his interpretation of the order and would dismiss this ground of appeal.

Issue 2 – Costs for Foreign In-House Lawyers

[36] During the course of Madam Kwok's application for assessment of costs incurred in the underlying Commercial Court proceedings, Madam Yao submitted that the fees of foreign registered/practising lawyers which have not been admitted to practice in the BVI and who are not entered onto the roll of practitioners as defined under section 2 of the Legal Professions Act ("the LPA") are not recoverable.

[37] The two lawyers whose work is substantially in question are Ms. Michaela Lam and Ms. Emily So. At the relevant time they were associates in Conyers' Hong Kong office but they were not admitted as legal practitioners in the BVI. They did not raise their own independent fee notes for work carried out and present them to Conyers as disbursements for payment. Payment for their work was not treated as a disbursement. In fact it is clear that this appeal is not concerned with disbursements because Madam Kwok has asserted that the cost of the work done by Ms. Lam and Ms. So could not in any event ever be or have been charged as a disbursement (nor was there any suggestion of doing so). According to Madam Kwok, each was paid an annual salary as an employee. The work carried out was carried out under the supervision of their employers (specifically two partners in Conyers, Mr. Evans in BVI, and Mr. Hau in Hong Kong, both of whom are admitted in the jurisdiction).

Respondents' Submissions

- [38] Mr. Chaisty submitted that, as against Madam Yao, it is the Conyers' fees which are being claimed. Neither Ms. Lam nor Ms. So received any part of that fee directly, they received a salary. However, the fee schedule makes clear that they were doing legal work and charging at an hourly rate. Madam Kwok therefore sought to recover USD \$395,161.00 in respect of Ms. Lam's time and USD \$291,790.99 in respect of Ms. So's. The learned judge determined that the fees referable to the work of Ms. Lam and Ms. So are recoverable on the detailed assessment.
- [39] In the counter notice of appeal, Madam Kwok contends that the decision of the learned judge in respect of fees relating to the work of Ms. Lam and Ms. So should be upheld and affirmed in whole (or in part) on the further ground that all (or some) of the work carried out by Ms. Lam and Ms. So was not, by its nature and in view of the tasks performed, in any event irrecoverable by reason of the provisions of the LPA, but is work, the fees raised for which can and should be recoverable.
- [40] Mr. Chaisty reiterated that neither Ms. Lam nor Ms. So raised their own fee notes for work carried out in the litigation. Their work was delegated to them by a BVI legal practitioner and carried out under the supervision of their employers especially 2 partners in Conyers, a law firm with a sizeable BVI presence, and so was not treated as a disbursement in the schedule of costs, instead it is Conyers' fees which are being claimed. With this factual matrix, none of the purposes, at which counsel argued that the objectives or mischief of the LPA may be aimed, relate to this situation. There is no justification on the application of the LPA to disallow this part of Conyers' fees.

Appellant's Submissions

- [41] Mr. Willan, on the other hand, submitted that the combined effect of sections 2 and 18 of the LPA is that costs incurred by a person practising BVI law who is not on the Roll of legal practitioners in the BVI will not be recoverable. Counsel submitted that

the above position is now beyond dispute and has been confirmed in three Court of Appeal cases.

[42] In **Dimitry Vladimirovich Garkusha v Ashot Yegiazaryan et al**¹⁴ this Court found that the costs of Berwin Leighton Paisner's Moscow office lawyers were not recoverable. At paragraph 73 of the judgment, this Court held that the LPA had-
'...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'.

[43] This position was later followed and clarified in **John Shrimpton et al v Dominic Scriven et al**¹⁵ where the Court of Appeal found that Herbert Smith Freehill's fees were not recoverable. At paragraph 44 of the judgment, this Court held that:

"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'."

[44] Finally, in **Gany Holdings (PTC) SA and Anor v Zorin Sachak Khan and Others**¹⁶ this Court held that the fees of a costs draftsman were not recoverable. At paragraph [67] of the judgment, the Court found that:

"Despite the lack of detailed guidance, it is clear that, as I stated earlier, 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. Furthermore, and being cognizant of the definition of 'practice 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'."

¹⁴ [2016] ECSCJ No. 104 (delivered 6th June 2016).

¹⁵ [2017] ECSCJ No. 15 (delivered 3rd February 2017).

¹⁶ (2020) 96 WIR 378.

[45] Mr. Willan submitted that despite the clear authority on this point, the learned judge misdirected himself when he relied on the obiter comment of Leon J in **Inna Gudavadz et al v Carlina Overseas Corporation et al**¹⁷ in which Leon J incorrectly considered, at paragraph 44, that- ‘**Garkusha** makes clear that... a foreign legal practitioner... can assist by doing work under the ultimate supervision of a BVI legal practitioner who is ultimately responsible for the final work product.’

[46] This comment appears to have caused the learned judge to find that the position is different when foreign lawyers are employed in the overseas offices of BVI law firms (as opposed to being employed by overseas firms) and when the foreign lawyer is working under the supervision of a Virgin Islands legal practitioner. Counsel referred to this as ‘the carve-out’. He argued that there is no authority for the learned judge in this case, making a finding in keeping with the carve-out. According to Mr. Willan, the wording of sections 2 and 18(3) of the LPA is clear. They set out, in clear terms, that the cost of foreign lawyers who are not on the Roll will not be recoverable. The wording is very much focused on the position of the individual and there is no carve-out at all for overseas’ lawyers who work for BVI law firms or who are supervised by BVI practitioners.

[47] Mr. Willan argued that the judgments in **Garkusha**, **Shrimpton** and **Gany Holdings** were also clear on this point and no indication was given at all that there should be an exception for lawyers employed by BVI law firms. He referred the Court to paragraph 46 of **Shrimpton**:

“It is undeniable that especially with modern technology a person not registered on the BVI roll can, from outside the BVI, carry on what would be considered to be the activities of a legal practitioner in the BVI, in relation to a BVI case. To interpret the prohibition against recoverability in s18(3) as not applying to such a person, simply because he is outside the BVI, while applying it to a person who performs the activity while within the BVI, would leave a gaping hole within the legislation and make nonsense of the provision. It certainly would not further the purpose of the Act which is to regulate the practice of BVI law and the persons who are permitted to practice such law.”

¹⁷ [2016] ECSCJ No. 262 (delivered 21st July 2016).

[48] The learned judge also attempted to deal with the issue that Ms. Lam and Ms. So were overseas' lawyers and therefore not on the Roll by finding that they were not actually 'practising' BVI law. Madam Yao however, contended that Ms. Lam and Ms. So were clearly acting as legal practitioners. This necessarily requires consideration to be given to whether or not they were 'practising law' as defined in the LPA. Counsel argued that the learned judge did not consider this in any meaningful way. Instead, he simply stated that Ms. Lam and Ms. So were not practising as legal practitioners. He did not however consider: (i) the fact that Ms. Lam and Ms. So were employed as lawyers within the legal department of a BVI law firm working on a case which dealt exclusively with issues of BVI law – it is therefore not clear what else they could have been doing other than practising BVI law; and (ii) the details of the costs schedule which show all of the tasks that they were carrying out in relation to the case.

[49] Finally, Mr. Willan submitted that in considering whether or not Ms. So and Ms. Lam's fees should be recoverable, the learned judge considered a number of English authorities which were unhelpful because they do not specifically consider the position of lawyers holding themselves out as legal professionals in a different jurisdiction where they are not on the Roll. Further, none of the English cases were decided in the context of the LPA. If proper consideration had been given to their role at Conyers and the entries in the costs schedule then the learned judge could not have reached any other conclusion. From these cases and the wording of the legislation it is clear that Ms. Lam and Ms. So were practising BVI law.

Analysis and Conclusion

[50] For many years, the entitlement of litigants with disputes before the Eastern Caribbean Supreme Court (Virgin Islands Circuit) to recover the costs incurred by their overseas lawyers, who were not enrolled as legal practitioners in the BVI, was governed by the common law principle that those fees were recoverable if they were

necessarily and reasonably incurred and claimed as a disbursement on the schedule of costs of the BVI admitted legal practitioner.¹⁸

[51] In 2015, the LPA introduced an entirely new legislative framework for regulating the legal profession in the BVI. The changes were remarkable. Under the LPA, the BVI Legislature introduced a new regime under which an individual not only commits an offence if they undertake or perform the functions of a legal practitioner in the BVI without first having been admitted to practise in the BVI, and added to the register of BVI legal practitioners, but such a party is also not entitled to recover their fees. Section 18(3) sets out in clear and definite terms that ‘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’.

[52] The interpretation and application of these provisions has been the subject of much litigation since promulgation. The first was this Court’s decision in **Garkusha**. In that case, this Court of its own motion, and on a written application for security for costs, refused to order security in relation to the costs which would be incurred by London solicitors, on the basis that these solicitors appeared to be practising BVI law and would consequently be committing an offence under section 18(1). The Court made clear that the introduction of the LPA abolished the practice of recovering overseas lawyers’ fees as disbursements in BVI legal proceedings, rendering those fees irrecoverable (unless the fees relate to the provision of expert evidence on foreign law to the BVI court).

[53] The Court of Appeal revisited the question of overseas lawyers’ fees in **Shrimpton**. This appeal was heard 10 months after **Garkusha** by a differently constituted panel. In that case, the Court considered whether the costs of an English firm, which was assisting the claiming party’s BVI law firm with the conduct of BVI proceedings, could be recovered as a disbursement of the BVI firm, or

¹⁸ See *Mccullie v Butler* [1962] 2 QB 309.

whether that common law right of recovery had been abrogated by the LPA, as decided in **Garkusha**.

- [54] Gonsalves JA [Ag.], delivering the decision in **Shrimpton**, found that the Court in **Garkusha** had wrongly relied upon section 18(1) because the offences within section 18(1) do not have extraterritorial effect. Further, having noted the status of section 2 (2) of the LPA, the Court of Appeal considered the terms of section 18 (3) and found that, given its clear terms, overseas lawyers' fees are not generally recoverable in BVI proceedings (again, the exception referenced was the provision of expert evidence on foreign law). Importantly the Court found that section 18(3) of the LPA operated disjunctively from sections 18(1) and 18(2) so that any conduct which constituted practising as a legal practitioner was subject to the statutory prohibition on the recovery of costs. At paragraph [44] the Court observed:

"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'."

- [55] 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'.¹⁹

- [56] After considering paragraph 69 of Webster JA [Ag.]'s judgment in **Garkusha**, at paragraph [45] of the judgment, Gonsalves JA [Ag.] concluded:

¹⁹ See paragraphs 44 – 45 of **Garkusha** per Webster JA [Ag.].

“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*.”

[57] In **Gany Holdings**, another differently constituted panel of this Court delivered a further judgment which clarifies the scope for recovery of foreign lawyers’ fees following the enactment of the LPA. One of the critical questions that arose in **Gany Holdings** was whether or a successful claimant was entitled to recover the costs associated with engaging an English costs draftsman to prepare the bill of costs.

[58] The costs draftsman concerned was not an enrolled BVI legal practitioner. The costs draftsman was not engaged in the substantive conduct of the litigation. His work, as described in the schedule of costs was limited to- ‘reviewing files and drafting schedule of costs in compliance with ECSC Rules and Practice Directions’. He therefore was tasked to prepare a BVI-law compliant bill of costs. Michel JA, who wrote the judgment of the Court, observed that the work of a costs draftsman is ‘solicitors work’²⁰ and concluded that it was therefore work which broadly assisted with the conduct of BVI litigation, and thus fell afoul of the recovery provisions in section 18(3). Michel JA found that, in the circumstances of that case, ‘the costs draftsman’s work was more than clerical and involved some consideration of the law and practice of costs; this is inherently the function of a legal practitioner’. This Court therefore found that the costs incurred by the overseas costs draftsman employed by the claiming party were irrecoverable.

²⁰ *Crane v Canons Leisure Centre* [2007] EWCA Civ 1352.

- [59] Michel JA confirmed that:
- “...by its very nature, section 18(3) requires an examination of the circumstances in which costs claimed were incurred... the requirement that costs were incurred while a person was ‘acting as a legal practitioner’ can only be sensibly assessed by examining the work for which the costs are claimed, as against conduct that amounts to ‘acting as a legal practitioner’.”
- [60] Following **Gany Holdings** it is now clear that in assessing whether costs are irrecoverable under section 18(3) of the LPA, the court is required to conduct a ‘a close examination of the facts of each case’. In doing so the court must therefore examine the actual nature of the work done by the persons whose costs are claimed, as against the roles and functions of a legal practitioner in order to determine whether the overseas lawyer was (or was not) ‘acting as a legal practitioner’.
- [61] These authorities were extensively considered by Counsel on both sides of this appeal and indeed they do provide key guiding principles for any court considering the application of section 18 of the LPA. However, while, the factual matrices in the cases referenced provide authority for the irrecoverability as a disbursement of a non-enrolled lawyer’s fees, none of these cases concerned a claim in which lawyers internal to the BVI law firm, whose work the BVI firm seeks to recover as fees of the BVI firm itself.
- [62] The arguments in this appeal, and the guidance from the Court of Appeal in **Garkusha**, **Shrimpton** and **Gany Holdings**, therefore compels this Court to consider whether fee earners working in an overseas office of a local BVI firm were ‘acting as legal practitioners’ and whether the costs they incurred were recoverable. The fee earners in question were not admitted to the Roll of legal practitioners in the BVI during the relevant period and as a consequence they were not BVI registered legal practitioners for the purposes of section 18 when the costs were incurred. It is however contended that they were working under the supervision of partners within Conyers who are BVI legal practitioners and therefore were not working or acting as legal practitioners for the purposes of section 18(3).

[63] Mr. Chaisty has firstly argued that there is no justification under the LPA, or purpose to be served which the LPA sought to address, to deny a BVI law firm from recovering its fees in respect of its own employees who in fact work outside of the jurisdiction. According to him, to deny such as a matter of principle would serve only to add and increase costs if BVI based lawyers were forced to travel say to Hong Kong to carry out tasks which would be carried out more economically by individuals based there rather than leave their clients with no prospect of recovering for the cost of work carried out on their behalf despite their success. To deny the costs of employed, in-house lawyers of BVI practitioners in the present circumstances would have potentially a hugely significant impact on the work and working methods of firms based in this jurisdiction that carry out international work for clients who have placed their commercial and business interests in the BVI. Counsel argued that there is no question in the present case of 'outsourcing' and so the mischief tackled by section 18 of the LPA is not engaged.

[64] Given that there has been specific legislative intervention which now governs a litigant's right to recover costs provided by foreign practitioners, the starting point must be the operating legislative provisions. The general remit and import of these provisions have been the subject of judicial pronouncements which make it clear that the legislative intent is to disallow recovery of any fees in respect of anything done by a person whose name is not registered on the Roll and who purports to act as a legal practitioner. Both **Garkusha** and **Shrimpton** have now put that position beyond doubt.

[65] The relevant context of this legislative reform cannot be overlooked. As a successful offshore financial centre, the BVI would attract a growing number of cross-jurisdictional disputes in which parties would be expected to instruct overseas legal counsel as well as a firm of BVI legal practitioners. Overseas lawyers are commonly instructed in the client's home jurisdiction, where the dispute originated or where assets are situated. Indeed, overseas lawyers are routinely instructed to appear at

all levels of the court system. Faced with this reality, in 2015 the BVI Legislature made its position plain in the LPA.

[66] In my judgment there is an obvious public interest in ensuring that the BVI has a cadre of well-qualified, trained and experienced legal practitioners, capable themselves of handling the great majority of legal proceedings, effectively, efficiently, in a reasonable time and at a reasonable cost. The existence of such a body of practitioners is essential to all who live or engage in business and other activities in BVI or who use it for the purposes of offshore incorporation, investments, trusts and wealth, estate and asset management.

[67] In a relatively small jurisdiction such as BVI it would be unfortunate if it was the norm to sub-contract the conduct of litigation to external lawyers. In my view, if that were to happen, it could only serve to weaken the local profession. The potential damage to the public interest becomes more evident when it becomes clear that by their very nature, external legal practitioners are not regulated by the LPA. They are not bound by the Code of Ethics set out at Schedule 4 of the LPA which regulates the professional practice, etiquette, conduct and discipline of a legal practitioner. Consequently, they cannot be the subject of complaint or disciplinary proceedings under Part V of the LPA. Such practitioners do not fall within the jurisdiction of the disciplinary tribunal and therefore aggrieved complainants are unable to seek recourse against them under the LPA. They would also fall outside a court's wasted costs jurisdiction under CPR 64.8(1)(a). I am satisfied that such factors informed the LPA and this is no more evident than in Part VIII of the LPA which is intended to regulate the temporary admission of foreign legal practitioners. Indeed, the current statutory regime provides a comparatively relaxed approach to admitting overseas barristers and lawyers affiliated with BVI firms and their overseas offices.

[68] I have no doubt that it is partly in response to such concerns and the prevalence of foreign lawyers in BVI commercial litigation, that the BVI Legislature sought by way of the LPA to limit the recovery of legal costs to lawyers registered in BVI. In my

judgment, therefore, the public interest of the BVI requires that only the fees and disbursements of BVI registered legal practitioners should be allowed. It seems to me that the public interest of BVI lies in the development of local expertise and of the resources and experience needed to conduct even cross border litigation of the most complex kind.

[69] Does the fact that the foreign legal practitioner is employed in the office of a local law firm and is effectively operating as an in-house practitioner make a difference? In my judgment it does not. The prescribed components of section 18(3) are plain: the individual's name must not be registered on the Roll and he or she must have acted as a legal practitioner. It matters not that he or she was employed or supervised while doing so. It seems to me that had the Legislature intended otherwise it would have included this qualification under section 18(4) of the LPA.

[70] Mr. Chaisty has also submitted that this conclusion would have dire consequences for local law firms because it effectively means that they would be breaching section 18(1) if they instruct their paralegals to assist in tasks which can be considered to be legal work. According to Counsel, construing section 18(3) in the manner proposed by the Madam Yao would impact the application of section 18(1) because one cannot distinguish between the terms 'practice law' under section 18(1) and 2(2) and 'acting as a legal practitioner' under section 18(3). He further argued that construing the relevant provisions in such a way would have the unintended consequence of stifling the development and upward mobility of local trainee lawyers and paralegals.

[71] I can find no force in these arguments. There is no need to conflate the subsections. This Court in **Shrimpton** has made it plain that 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 under section 18(1) or 18(2). Under section 18(3) the court is concerned with the question of recoverability of fees and in that respect the position is plain: fees charged by persons whose name is not

registered on the Roll but who purport to act as a legal practitioner are not recoverable. It seems to me that the obvious recourse open to the local law firm is for it to ensure that the relevant fee earners are duly admitted to the Roll in the BVI. Indeed, the regime under the LPA is relatively permissive to this end. Moreover, I fail to see how the development and mobility of local professionals could be assisted where local law firms are permitted to employ unregistered lawyers or unqualified persons in their overseas offices to work on BVI cases and applying BVI law.

[72] In view of the restricted ambit of section 18 of the LPA, and of the broad definition of the 'acting as a legal practitioner' applied by this Court in **Garkusha** and **Shrimpton**, there is no scope for a local law firm employing an unregistered and unregulated person to provide assistance with the conduct of litigation, secure in the knowledge that if successful, the client would recover the cost of such assistance. While it is always open to a court to exercise control by limiting recovery to what is reasonable and proportionate, in my view this still presents an inadequate means of controlling the activities of unregulated persons who are largely immune from legal and judicial sanction.

[73] In my view, it is no answer to say that the supervising partner in the law firm would ultimately be responsible and liable for any negligence or misconduct of his or her juniors. Without a doubt, a supervising partner may and should be disciplined for his own carelessness and failure to adequately supervise associate attorneys employed by his law firm. Some jurisdictions have gone further to enact legislation which holds partners generally responsible for another lawyer's violation of the rules where they order or ratify the conduct involved, or where they have direct supervisory authority over the other lawyer, or where they know of the conduct at a time when its consequences can be avoided or mitigated but fail to take reasonable remedial action. Unfortunately, the position has not been statutorily prescribed in the BVI and so complainants would be left in the invidious position of seeking redress in the absence of clear statutory provisions as to how this is to be done.

- [74] Throughout this appeal Mr. Chaisty highlighted that the fees in issue are the fees of Conyers, BVI practitioners, not Ms. Lam or Ms. So. He suggested that when considering the words ‘as a legal practitioner’ this Court should focus on Conyers and not Ms. Lam or Ms. So, as the entity which has ultimate responsibility and control and conduct of the litigation on behalf of Madam Kwok.
- [75] It seems to me that this approach would require the Court to adopt a rather artificial view because in BVI civil litigation, costs are the lawyers’ fees and disbursements of the parties. The operating regulatory regime in the BVI, which includes the **Eastern Supreme Court (Virgin Islands) Act**,²¹ the CPR and the LPA, does not contemplate the award of costs incurred by a law firm as an entity. Rather, it is clear that it is the successful litigant who is entitled to recover legal costs incurred by their individual legal practitioner (whether a sole legal practitioner or one employed by a law firm). Indeed, the recovery of costs by a law firm in these circumstances, would in effect be a reversion to the pre-**Garkusha** and pre-LPA position – i.e. permitting, by a sidewind, the recovery of costs incurred through the use of foreign lawyers who are acting as legal practitioners in the BVI.
- [76] Moreover, in my view, there is no material difference between the position of a practitioner qualified in another jurisdiction, and the costs draftsman considered in **Gany Holdings**. In each case, the provider of those services no doubt has valuable knowledge and expertise to provide, but in neither case are they authorised to conduct litigation, nor are they regulated by the LPA.
- [77] While Ms. Lam and Ms. So are qualified by reference to the law and procedure of their own jurisdiction, their position so far as BVI proceedings are concerned could be no more than that of lay persons and not legal practitioners. Any contrary conclusion would run afoul of section 18. Moreover, it seems clear that where a lay person provides services of a kind which a legal practitioner would provide, their fees for doing so are not ordinarily recoverable in litigation from the opposing party.

²¹ Cap 80, Revised Laws of the Virgin Islands.

- [78] If law firms were able to employ lawyers qualified in another jurisdiction to effectively '[act] as a legal practitioner' in relation to the conduct of BVI litigation, it seems to me that this would effectively undermine the intent and purpose of the LPA and the policy and public interest which it was clearly intended to protect.
- [79] Mr. Chaisty and the learned judge have sought to distinguish the earlier decisions of this Court on the basis that they concerned 'external lawyers', in other words, practising on their own account outside the BVI law firm, whose fees the BVI law firm seeks to recover as a disbursement. The argument appears to be that such fees are not being paid to the overseas lawyer directly but to their firm.
- [80] The learned judge equated the work of an in-house overseas lawyer to that of an agent or trainee solicitor to whom certain tasks are delegated by a qualified lawyer suggesting that the in-house overseas lawyer is not holding themselves out as a BVI legal practitioner nor are they 'acting as a legal practitioner'. Instead, they are acting as non-qualified fee earners, assisting with the conduct of the litigation as directed by and under the supervision of a qualified BVI legal practitioner. It may well be that neither Ms. Lam nor Ms. So held themselves out as being BVI legal practitioners but section 18(3) does not require this.
- [81] The learned judge had regard to the English law provisions citing a number of authorities decided by English courts, including the decisions of **Piper Double Glazing v DC Contracts**²² and **Agassi v Robinson**²³ which illustrate a narrow interpretation of 'acting as a solicitor' and make plain that the costs of unqualified clerks, paralegals and trainees are (and always have been) recoverable under English law. **Piper** concerned the costs of a firm of specialist tax advisors, who were not solicitors and not authorized litigators under the relevant English legislation, (section 25 (1) of the English Solicitor's Act 1974), who assisted a

²² [1994] 1 WLR 777.

²³ [2005] EWCA Civ. 1507.

taxpayer in the conduct of litigation in the English Court of Appeal. Mr. Justice Potter held that:

“...the words ‘acting as a solicitor’ are limited to the doing of acts which only a solicitor may perform and/or 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.”

[82] Following the decision in **Piper** the Solicitors Regulatory Authority has quietly taken care to ensure the position under its new Code of Conduct is the complete opposite of the position in **Piper**. Paragraph 13(a) of the guidance to rule 20.01 of the English Solicitors Code of Conduct now makes the position clear: if you are an in-house lawyer employed as a 'lawyer', you will need a practising certificate. Indeed, anyone involved in legal practice must hold a practising certificate (rule 20.01(2)). There are exemptions, for example if you are a solicitor to certain public authorities or government departments, or if your title is qualified by the words 'non-practising'.

[83] In **Agassi v Robinson**, the taxpayer had been represented in proceedings throughout by tax law experts, Tenon Media (TM), who were not legally admitted, but had a right to conduct litigation under the Legal Services Act 1990. The inspector objected to paying costs as if the representatives were admitted. The principal issue was whether TM's fees were irrecoverable by him because they were in respect of services supplied in breach of section 20 or 22 of the Solicitors Act 1974 or section 70(1) of the Courts and Legal Services Act 1990. The court found that a person who was not an authorised litigator might not exercise the right to conduct litigation within the meaning of the 1990 Act; might not act as a solicitor within the meaning of section 20(1) the 1974 Act; and might not draw or prepare an instrument contrary to section 22(1) of the 1974 Act. If he purported to do any of those things, he would not be entitled to recover his costs for doing so. A person who did not have a current practising certificate and who was not an authorised litigator within the meaning of the 1990 Act acted as a solicitor in breach of section 20(1) of the 1974 Act at least if he (a) issued proceedings; (b) performed any ancillary functions in relation to proceedings; or (c) drew or prepared an instrument relating to legal proceedings

contrary to section 22(1) of the 1974 Act. The court determined that Mr. Agassi was not entitled to recover costs as a disbursement in respect of work done by TM which would normally have been done by a solicitor who had been instructed to conduct the appeal. That meant that Mr. Agassi was not entitled to recover for the cost of TM providing general assistance to counsel in the conduct of the appeals. However, it did not necessarily follow that he was not entitled to recover costs in respect of the ancillary assistance provided by TM in the appeals.

[84] In my judgment, these English authorities can have only limited application. The question usually posed in these cases is whether the person has done something that only a solicitor having a current practising certificate can do, or usually does. Moreover, these authorities clearly considered legislative provisions which bear only a glancing similarity to the LPA. The English regulatory regime is differently structured. To that extent, reliance on their ratio would have to be approached with caution. This is especially so when the interpretation given to the English provisions is so clearly at odds with the appellate judgments coming from this Court.

[85] At paragraph 64 of **Gany Holdings**, Michel JA observed:

“...By its very nature, section 18(3) requires an examination of the circumstances in which costs claimed were incurred. Whereas it can easily be determined whether a person was enrolled as a legal practitioner or not... the requirement that costs were incurred while a person was ‘acting as a legal practitioner’ can only be sensibly assessed by examining the work for which the costs are claimed, as against conduct that amounts to ‘acting as a legal practitioner’.”

[86] As in **Gany Holdings**, I am satisfied that the proper approach is to consider the nature of the work carried out by the relevant persons. In this case, the schedule of costs seeks recovery on the basis that both Ms. Lam and Ms. So are fee earners. Their fees are not categorized as disbursements. Moreover, when I have regard to the description of the work done, it can in no way be compared to that of an unqualified clerk, paralegal or trainee. It is readily apparent that they were intricately involved in considering, reviewing and in drafting pleadings, evidence and other relevant documentation; reviewing interlocutory applications/discovery; assessing

the strength of arguments and considering skeleton arguments, litigation strategy and prospects of success, conducting research; instructing counsel and briefing paralegals etc. They were effectively doing tasks which legal associates running a case in the BVI would do. Indeed, they performed services which were akin to that the other fee earners in the schedule of costs and which could not be described as the work of an agent or trainee solicitor.

[87] I have no doubt that they were both active members of the litigation team and were acting as legal practitioners within meaning given to that phrase by this Court in **Garkusha, Shrimpton and Gany Holdings**. Had they been admitted in the BVI, I have no doubt that Madam Kwok would have been entitled to recover their fees at the hourly charge out rates indicated. In my view, the fact that they may have been operating under the direction and supervision of a BVI qualified practitioner raises no real point of distinction.

[88] They are overseas lawyers (albeit in-house) carrying out legal work in the context of BVI litigation when they are not legal practitioners for the purposes of the LPA. On the basis of the clear legal position evidenced by this Court's decisions in **Garkusha, Shrimpton and Gany Holdings**, I am of the view that the learned judge erred in his interpretation and application of the law to the facts before him and in concluding, as he did, that the costs incurred by the Madam Yao in relation to the work of Ms. Lam and Ms. So were recoverable. Applying the correct principles set out in the aforementioned cases in light of the clear legislative intent of section 18(3) in the context of the new regime established under the LPA for the recoverability of costs, I am of the view that costs incurred in respect of Ms. Lam and Ms. So were irrecoverable as a matter of law.

[89] Finally, Mr. Chaisty has urged that even if the main point of principle were to be found against Madam Kwok, the issues of recovering fees for work done by Ms. Lam and Ms. So should be remitted to the lower court for the exercise identified in **Gany Holdings** to be carried out, as some or all of their work, depending on the

nature of the task performed (bearing in mind their actual role in Conyers' legal services to Madam Kwok), will be recovered.

[90] The respondent contends that the decision of the learned judge below can be and should be upheld in whole or in part in any event, precisely how much will depend on the results of the exercise. This exercise will no doubt involve an in-depth classification of the charges made. I agree with Mr. Willan that there is no need to dissect what can and cannot be recovered here because, having found that Ms. Lam and Ms. So were acting as legal practitioners, any administrative tasks would be incidental to anything done by them if done to assist in the conduct of the litigation. Indeed, if as in the **Gany Holdings** judgment, the largely mechanical and arithmetical processes concerned with the preparation of a bill of costs constitute the practice of BVI law, then it is difficult to see what distinguishes that process from any other type of litigation support function.

[91] I therefore find no merit in Madam Kwok's arguments and would allow Madam Yao's appeal on this issue and dismiss Madam Kwok's counter appeal.

Conclusion

[92] Given my reasoning on both issues, it is clear that I am of the view that Madam Yao has successfully prosecuted her appeal in respect of issue 2, only, whereas Madam Kwok has successfully resisted the appeal on issue 1, and has failed in the prosecution of her counter appeal and in resisting the appeal on issue 2. Given the equal and partial success of each party in these proceedings, I am satisfied that the result should be costs neutral. Accordingly, the appropriate order as to costs would be that there is no order as to costs on this appeal.

Order

[93] For all the forgoing reasons I would make the following orders:

- (1) Both the appeal and counter appeal are allowed in part.

- (2) The order of the learned judge granting Madam Kwok costs in the Court of Appeal at two-thirds of the costs in the court below, assessed in the sum of US\$ 2,200,000.12, is affirmed.
- (3) The decision of the learned judge to allow, as part of the costs to be paid by the Madam Yao, costs incurred by the use of the in-house lawyers of Conyers working from Hong Kong, is set aside.
- (4) No order as to costs in this appeal.

I concur.

Louise Esther Blenman

Justice of Appeal

I concur.

Mario Michel

Justice of Appeal

By the Court

Chief Registrar