

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0051

BETWEEN:

VLADIMIR NIYAZOV

Appellant

and

**[1] MAPLES AND CALDER
[2] AGON LITIGATION**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Paul Webster
The Hon. Mde. Vicki Ann Ellis

Chief Justice
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Jonathan Crystal for the Appellant
Mr. David Welford for the First Respondent
Mr. Michael Fay, QC for the Second Respondent

2019: July 19;
2020: October 12.

Commercial appeal – Recovery of costs – Whether solicitor and/or barrister acting in person can recover costs – Interpretation of Legal Profession Act, 2015 — Whether a firm of legal practitioners is entitled to recover legal costs in proceedings for which it acted for itself – Whether the exception to the rule governing recovery of costs in *London Scottish Benefit Society v Chorley, Crawford and Chester* applies in the Territory of the Virgin Islands – Chorley exception – Whether Chorley exception unconstitutional in light of the right to equality before the law under section 12 of the Constitution of the Territory of the Virgin Islands

On 22nd January 2019, the appellant was granted leave to appeal a decision from the Commercial Court. However, the appellant failed to either serve the notice of appeal within the period prescribed by the said order or to file and serve his written submissions or the

bundle of documents in support of the notice of appeal. The appellant sought relief from sanctions and an extension of time to file written submissions in support of his appeal. This application was dismissed, inter alia, on the ground that the appeal had no prospects of success. As a consequence, the Court also dismissed the substantive appeal. The respondents who were law firms and who acted as self-represented litigants submitted that the appellant should be ordered to pay not only their costs of the application but also the costs of the appeal.

The broad issues which arose for determination before this Court were: (i) whether the Chorley exception would operate to cover barristers and or law firms when acting as litigants in person in proceedings in the Territory of the Virgin Islands (“BVI” or “the Virgin Islands”); and (ii) whether the Chorley exception should be abandoned on the basis that it violates section 12 of the BVI Constitution which guarantees that everyone is equal before the law and has the right to equal protection and benefit of the law.

Held: ordering that the appellant pays the costs of the respondents on their application and such reasonable costs incurred in preparing for the hearing of this appeal to be assessed by a judge of the Commercial Court if not agreed within 30 days of the date of this order, that:

1. The **Civil Procedure Rules 2000** (“CPR”), which provides the procedural framework, makes it clear that costs are in the discretion of the court. A court has full power to determine by whom, to whom and to what extent costs are to be paid. It is clear that the relevant provisions of the CPR do not reflect any distinction between barristers and solicitors and are therefore clearly inconsistent with the limited application of the Chorley exception. It is also apparent that the BVI has never, as a matter of law or practice, recognised a distinction between solicitors and barristers in so far as the recovery of costs is concerned. Given the peculiar historical context and the evolving and peculiar legislative framework which currently operates in the Virgin Islands, the Court can see no proper basis to refrain from extending the Chorley exception so as to enable self-represented barristers to recover their costs in respect of work undertaken, as if they had been retained as counsel.

Rule 2.4 and Part 64 of the **Civil Procedure Rules 2000** applied.

2. Fairness, justice and equality before the law and their reflections in a lack of differential treatment without a reasonable relation to a proper objective, must characterise the judicial process and its expected outcomes. When considering the rationales which underpin the Chorley exception, the Court is satisfied that they do not meet the relevant threshold and that the only logical conclusion which remains is that the exception is grounded in privilege accorded to solicitors. The Chorley exception is inconsistent with the equality of all persons before the law.

Quincy Mc Ewan v The Attorney General of Guyana [2018] CCJ 30 (AJ) applied; **Husbands v Warefact** [2003] UKPC 23 distinguished.

3. In the Eastern Caribbean, the common law has continued to evolve such that there is no reason to continue to maintain the general rule that a self-represented litigant should not obtain recompense (other than out of pocket expenses) and the common law distinction between barristers and solicitors adumbrated in the Chorley line of authorities. The modern approach reflected in **Horsford v Bird** [2006] UKPC 55, [2007] 2 Costs LR 245 and in rule 2.4 and Part 64 of the CPR is one which fully remedies the constitutional dilemma fostered by Chorley and its disparate treatment of self-represented lay litigants.

Horsford v Bird [2006] UKPC 55, [2007] 2 Costs LR 245 applied.

4. Section 13 of the **Legal Profession Act, 2015** (“the LPA”) was intended to remove any lingering distinctions between barristers and solicitors thus entitling all persons who are admitted to the roll, now referred to as legal practitioners, to have the right of audience before any court; to practise law in the BVI and to sue for and recover their fees for services rendered. However, the transitional provisions introduced shortly after the LPA was passed, effectively suspended the operation of section 13 of the LPA while inadvertently ignoring the fact that section 66 (1) of the LPA had repealed sections 70 and 71 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act 1969** which entitled an enrolled barrister to practise as a solicitor, and to sue for and receive his or her taxed costs as such. In temporarily suspending the total fusion of the legal profession in this way, the Legislature could not have intended to deprive enrolled barristers of a long established right which is also reflected in the historical and practical realities which obtain in the Virgin Islands.

Sections 13, 66(1) and 67(1) of the **Legal Profession Act, 2015** No. 13 of 2015, Laws of the Virgin Islands and the **Legal Profession (Amendment) Act** No. 1 of 2016, sections 70 and 71 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**, Cap. 80, Revised Laws of the Virgin Islands 1991 considered.

JUDGMENT

- [1] **ELLIS JA [AG.]**: The appeal in this matter arose out of an ex tempore judgment by Wallbank J (“the learned judge”) in which he dismissed the appellant’s application for a wasted costs order against Agon Litigation and Maples and Calder (referred to collectively as “the respondents”), and ordered the appellant to pay in total \$25,000.00 in costs (\$18,000.00 to Agon Litigation; \$7,000.00 to Maples and Calder).

- [2] The appellant was granted leave to appeal that decision on 22nd January 2019. However, the appellant did not serve the notice of appeal within the period prescribed by the order which granted leave to appeal and also failed to file and serve his written submissions or the bundle of documents in support of the notice of appeal in accordance with rule 62.10(1) of the **Civil Procedure Rules 2000** ("the CPR").
- [3] By notice of application filed 20th June 2019, the appellant sought relief from sanctions and an extension of time to file his written submissions in support of his appeal. On 19th July 2019, this Court dismissed the appellant's application for an extension of time *inter alia* on the ground that the appeal had no prospects of success. In light of this finding, the Court then went on to dismiss the substantive appeal. The Court then had to consider whether any further orders should be made in relation to the issue of costs.
- [4] Both respondents submitted that costs should follow the event and so the appellant should be ordered to pay their costs of the appeal and the costs of the application for an extension. However, during the course of these proceedings, the respondents, being law firms, acted as litigants in person and so the Court was compelled to consider the application of the common law rule which permits a litigant in person to recover only his out of pocket expenses.
- [5] The parties were asked to address the Court on the question of whether a legal practitioner's law firm is entitled to recover legal costs for acting for itself in proceedings in the Virgin Islands, and in particular, whether it can do so when acting for itself in a wasted costs application.
- [6] When it became clear that the matter could not be resolved at the hearing, the parties were asked to address the issue in written submissions. These written submissions reveal significant common ground between the parties. All parties relied on the English appellate decision in **London Scottish Benefit Society v**

Chorley, Crawford and Chester.¹ In that case, an action was brought against the defendants, who were solicitors. The result of the litigation was in the defendants' favour, and they recovered costs against the claimants. The defendants sought to have their costs taxed as if they were acting as solicitors for another person, and the court had to consider whether this contention could be maintained. It was argued on the one side, that with regard to taxation of costs, there is no difference between a solicitor and any other party to an action who sues or defends in person; and, on the other side, that a solicitor who sues or defends in person and is successful is entitled to the same costs as if he were acting for a client.

[7] The English Court of Appeal expressly rejected the assertion that a solicitor embarking upon litigation and seeking his costs should be treated the same as a litigant in person doing the same. The court held that when an ordinary party to a suit appears for himself, he is not indemnified for loss of time but where an action is brought against a solicitor who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary. In other words, a solicitor who acted for himself as a party to litigation is entitled to recover not only his out-of-pocket expenses but also his profit costs. However, he could not recover for anything which his acting in person has made unnecessary.

[8] In **Halborg v EMW Law LLP**,² Etherton MR summed up the common law position from **Chorley** in the following terms:

"The common law principle established by the Chorley case ("the Chorley principle") may be summarised as being that: (1) a solicitor who acts for himself as a party to litigation can recover not only his out of pocket expenses but also his profit costs, but he cannot recover for anything which his acting in person has made unnecessary; (2) the reason is not because of some special privilege but on the purely pragmatic grounds that (a) there has actually been an expenditure of professional skill and labour by the solicitor party, (b) that expenditure is measurable, (c) the solicitor party would otherwise employ another solicitor and, if

¹ (1884) 13 QBD 872.

² [2017] EWCA Civ 793.

successful, would be entitled to recover the costs of that other solicitor, and (d) since he cannot recover for anything which his acting in person has made unnecessary, the unsuccessful party will have the benefit of that disallowance and so would pay less than if the solicitor party had instructed another solicitor."

[9] In the United Kingdom, the so-called **Chorley** exception has been applied by the English Court of Appeal in **Malkinson v Trim**³ (even after the introduction of the English Civil Procedure Rules) which made clear that partners facing legal action can reclaim the costs their firms incurred in successfully defending them.⁴ In **Trim**, a solicitor had successfully defended proceedings brought against him personally, by employing his own firm to represent him. He sought his costs. The claimant disputed his right to costs. The court held that in serving a notice of discontinuance of the action, the claimant had made himself liable for costs. The court further held that there should be no difference between work done by an employee of a solicitor, and work done by a partner. The UK Civil Procedure Rules had not changed the position.

[10] The dictum in **Chorley** has been approved and applied in the Eastern Caribbean. In the Court of Appeal decision of **Parry Husbands v Warefact Limited**⁵ the learned Barrow JA made the following observation:

"This accords with the principle that a litigant in person who is a solicitor holding a valid practising certificate is entitled to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary; see **The London Scottish Benefit Society v Chorley** and **Buckland v Watts**."

[11] No doubt that the dictum in **Chorley** would similarly permit a solicitor acting as a litigant in person in the Virgin Islands to seek and obtain an award of costs. However, the position with regard to self-represented barristers is not as clear and requires closer examination because of the old common law position that formerly

³ [2003] 1 WLR 463; [2002] EWCA Civ. 1273.

⁴ The Times 11-Oct-2002; also in *Halborg v EMW Law LLP* [2017] EWCA Civ. 793 the English Supreme Court held that the common law principle established in 1884 that a solicitor who acts for himself can recover his profit costs, continued to hold good.

⁵ [2006] ECSCJ No. 141.

applied in England which prohibited barristers, but not solicitors, from suing for fees. This position was based on the old common law rule that the relationship between a barrister and client is not contractual and would give rise to no enforceable claim for reward.⁶

- [12] In the Eastern Caribbean, this Court has extended the **Chorley** exception in favour of self-represented barristers on the basis of the fusion of the legal profession. In **Husbands v Warefact**,⁷ the facts disclose that Mr. Husbands was a Queen's Counsel who acted as a litigant in person in his appeal before the Privy Council. In the judgment rendered in that case, the Board decided that because the legal profession in Saint Lucia is fused, the appellant was not precluded, although he was a Queen's Counsel, from suing for legal fees. After examining the legislative framework regulating the legal profession in Saint Lucia, the Board concluded:⁸

“As is evident from these provisions (and subject to the special position of Queen's Counsel, which calls for separate consideration), legal practice in St Lucia differed from that in the United Kingdom in four significant ways. First, there was a fused legal profession, since barristers were entitled to practise as solicitors and notaries. The historic divide between barristers and advocates on the one hand and solicitors on the other did not obtain. Secondly, barristers were not required (in all but a few exceptional cases) to act only on the instructions of a solicitor. Since barristers were also solicitors, such a rule would make no sense. Thirdly, barristers were entitled to practise in partnership with other barristers, no doubt because they were entitled to practise as solicitors and solicitors in the United Kingdom have always been entitled to practise in partnership. Fourthly, barristers were entitled to sue for their fees. This is because all lawyers were entitled to sue for their fees, as solicitors in the United Kingdom have always been entitled to do. The rule (to which fuller reference is made in paragraph 20 below) that the relationship between barrister and client is not contractual and that barristers cannot enforce a claim for professional remuneration by action has never been extended to solicitors.”

- [13] Critically, at paragraph 4 of **Husbands v Warefact**, Barrow JA concluded:

⁶ Kennedy v Broun (1863) 13 CB (NS) 677, 143 ER 268; Mostyn v Mostyn (1870) LR 5 Ch App 457; and Rondel v Worsley [1969] 1 AC 191 at 232, 236-240, 260-263, 277-279, 287-288.

⁷ [2003] UKPC 23.

⁸ Parry Husbands v Warefact [2003] UKPC 23 at Paragraph 15.

“In light of the decision in the applicant’s case before the Privy Council, that a barrister in the fused legal profession in St. Lucia is entitled to sue for his fees in the same way as a solicitor, it seems that the rule that a solicitor acting in person may be awarded costs should equally apply to a barrister acting in person.”⁹

[14] In addressing the position in the Virgin Islands, the first respondent originally submitted that by virtue to the **Legal Profession Act, 2015**¹⁰ (“the LPA”), barristers and solicitors are deemed, for all intents and purposes, one and the same in the Virgin Islands and are collectively referred to as “legal practitioners”. Counsel argued therefore that the principles espoused by the English Court of Appeal in **Chorley** and applied by the Eastern Caribbean Court in **Husbands** should therefore translate to cover all legal practitioners in the jurisdiction of the Virgin Islands. The second respondent¹¹ and the appellant also advanced similar arguments.¹²

[15] However, the parties failed to recognise a critical distinguishing factor.

[16] The Virgin Islands has long recognised the need to reform the regulation of the legal profession, and the LPA¹³ represented the culmination of diligent efforts. The LPA put beyond any doubt that the legal profession in the Virgin Islands is fused so that all persons who are admitted to practise law in the BVI would be known as “legal practitioners”. Sections 13(1) and (2) of the LPA provides as follows:

- “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.

⁹ Saint Lucia Civil Appeal No 7 of 1997 (delivered 17th March 2006, unreported).

¹⁰ No. 13 of 2015, Laws of the Virgin Islands.

¹¹ Paragraph 6 of the Written Submissions.

¹² Paragraph 2 of the Written Submissions.

¹³ Legal Profession Act No. 13 of 2015 of the Laws of the Virgin Islands enacted 11 May 2015.

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

[17] However, while fusion may have been the Legislature’s original intention, by January 2016, two amendments to the LPA were introduced in quick succession which dis-applied certain provisions of the LPA¹⁴ and which introduced transitional provisions aimed at allowing time for the necessary supporting regulations to be introduced. One critical amendment was the reversal of the provision that all legal practitioners had an automatic right of audience before the BVI Court.¹⁵ Section 11(6) of the LPA now makes it clear that a solicitor who does not have the right of audience before the superior court of record in the jurisdiction where they qualified as a solicitor, does not have the right of audience before the courts of the Virgin Islands. More importantly, section 13 of the LPA was specifically dis-applied by section 67 (1) of the LPA which provides as follows:

“67. (1) Until the list of jurisdictions, regulatory bodies, institutions, courses of study and professional training in law specified in section 11(4) have been published

(a) sections 10 to 13 and sections 45 to 47 shall not have effect; and

(b) any application for admission to practise shall continue to be dealt with under Part IV of the Eastern Caribbean Supreme Court (Virgin Islands) Act as if that Part was not repealed.”

[18] It follows that until the specified list of jurisdictions, regulatory bodies, institutions, courses of study and professional training in law have been published, section 13 of the LPA has no effect. As at the date of this judgment, the relevant publication has not been realised.

[19] The Court therefore sought to determine whether this would have any impact on the original positions adopted by the parties and so they were invited to provide further or supplemental submissions to address this issue.

¹⁴ Legal Profession (Amendment) Act No 1 of 2016.

¹⁵ Section 11(6) of the Legal Profession (Amendment) Act No 1 of 2016.

- [20] Counsel for the appellant, Mr. Jonathan Crystal, submitted that the LPA created the new profession of “legal practitioner” and made it clear that existing solicitors, barristers and attorneys at law, entitled to practise before the High Court, became, subject to conditions, legal practitioners. Counsel did not however go on to identify these so called conditions. Instead, counsel cursorily asserted that all barristers and solicitors practising before the High Court of the Virgin Islands effectively became legal practitioners on the coming into force of the 2015 Act and he concluded that in law, there are no longer practising barristers or solicitors in the Virgin Islands.
- [21] The written submissions of the second respondent urged the Court to consider the provisions of section 67 in conjunction with the interpretation and definition section set out in section 2 of the LPA. According to Mr. Michael Fay QC, this conjunctive reading leads to a number of conclusions. First, he submitted that the LPA did not create a new category of the legal profession. Rather, the LPA merely uses this expression for the purpose of describing the persons to whom the LPA relates. He concluded that the term legal practitioner is an umbrella term for someone who is registered as a legal practitioner on the roll kept by the Registrar in accordance with section 8 of the LPA.
- [22] Mr. Fay also referred the Court to section 11 of the LPA which sets out the qualification requirements for admission to practise as a legal practitioner. He submitted that in as much as that section refers to barristers and solicitors who are entitled to practice law in the United Kingdom, the section does not purport to alter or enhance the rights of any such barrister or solicitor upon being admitted to practice in this jurisdiction.
- [23] Mr. Fay further submitted that there are a number of authorities in England which demonstrate that there is no impediment to a barrister claiming for his profit costs on the same basis as a solicitor where he successfully represents himself in

litigation. He referred to the judgment in **Khan v Lord Chancellor**,¹⁶ in which Mitchell J held that the **Chorley** exception applied to barristers as much as it did to solicitors. At paragraphs 51 and 52 of **Khan**, the learned judge held:

“51. It is submitted in the alternative that even if the true ratio of *R v Boswell* does not incorporate the Chorley principle, that principle can properly be extended to a barrister in Mr Khan's position. It is rightly accepted that the fact of expenditure by him of his skill and labour in his own defence does not change the capacity in which either he appears in court or performs the preparatory work. Throughout he is and remains a defendant/appellant. None the less, so it is submitted, his expenditure, subject to proof and reasonableness, is to be indemnified in accordance with the principle. If the true ratio of *R v Boswell* is narrower than that contended for on behalf of Mr Khan then in my judgment this alternative submission is sound. In short, in my judgment no provision in the Code of Conduct is an answer to Mr Khan's claim nor should his position be equated to that of a lay litigant in person.

52. Given then that in my judgment Mr Khan's circumstances fall four-square within the Chorley principle (as explained in *Malkinson v Trim* [2003] 1 WLR 463) does that principle enable him to be indemnified having regard to the provisions of section 16(6) and regulation 7? In my judgment it plainly does. Under section 16(6) he is entitled to reasonably sufficient compensation for “any expenses properly incurred by him in the proceedings”. The relevant head of expense, (and “expenses” includes “expense”: section 6 of the Interpretation Act 1978), is the work he performed—namely the professional skill and labour expended by him on his own defence to the allegation of criminal conduct and thereafter, having been convicted, in lawful pursuit of his various statutory rights relating to the challenging of the conviction. It is difficult to see how in principle this head of expense was not “properly incurred” because had the work being performed by another barrister on behalf of Mr Khan it is not suggested, nor could it be, that such a barrister would not have been entitled to remuneration for it and that such remuneration would properly have been an item in a bill of costs submitted for taxation in pursuance of an order under section 16. The fact that here the necessary work involving the exercise of professional skill was performed by Mr Khan himself does not remove this work from the ambit of compensation provided for in the words “any expenses properly incurred by him in the proceedings”. The

¹⁶ [2003] 1 WLR 2385, at paragraph 50; applied by the English Court of Appeal in *R (Bar Standards Board) v Disciplinary Tribunal of the Inns of Court* [2016] EWCA Civ 478.

argument that such work falls outside the ambit was advanced and rejected in *R v Stafford, Stone and Eccleshall Justices, Ex p Robinson* [1988] 1 WLR 369.”

[24] Relying on this dictum, counsel concluded that whether Agon Litigation is represented by Michael Fay, QC (a barrister) or by Arabella di Iorio (a solicitor) has no impact on the Court’s ability to apply the **Chorley** principle because the **Chorley** principle applies both to barristers and solicitors and it applies where a solicitor is represented by another solicitor in the same firm. Mr. Fay submitted that Agon Litigation is and remains the firm, irrespective of which of the partners represents it. Accordingly, the Court should not be concerned with extending the **Chorley** exception to barristers since the second respondent is neither a barrister nor a solicitor but a firm of barristers and solicitors with the two partners, Michael J. Fay QC a barrister, and Arabella di Iorio, a solicitor with a higher rights certificate. Counsel submitted that the second respondent firm seeks to recover its own costs of defending the application made against it – it did not engage outside counsel and work undertaken by the firm in defending itself is a loss of profit and not merely time.

[25] In the event that this Court decides that the legal profession has not been fused in this jurisdiction (which the second respondent denies), counsel submitted that the principle in **Chorley** should apply no less to legal practitioners, who thereby encompass barristers, than it should to solicitors simpliciter.

[26] Turning next to the written submissions of Maples and Calder, Mr. David Welford quite correctly submitted that the legal profession was fused in the Virgin Islands long before the enactment of the LPA. Mr. Welford referred the Court to section 70 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**,¹⁷ (“the Supreme Court Act”) which provides:

“Subject to the provisions of section 71, every person enrolled as a barrister shall be entitled to practise as a solicitor, and to sue for and

¹⁷ Cap. 80 of the Revised Laws of the Virgin Islands 1991.

receive his or her taxed costs as such, but if he or she practises as a solicitor, he or she shall be subject to all the liabilities which attach by law to a solicitor."

- [27] Mr. Welford noted that section 13 of the LPA endorsed the already fused nature of the profession in the BVI, by providing that every person entered onto the roll is to be known as a legal practitioner, is entitled to practise law and sue for their fees, has rights of audience before any court and is an officer of the court. Counsel submitted that these provisions cut across the historic distinctions between barristers and solicitors. In attempting to reconcile legislative quandary presented by the LPA's transitional provisions, counsel submitted that:

"It is an oddity of the transitional provisions of the LPA that, whilst Part IV of the Supreme Court Act (which includes s. 71) has been repealed (s. 66 of the LPA), s. 13 of the LPA shall have "no effect" until certain steps are taken by the Legal Council (s. 67(1)(a) of the LPA). It is submitted that this does not impact upon the above analysis. In particular, ss. 66(3) and 67(3) of the LPA make it tolerably clear that the scheme of the LPA is still to apply to those admitted to practise law. Furthermore, it would be a startling outcome if the effect of the enactment and transitional provisions of the LPA were to reverse the fusion of the professions effected by the Supreme Court Act, when it is clear from the wording of s.13 that the Legislature's intention was to further cement [the fusion of the] two professions."¹⁸

- [28] I have no doubt that there is no small degree of legislative inadvertence operating here. Section 13 of the LPA was clearly intended to fully merge the profession, removing any doubt or lingering distinction between barristers and solicitors and thus entitling persons who are admitted to the roll, now referred to as legal practitioners, to practise law and sue for and recover their fees for services rendered. However, this purported reform may have been superfluous because, in reality, the legal profession in the Virgin Islands has been somewhat fused with barristers being entitled to practise as solicitors and entitled to sue for and receive their taxed costs as such since 1969.

¹⁸ Paragraph 16 of the Further Supplemental Submissions of the Second Respondent.

- [29] While the LPA was no doubt intended to foster clarity, unfortunately it created a muddle; in that, although section 67(1)(b) of the transitional provisions of the LPA provides some measure of life support to Part IV of the Supreme Court Act by providing that an application for admission to practise shall continue to be dealt with under Part IV of the LPA as if that Part was not repealed, the remaining sections of Part IV (which include section 70), apparently remained repealed.
- [30] In repealing section 70 of the Supreme Court Act¹⁹ without enacting a corresponding provision in the new legislative regime, the Legislature has effectively deprived barristers of rights which they clearly would have had for some time. The result is that while there was no doubt of the application of the **Chorley** exception in the Virgin Islands, what is now unsettled, is whether and to what extent the ambit of the **Chorley** exception can be extended to self-represented barristers. Without the benefit of extant and specific legislative intervention, what then is the position?
- [31] It is now well established that in the absence of any local legislation or case law to direct its approach, the Virgin Islands courts will look to the common law of England which was extended to the Virgin Islands by the **Common Law (Declaration of Application) Act, 1705**²⁰ which provides:
- “That the Common Law of England, as far as it stands unaltered by any writ[t]en Laws of these Islands, or some of them, confirmed by Your Majesty ... is in force in each of these your Majesty’s Leeward Charibee Islands, and is the certain Rule whereby the Rights and Properties of your Majesty’s good Subjects inhabiting these Islands, are and ought to be determined; and all Customs or pretended Customs or Usages, contradictory thereunto, are illegal, null, and void.”
- [32] By virtue of the **Common Law (Declaration of Application) Act, 1705** the Virgin Islands adopted the English common law, subject to any modifications thereof, enacted either locally or by extension of English enactments. It is therefore clear that **Chorley** has been a part of the Virgin Islands’ legal landscape since 1884.

¹⁹ Section 66 (1) of the LPA.

²⁰ Cap. 13, Revised Laws of the Virgin Islands 1991.

The principles and practice relating to a claim for costs by self-represented solicitors, which is now decades old, was expressly brought into force in the Virgin Islands by virtue of the **Common Law (Declaration of Application) Act, 1705**.

- [33] However, where the admission to practise law is not uniform for both barristers and solicitors and there is doubt as to whether the profession is now fused, I must consider the position at common law. Such analysis may conveniently commence with the English Court of Appeal judgment in **Buckland v Watts**²¹ in which that court held that a successful plaintiff in person (who was not a solicitor) was not entitled to claim costs in respect of the time which he had expended in preparing his case. At page 987 of the judgment, Sir Gordon Willmer had this to say:

“What a successful party, who has got an order for costs, is entitled to recover falls, as is well known, under two headings. One heading covers his disbursements, that is to say, money which he has actually had to pay out to other people, such as witnesses, counsel, professional advisers, and so forth. The other heading is described as “costs”. This is intended to cover remuneration for the exercise of professional legal skill. That, I think, is in accordance with the views expressed by Bowen L.J., in the judgment which Danckwerts L.J., has already read. It is because there has been an exercise of professional legal skill that a solicitor conducting his own case successfully is treated differently from any other successful litigant conducting his own case in person. We are not concerned with the exercise of other professional skills. **Other professional people, who become involved in litigation and conduct their own case, may recover something in respect of their own professional skill, insofar as they qualify as witnesses and are called as such. But nobody else, except a solicitor, has ever been held entitled to make any charge, as I understand it, in respect of the exercise of professional legal skill;** and it is that which the plaintiff has sought to do in the present case.” (Emphasis mine)

- [34] This appears to be consistent with the practice and custom of the English Bar which at the time did not entitle a barrister to claim a fee when he appears on his own behalf and it is clear that the question of whether a self-represented solicitor should be entitled to claim costs was decided against that backdrop.

²¹ [1969] 2 All ER 985.

[35] Within the United Kingdom, however, there have been cases where the courts have held that self-represented barristers are entitled to their fees. In **R v Boswell**,²² junior counsel had appeared for himself and senior counsel before a taxing master in relation to their costs in other proceedings. On appeal from the taxing master, junior and senior counsel had engaged other counsel to appear for them. Leggatt J, at 517, after referring to the **Chorley** exception, accepted as correct a submission that “costs recoverable where one counsel instructs another must be the same in principle as where one solicitor instructs another”. His Honour added:

“Indisputably an appellant solicitor or counsel can conduct his own appeal. An attempt to equate such a professional person with a litigant in person is unhelpful because the [1982 regulations] do not limit the scope of the remuneration recoverable by an appellant, and such an appellant brings to bear professional skill and labour, the value of which can as readily be assessed as if they were performed for him by another lawyer.”

[36] In **R (Bar Standards Board) v Disciplinary Tribunal of the Council of the Inns of Court**,²³ a barrister successfully defended herself in disciplinary proceedings brought by the Bar Standards Board. She was, at all times, self-represented before the disciplinary tribunal. The Court of Appeal (UK) held that the tribunal had wrongly applied the English Civil Procedure Rules in relation to costs and that, under the Bar’s Disciplinary Tribunals Regulations, which applied, the tribunal had a broad discretion as to costs. McCombe LJ (King LJ agreeing) held, at [19], that if the Civil Procedure Rules did not apply, “the best guidance for the tribunal in assessing costs remains the common law as stated in [Chorley]”.

[37] In coming to this conclusion, the Court of Appeal approved the decision in **Khan v Lord Chancellor**,²⁴ in which a barrister who had represented himself in criminal proceedings was held to be entitled to his professional costs on the basis of the **Chorley** exception. At paragraphs [51]-[53] of the judgment, Mitchell J

²² [1987] 2 All ER 513.

²³ [2016] EWCA Civ 478.

²⁴ [2003] 2 All ER 367.

considered, that the **Chorley** exception properly extended to a self-represented barrister and that there were no policy objections to the extension of the rule.

[38] In my view, this line of cases (which were referenced by the respondents) provides only limited clarity for the Virgin Islands as they were decided against the backdrop of different statutory regimes which do not operate in the Virgin Islands.²⁵ However, I cannot ignore the actual backdrop in the Virgin Islands which reveals that the strict historic divide between barristers on the one hand and solicitors on the other has never really obtained in the Virgin Islands. Barristers were not required (in all but a few exceptional cases) to act only on the instructions of a solicitor. Further, barristers routinely practise in partnership with other barristers and have always been entitled to practise as a solicitor carrying out functions which are routinely carried out by solicitors. It is also clear that barristers have always been entitled to sue for their fees.

[39] I also cannot ignore the operating procedural regime which covers the award and assessment of costs in the Virgin Islands. Civil practice and procedure in the Virgin Islands is regulated both by the common law and by statute. Part 64 of the CPR which provides the procedural framework makes it clear that costs are in the discretion of the court. A court has full power to determine by whom, to whom and to what extent costs are to be paid. Rule 64.2 defines costs as including:

“...a legal practitioner’s charges and disbursements, fixed costs, prescribed costs, budgeted costs or assessed costs”²⁶

[40] Importantly, rule 2.4 of the CPR defines the term legal practitioner as including:

“...a Queen’s or Senior Counsel, a barrister at law, a solicitor, an attorney at law and a notary royal.”

[41] These provisions do not reflect any distinction between barristers and solicitors and are therefore clearly inconsistent with the limited application of the **Chorley**

²⁵ Litigants in Person (Costs and Expenses) Act 1975 (UK) and CPR Rule 48 (6).

²⁶ ECSC CPR Part 64.2 (1).

exception. Ultimately, this may well provide the complete answer to the question as to whether there is any remaining distinction between solicitors and barristers in the Virgin Islands at least in so far the question of costs are concerned.

[42] I am prepared to accept that these legislative provisions enacted against the background of the long held common law exception in **Chorley** removed any distinction. No doubt the drafters recognised that notwithstanding the lack of formal fusion in the Virgin Islands, the work performed by solicitors and barristers contains significant crossover such as the drafting of pleadings and affidavits. Indeed, the reality is that the fact that a litigant may have instructed solicitors has never precluded claims for work performed by barristers including solicitor advocates and Queen's Counsel and they have routinely been entitled to recover their own costs. The Virgin Islands has never, as a matter of law or practice recognised a distinction between solicitors and barristers in so far as the recovery of costs is concerned.

[43] It is this historical context which has convinced me that the legislators in drafting the relevant transitional provisions to the LPA may not have fully appreciated that in partly repealing Part IV of the Supreme Court Act, while delaying the coming into force of section 13 of the LPA, they have effectively deprived barristers of a previously held right. I have no doubt that the legislators did not intend to repeal section 70 of the Supreme Court Act without replacing it with an equivalent legislative protection. It is hoped that the Legislature will take immediate steps to put the position beyond doubt - making clear that the relevant provisions under the Supreme Court Act which, since 1969 have entitled barristers to sue for their fees remain in force.

[44] In construing the application and the ambit of **Chorley**, I note that although different professional duties attach to barristers and solicitors, historically, there is and has been considerable overlap. Given the peculiar historical context and the evolving and peculiar legislative framework which currently operates in the Virgin

Islands, I can see no proper basis to refrain from extending the **Chorely** exception so as to enable self-represented barristers to recover their costs in respect of work undertaken, as if they had been retained as counsel.

Constitutionality of the Chorley Exception

- [45] There is however a more fundamental issue at play here which the Court cannot ignore. This issue has been highlighted in judgments delivered in other parts of the Commonwealth such as New Zealand, Australia and Canada where the **Chorley** exception has not found favour.
- [46] Until recently, the ratio in **Chorley** was applied in Australia, most notably, in the High Court's decision of **Guss v Veenhuizen (No 2)**²⁷ which was then accepted as binding authority in most Australian jurisdictions.²⁸ This decision was followed in **Pentelow v Bell Lawyers Pty Ltd.**,²⁹ where the Supreme Court of New South Wales also confirmed that the **Chorley** exception also applied to barristers.
- [47] In that case, Ms. Pentelow, a barrister who brought proceedings in both the local court and Supreme Court of New South Wales, sought to recover unpaid fees following a dispute with her client (who had been her instructing solicitors). Although the Supreme Court awarded costs in Ms. Pentelow's favour in respect of both proceedings, the costs assessor later rejected in its entirety that part of the costs claimed by Ms. Pentelow for preliminary work that she had undertaken herself prior to engaging legal representation, such as drafting the originating process and her affidavit of evidence. During a subsequent review by the costs review panel, Ms. Pentelow's claim for costs relating to work that she had undertaken was again disallowed on the basis that, relevantly, the **Chorley** exception did not extend to barristers. Ms. Pentelow subsequently appealed to the District Court of New South Wales. However, she was unsuccessful on the same basis and thus sought judicial review of the decision.

²⁷ [1976] HCA 57; (1976) 136 CLR 47.

²⁸ *Coshott v Spencer* [2017] NSWCA 118 and *Soia v Bennett* [2014] WASCA 27; (2014) 46 WAR 301.

²⁹ [2018] NSWCA 150.

- [48] In the New South Wales Court of Appeal, Beazley ACJ (with whom MacFarlan JA agreed) held that the **Chorley** exception extended to the work undertaken by a self-represented barrister, so long as that work was not expressly proscribed by the Bar Rules. Significant in Beazley ACJ's reasoning was the fact that there was now significant overlap in the work undertaken by both solicitors and barristers and the costs of each may be assessed under the same costs assessment processes.
- [49] The apparent bases for this exception included the view that solicitors should not be encouraged to employ another solicitor to do legal work which they could themselves do (and that it would be absurd for costs to be recoverable in the former situation but not the latter); as well as the idea that the value of solicitors' time was capable of being measured in a way that the value of a lay-person's time could not be. However, in December 2018, Bell Lawyers were granted special leave to appeal the decision to the High Court of Australia. The High Court was requested to consider whether the **Chorley** exception extends to barristers and more fundamentally whether the exception should be recognised as part of the common law of Australia at all.
- [50] In September 2018, the Australian High Court found in favour of the Bell Lawyers and allowed the appeal, overturning the decision of the New South Wales Court of Appeal. In doing so, the High Court effectively abolished the **Chorley** exception in Australia. In a major decision delivered on 4th September 2019, the High Court of Australia in **Bell Lawyers Pty Ltd v Pentelow**³⁰ ended the right of lawyers to claim costs when they are self-represented litigants, saying that the special rule was an anomaly and "an affront to the fundamental value of equality of all persons before the law" which could not be justified by the considerations of policy which are said to support it.
- [51] The learned judges, Keifel CJ, Bell, Keane and Gordon JJ determined that they had a responsibility to address the proper effect of the relevant local legislative

³⁰ [2019] HCA 29.

provisions in the context of the broader question of whether the **Chorley** exception should be recognised as part of the common law of Australia. They then considered the rationale expressed to underlie the **Chorley** exception. First, the learned judges considered the contention that it benefits the other side if a solicitor acts for himself because the expense to be borne by the losing party can be expected to be less than if an independent solicitor were engaged. Quite rightly, the learned judges noted that there is an obvious flaw in the argument because it fails to take into account that a self-representing solicitor, lacking impartial and independent advice expected of officers of the court, may also lack objectivity due to his self-interest. This may well result in higher costs being passed on the other party.

- [52] When considering an award for costs to be a partial indemnity for professional costs incurred during litigation, the learned judges questioned whether an award of costs to a self-represented practitioner could be considered more akin to compensation for a loss of earnings or as a reward for success, rather than partially indemnifying the successful party for monies out laid during the litigation. At paragraph 33 of the judgment, the court observed:

“It has never been thought that any of the ubiquitous statutory provisions empowering courts to order costs are available to compensate a litigant for his or her time and trouble in participating in litigation. That is because costs are awarded by way of indemnity; they are not awarded as compensation for lost earnings, much less as a reward for a litigant’s success. The courts have long regarded the statutory power to make an order for costs as confined by the concern to provide the successful party with a measure of indemnity against the expense of professional legal costs actually incurred in the litigation. Thus, the majority in Cachia said:

‘It has not been doubted since 1278, when the **Statute of Gloucester** introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant’.”

- [53] The High Court considered the rationale adopted by the court in **Chorley**, that the professional skill and labour exercised by a solicitor litigant may be measured by

the law, whereas the “private expenditure of labour and trouble by a layman cannot be measured”. The Court did not put much store in this argument. At paragraph 24 of the judgment, the Court observed:

“The notion that the ‘private expenditure of labour and trouble by a layman cannot be measured’ is not the basis for the general rule. The general rule that a self-represented litigant may not obtain any recompense for his or her time spent on litigation is not based on a concern about the difficulty of valuing the appropriate amount of recompense, but, as was explained by the majority in *Cachia v Hanes*, because ‘costs are awarded by way of ... partial indemnity ... for professional legal costs actually incurred in the conduct of litigation’. Accordingly, to say that the value of legal services rendered by a solicitor to himself or herself can be measured is not to justify an exception to the general rule.”

[54] Later, the Court went on to observe:

“[T]here is no reason why, in principle, the reasonable value of the time of any litigant cannot be measured. The courts regularly value the provision of labour or services in the context of quantum meruit claims. To act upon a principle that evidence enabling the quantification of the value of the time of non-solicitor litigants in person should not be received or acted upon by the courts is to exalt the position of solicitors in the administration of justice to an extent that is an affront to equality before the law. To say that practical difficulties may arise in taking evidence to value the time of non-lawyers spent in the course of litigation is merely to identify a reason why, as a matter of policy, the general rule should not be abolished. No doubt such practical difficulties as might be expected to arise in that event could be addressed in legislation for the abolition of the general rule. The need to address practical questions of this kind is one reason why the abolition of the general rule is properly a matter for the legislature rather than the courts. The point to be made here, however, is that to suggest that practical difficulties may attend the abolition of the general rule is not to identify a reason that supports the *Chorley* exception.”

[55] The learned judges were therefore not persuaded by Fry LJ’s assertion in **Chorley** that “[t]his is not a question as to a solicitor’s privilege”. After considering that the exception is inconsistent with the underlying principle upon which costs rules have developed, it is not surprising that the learned judges concluded that:

“...there is an air of unreality in the view that the *Chorley* exception does not confer a privilege on solicitors in relation to the conduct of litigation...A privilege of that kind is inconsistent with the equality of all persons before the law.”

[56] The result is that the **Chorley** exception is no longer recognised as a part of the common law of Australia. A self-represented solicitor or barrister is no longer able to recover his or her own professional costs incurred for acting on his or her own behalf in any litigation.

[57] In Canada, the courts have also considered how the principles for awarding costs should be applied to those who come to court as their own representative. Rather than dis-applying the **Chorley** exception, the courts in Canada have adopted a more inclusive approach. In **Skidmore v Blackmore**³¹ the Court of Appeal of British Columbia overturned earlier decisions and found that successful self-represented litigants are entitled to be compensated for their time in the same way that a legal practitioner would be. The Court began by acknowledging that the former Canadian practice closely followed English common law (**Buckland v Watts**). At paragraphs 38 - 41 of the judgment, the court noted as follows:

“Under the old English practice, which was implicitly accepted as the law in this province in **Kendall**, the self-represented lay litigant is in the unenviable position of being unable to take advantage of the cost provisions of the **Rules of Court** while, at the same time, being liable to pay costs to his or her solicitor-represented opponent if the opponent is entitled to costs. The only justification found in the case law for denying costs to a successful self-represented lay litigant is because of the difficulty in valuing the efforts of that person in preparing the case.

This was a larger problem in the United Kingdom, where a successful litigant is usually entitled to full solicitor and client costs. When the British Parliament passed legislation to reverse the effect of **Buckland**, it resolved this problem by setting costs of a self-represented lay litigant as two-thirds of the amount the taxing officer considered to be reasonable solicitor and client costs.

As previously mentioned, in this province costs are assessed under a tariff in Appendix B of the Rules. Thus, the difficulty in valuing the time and effort which a self-represented lay litigant expends in the preparation of his or her case would be avoided by making an order that costs are to be assessed by the Registrar. The Registrar can then determine what those costs ought to be, as is done where the successful litigant is represented by counsel. The

³¹ 1995 CanLII 1537 (BC CA).

concern in the United Kingdom, that a self-represented lay litigant may be over-compensated, does not arise in this province because the tariff provides significantly less than the amount actually payable by a party to his or her solicitor. Also, the tariff is flexible enough to allow the Registrar to find a proper balance between the amount required to indemnify for solicitor's services and those things done by lay litigants. The tariff is flexible in providing for different scales of costs, and for minimum and maximum units. Also, the trial judge has an overall discretion to exercise which may permit a flexible measure.

In conclusion, I am of the opinion that **Kendall** accepted an English practice that was unsound and unsupported by authority. I am further of the view that there are sound reasons for allowing costs to successful self-represented lay litigants, and no good reason why costs should be denied to such litigants."

[58] This decision was followed by **Fong v Chan**³² which further developed a process for self-represented litigant costs awards. The court in **Fong** recognised that lawyers as professional agents should not be the only parties entitled to costs, as self-represented litigants also devote their own time away from paid activity to pursue a legal claim. At paragraphs 23-24, the court observed:

"[23] Since the Chorley case over 100 years ago, it had been accepted that self-represented lawyers are entitled to indemnity on the "time is money" or opportunity cost rationale. It is difficult to see why the opportunity cost rationale should not be more generally applicable to self-represented litigants. The self-represented lawyer possesses legal skills, but lacks professional detachment when acting in his or her own cause. If the law is prepared to compensate lawyers for this loss of time when devoting their efforts to their own cause, I fail to see any basis for denying the same entitlement to self-represented lay litigants who are able to demonstrate the same loss.

[24] A rule precluding recovery of costs, in whole or in part, by self-represented litigants would deprive the court of a potentially useful tool to encourage settlements and to discourage or sanction inappropriate behaviour. For example, an opposite party should not be able to ignore the reasonable settlement offer of a self-represented litigant with impunity from the usual costs consequences. Nor, in my view, is it desirable to immunize such a party from costs awards designed to sanction inappropriate behaviour simply because the other party is a self-represented litigant."

³² 1999 ONCA 3955 (CanLII).

[59] The court however found that these costs were not to include the time that a represented party would ordinarily spend on their case as a “client”, for example attending a hearing or preparing for the trial with their lawyer.

“[26] I would also add that self-represented litigants, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. As the *Chorley* case, *supra*, recognized, all litigants suffer a loss of time through their involvement in the legal process. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation and that, as a result, they incurred an opportunity cost by forgoing remunerative activity. As the early Chancery rule recognized, a self-represented lay litigant should receive only a “moderate” or “reasonable” allowance for the loss of time devoted to preparing and presenting the case. This excludes routine awards on a *per diem* basis to litigants who would ordinarily be in attendance at court in any event. The trial judge is particularly well-placed to assess the appropriate allowance, if any, for a self-represented litigant, and accordingly, the trial judge should either fix the costs when making such an award or provide clear guidelines to the Assessment Officer as to the manner in which the costs are to be assessed.”

[60] I have also considered that even the English courts have recognised the inconsistency of allowing self-represented lawyers to recover for their time while refusing the same right to lay litigants. In **Buckland v. Watts**,³³ Donaldson J observed that in principle the opportunity cost rationale applied equally to self-represented lay litigants, and that their time could be compensated with appropriate modification for lack of professional skill and training. However, Donaldson J held that he was not free to depart from past authority, and he disallowed the lay litigant's claim and this decision was upheld on appeal.

[61] This anomaly appears to have been recognised by the English legislators who determined that if the anomaly were to be removed by abolishing the general rule, it could appropriately be done only by legislation and not judicial decision. In 1975, the UK Parliament enacted the Litigants in Person (Costs and Expenses)

³³ [1970] 1 Q.B. 27 at p. 31, [1969] 2 All E.R. 985.

Act³⁴ which now allows lay litigants to recover “...sums in respect of any work done, and any expenses and losses incurred, by the litigant in or in connection with the proceedings to which the order relates”. While neither the act nor the English Civil Procedure Rules (“the English CPR”) defines what a litigant in person is, rule 46.5(6) of the English CPR clarifies that a litigant in person can include a company or other corporation, a barrister, a solicitor, a solicitor’s employee, a manager of a body recognised under section 9 of the Administration of Justice Act 1985 (incorporated practices) and a person who, for the purposes of the Legal Services Act 2007, is authorised to conduct litigation.

- [62] Recognising that the Virgin Islands is governed by a written Constitution with entrenched fundamental rights provisions, this Court invited the parties to address the obvious constitutional implications which arise in these proceedings. The parties were specifically asked to consider section 12 of the **Virgin Islands Constitution Order 2007**³⁵ (“the Constitution”) which provides that everyone is equal before the law and has the right to equal protection and benefit of the law.
- [63] Counsel for the appellant, Mr. Crystal submitted that there can be no doubt that denying lay litigants in person whilst permitting self-representing barristers and solicitors is a breach of section 12 of the Constitution. Indeed, counsel went further and submitted that this would amount to a breach of section 26 of the Constitution which guarantees protections against discrimination. He submitted that the justification advanced in **Chorley** for such disparate treatment – that “the private expenditure or labour and trouble by a layman cannot be measured” is now fallacious.
- [64] Not surprisingly, counsel for both Maples and Calder and Agon Litigation were of a contrary view. The former submitted that allowing Maples and Calder to recover its costs would not engage section 12 of the Constitution and urged the Court not

³⁴ Section 1(2) of Cap. 27.

³⁵ S. I No. 1678 of 2007.

to depart from the clear and well-established common law position. According to Mr. Welford, everyone is entitled to the benefit of expert legal services in connection with litigation if they so wish and everyone who is successful in such litigation is entitled to recover the costs of those services. Where the litigant is a lawyer, he is able to provide such services himself, where the litigant is not a lawyer, he is unable to do so. The difference is a consequence of their respective individual circumstances and not a discriminatory legal rule. The legal rule is the same for lawyers and laymen alike as they may each recover the costs of incurring expert legal assistance.

[65] Mr. Welford submitted that English authorities have long rejected the argument that the **Chorley** exception is in some sense discriminatory. He noted that the court in **Chorley** expressly rejected that the exception rests on some form of solicitor privilege.

[66] He further submitted that in any event, Maples and Calder is entitled to recover its costs because none of the authorities referenced have suggested that it is inequitable for a successful litigant law firm to recover its costs of employees engaged to represent it in litigation. Counsel referred to the following dictum in

Bell Lawyers v Pentelow:

“[50] A decision by this Court that the Chorley exception is not part of the common law of Australia would not disturb the well-established understanding in relation to in-house lawyers employed by governments and others, that where such a solicitor appears in proceedings to represent his or her employer the employer is entitled to recover costs in circumstances where an ordinary party would be so entitled by way of indemnity.

[51] Whether the same view should be taken in relation to a solicitor employed by an incorporated legal practice of which he or she is the sole director and shareholder stands in a different position. It might be queried whether such a solicitor has sufficient professional detachment to be characterised as acting in a professional legal capacity when doing work for the incorporated legal practice. And it might be queried whether costs claimed by an incorporated legal practice for work of its sole director and shareholder are within the expansive view of indemnity that has been adopted in the authorities. In this regard, in *McIlraith*,⁶⁵ *Brereton J* was

disposed to attribute 'no significance' to the circumstance that the party seeking an order for costs was an incorporated legal practice whose director was the solicitor who actually performed the work for which costs were sought. It is neither appropriate nor necessary to come to a conclusion as to whether Brereton J was correct in this regard." (emphasis mine)

- [67] This dovetails with the approach taken in the New Zealand case of **Jeremy James McGuire v Secretary for Justice**:³⁶

"It was, however, directly addressed by the Court of Appeal in **Henderson Borough Council v Auckland Regional Authority**. There, Cooke J, with whom Woodhouse P and Richardson J agreed, noted: **In New Zealand I do not think it can be said to be improper for an employed barrister to represent his employer. Nor did counsel for the appellant so argue. A fortiori an employed solicitor duly enrolled and with a current practising certificate may properly act as solicitor for his employer. Against that background it appears to me that the fact that an employed practitioner has acted for the successful party is not a sufficient reason for denying that party an award of party and party costs: after all, the time of a salaried employee has been occupied. On this basis, the successful party who had been represented by an employed solicitor was awarded costs in both the High Court and Court of Appeal.**" (emphasis mine)

- [68] Mr. Welford concluded that Maples and Calder would be entitled to recover its costs on the basis of the generally accepted exemption which applies to in-house lawyer or lawyers employed by a law firm or government.
- [69] Counsel for Agon Litigation, Mr. Fay, QC submitted that there is nothing in section 12 of the Constitution which compels the Court to abandon the well-known and long-standing **Chorley** exception in this case because it has been determined that this exception survived the migration of the English Civil Procedure Rules, has been accepted without controversy in this jurisdiction and has not been expressly abolished by the CPR or by any other statute.

³⁶ [2018] NZSC 116.

[70] He argued that there is nothing inherently invidious in providing for different rules for recoverability of costs in different circumstances where practical considerations warrant them. In this regard, counsel relied on the Irish case of **Dillane v Ireland and the Attorney General**³⁷ in which the Supreme Court of Ireland upheld the distinction in Order 67 of the District Court Rules which provides that no award can be made against a police officer acting in the discharge of his duties brings a prosecution. This rule has the effect of differentiating between a common informer who is a police officer and an ordinary common informer who is not a police officer. The discrimination was held not to breach the equality guarantee of article 40.1 because it related to the difference in social function between the two categories in a manner that was not arbitrary or capricious. Significantly, Henchy J said in relation to the rule:

“[W]hat matters is whether it could reasonably have been arrived at as a matter of policy by those to whom the elected representatives of the people delegated the power of laying down the principles upon which costs are to be awarded.”

“....the desirability that members of the Garda Síochána should be encouraged to discharge their police duties assiduously by being given immunity from liability for costs or witnesses' expenses in the District Court – this discrimination could reasonably be thought a justifiable concomitant of the social function of the members of the Garda Síochána when carrying out their duties as police officers.”

Like *Maples and Calder, Agon Litigation* reiterated that the court in **Chorley** was clear that it was not creating or recognising a privilege for solicitors. Instead the distinction is based on purely pragmatic grounds which are neither arbitrary nor capricious. These pragmatic grounds were summarised in **Halborg v EMW Law LLP**.³⁸

[71] According to Mr. Fay, any assertion that the distinction drawn between solicitors and others is invidious or “unfairly or offensively discriminating” is unsupportable, given that the **Chorley** principle does not prevent the court in an appropriate case

³⁷ [1980] ILRM 167.

³⁸ See para. 8 of this judgment.

from extending the benefits of **Chorley** to other litigants in person. He concluded that this Court could only depart from the principles adumbrated in **Chorley** where it is satisfied that it has been demonstrated that the **Chorley** exception possesses such an invidious character such that it warrants a finding that the rule has been in fact abolished by the Legislature by a very wide and necessarily idealistic provisions relating to equality before the law as opposed to a specific legislative provision.

[72] I have carefully considered the very useful submissions of the respondents in this matter which urged this Court to refrain from departing from long held precedents. However, I am satisfied that courts have an obligation to apply and develop the common law in a manner which is consistent with the fundamental values enshrined in the Constitution. The civic values of the Virgin Islands are laid out in its Constitution, which prescribes that every person in the Virgin Islands is entitled to the fundamental rights and freedoms of the individual. Section 12 of the Constitution secures one such fundamental right. It is based on the principle that each independent being must be treated equally by the law and that all are subject to the same laws of justice. That section provides as follows:

“12. — (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Subject to such limitations as are prescribed by law, equality includes the full and equal enjoyment of all rights and freedoms.”

[73] In **Quincy Mc Ewan v The Attorney General of Guyana**³⁹ the Caribbean Court of Justice opined on the scope of the equivalent right (article 149) under the Guyana Constitution. At paragraphs 64 – 65 of the judgment, the Court noted:

“[64] At the heart of the right to equality and non-discrimination lies a recognition that a fundamental goal of any constitutional democracy is to develop a society in which all citizens are respected and regarded as equal. Article 149 gives effect to this goal. The Article signifies a commitment to recognising each person’s dignity and equal worth as a human being despite individual differences.

³⁹ [2018] CCJ 30 (AJ).

[65] The Inter-American Court of Human Rights has repeatedly made the link between equality and dignity. In its Advisory Opinion on Proposed Amendment to the Political Constitution of Costa Rica related to Naturalization, the Court said at paragraph 55:

“The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.”

[74] Therefore, the law must guarantee that no individual or group of individuals be privileged or discriminated against, whether by prescribing legislative distinctions or by applying other measures that would treat a group of persons as second-class citizens. The principle of equality and non-discrimination guarantees that those in equal circumstances are dealt with equally in law and practice.

[75] However, it is important to stress that not every distinction or difference in treatment will amount to discrimination. In general, a violation of the principle of non-discrimination arises if: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; or c) if there is no proportionality between the aim sought and the means employed.

In the words of **Quincy McEwan**:

“Parliament may, for example, properly enact legislation limiting or impinging fundamental rights if such legislation is reasonably required in the interests of, inter alia, public order, public morality, or for the purpose of protecting the rights and freedoms of other persons, including the right to practice and observe any religion, or that imposes restrictions upon public officers. Any such limitation should be demonstrably justified in a democratic society. In other words, the infringing law must pursue some pressing objective and be rationally connected to that objective. The infringing law should impair only such of the right as is necessary to be impaired. And there must be proportionality of effects between the deleterious and salutary effects of the infringing law in question.”

[76] When I consider the rationales which underpin the **Chorley** exception, I am satisfied that they do not meet the relevant threshold. The analysis set out in **Bell Lawyers v Pentelow**, in my view, persuasively debunks each limb underpinning the justification. At paragraphs 18 and 19 of the judgment, the High Court deals with the contention that it is somehow a benefit to the other party that a solicitor acts for himself or herself, because the expense to be borne by the losing party can be expected to be less than if an independent solicitor were engaged. The Court in **Chorley** found that this is not self-evidently true. There can be no doubt that a self-representing solicitor, lacking impartial and independent advice that the court expects its officers to provide to the litigants they represent, may also lack objectivity due to self-interest. Ultimately, this may, result in higher legal costs to be passed on to the other party in the event that the self-representing solicitor obtains an order for his or her costs. In fact, where a solicitor acts for himself or herself there cannot be independent and impartial advice, and this is in principle a strong reason for holding that a solicitor litigant should not be entitled to costs of acting for him or herself.

[77] At paragraph 21 and 22, the High Court considered the contention that the professional skill and labour of a solicitor are recognised and can be measured by the law while the private expenditure of labour and trouble by a layman cannot be measured. The High Court found that this argument was also not persuasive, and observed as follows:

“ The general rule that a self-represented litigant may not obtain any recompense for his or her time spent on litigation is not based on a concern about the difficulty of valuing the appropriate amount of recompense, but, as was explained by the majority in *Cachia v Hanes*, because

‘costs are awarded by way of ... partial indemnity ... for professional legal costs actually incurred in the conduct of litigation’.

Accordingly, to say that the value of legal services rendered by a solicitor to himself or herself can be measured is not to justify an exception to the general rule.”

[78] I am in full agreement that there is no reason why, in principle, the reasonable value of the time of any litigant cannot be measured. The courts regularly value the provision of labour or services in the context of quantum meruit claims. In my view, to act upon a principle that evidence enabling the quantification of the value of the time of non-solicitor litigants in person should not be received or acted upon by the courts is to exalt the position of solicitors in the administration of justice to an extent that is an affront to equality before the law. To say that practical difficulties may arise in taking evidence to value the time of non-lawyers spent in the course of litigation is merely to identify a reason why, as a matter of policy, the general rule should not be abolished. No doubt such practical difficulties as might be expected to arise in that event could be addressed in legislation for the abolition of the general rule. The need to address practical questions of this kind is one reason why the abolition of the general rule is properly a matter for the legislature rather than the courts.

[79] It follows that the practical difficulties could not, without more, justify the continued application of the **Chorley** exception. Certainly, other jurisdictions have not been reticent in considering and implementing workable solutions. For instance, the English Parliament no doubt recognising the obvious disparity enacted the Litigants in Person (Costs and Expenses) Act 1975.⁴⁰ Although the Litigants in Person (Costs and Expenses) Act does not define a litigant in person, the term plainly refers to a person who acts on his own behalf for either all or part of the claim is likely to be a litigant in person, unless represented. Moreover, rule 46.5(6) of the English Civil Procedure Rules clarifies that a litigant in person can include a company or other corporation, a barrister, a solicitor, a solicitor's employee, a manager of a body recognised under section 9 of the Administration of Justice Act 1985 (incorporated practices) and a person who, for the purposes of the Legal Services Act 2007, is authorised to conduct litigation.

⁴⁰ See: paragraph 61 above. In the United Kingdom Parliament resolved this problem by setting costs of a self-represented lay litigant as two thirds of the amount the taxing officer considered to be reasonable solicitor client costs.

- [80] Clearly, the United Kingdom has taken steps to level the playing field which remains wholly unequal under the common law in the Virgin Islands. In the absence of legislative intervention and in circumstances where the rationale for allowing the costs of a solicitor acting for himself is so unconvincing, the logical answer may be to abandon the exception in favour of the general principle. Like the Australian High Court, I am convinced that the contention that the exception does not confer a privilege on legal practitioners is naïve. In my view, it would have been unrealistic in 1884 and it is patently unrealistic in these modern times.
- [81] Equal justice according to law may require, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. Fairness, justice and equality before the law and their reflections in a lack of differential treatment or discrimination without a reasonable relation to a proper objective, must characterise the judicial process and its expected outcomes. Once the rationales for the purported **Chorley** exception are convincingly debunked, the only logical conclusion which remains is that the exception is grounded in privilege. In my judgment, there can be no doubt that the so-called **Chorley** exception would therefore be inconsistent with the equality of all persons before the law.
- [82] The respondents in this appeal have urged judicial restraint on the basis of established judicial precedent. It is clear that whether the **Chorley** exception is part of Saint Lucian common law was not in question in **Husbands v Warefact**. That court simply assumed the correctness of the **Chorley** ratio without argument and without considering its rationale and whether it supported the derogation from the fundamental right to equality before the law.⁴¹ I am therefore satisfied that that decision would not bind a later court to accept the wholesale application of the **Chorley** exception.⁴²

⁴¹ CSR Ltd v Eddy (2005) 226 CLR 1 at page 11, paragraph 13.

⁴² R v Warner (1661) 83 ER 814 at 815; National Enterprises Ltd v Racial Communications Ltd [1975] Ch. 397 at 405-406; in re Hetherington [1990] Ch. 1 at 10.

[83] What then is the appropriate course to be adopted in the circumstances? The referenced case law discloses that there are obvious available alternatives. Counsel for the appellant submitted that the Court should simply decide that the **Chorley** exception is inconsistent with the Constitution and that the respondents are only entitled to such costs as a litigant in person would be entitled to a claim in the Virgin Islands. This proposal would not affect the position of in-house lawyers employed by governments or firms. Mr. Welford however, submitted that any concerns would not impact Maples and Calder's entitlement to costs because it is clear that the firm would be entitled on the basis of the employed lawyer rule. In the event that the Court is minded to adopt a broader review, counsel cautioned the Court to consider the terms of section 31 of the Constitution which he contends sets out the scheme by which alleged contraventions of the protections afforded by the Constitution should follow. Counsel submitted that the Court should direct the joinder of interested parties such as the Attorney General and the Bar Association as it is apparent that any decision in this area would substantially impact the conduct of litigation by self-represented barristers and solicitors going forward. Finally, on behalf of Agon Litigation, Mr. Fay submitted that if the court finds that there is inconsistency, then this would necessitate a finding that the Constitution effectively abolished **Chorley** from the date of its enactment.

[84] A careful review of relevant judicial authorities discloses that constitutional or fundamental rights concerns do not arise in the case where an employed barrister seeks to represent his employer law firm in legal proceedings. In the New Zealand case of **Henderson v Borough Council v Auckland Regional Authority**⁴³ this issue was deftly considered by Cooke J, who concluded that:⁴⁴

“A fortiori an employed solicitor duly enrolled and with a current practising certificate may properly act as solicitor for his employer. Against that background it appears to me that the fact that an employed practitioner has acted for the successful party is not a sufficient reason for denying that party an award of party and party costs: after all, the time of a salaried employee has been occupied.”

⁴³ [1984] 1 NZLR 16 (CA).

⁴⁴ *Ibid per* Cooke J, at p. 23.

In that case, the court determined that the successful party who had been represented by an employed solicitor was awarded costs in both the High Court and Court of Appeal.

[85] In the English case of **Malkinson v Trim**⁴⁵ the rationale was explained in the following terms:

“[24] A partner who is represented in legal proceedings by his firm incurs no liability to the firm; but he suffers loss for which under the indemnity principle he ought to be compensated, because the firm of which he is a member expends time and resources which would otherwise be devoted to other clients. The only sensible way in which effect can be given to the indemnity principle is by allowing those costs. And, as I have sought to explain, that is the solution which, for over one hundred years, the courts have adopted as rule of practice.”

[86] It follows that where the litigant is a lawyer or a law firm but is represented by a lawyer whom they employ, the costs associated with the work of such an associate would be justified.⁴⁶ I accept the contention that to the extent that both Maples and Calder and Agon Litigation were represented before both the High Court and this Court by partners or associates of these firms, they would be entitled to the same costs as when acting on behalf of a client except for those items which did not exist by virtue of the fact they were acting for themselves.

[87] However, where the costs claimed are on account of the work of a barrister or solicitor who is not a salaried employee, then the position is somewhat more complicated given the findings herein. In considering these complications, I am satisfied that the answer may well lie in the present framework governing the award of costs in the Virgin Islands.

⁴⁵ [2003] 2 All ER 356 at [24].

⁴⁶ *Brownie Wills v Shrimpton* [1999] Lloyd's Rep PN 39.

[88] There can be no doubt that costs are a creature of statute.⁴⁷ In the Virgin Islands, the principal regulating statute which deals with the issue of costs is the CPR. Costs are regulated under Parts 64 and 65 of the CPR. The statutory definition of "costs" in rule 64.2 includes 'legal practitioner's charges and disbursements, fixed costs, prescribed costs, budgeted costs and assessed costs.' The general rule is that where the rule relating to fixed costs does not apply and a party is entitled to costs of any proceedings, those costs must be determined in accordance with the prescribed scales set out in appendices A – C of part 65 or alternatively, in accordance with a budget approved by the court under rule 65.8 (budgeted costs) and if neither prescribed nor budgeted costs are applicable, by assessment in accordance with procedures rules 65.11 and 65.12.

[89] This presents a complete departure from the previous costs regime which was solely based on complex and often arbitrary taxation. This regime was touted as being certain, easy to calculate and transparent; and in large measure, it achieved its aim. The basis for determining the measure of fixed or prescribed costs is the value of the claim. Rule 65.5 (2) prescribes that the value of the claim is to be decided in the case of the claimant or defendant, by the amount agreed or ordered to be paid; or if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to, such costs or, if not agreed, a sum stipulated by the court as the value of the claim or if the claim is not for a monetary sum it is to be treated as a claim for \$50,000, unless the court makes an order pursuant to an application to determine the value of the claim filed under rule 65.6(1)(a).

[90] Parts 64 and 65 together with the appendices provide different scales of costs and for minimum and maximum units. This presents a substantial incursion into the so-called practical difficulties by the legislative framework which operates in the

⁴⁷ Per Pereira, CJ in *Halliwel Assets Inc. et al v Hornbeam Corporation* BVIHCP2015/0001 (delivered 12th October 2015, unreported).

Eastern Caribbean Supreme Court as it essentially dispenses with the need to measure the private expenditure, and reasonable time and labour of laymen. Where this form of quantification proves untenable and the court is obliged to assess costs, then I am satisfied that a judge or master properly exercising his discretion, can assess what these costs ought to be as is done where the litigant is represented by counsel. Certainly, there is precedent for this at an appellate level.⁴⁸

[91] Of course, it is unclear whether the drafters of the CPR properly contemplated the implications for recovery of costs by unrepresented lay litigants. As it stands, the position is not sufficiently definitive and in my view there needs to be a more categorical legislative framework which comprehensively addresses this issue. Given that the source of power for awarding costs is statutory, there is a good argument that this would be the only appropriate course in the circumstances.

[92] In the Eastern Caribbean however, the common law has continued to evolve such that there now appears to be no reason to continue to maintain a common law distinction adumbrated in the **Chorley** line of authorities. In **Horsford v Bird**⁴⁹ the appellant, Mr. Horsford acted as a lay litigant in person in legal proceedings which included an appeal to the Privy Council. During his appeal, the Board was asked to determine the damages to be awarded after the defendant had built a wall which encroached on the appellant's land and appropriated some 455 square feet. Aggravated damages had been awarded. The Board was asked whether the damages should reflect the increase in value of the defendant's property rather than the strict value of the land itself. After advising Her Majesty that the appellant's appeal should be allowed, the Board made the following costs order:

“Costs in the lower courts will be the appellant's costs at the prescribed rate. The respondent must pay the costs of this appeal.”

⁴⁸ Joseph W. Horsford v Lester B. Bird And Others ANUHCVP2008/0005 (delivered 17th November 2008, unreported) per Kimberly Cenac-Phulgence, Chief Registrar (as she then was).

⁴⁹ [2006] UKPC 55, [2007] 2 Costs LR 245; This order was applied by the Court of Appeal in HCVAP 2008/005.

[93] There is therefore an authority at the highest appellate level in which a lay litigant was awarded his costs incurred in legal proceedings before the Antiguan courts and up to the Privy Council. In a judgment written by Gordon JA, this Court put the matter beyond doubt, holding that whether or not a successful party uses a legal practitioner of reasonable competence, such party would be entitled to the same costs as if such a practitioner had been sued pursuant to rule 65.2(1) of the CPR. Gordon JA [Ag.] observed at paragraph 11:

“The appellant is a lay person. That is to say, he is a person who does not possess a practicing certificate as an attorney at law. Implicit in the Privy Council Order is an acknowledgment that notwithstanding the status of the appellant as a lay person he is entitled to prescribed costs. I have no doubt that their Lordships considered the language of Part 65.5 of CPR which speaks to “a party” being entitled to the costs of any proceedings and the language of Part 65.7 which states that prescribed costs include “attendance and advocacy at the trial...” However, where a matter, such as the instant application being dealt with, is excluded from prescribed costs, then I am of the view that the applicable law in respect of costs is the pre-CPR law.”⁵⁰

[94] No doubt the drafters will ultimately provide a clear rationale for how such costs are to be quantified but for now and for this appeal, I am satisfied that the modern approach is one which fully remedies the constitutional dilemma fostered by **Chorley** and its disparate treatment of self-represented lay litigants. It also effectively erases any lingering doubts which I may have had about the continued application of this exception in the Virgin Islands.

Conclusion

[95] Applying the findings herein, and given the ruling of this Court (rendered by Webster JA [Ag.]) which disposed of the application and the appeal in the favour of the respondents, I find that the respondents, who are law firms which were represented by counsel, who are employed barristers, are both entitled to their costs on the basis that costs follow the event.

⁵⁰ See footnote 49.

- [96] This however, is an appeal lodged in the commercial division and so the prescribed costs approach on appeal is dis-applied notwithstanding rule 65.13 of the CPR because rule 69B.10 specifically dis-applies the prescribed costs approach at first instance see: **Westford Special Situations Fund Ltd. v Barfield Nominees Limited et al.**⁵¹ It follows that the relevant costs will have to be assessed. The basis of such quantification is not new. Since 2000, rule 65.2(1) has prescribed that the sum to be allowed is the amount that a court deems to be reasonable where the work is to be carried out by a legal practitioner of reasonable competence and which appears to the court to be fair both to the person paying and the person receiving such costs.
- [97] In conducting such an assessment, therefore, the manner of disposal in this matter must be borne in mind. While there may have been some limited effort expended in preparing for the substantive appeal in this matter, the fact is that this appeal was ultimately disposed of on the basis of an unsuccessful interlocutory application seeking an extension of time. While costs of the appeal may be recoverable it would be inappropriate for this to be assessed on the basis of the two-thirds rule given the risk for duplication and the fact that the substantive appeal was not heard.
- [98] I would therefore order that the appellant pay the costs of the respondents, their costs of the application and such reasonable costs incurred in preparing for the hearing of this appeal to be assessed by a judge of the commercial court if not agreed within 30 days of the date of this order.

I concur.
Janice M. Pereira
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

⁵¹ BVIHCVP2010/014 (delivered 28th March 2011, unreported) at para. 42 et seq per George – Creque JA (as she then was).

By the Court

Chief Registrar