THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0045

BETWEEN:

[1] GANY HOLDINGS (PTC) SA
[2] ASIF RANGOONWALA

Appellants

and

[1] ZORIN SACHAK KHAN
[2] AFAQUE AHMED KHAN
[3] SASHEEN ANWAR

Respondents

HEARD TOGETHER WITH:

BVIHCMAP2018/0048

[1] GANY HOLDINGS (PTC) SA
[2] ASIF RANGOONWALA

Appellants

and

[1] ZORIN SACHAK KHAN
[2] AFAQUE AHMED KHAN
[3] SASHEEN ANWAR

Respondents

Before:

The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Rolston Nelson — Justice of Appeal [Ag.]

Appearances:

Mr. Adrian Francis and Mr. Simon Hall for the Appellants
Mr. Adam Solomon, QC with him, Mr. Nicholas Brookes for the Respondents

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2018: October 31;
2020: March 30.

Commercial appeal — Costs — Recovery of costs for work done by persons not enrolled as legal practitioners in the Virgin Islands — Statutory interpretation — Section 18(3) of Legal Profession Act of the Virgin Islands — Presumption against retrospective application of statutes — Whether Legal Profession Act prohibits recovery of costs of overseas lawyers acting as legal practitioners in the Virgin Islands where costs incurred prior to commencement of Act — Whether costs incurred after commencement of Legal Profession Act by UK costs draftsman not entitled to practise law in the Virgin Islands recoverable

Zorin Sachak Khan, Afaque Ahmed Khan and Sasheen Anwar ("the respondents") were beneficiaries of the ZVM Trust. Gany Holdings (PTC) SA and Asif Rangoonwala ("the appellants") were the trustee and appointor respectively of the ZVM Trust (the "Trust"). The respondents filed a claim in the Commercial Court in the Territory of the Virgin Islands ("the BVI") seeking, among other things, to have the appellants removed as trustee and appointor of the Trust. The claim was dismissed and the respondents were ordered to pay the appellants' costs. The respondents appealed to the Court of Appeal. The Court allowed the appeal and ordered the appellants to pay the respondents' costs, with such costs to be assessed by the Commercial Court, if not agreed within 21 days. The appellants appealed the Court of Appeal's judgment to the Privy Council and the Privy Council dismissed the appeal in its entirety.

Subsequently, the respondents applied to the Commercial Court to have their costs in the proceedings assessed pursuant to the Court of Appeal's order; costs having not been agreed in the 21 days following the order. The respondents filed a detailed schedule of costs which was prepared by a UK qualified legal practitioner, referred to by the parties as a "costs draftsman". The costs draftsman was not, at any material time, a legal practitioner in the BVI entitled to practise BVI law. The appellants contested the assessment proceedings, making two objections on the basis of section 18(3) of the Legal Profession Act, 2015 (the "Act") to the costs claimed. First, the appellants contended that the costs incurred by the respondents' use of overseas lawyers were not recoverable, as section 18(3) prohibits a person acting as a legal practitioner from recovering costs in any action, if the said person is not registered on the Roll. Second, that the costs incurred in relation to the costs draftsman similarly could not be recovered. The learned judge overruled the objections and allowed the recovery of the costs claimed for the work done by the respondents' overseas lawyers and for the preparation of the schedule of costs by the costs draftsman.

The appellants filed two notices of appeal ("Appeal No. 45 and Appeal No.48") against the learned judge's decision. The notices of appeal raise two broad issues for this Court's determination. On Appeal No. 45, the issue is whether the Act prohibits the recovery of the costs of overseas lawyers acting as legal practitioners in the BVI, where such costs were incurred prior to the commencement of the Act. On Appeal No. 48, the issue is whether costs incurred after the commencement of the Act for the preparation of the schedule of costs by the costs draftsman are recoverable under section 18(3) of the Act.

Held: dismissing Appeal No.45 and affirming the judge's decision that the costs incurred by the respondents' use of overseas lawyers prior to commencement of the Act are

recoverable; allowing Appeal No.48 and setting aside the judge's decision to allow the recovery of costs incurred by the respondents' use of the costs draftsman; and making no order as to costs, that:

1. The well-established presumption against the retrospective operation of legislation is that, save for circumstances where an enactment so provides expressly or by necessary implication, an enactment is presumed to operate prospectively. The presumption does not apply exclusively to circumstances where a statute takes away or impairs a vested right acquired under existing laws, but also applies where a statute creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to an event already past. In this case, the application of section 18(3) of the Act to costs already incurred is very properly an attachment of a new disability to extant proceedings and therefore engages the rules on retrospective application of enactments.

   Yew Bon Tew Alias Yong Boon Tiew and Another v Kenderaan Bas Mara [1982] 3 WLR 1026 applied; **Manchester Ship Canal Company Ltd. v United Utilities Water Plc (Canal & River Trust and others intervening); Bridgewater Canal Co Ltd v Same (Same intervening)** [2014] 1 WLR 2576 considered; **Wilson v First County Trust Ltd.** [2003] UKHL 40 applied; **Wright v Hale** [1860] 30 LJ Ex 40 distinguished; **Dimitry Vladimirovich Garkusha v Ashot Yegiazaryan et al** BVIHCMAP2015/0010 (delivered 6th June 2016, unreported) distinguished; **John Shrimpton et al v Dominic Scriven et al** BVIHCMAP2016/0031 (delivered 3rd February 2017, unreported) distinguished.

2. The question of whether a statute is to operate retrospectively is to be determined by the usual rules of statutory interpretation. The objective of statutory interpretation is to determine the manner in which Parliament intended the statute to operate. In the Act, the expressions "Roll" and "legal practitioner" are given a forensic meaning. The "Roll" as defined by the Act did not exist prior to the commencement of the Act and no person could be a "legal practitioner" under the Act until the Roll came into existence. Therefore, in so far as section 18(3) bars the recovery of costs in respect of anything done by a person "whose name is not registered on the Roll" who was "acting as a legal practitioner", it relates to things done after the coming into force of the Act. Having construed section 18(3) of the Act and its corollary provisions according to their plain and ordinary meaning, it is clear that section 18(3) was intended by Parliament to apply prospectively, that is, to the recovery of costs incurred after the coming into force of the Act.

   Sections 33 and 42(1) of the **Interpretation Act**, Cap. 136, Revised Laws of the Virgin Islands 1991 considered; **Asiyah Grant v Javier Maduro** BVIHCVAP2019/0001 (delivered 13th November 2019, unreported) considered.

3. In cases of purportedly retrospective statutes, the court should consider whether the consequences of applying the statutory provision retrospectively would be so unfair that Parliament could not have intended it to be applied retrospectively. Here, there was no opportunity for the respondents to relieve themselves of the

prohibition in section 18(3), because section 18(3) did not then exist. The respondents would have incurred the costs that they did well knowing that the costs were recoverable, subject to the findings of a judge on the reasonableness of the costs. The unfairness to the respondents and similarly situated litigants is patent and could not have been intended by Parliament. Therefore, section 18(3) does not apply to bar the recovery of costs incurred prior to the commencement of the Act and the learned judge did not err in so finding.

Wilson v First County Trust Ltd. [2003] UKHL 40 applied; **Wright v Hale** [1860] 30 LJ Ex 40 considered.

4. In order for costs to be irrecoverable under section 18(3) of the Act, the judge ought to have been satisfied that the costs draftsman was acting as a legal practitioner and was so acting while not registered on the Roll. 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, 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". It therefore cannot be said that the learned judge undertook an impermissible assessment of the work done by the costs draftsman in order to make a determination as to the recoverability of the costs claimed.

5. When faced with an allegation that costs are irrecoverable under section 18(3) of the Act, 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. Here, the broad description of the work done by the costs draftsman lends itself to the view that the costs draftsman was engaged in a substantive legal capacity in the production of the schedule of costs. There is no doubt that the costs draftsman was acting as a legal practitioner within the terms of section 18(3). Accordingly, the costs incurred by the respondents' use of the costs draftsman are not recoverable, and the learned judge erred by finding to the contrary.

Dimitry Vladimirovich Garkusha v Ashot Yegiazaryan et al BVIHCMAP2015/0010 (delivered 6th June 2016, unreported) followed; **John Shrimpton et al v Dominic Scriven et al** BVIHCMAP2016/0031 (delivered 3rd February 2017, unreported) followed.

JUDGMENT

[1] **MICHEL JA**: The interpretation and application of section 18(3) of the **Legal Profession Act, 2015**[1] ("the Act") have been the subject of much litigation since

[1] Act No. 13 of 2015.

the commencement of the Act in the Territory of the Virgin Islands ("the BVI") on 11th November 2015. These two appeals are the most recent proceedings concerned primarily with section 18(3) and arise from the judgment and order of a learned judge dated 19th June 2018 by which the judge permitted the recovery of costs by the respondents for work done by persons who are not enrolled as legal practitioners in the BVI. The appeals, though not formally consolidated by an order of the Court, were heard together as they arose from decisions made by the same judge, within the context of the same proceedings in the court below, and are contested by the same parties.

[2] Both appeals specifically relate to the recovery of costs for work done by persons who are entitled to practise law in a foreign country but who are not entitled to practise law as legal practitioners in the BVI in accordance with the Act. In the interest of brevity, I will refer to these person as "overseas lawyers".

[3] A brief background to both appeals is set out below.

Background

[4] Zorin Sachak Khan, Afaque Ahmed Khan and Sasheen Anwar ("the respondents") were beneficiaries of the ZVM Trust. Gany Holdings (PTC) SA and Asif Rangoonwala ("the appellants") were the trustee and appointor respectively of the ZVM Trust (the "Trust"). The respondents filed a claim in the Commercial Court in the BVI seeking, among other things, to have the appellants removed from their positions as trustee and appointor of the Trust. The claim was heard and dismissed, and the respondents were ordered to pay the appellants' costs, with the order taking effect from 21st February 2013. The respondents appealed to this Court. On 14th March 2016, the Court of Appeal allowed the appeal and ordered the appellants to pay the respondents' costs, with such costs to be assessed by the Commercial Court, if not agreed within 21 days. The appellants and respondents did not agree on the costs to be paid.

[5] The appellants appealed the Court of Appeal's judgment to the Privy Council. On 30th July 2018, the Privy Council dismissed the appeal in its entirety. Following the dismissal of the appeal, the respondents applied to the Commercial Court to have their costs in the proceedings assessed pursuant to the Court of Appeal's 14th March 2016 order; costs having not been agreed in the 21 days following the order.

[6] A detailed schedule of costs was filed by the respondents. The schedule of costs was prepared by a UK qualified legal practitioner, referred to by the parties as a "costs draftsman". The costs draftsman was not, at any material time, a legal practitioner in the BVI entitled to practise BVI law.

[7] The appellants rigorously contested the assessment proceedings. Of most relevance, are the two objections made by the appellants on the basis of section 18(3) of the Act. The first of these objections pertained to costs claimed in relation to the work done by overseas lawyers retained by the respondents for conduct of the substantive claim. The work done by the overseas lawyers and accordingly the costs incurred by the respondents for that work, both predate the commencement of the Act. Stated simply, the appellants' contention was that section 18(3) derogated the right of litigants to recover costs incurred from the use of overseas lawyers. It did not matter that the costs were incurred prior to the commencement of the Act. In the appellants' submission, the costs were simply not recoverable in light of section 18(3).

[8] The second of the appellants' objections related to costs claimed by the respondents for the assessment proceedings and not the substantive claim, and pertained to the use of the costs draftsman, who prepared the schedule of costs for the assessment. The appellants' position was that costs in relation to the costs draftsman were clearly incurred after the commencement of the Act, that the work done by the costs draftsman was the work of a legal practitioner, that the costs

draftsman was not enrolled as a legal practitioner in the BVI, and therefore that the costs draftsman's costs could not be recovered.

[9] The application for assessment of costs first came up before the learned judge on 23rd and 24th May 2018. At the hearing of the application, the judge delivered an *ex tempore* decision on the first of the appellants' objections and allowed the recovery of costs claimed for the work done by the respondents' overseas lawyers in the substantive claim. The parties jointly requested that the reasons for the decision be reduced to writing. The judge agreed and delivered his written reasons on 19th June 2018. The key findings of the learned judge were the following:

(i) the literal rule of interpretation is to be used to determine the meaning and effect of the provisions of the Act, and section 18(3) in particular;

(ii) the expressions "acting", "legal practitioner", "Roll" and "is recoverable", contained in section 18(3), evidence that the section was intended to operate prospectively and not retrospectively;

(iii) the application of section 18(3) to costs incurred prior to the coming into force of the Act would lead to an unfair and absurd result which could not have been sensibly intended by Parliament; and

(iv) the costs for the use of overseas lawyers, incurred prior to the commencement of the Act, are recoverable in cost assessment proceedings.

[10] On 19th June 2018, the judge assessed the costs of the assessment proceedings and dealt with the appellants' objection to the costs draftsman's costs. The judge did not produce a written decision on the objection and rendered an *ex tempore* decision, by which he overruled the objection and allowed the costs. The judge decided as follows:

> "…clearly the type of person that the Court of Appeal was talking about was somebody practising law. What they were talking about is not

> anybody who is assisting, but it is with reference to somebody who purports to be practicing as a BVI legal practitioner, without being on the [roll]. This is clearly what the Court of Appeal had in mind.
>
> It cannot, in my respectful and humble opinion, cover people who cannot be on the [roll]. Whether they are not on the [roll] in England or any other jurisdiction, they cannot be on the roll because they are not acting as a lawyer. The whole point of the Legal Profession Act is that legal professionals, legal practitioners must be on the [roll] if their fee is to be recoverable. This costs draftsman not (sic) practicing as a legal practitioner."[2]

The appeal

[11] The appellants filed two notices of appeal. By notice of appeal filed on 6th July 2018 ("Appeal No. 45"), the appellants have appealed against the judge's decision to allow recovery of costs in relation to the work of the overseas lawyers in the substantive claim. By notice of appeal filed on 10th October 2018 ("Appeal No. 48"), the appellants challenge the judge's decision to allow the recovery of costs which were incurred by the use of the cost draftsman.

[12] Together, the notices of appeal contain 11 grounds of appeal which raise two broad issues for the Court's determination. On Appeal No. 45, the issue for determination is whether the Act prohibits the recovery of costs of overseas lawyers acting as legal practitioners in the BVI, where such costs were incurred prior to the commencement of the Act on 11th November 2015. On Appeal No. 48, the issue is whether costs incurred after the commencement of the Act for the preparation of the schedule of costs by the costs draftsman are recoverable under section 18(3) of the Act. I will address the issues in turn.

Appeal No. 45 – Costs incurred prior to 11th November 2015
Appellants' submissions

[13] I understand the appellants to have made four broad submissions on this issue. First, the appellants submit that the judge erred in his attempt to deploy the literal interpretation of section 18(3) and in coming to the conclusion that section 18(3)

[2] See p. 64 of the transcript of the proceedings.

was intended to operate prospectively and not retrospectively. The appellants say that the plain words of section 18(3) do not indicate whether the prohibition on the recovery of costs contained therein should apply retrospectively, prospectively, or both retrospectively and prospectively. The appellants therefore say that on a literal interpretation of the section and its silence in that regard, the judge ought to have found that the section applied both retrospectively and prospectively. This, the appellants urged, is the proper conclusion to arrive at on the plain words of section 18(3), especially in light of this Court's decisions in **Dimitry Vladimirovich Garkusha v Ashot Yegiazaryan et al**[3] and **John Shrimpton et al v Dominic Scriven et al**,[4] wherein the court held and affirmed that the Act "intended to do away with the practice of litigants being able to recover the fees of overseas lawyers in costs recovery proceedings".[5]

[14] Second, the appellants argue that the rule against retrospective application of statutes applies only to statutes that purport to impair a vested right. Relying on a number of cases, principal among which is **Wright v Hale**,[6] the appellants argue that there is no vested right to costs and only a contingent liability to costs. Accordingly, the appellants argue that section 18(3), in so far as it relates to the claims for recovery of costs, does not purport to take away a vested right and therefore, in law, does not offend the presumption against retrospective application of statutes.

[15] Third, the appellants argue that the judge erred in his analysis of the provisions and scheme of the Act and in his conclusion that the Act was intended to operate prospectively. The appellants take issue primarily with the judge's findings that the terms "Roll" and "legal practitioner" were created by the Act. The appellants say that the Act did not introduce the concepts of qualification and enrolment to practise in the BVI. In the appellants' submission, the concept of the Roll and the

[3] BVIHCMAP2015/0010 (delivered 6th June 2016, unreported).
[4] BVIHCMAP2016/0031 (delivered 3rd February 2017, unreported).
[5] Supra, n.3 at para.73.
[6] [1860] 30 LJ Ex 40.

designation of legal practitioner existed prior to the commencement of the Act under the **Eastern Caribbean Supreme Court (Virgin Islands) Act**[7] (the "**Supreme Court Act**") and the **Interpretation (Amendment) Act**[8] and therefore cannot be used as evidence of the Act's prospective nature. The appellants further submit that the judge was wrong in finding that the Act as a whole was prospective, as sections 2(3), 2(4) and 9 of the Act expressly make reference to the previous designations of barristers and solicitors and bring them under the Act's new dispensation as legal practitioners, and requiring the Registrar to enter their particulars on the Roll in accordance with the requirements of the Act. All of this, the appellants say, are indicators that the Act was intended to apply both retrospectively and prospectively to costs incurred both before and after the commencement of the Act.

[16] Fourth, the appellants say that the learned judge's interpretation defeats the objects of section 18(3), and that if the costs assessment jurisdiction of the court were to proceed in the way urged by the respondents, the legal profession in the BVI would find itself in the same state of affairs that the legislature intended to do away with – that unregulated, unaccountable foreign lawyers would continue to earn massive costs in BVI litigation. The courts would, in the appellants' submission, sustain an objectionable practice by endorsing and allowing those costs to be recovered, knowing that the legislature took steps to do away with it.

Respondents' submissions

[17] The respondents' skeleton arguments very succinctly summarise their position. The respondents urge this Court to dismiss the appeal on the following grounds:

(i) The appellants' construction of the Act has a retrospective effect and, in the absence of express words, as a matter of law, this cannot have been the intention of the legislature.

[7] Cap. 80, Revised Laws of the Virgin Islands 1991.
[8] Act No. 4 of 2014.

(ii) In any event, the object of the Act in preventing non-BVI lawyers from practising BVI law is not met by preventing litigants from recovering costs incurred prior to the coming into force of the Act.

(iii) The appellants' construction of the Act results in an incoherent and inconsistent effect for both section 18(3) and the Act as whole.

(iv) The **Garkusha** and **Shrimpton** cases did not consider the issue of pre-Act costs and cannot be applied to this appeal; and

(v) The relief sought by the appellants is incoherent and not justified by the appeal.

[18] First, the respondents say that the case is one in which the presumption against retrospective application of statutes ought to apply. The respondents argue in particular that this case is one which concerns the retrospective interference with a vested right. Relying on **Re Nortel GmbH (in administration) and other companies**,[9] the respondents say that the contingent liability which arises in relation to costs, is tantamount to a vested right.

[19] Second, the respondents argue that the public policy motivating the implementation of the Act included the protection of the BVI legal profession and users of legal services in the BVI. The Act was to prevent work being done by those not admitted to practise law in the BVI. The respondents say that this object is not achieved by the retrospective application of section 18(3), since work done before the Act would already have been done and preventing the recoverability of costs for that work would not protect the BVI legal profession or the users of BVI legal services. The respondents say therefore that the judge's interpretation conforms with the public policy intentions of the Act.

[9] [2013] UKSC 52.

[20] Third, the respondents say that the terms "legal practitioner", "Roll", "practise law" contained in the Act all evidence the prospective nature of the Act, and that the judge was correct to conclude as such. Accordingly, the respondents agree with the learned judge that the clear words of the Act are evidence that the legislature intended the Act to apply exclusively to costs incurred after the commencement of the Act.

[21] Fourth, the respondents argue that the cases of **Garkusha** and **Shrimpton** did not decide the legal position in relation to costs incurred before the commencement of the Act. The respondents say that the language of those cases is to be understood in its context and should not be construed as speaking to the issues on this appeal.

[22] Lastly, the respondents say that the relief sought by the appellants is not justified by the grounds of appeal and the circumstances in the court below, and should be refused.

[23] I shall now examine the relevant provisions of the Act.

The Legal Profession Act

[24] Section 18(3) is at the heart of this appeal. Section 18(3) reads:

> "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."

[25] The expressions "fee", "Roll" and "legal practitioner" contained in section 18(3) are defined at section 2 of the Act as follows:

> "(1) In this Act, unless the context otherwise requires,
> …
> 'fees' includes charges, disbursements, expenses and remuneration;
> …
> 'legal practitioner', except for purposes of Part VII, means a person whose name is entered on the Roll in accordance with this Act;
> …
> 'Roll' means the register of legal practitioners kept by the Registrar pursuant to section 8; …"

[26] Section 2(3) essentially harmonises the term "legal practitioner", which is defined in the Act, with equivalent expressions in other enactments. Section 2(3) provides: "[a] reference in an enactment or document to a barrister, solicitor or attorney-at-law shall be read to mean a reference to a legal practitioner". Section 2(4) provides:

> "Where under an enactment the qualifications of a legal practitioner to hold office include a period of years as a legal practitioner, the number of years during which he or she has been entitled to practise as a barrister, solicitor or attorney-at-law shall form part of the period of his or her enrolment as a legal practitioner."

[27] Section 8 establishes the register of legal practitioners referred to in section 18(3) and defined by section (2) as the "Roll". Section 8(1) states:

> "The Registrar shall keep a register of legal practitioners to be known as the Roll on which he shall cause to be registered the name of every person entitled to practise law under section 9 or admitted and entitled to practise law under section 10, together with the following particulars in respect of each such person:
>
> (a) his or her full name and address;
> (b) the date of his or her admission to practise law;
> (c) a description and date of the qualifications in respect of which he has been admitted to practise law;
> (d) any other information which, in the opinion of the Registrar, is relevant."

[28] Section 9 speaks to the Registrar's duty to place on the Roll, every person who was entitled to practise as a barrister, a solicitor or an attorney-at-law before the High Court in the BVI, immediately before the commencement of the Act. Section 9 provides:

> "The Registrar shall, as soon as possible after the commencement of this Act, cause to be registered on the Roll the particulars specified in section 8 (1) of every person who immediately before the commencement of this Act was entitled to practise as a barrister, solicitor or an attorney-at-law before the High Court in the Virgin Islands."

[29] Section 13 speaks to the designation of "legal practitioner". The section provides:

> "(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.

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

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

(4) A legal practitioner shall enjoy no special immunity from action for any loss or damage caused by his or her negligence in the performance of his or her functions, except in respect of the performance of his or her functions in court."

[30] It is convenient at this stage to address the rules of statutory interpretation which concern the retrospective application of legislation.

Rules of statutory interpretation: retrospective application of legislation

[31] The interpretation of statutes is a legal exercise conducted within the framework of common law rules of interpretation and statutory provisions contained in legislation like the **Interpretation Act**.[10] At common law, there is a well-established presumption against the retrospective operation of legislation. The presumption is summarised by the authors of **Maxwell on the Interpretation of Statutes**,[11] as follows:

> "it is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

The overarching policy underpinning the presumption in this area was simply expressed by Lord Mustill in **L'Office Cherifien des Phosphates and Unitramp**

[10] Cap. 136, Revised Laws of the Virgin Islands 1991.
[11] Sir Peter Benson Maxwell: Maxwell on the Interpretation of Statutes (12th Edn., Sweet & Maxwell: 1969) at p. 215.

S.A. v Yamashita-Shinnihon Steamship Co Ltd,[12] as "no more than simple fairness". In more practical terms, **Bennion on Statutory Interpretation**[13] states the policy on the presumption as follows:

> "[t]he essential idea of a legal system is that current law should govern current activities. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it."

[32] The effect of the presumption against retrospective application of statutes is that, save for circumstances where an enactment so provides expressly or by necessary implication, the enactment is presumed to operate prospectively. This presumption is not limited to criminal or penal statutes and applies to legislation generally. As the court in **R v Docherty**[14] stated, "[t]he general rule of English law, not confined to the criminal law, is that a statute is prospective rather than retrospective in effect unless it distinctly says otherwise…".

[33] The decision of the Privy Council in **Yew Bon Tew Alias Yong Boon Tiew and Another v Kenderaan Bas Mara**[15] is oft cited as to what amounts to a retrospective application of the legislation. In **Yew Bon Tew**, the Privy Council stated:

> "…there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past."[16] (Underlining supplied)

[34] The courts have traditionally focused on determining whether a right is vested or not, or whether the statute in question is substantive or procedural, as a means of determining whether a statute operates or ought to operate retrospectively. If a

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[12] [1994] 1 AC 486, 525A.
[13] Oliver Jones: Bennion on Statutory Interpretation (5th Edn., Lexis Nexis 2008) Section 5.12.
[14] [2017] 1 WLR 181 at para. 17.
[15] [1982] 3 WLR 1026.
[16] Ibid at p. 1029.

"vested right" was impliedly impaired by an enactment, then the enactment was presumed to be impermissibly retrospective. Similarly, if an enactment impliedly impaired substantive rights, as opposed to addressing matters of pure procedure, the enactment was presumed to be impermissibly retrospective. Since the **Yew Bon Tew** decision, the law has tended away from these strict classifications. In relation to the term "vested rights", the United Kingdom Supreme Court in **Manchester Ship Canal Company Ltd. v United Utilities Water Plc (Canal & River Trust and others intervening); Bridgewater Canal Co Ltd v Same (Same intervening)**,[17] observed that: "…the precise nature of a vested right is somewhat elusive". Similarly, in relation to the procedural/substantive classifications, Lord Brightman said in **Yew Bon Tew**:

> "[the] expressions 'retrospective' and 'procedural,' though useful in a particular context, are equivocal and therefore can be misleading…and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself…"[18]

[35] Instead of these rigid classifications, the Privy Council in **Yew Bon Tew** stated in clear words that the question of whether a statute was intended to operate retrospectively, is resolved by deploying the usual rules of statutory interpretation. The Privy Council said:

> "Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute."[19]

The aim in this regard, as with all rules of statutory interpretation, is to determine the intention of Parliament in passing the enactment. Lord Rodger in **Wilson v First County Trust Ltd.**[20] expressed the test in cases of retrospectivity as:

> "Would the consequences of applying the statutory provision retroactively, or so as to affect vested rights or pending proceedings, be 'so unfair' that Parliament could not have intended it to be applied in these ways?"[21]

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[17] [2014] 1 WLR 2576.
[18] Supra, n.15 at p.1029.
[19] Supra, n.15 at p.1029.
[20] [2003] UKHL 40 at para. 201.

[36] From a review of the authorities, therefore, it is clear that:

(i) there is a well-founded presumption against the retrospective operation of enactments which do not expressly provide for such operation;

(ii) whether an enactment is to operate retrospectively, and to what extent, is to be determined by the usual rules of statutory interpretation; and

(iii) the overriding objective of the statutory interpretation exercise is to determine the manner in which Parliament intended the statute to operate.

Discussion

[37] There is no dispute that the respondents' overseas lawyers in the substantive claim were acting as BVI legal practitioners and engaged in the practice of BVI law. There is also no dispute that at the time the costs were incurred, the respondents would have ordinarily been entitled to claim recovery of the category of costs in dispute (the costs of the overseas lawyers) in the context of an assessment conducted before the coming into force of the Act. Furthermore, it is not disputed that costs incurred by the use of overseas lawyers after the commencement of the Act are not recoverable by virtue of section 18(3).

[38] The heart of the dispute on this appeal is whether costs incurred prior to the commencement of the Act on 11th November 2015 are recoverable in costs assessment proceedings conducted after that date. This issue has not before been addressed by this Court. I agree with the respondents that the appellants' reliance on **Garkusha** and **Shrimpton** in relation to the issues on appeal is misplaced as the issues before the Court in those cases are unlike the issues arising on this appeal. As the learned judge indicated:

> "In **Garkusha** and **Shrimpton** the Court of Appeal was addressing an issue whether overseas lawyers' fees are recoverable following the

[21] Cited with approval in Manchester Ship Canal Company Ltd. and another (Respondents) v United Utilities Water Plc (Appellant) [2014] 1 WLR 2576. See also L'Office Cherifien des Phosphates and Unitramp S.A. v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486, 525A.

> introduction of the LPA. The Court of Appeal was not addressing its mind to the specific question whether such fees are recoverable if incurred prior to the coming into force of that Act but assessed subsequently."

[39] It is true that the Act as a whole, or section 18(3) in particular, does not expressly say whether it is to apply retrospectively, prospectively, or both retrospectively and prospectively. But the very nature of the appellants' suggested interpretation of section 18(3) engages the presumption against retrospectivity which I have detailed above, in so far as it is urged that section 18(3) be interpreted so as to disentitle a party from recovering a category of costs, in accordance with laws which were not yet passed or in force at the time the costs were incurred. In light of this, the appellants' first submission, in essence, invites the court to avoid the interpretative exercise that is required by the breadth of the authorities on the well-settled presumption against retrospectivity of legislation outlined above. In other words, the appellants seek to bypass altogether the breadth of authorities on the statutory interpretation exercise required when a court is faced with a suggestion that legislation should operate retrospectively to take away some right, or attach some disability to a party in the course of extant proceedings.

[40] The appellants justify this approach by their reliance on a number of cases, chief among which is **Wright v Hale**, to say that the rules of interpretation against retrospectivity do not apply to statutes concerning the recoverability of costs since no vested right attaches to costs during the course of proceedings. A close examination of **Wright**, in the context of the modern learning on statutory interpretation, reveals that it does not support the appellants' submission.

[41] First, **Wright** is an authority of much vintage and proceeded on the view that the presumption against retrospectivity applied only to vested rights. This narrow approach to the construction of allegedly retrospective statutes has been abandoned by the courts in cases like **Yew Bon Tew**, **Manchester** and **Wilson**. The Privy Council in **Yew Bon Tew** expressed that the presumption applies in circumstances where a statute takes away or impairs a vested right acquired

under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to an event already past. The application of section 18(3) to costs already incurred is very properly an attachment of a new disability to extant proceedings within the terms of **Yew Bon Tew**, and therefore engages the rules on retrospective application of enactments.

[42] Second, **Wright** is factually distinguishable from the present appeal. In **Wright**, the effect of the relevant enactment was to make costs irrecoverable on the condition that, at the end of the proceedings, a verdict of less than 5 pounds sterling was arrived at by the jury. In essence, the law specified the legal consequence that would take effect at the end of a proceeding. The proceedings in that case were not yet complete when the relevant enactment came into force. It was emphasised that the parties had the option of avoiding the possibility of not recovering their costs, by discontinuing the proceedings; that is not the case in the present appeal.

[43] Third, the analysis of the court in **Wright** also relied on the procedural/substantive classifications which have been effectively abandoned since the **Yew Bon Tew** decision. In any event, even if one were to deploy the procedural/substantive dichotomy applied by the court in **Wright**, one could hardly conclude that section 18(3) gives rise to a matter of pure procedure. Section 18(3) in very clear words extinguishes a right of action in relation to a category of costs for which a right of action existed prior – this could by no means be interpreted as a merely procedural matter. Therefore, the presumption applied in **Wright** that procedural changes in the law are intended to apply both retrospectively and prospectively, could not apply in this circumstance.

[44] The other cases cited by the appellants in support of their position are of similar vintage, and suffer the same defects I have identified in relation to **Wright**. The cases cited, therefore, are of limited assistance. In the absence of any tenable authority brought to the attention of the court, which would support the appellants'

approach, I reject the argument that the case is not properly one in which the presumption against retrospectivity applies because it does not concern vested rights. My findings on this argument, and in particular the observation that the presumption against retrospectivity does not apply exclusively to vested rights, in accordance with **Yew Bon Tew**, dispenses with the need to address the respondents' contention that in the extant proceedings there is a vested contingent liability to costs.

[45] As I stated earlier referencing the case of **Yew Bon Tew**, the manner in which an enactment is intended to apply is a question of statutory interpretation to be determined by the rules of statutory interpretation. I will therefore proceed now to examine the appellants' arguments on the construction of the Act.

Construction of section 18(3)

[46] The appellants challenge the judge's overall construction of the Act and the conclusion that Parliament intended section 18(3) to apply prospectively and not retrospectively. Having carefully examined the provisions of the Act, and in particular those which are directly relevant to this appeal, which I have reproduced above, I do not agree with the appellants' analysis and conclusion that section 18(3) was intended to apply retrospectively, and not prospectively as the judge found.

[47] First, as regards the expressions "Roll" and "legal practitioner", the **Interpretation Act** speaks to the effect of definitions contained in the text of an enactment. Section 33 of the **Interpretation Act** provides:

> "(1) Definitions or rules of interpretation contained in an enactment apply to the construction of the provisions of the enactment which contain those definitions or rules of interpretation, as well as to the other provisions of the enactment.
>
> (2) An interpretation section or provision contained in an enactment shall be read and construed as being applicable only if a contrary intention does not appear in the enactment."

[48] Section 33 of the **Interpretation Act** is clear – the expressions "Roll" and "legal practitioner", though ordinary English expressions, are given a forensic meaning by the Act and are to be understood as they are defined in the context of the Act. If "Roll" means "the register of legal practitioners kept by the Registrar pursuant to section 8", it cannot be logically argued that the "Roll" as defined by the Act existed before section 8 came into force. Prior to 11th November 2015, the "Roll" as defined by the Act simply did not exist. To say otherwise, is to also say that the obligation on the Registrar to maintain the Roll in accordance with the provisions of the Act also existed prior to the commencement of the Act. There is also no provision in the Act which deems the register of barristers and solicitors under the **Supreme Court Act** to be the Roll created by the Act or provides for the continuity of the register under the Act. On the contrary, section 9 requires the Registrar to register, on the Roll, the names and particulars of those who were, at the time the Act came into force, entitled to practise law in the BVI. This is a clear indication that the Roll and the register maintained under the **Supreme Court Act** are not one and the same. There was no means for any person to comply with the requirement to be registered on the Roll under section 18(3) prior to 11th November 2015, because the Roll did not exist prior to then. By this fact alone, it appears that section 18(3) could not apply retrospectively to bar the recovery of costs incurred prior to the coming into force of the Act, as there was simply no means of compliance with the provisions of the Act at the time the costs were incurred.

[49] Similarly, the term "legal practitioner" is, by virtue of section 33 of the **Interpretation Act**, to have the meaning ascribed to it by the Act unless a contrary intention appears to arise from the context in which the term is used. The term "legal practitioner" as defined under section 2, is pegged to the precondition of entrance unto the Roll in accordance with the Act. This simply means that no person could be a "legal practitioner" as defined by the Act until the Roll came into existence after 11th November 2015. The effect of this is that, in so far as section 18(3) bars the recovery of costs in respect of anything done by a person "whose

name is not registered on the Roll" who was "acting as a legal practitioner", it relates to things done after the coming into force of the Act.

[50] Having construed section 18(3) and its corollary provisions according to their plain and ordinary meaning, I find that the judge did not err in his analysis of section 18(3), and in coming to the conclusion that the section was intended by Parliament to apply prospectively, that is, to the recovery of costs incurred after the coming into force of the Act, and not to costs incurred before the commencement of the Act.

Purposive interpretation of section 18(3)

[51] I note as, Pereira CJ recently did in **Asiyah Grant v Javier Maduro**,[22] that "there is statutory weight to the purposive approach to interpretation in the Virgin Islands". Section 42(1) of the **Interpretation Act** states:

> "In the interpretation of a provision of an enactment, an interpretation that would promote the purpose or object of the underlying enactment (whether that purpose or object is expressly stated in the enactment or not) shall be preferred to an interpretation that would not promote that purpose or object."

[52] The appellants have not provided the Court with an explanatory note to the Act or any document which evidences the object and purpose of the Act, or which shows that section 18(3) requires the interpretation and application they have urged. Some light is shed on the purpose of the section by the analysis of Webster JA [Ag.] in **Garkusha**, wherein Webster JA [Ag.] found that the Act by necessary implication intended to do away with the recovery of costs by overseas lawyers for acting as legal practitioners in BVI proceedings. It is evident, however, that the **Garkusha** decision does not specifically speak to costs incurred prior to the commencement of the Act as that issue was not before the Court of Appeal at that time. In the absence of any judicial pronouncements and any documentary

[22] BVIHCVAP2019/0001 (delivered 13th November 2019, unreported).

evidence as to the purpose of the Act, the Court is then left to ascertain the object and purpose of section 18(3), from the mere text of the Act.

[53] From my analysis of section 18(3), there is nothing to indicate that the legislature in any way intended that section 18(3) apply to costs incurred prior to the commencement of the Act. As I have indicated, the text of the Act evidences a prospective scheme, including the section 18(3) prohibition, and there is no evidence that the legislature intended expressly or impliedly to have the Act apply retrospectively. My findings on that point make the appellants' argument in this regard untenable. I would therefore refuse the appellants' suggested purposive application of section 18(3), and find that the Act is clear on any reading, as to the prospective nature of section 18(3).

Unfairness in the end-result

[54] Lord Rodger in **Wilson** emphasised the role of fairness in the analysis of an alleged retrospective statute. For emphasis, Lord Rodger expressed the overall concern of the court in cases of purportedly retrospective enactments to be: "would the consequences of applying the statutory provision retroactively, or so as to affect vested rights or pending proceedings, be 'so unfair' that Parliament could not have intended it to be applied in these ways?".

[55] I observe that in **Wright**, it was relevant to the court's analysis that the claimants had the opportunity to relieve themselves from the undesired effect of the retrospective law. Such a possibility does not exist in the present case or any case like it. There was simply no possibility for the respondents to have discontinued the proceedings, or to have disengaged the overseas lawyers and engaged BVI enrolled lawyers with a view to avoiding the effect of section 18(3), as the Act came into force after the costs were already incurred. There was no opportunity for the respondents to relieve themselves of the prohibition in section 18(3), because section 18(3) did not then exist. The respondents, in these circumstances, would have incurred the costs that they did under an extant legal

regime, and in good faith, knowing well that the costs were recoverable subject to the findings of a judge on the reasonableness of the costs. The unfairness to the respondents and similarly situated litigants is patent and could not have been intended by Parliament. As I have already stated, there is also no evidence from either the text of the Act or any other document related to the Act, that Parliament had intended to prevent persons who lawfully incurred costs prior to 11th November 2015 from recovering those costs.

[56] Applying **Wilson** therefore, I find that, in all the circumstances, section 18(3) does not apply to bar the recovery of costs incurred prior to the commencement of the Act on 11th November 2015 and that the judge did not err in so finding.

Conclusion

[57] For the above reasons, the appellants have not demonstrated that the learned judge erred in his reasoning and in finding that section 18(3) was intended to apply prospectively and not retrospectively. I therefore agree with the learned judge that costs incurred prior to the commencement of the Act on 11th November 2015 are recoverable in costs assessment proceedings conducted after that date.

Appeal No. 48 – The Costs Draftsman Appeal
Appellants' Submissions

[58] The appellants raise two broad and alternative complaints in relation to the learned judge's decision to permit the recovery of costs in relation to the work done by the costs draftsman. Firstly, the appellants say that the judge erred by engaging in an examination of the nature of the work undertaken by the costs draftsman with a view to determining whether the costs draftsman's assistance was permitted under section 18(3). This, the appellants say, was not permitted as a matter of law, having regard to the provisions of the Act and the **Garkusha** and **Shrimpton** decisions by this Court. The appellants say that, in light of **Garkusha** and **Shrimpton**, it does not matter that the costs draftsman is in fact an attorney. Even if the bill of costs had been prepared by an accountant, these costs would still be

irrecoverable. The appellants submit that what is relevant, is that he can be broadly deemed to be "assisting with the conduct of a BVI matter" within the terms of **Garkusha** and **Shrimpton**.

[59] Alternatively, the appellants argue that even if the learned judge was permitted as a matter of law to engage in an examination of how exactly the costs draftsman was assisting the respondents, the learned judge erred in law and fact by finding that the costs draftsman was not acting as a legal practitioner for the purposes of section 18(3), because the costs draftsman was assisting with the conduct of BVI proceedings and therefore acting as a legal practitioner within the wide and general terms of section 18(3). In support of this contention, the appellants point to the respondents' schedule of costs wherein the work done by the costs draftsman was described as "reviewing files and drafting schedule of costs in compliance with the ECSC Rules and Practice Directions". This, the appellants say, is plainly assisting with a BVI matter and, in any event, prohibited by section 18(3). In the round, the appellants' basic position is that the learned judge ought to have found that the costs of the costs draftsman were irrecoverable.

Respondents' submissions

[60] The respondents submit that the learned judge was correct to determine whether the work done by the costs draftsman amounted to acting as a legal practitioner, practising BVI law. The respondents say that such an investigation is required by the words of the Act. They say that this is a question of fact to be assessed on a case by case basis, to determine whether the work done by a foreign lawyer falls within the scope of section 18(3). The respondents therefore say that the learned judge correctly directed himself as to the law, and that the judge's assessment of the work of the costs draftsman is not a basis upon which the judge's decision can be overturned.

[61] The respondents' position in relation to the appellants' alternative argument is that the work done by the costs draftsman was not the work of a BVI legal practitioner. The respondents say that a costs draftsman is not required to be a legal

practitioner (a legal professional in England and Wales) and that a costs draftsman is not a person who could be admitted to the Roll in the BVI. On that basis, the respondents submit that the judge was correct to make the factual determination that the work undertaken was not practising law in breach of section 18(3). The respondents submit that the question is not whether the work done could be carried out by a BVI lawyer, but whether the work done is the work of a BVI lawyer.

Discussion

[62] It is common ground that the costs draftsman was not a person whose name was entered on the Roll and therefore entitled to practise law in the BVI. It is also common ground that the costs for the respondents' use of the costs draftsman were incurred after the coming into force of the Act. The issue on appeal here is therefore unlike that in Appeal No. 45.

[63] In light of the appellants' submissions, it is necessary first to discuss whether the learned judge had a discretion to determine whether work done by an overseas lawyer falls within the section 18(3) prohibition. I wish to state outrightly that I do not share the appellants' view that the judge undertook any sort of evaluation of the work done by the costs draftsman. It is clear from the *ex tempore* judgment quoted above, that the judge took the view that, as a matter of law, the costs draftsman was not a person who was intended to be caught by section 18(3), as opposed to examining the particulars of the work done by the costs draftsman. The submission that the judge engaged in an examination of the cost draftsman's work is, therefore, without merit.

[64] In any event, even if one were to view the learned judge's actions differently, the clear words of section 18(3) do not support the contention that the judge is not permitted to examine the nature of the work for which costs have been claimed. For emphasis, section 18(3) states: "No fee in respect of anything done by a person whose name is not registered on the Roll or to whom subsection (2)

relates, acting as a legal practitioner, is recoverable in any action, suit or matter by any person". It appears from the words of section 18(3) that the learned judge ought to have been satisfied that the costs draftsman was acting as a legal practitioner and was so acting while not registered on the Roll or while being a person to whom section (2) relates. 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, by reference to the Roll established by section 8, 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". It appears, therefore, that on a mere examination of section 18(3) of the Act, the appellants' primary position on the judge's treatment on the costs draftsman appeal is untenable.

[65] Furthermore, and contrary to the appellants' submission, **Garkusha** and **Shrimpton** underscore that a judge is required to examine the activities undertaken by the person in question to determine whether costs in relation to that person were irrecoverable by virtue of section 18(3). In **Garkusha**, the Court of Appeal did not allow the recovery of costs incurred by overseas lawyers which were related to the preparation of the defence to the security for costs application, but allowed the costs incurred by the overseas lawyers in relation to arranging the preparation of the expert evidence required for the conduct of the security for costs application, the former being caught by the section 18(3) prohibition. In **Shrimpton**, Gonsalves JA [Ag.] cited the dictum of Webster JA [Ag.] in **Garkusha**, that "on a plain reading of section 2 and 18… an overseas lawyer who assists local lawyers with the advice and conduct in a BVI matter [the practising law] must be regarded as a matter of BVI law, as practising BVI law…."[23] and merely proceeded to apply that statement of principle to the issues before the Court. It is very evident that neither **Garkusha** nor **Shrimpton** support the appellants'

[23] Supra, n.4 at para. 29.

submission. With the above said, I would dismiss the appellants' first objection that the judge undertook an impermissible assessment of the work done by the costs draftsman, and that the judge had no discretion to assess the work done by the costs draftsman in order to make a determination as to the recoverability of the costs claimed.

[66] Having determined that the judge was entitled to examine the work done by the costs draftsman, it now falls to be determined whether the judge correctly concluded that the preparation of the schedule of costs by the costs draftsman did not equate to "acting as a legal practitioner" within the terms of section 18(3). The phrase "acting as a legal practitioner" is not defined by the Act. The Act does not go much further in terms of setting a threshold for what amounts to "acting as a legal practitioner" within the terms of section 18(3). Some light however is shed on the intended meaning of that phrase by section 2, which defines "practise law" to mean "to practise as a legal practitioner or to undertake or to perform the functions of a legal practitioner, as recognised by any law whether before or after the commencement of this Act".

[67] Despite the lack of detailed statutory guidance, it is clear however 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 "practise law" contained in section 2 of the Act, it appears to me that, when faced with an allegation that costs are irrecoverable under section 18(3), the court is required to examine the work done by the person whose costs are claimed, against the roles and functions of a legal practitioner, or what amounts to – in the words of Webster JA [Ag.] in **Garkusha** – "assisting…with the **advice** and **conduct** of a matter".[24] (Emphasis supplied)

[24] Supra, n.3 at para. 70.

[68] Before expressing any view on this substantive issue, I note first that the effect of my finding above, that whether a person is acting as a legal practitioner within the terms of section 18(3) is a question of fact, very clearly engages the rules which speak to an appellate court's treatment of findings of fact by a judge in the court below. The authorities are very clear that an appellate court is required to treat cautiously with such findings. In my view, however, the circumstances of this case do not require the degree of care and caution to which the Court is ordinarily bound in this regard. There was no suggestion from the transcript of the proceedings and the judge's *ex tempore* judgment that his decision on the recoverability of the costs draftsman's costs was based on anything outside the documents filed in support of the assessment proceedings. The assessment of the costs in relation to the costs draftsman did not involve the examination and cross-examination of witnesses, and it is clear that on this point, the judge did not engage in any complex evaluations of fact. Indeed, all the documents relied upon by the parties in the court below were very helpfully provided to this Court by the parties in their appeal bundles. This Court therefore, having the same evidence before it upon which the judge concluded that the costs draftsman was acting as a legal practitioner for the purposes of section 18(3), is in the same position to make findings in this regard.

[69] I agree with the appellants that the fact that the costs draftsman is a UK qualified legal practitioner is not, itself, determinative of the question – whether or not the costs draftsman was acting as a legal practitioner. The focus of section 18(3) is not that the costs claimed pertain to work done by someone who is in fact a lawyer; but whether the work done amounts to acting as a legal practitioner. For the purpose of this examination, the appellants have placed heavy reliance on the description ascribed by the respondents in the schedule of costs to the work done by the costs draftsman. The schedule of costs describes the work done by the costs draftsman as: "reviewing files and drafting schedule of costs in compliance with the ECSC Rules and Practice Directions". This is the only direct evidence as to the nature of the work conducted by the costs draftsman.

[70] I recognise that this description of the costs draftsman's work was framed in very broad and general terms. In my view, the broad description of the work done by the costs draftsman lends itself to the view that the costs draftsman was engaged in a substantive legal capacity in the production of the schedule of costs. Specifically, the words "in accordance with the ECSC Rules and Practice Directions" are telling and give the strong impression that the costs draftsman's work was more than clerical and involved some consideration of the law and practice on costs; this is inherently the function of a legal practitioner. Furthermore, when one considers the contents of the schedule of costs as a whole, and the role that the respondents' legal practitioners played in advising the costs draftsman, there is nothing to rebut the strong impression created by the words used by the respondents to describe the cost draftsman's work. The following items were claimed which related to the respondents' legal practitioners' interactions with the costs draftsman:

> "JMK: Considering further information needed to draft bill of costs including costs information from Ogier; reviewing bill of costs and finalising from service."
>
> "KSS: Instructing Costs Lawyers to prepare bill of costs including collating all papers needed to draft bill of costs; attendances on Costs Lawyers to discuss drafting of bill of costs; reviewing and amending bill of costs; liaising with Costs Lawyer regarding draft; considering further drafts of the bill of costs; checking, finalising and approving bill of costs."
>
> "ASG: Retrieving copies of all invoices and fee-notes issues in this case; liaising with Costs Lawyers regarding fees and invoices issued to the client; detailed reviewing of bill of costs including checking and amending 92 page breakdown of London lawyers' costs; preparing narrative and chronology; forwarding amending version of bill of costs to Costs Lawyers; discussing amendments and considering revised draft bill of costs."
>
> "DS: Collating copies of invoices and information needed for Costs Lawyer to prepare bill of costs."

[71] Having examined the description of the costs draftsman's work, alongside the work done by the respondents' legal practitioners, one cannot help but conclude that the costs draftsman was acting as a legal practitioner. Accordingly, I find that the costs draftsman was acting as a legal practitioner within the terms of section

18(3), that the costs incurred by the respondents' use of the costs draftsman are not recoverable, and that the learned judge erred by finding to the contrary.

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

[73] I note that in the United Kingdom, the use of costs draftsmen (sometimes referred to as costs draftspersons, costs consultants or costs professionals) has become relatively common place. This is so much so that the relevant rule making body has made express provision for the recovery of costs for the use of costs draftsmen in at least one practice direction to the UK Civil Procedure Rules.[25] Notwithstanding the provision made for the use of costs draftsmen and their widespread use in the United Kingdom, it has been noted that the work of a costs draftsman is "solicitor's work", whether or not the costs draftsman is in fact qualified to practise law.[26] It has also been stated that costs draftsmen are often able to recover costs which are comparable and sometimes equivalent to the costs recovered by lawyers with conduct of the case.[27] These are exactly the circumstances against which section 18(3) was intended to militate, that: (i) persons who are not enrolled as legal practitioners in the BVI would be performing the role of a legal practitioner and; (ii) litigants would be visited with large costs

[25] See Civil Procedure Rule Practice Direction 46.
[26] Crane v Canons Leisure Centre [2007] EWCA Civ 1352.
[27] See for example Motto & Ors v Trafigura Ltd & Anor [2011] EWHC 90201 (Costs) (15 February 2011); and Cook on Costs wherein the learned authors stated: "in heavy bills involving amounts considerably in excess of the fast track… the use of a Grade A or B draftsman would be reasonable and proportionate."

awards which take account of the outsourcing by their opponents' legal practitioners of legal work which they had been retained to do. Against this background, I do not believe that any ruling can properly be made that the costs of costs draftsmen are generally recoverable or irrecoverable under the law as it now stands. A definitive position one way or the other can only result from legislative intervention and not judicial determination.

Conclusion

[74] For all the above reasons, I would dismiss Appeal No.45 and affirm the judge's decision that the costs incurred for the use of overseas lawyers prior to commencement of the Legal Profession Act, 2015 are recoverable. I would also allow Appeal No.48 and set aside the judge's decision to allow the recovery of costs incurred by the respondents' use of the costs draftsman.

[75] Given that the appellants have been successful on one appeal but have failed on the other, it is appropriate in the circumstances that there be no order as to costs, and I so order.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Rolston Nelson
Justice of Appeal [Ag.]

EASTERN CARIBBEAN SUPREME COURT
SEAL
COURT OF APPEAL

By the Court

Chief Registrar