

Neutral Citation Number: [2005] EWCA Civ 1507

Case No: C3/2004/0829

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(CHANCERY DIVISION)
MR JUSTICE LIGHTMAN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2005

Before :

LORD JUSTICE BROOKE
Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE DYSON
and
LORD JUSTICE CARNWATH

Between :

Andre Agassi	<u>Appellant</u>
- and -	
S Robinson (H M Inspector of Taxes)	<u>Respondent</u>
(Bar Council and Law Society intervening)	

Mr Patrick Way and Ms Nicola Shaw (instructed by Christopher Mills, Tenon Media) for the Appellant

Mr Bruce Carr (instructed by The Solicitor of the Inland Revenue) for the Respondent
Anthony Speaight QC and Ron Chatterjee for the Bar Council
Richard Drabble QC and David Holland for the Law Society

Hearing dates: 31 October 2005 and 1 November 2005

Lord Justice Dyson: This is the judgment of the court, to which all its members have contributed.

Introduction

1. The appellant is a well known professional tennis player. Through his company, Agassi Enterprises Inc, he entered into endorsement contracts with two manufacturers of sports clothing, Nike Inc and Head Sports AG, neither of which is resident or has a tax presence in the UK. A question arose as to whether the appellant, being at all material times resident in the US, could be assessed to income tax under section 556 of the Income and Corporation Taxes Act 1988 in respect of payments connected with his activities in the UK as a sportsman. The Special Commissioners decided that he was assessable for tax and that decision was upheld by Lightman J. On 19 November 2004, however, his appeal was allowed by this court (Buxton, Sedley and Jacob LJJ). The question of costs was adjourned because an issue of principle was raised by the HM Revenue and Customs. They disputed the appellant's claim that he was entitled to the costs he had incurred in retaining the services of Messrs Tenon Media ("Tenon"). We have been assisted by the Senior Costs Judge sitting as an assessor.
2. Tenon are experts in the field of tax law. Mr Christopher Mills of Tenon is a member of the Chartered Institute of Taxation. In that capacity he is licensed to instruct counsel under the Bar's "Licensed Access" scheme (previously known as "BarDIRECT"). That is what he did in the present case for the purposes of the appeal to the High Court and then the appeal to this court. Although this appeal concerns the costs treatment of fees paid to a member of the Chartered Institute of Taxation, the issues raised have implications for fees paid to other persons who do not have the right to conduct litigation within the meaning of section 28 of the Courts and Legal Services Act 1990, and we have reconstituted the court because it was recognised that the issues were of considerable importance to the conduct of civil litigation and to the legal profession. The Bar Council and Law Society were invited to make representations to us, and we have been greatly assisted by their contributions.
3. Tenon have acted for the appellant for many years and are said to be more familiar than anyone with his tax affairs. They are experts in tax law. The tax point at issue in the current litigation was a short point of statutory interpretation. There was no evidence to be marshalled and no witnesses were to be called. The appellant considered that it was more efficient to use Tenon rather than a firm of solicitors. This was because the appeals did not require expertise in the general conduct of litigation and Tenon had already been involved in briefing counsel during 2002 and 2003 on the matter, and had briefed counsel in relation to the hearing before the Special Commissioners.

The Solicitors Act 1974 ("the 1974 Act")

4. Section 20 provides:

“(1) No unqualified person shall-

(a) act as a solicitor, or as such issue any writ or process, or commence, prosecute or defend any action, suit or other proceeding, in his own name or in the name of any other person, in any court of civil or criminal jurisdiction; or

(b) act as a solicitor in any cause or matter, civil or criminal, to be heard or determined before any justice or justices or any commissioners of Her Majesty's revenue.

5. An "unqualified person" is a person who has not been admitted as a solicitor and does not have in force a practising certificate: sections 1 and 87.

6. Section 22 provides:

"(1) Subject to subsections (2) and (2A), any unqualified person who directly or indirectly—

(a) draws or prepares any instrument of transfer or charge for the purposes of the Land Registration Act 2002, or makes any application or lodges any document for registration under that Act at the registry, or

(b) draws or prepares any other instrument relating to real or personal estate, or any legal proceeding shall, unless he proves that the act was not done for or in the expectation of any fee, gain or reward, be guilty of an offence..."

7. Section 25 provides:

"(1) No costs in respect of anything done by any unqualified person acting as a solicitor shall be recoverable by him, or by any other person, in any action, suit or matter."

The Courts and Legal Services Act 1990 ("the 1990 Act")

8. Part II of the 1990 Act (ss 17-70) is entitled "Legal Services". Sections 17 and 18 are headed "Introductory" and describe the "statutory objective", the "general principle" and the "statutory duty". Sections 27-31C are concerned with rights of audience and rights to conduct litigation.

9. Section 17 of the 1990 Act is in these terms:

"(1) The general objective of this Part is the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider

choice of persons providing them, while maintaining the proper and efficient administration of justice.

(2) In this Act that objective is referred to as “the statutory objective”.

(3) As a general principle the question whether a person should be granted a right of audience, or be granted a right to conduct litigation in relation to any court or proceedings, should be determined only by reference to –

a) whether he is qualified in accordance with the educational and training requirements appropriate to the court or proceedings;

b) whether he is a member of a professional or other body which –

i) has rules of conduct (however described) governing the conduct of its members;

ii) has an effective mechanism for enforcing the rules of conduct; and

iii) is likely to enforce them;

(c)...

(d) whether the rules of conduct are, in relation to the court or proceedings, appropriate in the interests of the proper and efficient administration of justice; and

(4) In this Act that principle is referred to as “the general principle.”

10. Section 18 provides, in the present context, that when the Lord Chancellor is called upon to exercise any functions which are conferred by Part II of the Act with respect to the granting of rights of audience or the approval of rules of conduct, it is his duty to act in accordance with the general principle and subject to that, so far as it is possible to do so in the circumstances of the case, to act to further the statutory objective. This is what is called, in the heading to this section, “the statutory duty.”
11. Section 27 contains provisions in relation to rights of audience. It provides by s 27(2) that a person is to have a right of audience before a court in relation to any proceedings only in certain clearly defined circumstances. One of these, which relates to a member of the Bar, is where he has a right of audience before that court in relation to those proceedings granted by the appropriate body, and that body’s qualification regulations and rules of conduct have been approved for the purposes of this section in relation to that right (s 27(1)). Section 28 deals with the right to conduct litigation and, so far as material, provides:

“(1) The question whether a person has a right to conduct litigation, or any category of litigation, shall be determined solely in accordance with the provisions of this Part.

(2) A person shall have a right to conduct litigation in relation to any proceedings only in the following cases—

(a) where—

(i) he has a right to conduct litigation in relation to those proceedings granted by the appropriate authorised body; and

(ii) that body’s qualification regulations and rules of conduct have been approved for the purposes of this section, in relation to ... that right;

(b) where paragraph (a) does not apply but he has a right to conduct litigation in relation to those proceedings granted by or under any enactment;

(c) where paragraph (a) does not apply but he has a right to conduct litigation granted by that court in relation to those proceedings;

(d) where he is a party to those proceedings and would have had a right to conduct the litigation, in his capacity as such a party, if this Act had not been passed.

(2A) Every person who exercises in relation to proceedings in any court a right to conduct litigation granted by an authorised body has—

(a) a duty to the court to act with independence in the interests of justice; and

(b) a duty to comply with rules of conduct of the body relating to the right and approved for the purposes of this section;

and those duties shall override any obligation which the person may have (otherwise than under the criminal law) if it is inconsistent with them.

(3)

(4) Where, immediately before the commencement of this section, no restriction was placed on the persons entitled to exercise any right to conduct litigation in relation to a particular court, or in relation to particular proceedings, nothing in this section shall be taken to place any such restriction on any person.

.....

(5) In this section—

“authorised body” means—

(a) the Law Society;

(aa) the General Council of the Bar;

(ab) the Institute of Legal Executives; and

(b) any professional or other body which has been designated by Order in Council as an authorised body for the purposes of this section;

“appropriate authorised body”, in relation to any person claiming to be entitled to any right to conduct litigation by virtue of sub-section (2) (a), means the authorised body—

(a) granting that right; and

(b) of which that person is a member;

“qualification regulations”, in relation to an authorised body, means regulations (however they may be described) as to the education and training which members of that body must receive in order to be entitled to, or to exercise, any right to conduct litigation granted by it; and

“rules of conduct”, in relation to any authorised body, means rules (however they may be described) as to the conduct required of members of that body in exercising any right to conduct litigation granted by it.

.....

(6) Section 20 of the Solicitors Act 1974 (unqualified person not to act as a solicitor), section 22 of that Act (unqualified person not to prepare certain documents etc) and section 25 of that Act (costs where unqualified person acts as a solicitor) shall not apply in relation to any act done in the exercise of a right to conduct litigation.”

12. Section 29 provides that the provisions of Schedule 4 are to have effect with respect to the authorisation of bodies for the purposes of section 27 and 28 and the approval and alteration of qualification regulations and rules of conduct. Schedule 4 sets out the consultative procedure which leads up to a decision being taken by the Lord Chancellor on any application that is made to him in this context.
13. Section 70 deals with offences. Section 70(1) provides that a person is guilty of an offence if he does any act “in purported exercise of a...right to conduct

litigation, in relation to any proceedings or contemplated proceedings when he is not entitled to exercise that right”. Section 70(3) provides that a person is guilty of an offence if he “wilfully pretends... (ii) to be entitled to exercise any right to conduct litigation....”

14. Section 119 (1) defines “right to conduct litigation” as the right “(a) to issue proceedings before any court; and (b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions).”

Licensed Access

15. The issues on this appeal flow from a change, approved by the Lord Chancellor, to that part of the Bar Council’s rules of conduct that govern the exercise by a barrister of his rights of audience in the higher courts in connection with certain tax appeals. On 13 November 1999, the Bar Council removed the limitations on the types of work for which barristers might be instructed by approved persons or members of approved bodies. In both respects the approvals were to operate by means of the Bar Council granting licences. This scheme was called “BarDIRECT”. The changes to the previous arrangements for Direct Professional Access were approved by the Lord Chancellor under Schedule 4 of the 1990 Act.
16. In approving these changes the Lord Chancellor was bound to act in accordance with the general principle and to further the statutory objective, as far as possible (see paras 10 and 12 above). This was certainly both a new and a better way of providing advocacy services, because it enabled the barrister to receive instructions direct from a skilled professional who understood the very technical issues of tax law that arose in the case more efficiently and at less cost than would be involved if the client had to instruct a solicitor as well. And the Lord Chancellor must have been satisfied when he approved this rule change that these new arrangements were appropriate in the interests of the proper and efficient administration of justice. This is an important feature of this case.
17. The arrangements for BarDIRECT were contained in the BarDIRECT Recognition Regulations (now the Licensed Access Recognition Regulations), which deal with the granting of licences, and in the BarDIRECT Rules (now the Licensed Access Rules), which deal with how barristers should handle such work. The title was changed from BarDIRECT to “Licensed Access” in 2004. Save for this change, the current Licensed Access Recognition Regulations and the Licensed Access Rules have not changed since 1999. We shall refer to the scheme as “the Licensed Access Scheme”. The introduction of the scheme opened up for the first time the possibility that a barrister could be instructed to undertake advocacy in a higher court without being instructed by a solicitor.
18. By a letter dated 1 August 2001, the Bar Council confirmed to the Chartered Institute of Taxation that its members were permitted to instruct a barrister on an appeal in a tax matter to the High Court or Court of Appeal. The licence applied only where the member of the Institute had conducted the case (either representing the client themselves or instructing a barrister) before the General Commissioners, the Special Commissioners or the VAT Tribunal. The Bar Council has issued Guidance Notes for members of the Chartered Institute of Taxation. These state at para 8 that the Civil Procedure Rules (“CPR”) envisage litigation being conducted

on two bases, either by a litigant in person or by a solicitor. They go on to say that, unless a member is also a solicitor, a member is not entitled to institute proceedings on the basis that he or she is a solicitor: “this means that any litigation will have to be conducted on the basis that the litigant is a litigant in person”. One of the questions that arises in the present case is whether this is a correct view of the position where a member of the Chartered Institute of Taxation (who is not a solicitor) instructs a barrister on behalf of a client.

19. It is clear, therefore, that more flexible arrangements for the conduct of litigation have started to be developed. In addition to the two classic arrangements of (i) full representation by solicitor and barrister and (ii) the litigant in person, there are other models. Examples of these are (a) the lay client performing the role of litigator with a directly instructed barrister acting as the advocate (under the Bar’s new “public access” arrangements, approved by the Lord Chancellor in 2004); and (b) lay client as litigator, with licensed professional instructing barrister as advocate.
20. It is common ground that, whatever costs may be recoverable by a litigant in respect of professional services such as those provided by Tenon to the appellant, they cannot include the cost of any activities which are unlawful. It is therefore necessary to consider what legal restrictions there are on litigation conduct by persons who are not solicitors.

The issues

21. The principal issues that have been raised on this appeal are: (i) is the appellant a litigant in person within the meaning of CPR 48.6; (ii) are Tenon’s fees irrecoverable by the appellant because they are in respect of services supplied in breach of sections 20 or 22 of the 1974 Act or section 70(1) of the 1990 Act; and (iii) are the fees recoverable in principle by the appellant (a) as costs under section 51 of the Supreme Court Act 1981 and CPR 44.3(1) or (b) as a disbursement under CPR 48.6?

The first issue: is the appellant a litigant in person?

22. As this court explained in *Gregory v Turner* [2003] EWCA Civ 183 at [50]-[55]; [2003] 1 WLR 1149, the 1990 Act was –

“... intended to establish a comprehensive modern code to replace the diverse statutory and common law rules which previously governed these matters.”

Within that code section 28, as we have seen, governs rights to conduct litigation. If Tenon itself had no right to conduct litigation under that section, the only alternative basis available under the section was that Mr Agassi was a litigant in person, or (in the words of s 28(2) (d)) that -

“...he (was) a party to those proceedings and would have had a right to conduct the litigation, in his capacity as such a party if this Act had not been passed.”

We read that sub-section as designed to preserve the pre-existing rights of litigants in persons, and we would treat it as identical in scope.

23. In the course of his reply, Mr Way accepted that the appellant is a litigant in person within the meaning of CPR 48.6. But Mr Speaight QC maintained as his primary submission that he is not. In short, he contends that a party cannot be a litigant in person if, as was this appellant, he is represented at the final hearing. There is no definition of a “litigant in person” in the Litigants in Person (Costs and Expenses) Act 1975, or in the CPR. In *Jonathan Alexander Ltd v Proctor* [1996] 1 WLR 518, at 523D Hirst LJ referred to “...the ordinary meaning, as I understand it, of the description “litigant in person”, viz an unrepresented individual”. Peter Gibson LJ said at p 525G:

“A litigant in person in ordinary parlance is a party to litigation who represents himself by appearing in court himself. If someone other than himself represents him, then notwithstanding that that other person is his agent, that party is not a litigant in person”.

That was a case where a company brought a claim and was represented at the trial by one of its directors. It did not instruct solicitors or counsel at any stage of the proceedings.

24. But the court did not have in mind an arrangement of the kind entered into in the present case, where the litigant employs a professional person, who is not a lawyer, to conduct litigation on his behalf and to instruct counsel to conduct an appeal. It is common ground that Tenon does not have the right to conduct litigation within the meaning of the 1990 Act. That right may only be exercised in one of the cases mentioned in section 28(2)(a) to (d). Of these, the most important are persons who have been granted the right by an appropriate authorised body (section 28(2)(a)) and thereby become legal representatives within the meaning of CPR 2.3(1), and (ii) litigants in person (section 28(2)(d)). We shall refer to the former as “authorised litigators”. Section 28(2)(b) and (c) have no application in the present case. It follows that, if the appellant is not a litigant in person, nobody had the right to conduct this litigation within the meaning of the 1990 Act.
25. In our judgment, the observations made by this court in *Jonathan Alexander* do not support the proposition that a person is not a litigant in person if he or she is represented by counsel through the agency of the Licensed Access Scheme. Even before the 1990 Act, a litigant might have been acting in person for only part of the proceedings: for example, a litigant might have commenced the proceedings on his own, but later instructed solicitor and counsel. Such a person would properly have been regarded as a “litigant in person”, if and so long as he acted on his own behalf. At the time of the *Jonathan Alexander* decision, the general position was that a person could either appear in court in person or be represented, having instructed solicitors or solicitors and counsel (ie by a legal representative). It is easy to see why, against that background, it was considered that, if a person was represented in court, he was not acting in person. Under the more prescriptive scheme of the 1990 Act, however, there is no reason why a party

should not be a litigant in person for the purpose of conducting litigation (under s 28(1)(d)), even if rights of audience on his behalf (under s 27) are exercised by an authorised advocate.

26. The introduction of the Licensed Access Scheme, therefore, has meant that the *Jonathan Alexander* approach will no longer suffice as an all-embracing definition of a litigant in person. In our view, where a member of the Chartered Institute of Taxation instructs a barrister under the Licensed Access Scheme, the presence of the barrister does not prevent the party on whose behalf the barrister has been instructed from being a litigant in person. After the BarDIRECT committee informed the Chartered Institute of Taxation on 1 August 2001 that members of that body were now permitted to instruct a barrister on an appeal to the High Court and Court of Appeal, it issued Guidance Notes. We have already noted (see para 18 above) how these Notes made it clear that

“...any litigation will have to be conducted on the basis that the litigant is a litigant in person” (para 8)

In all the circumstances we agree with the Bar Council’s statement that, unless a member of the Chartered Institute of Taxation is also a solicitor, any litigation must be commenced on the basis that the litigant is a litigant in person.

27. We conclude, therefore, that the appellant is a litigant in person within the meaning of CPR 48.6.

The second issue: lawful activities

28. As we have already stated, it is common ground that the appellant cannot on any view recover the cost of activities performed by Tenon which it was not lawful for them to perform. In relation to activities which are in breach of section 20(1) of the 1974 Act, that is expressly provided by section 25. It is necessary, therefore, to consider certain provisions of the 1974 and 1990 Acts to see to what extent services of the kind supplied by Tenon in this case were unlawful.

Sections 20, 22 and 25 of the 1974 Act

29. At first sight, it is unclear whether the language of section 20(1(a)) is directed at, and only at, prohibiting unqualified persons from pretending to be a solicitor. The phrase “act as a solicitor” is ambiguous. It could mean “pretend to be a solicitor”. But it could also mean “do those things which only a solicitor is permitted to do”. The words “or as such” suggest that what is being prohibited at least in the second limb is not the issuing of a writ etc by an unqualified person, but the issuing of a writ by an unqualified person “as a solicitor”. It has been established by the authorities, however, that it is no answer to an allegation of a breach of section 20(1) that the unqualified person did not pretend to be a solicitor when he issued the writ etc.
30. As long ago as in 1883, the House of Lords made it clear in *The Law Society of the United Kingdom v Waterlow Brothers and Layton* (1883) 8 App Cas 407 that, if some step in a proceeding is required to be done only by the party or his solicitor, then if that step is taken by an unqualified person (not being the party),

that person will necessarily be acting as a solicitor within the meaning of section 2 of the Solicitors Act 1843 (an early predecessor of section 20 of the 1974 Act). The Rules of the Probate Court required applications for probate to be made, if not by the executor, then by a proctor, solicitor or attorney. It was held that such an application was “a solicitor’s or proctor’s business”. The claim that there had been a breach of section 2 of the 1843 Act by law stationers (who had had various dealings with the Probate registry under the supervision of solicitors) was dismissed. The stationers were simply executing instructions to do ministerial acts in order to save the real solicitor from the trouble and expense of doing them: they had not been practising as solicitors themselves. In considering whether there had been a breach of section 2, the House of Lords proceeded on the footing that to act as a solicitor is to do what may only be done by a qualified practitioner. The decision is notable for the words of Lord Bramwell at (p 417) when determining whether the stationers acted as solicitors: “I am of the opinion that they have not; and I am of opinion that they have not because they have not; and really that is the only answer which one can give...”

31. Section 20 (and its predecessors) have been interpreted as prohibiting acts by an unqualified person which only a solicitor is permitted to do. Where a statute or rule expressly requires an act in connection with litigation to be done either by the party or his solicitor, there is no difficulty in applying this interpretation.
32. Thus in *In re Ainsworth, ex parte the Law Society* [1905] 2 KB 103, it was held that an unqualified person who gives notice of appearance is thereby acting in contravention of section 2 of the Solicitors Act 1843. In reaching this conclusion Lord Alverstone CJ was influenced by the fact that the relevant rule of court required a notice of appearance to be given either by the defendant himself or his solicitor.
33. We were referred to a number of other authorities. We do not propose to discuss them all. It is difficult to determine what interpretation of “act as a solicitor” has been applied in these cases. In *re Hall* (1893) 69 LT(NS) 385, the question was whether an unqualified person had acted as a solicitor contrary to section 2 of the Solicitors Act 1843. It was alleged that Mr Hall had exercised the functions of a solicitor by entering an appearance, doing what the court described as “ordinary solicitors’ work” with reference to the court (such as paying a court fee) and negotiating the settlement of the action. It was held that Mr Hall had committed a breach of the Act by entering an appearance and doing things in court, but had not acted as a solicitor by writing letters and settling the claim. It is not clear whether any provision was relied on as showing that Mr Hall had done anything that was prohibited.
34. In *re Louis ex parte The Incorporated Law Society* (1891) 1 QB 649, it was held that a person who was employed by a process-server, who settled the affidavits of persons in his employment relating to service of process, was not acting as a solicitor contrary to section 2 of the Solicitors Act 1843.
35. None of the early cases that were cited to us contains any *analysis* of what “acting as a solicitor” means. The issue arose more recently in the context of an arbitration in *Piper Double Glazing Ltd v DC Contracts* [1994] 1 WLR 777. The claimant, who was represented by a claims consultant, was successful in

arbitrations and was awarded costs. On the taxation, the master rejected the paying party's contention that, by reason of section 25 of the 1974 Act and RSC Ord 62, there was no authority for the taxation of the fees of a person who was neither a barrister nor a solicitor nor a litigant in person, and allowed the costs of the claims consultant. On a review, Potter J sitting with assessors upheld the decision of the master. The effect of section 18 of the Arbitration Act 1950 was that any costs directed by the arbitrator to be paid were, unless the award otherwise directed, to be taxable in the High Court.

36. The critical passage of Potter J's judgment is at p 786D where he said:

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

It will be seen that this definition of “acting as a solicitor” explicitly includes “the doing of acts which only a solicitor may perform”.

37. In *Regina (Factortame Ltd and others) v Secretary of State for Transport, Local Government and Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381, the claimants, who were legally represented, sought to recover as costs sums payable by them to Grant Thornton, who had been appointed as forensic accountants to provide services ancillary to the litigation being conducted by the solicitors. The claimants were successful in the litigation and were awarded costs. A question arose as to whether the agreements with Grant Thornton were champertous. In approaching this question, this court had to consider the nature of the services being provided by Grant Thornton “and in particular whether they have been providing services which are customarily provided to litigants by solicitors” (para 23). The court continued:

“24. Section 28 of the Courts and Legal Services Act 1990 makes provision for those who have the “right to conduct litigation”. Such a right can only be granted by “the appropriate authorised body”. The Law Society is such a body. The Institute of Chartered Accountants is not. Thus accountants have no right to “conduct litigation” The right to conduct litigation is defined by section 119 of the Act. It means the right “(a) to issue proceedings before any court; and (b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)”.

25. Section 20 of the Solicitors Act 1974 makes it an indictable criminal offence for an unqualified person to “act as a solicitor”. It is plain, in the light of this, that the “conduct of litigation” which is reserved to a solicitor or other authorised person by section 28 of the 1990 Act must be given a restricted ambit. It cannot embrace all the activities that are ancillary to litigation and which are sometimes carried on by a solicitor and sometimes by a person who has no right to conduct litigation.”

38. They then referred to a passage at p 783 of Potter J’s judgment in *Piper Double Glazing*. In fact the passage quoted was from that part of the judgment which summarised the grounds on which the claimants relied before him. But in substance, this passage is in the same terms as the passage that we have cited at para 29 above.
39. The court then continued at para 27:
- “Thomas Cooper have at all times had the conduct of the litigation on behalf of the claimants. Grant Thornton have done nothing for which they required authority under section 28 of the 1990 Act or which offended against section 20 of the 1974 Act. Their services have been ancillary to the conduct of the litigation by Thomas Cooper. Of what have those services consisted?”
40. There followed a description of the role played by Grant Thornton in the litigation. It was extensive. It included advising on, co-ordinating and playing a major part in the gathering of voluminous and complex evidence as to loss; playing a major part in assisting and liaising with the experts, solicitors and counsel; working with the experts to create a model for the calculation of loss; and performing a supporting and advisory role to the claimants and their legal representatives. Finally, at para 29 the court said that many of these services could have formed part of the services provided by the solicitors. Most of the services, however, more naturally formed part of a package of forensic accountancy services which would have included the provision of expert evidence itself.
41. We are in no doubt that we should apply the meaning of “act as a solicitor” which is propounded in *Piper Double Glazing* and approved in *Factortame*. Mr Carr

submits that *Piper Double Glazing* is of little relevance because it concerned an arbitration in which parties were free to employ lay representatives and in respect of which the Rules of the Supreme Court on costs had effect “with such modifications as may be necessary” (RSC Ord 62 r 2(2)). We do not agree. The *meaning* of “act as a solicitor” cannot vary according to whether the context is litigation or arbitration. The test articulated by Potter J is of general application. He rejected the submission that allowing the claims consultants their costs would amount to a breach of section 20(1) of the 1974 Act. He did not identify the acts which only a solicitor may do, although he was clearly of the view that there is no aspect of the conduct of an arbitration which only a solicitor may do. This was a reflection of the submission by the claimants that there are no statutory or other restrictions on the right of a party to be represented in an arbitration by the advocate of his choice, whether qualified or not.

42. Potter J’s test was implicitly approved by this court in *Factortame* in the context of litigation. We are satisfied that we should treat this clear and authoritative statement as superseding the sometimes conflicting statements in the old authorities. We acknowledge that the *application* of that test is likely to be different in litigation from its application in arbitration. For example, it would seem that section 22 has no application to arbitrations. The prohibition on unauthorised litigators exercising the right to conduct litigation within the meaning of the 1990 Act will have no application to arbitrations. But in the absence of express prohibitions on unqualified persons which are peculiar to litigation, it is difficult to see any basis for holding that, simply by reason of the status, duties and role of solicitors, unqualified persons are subject to restrictions in relation to litigation to which they are not subject in relation to arbitration. It is clear from *Piper Double Glazing* that an unqualified person does not act as a solicitor if he conducts an arbitration (unless he pretends to be a solicitor). This is because there is no rule that only solicitors may conduct arbitrations.
43. As was stated in *Factortame*, section 20 must be given a “restricted ambit” because of its penal nature. What does this mean? Where is the line to be drawn? Does the prohibition go any further than what is expressly prohibited? It is common ground that it does not extend to what might be termed purely clerical or mechanical activities such as photocopying documents, preparing bundles, delivering documents to opposing parties and the court and so on. Mr Speaight submits that none of the following activities, if conducted by an unqualified person, would be in breach of sections 20 or 22:
- a. Delivering to a court office a claim form, appeal notice, application or the like, provided it has been signed by the party himself.
 - b. Typing or printing out an appeal notice, statement of case or other formal court document, which has been drafted by a barrister.
 - c. Service of a claim form or other documents.
 - d. Taking a statement from a prospective witness.

- e. Correspondence with the opposing party.
- f. Preparing a bundle of documents for use in a court hearing.
- g. Drafting instructions to a barrister.
- h. Sitting behind a barrister during a hearing to provide administrative assistance.”

44. He described these as “administrative support”. It is to be noted that we were shown no statute or rule which prohibits an unqualified person from giving legal advice. Mr Speaight accepts that discussing the law with counsel and/or giving legal advice to the client in connection with the litigation is not acting as a solicitor. Since such conduct by unqualified persons is not prohibited, it seems to us that, on an application of the *Piper Double Glazing* test, it does not amount to acting as a solicitor. Mr Drabble questions whether some of the items in Mr Speaight’s list would normally amount to mere administrative support: for example, correspondence with the opposing party which, he submits, is an integral part of the conduct of litigation. Mr Drabble says that it is a question of degree whether correspondence goes beyond what may fairly be described as administrative support for the party.
45. This is a difficult area. There is no statutory (and so far as we are aware no other) definition of “acting as a solicitor”. The phrase “administrative support” may seem to be a convenient label to use to refer to those activities which do not amount to acting as a solicitor, but it is not particularly illuminating shorthand for the only activities that may be carried out by an unqualified person on a proper application of the *Piper Double Glazing* test.
46. The hallmark of a solicitor is that he is professionally qualified to practise law, is subject to regulation by the Law Society and owes important duties to the court. For this reason, there is much to be said in favour of a broader view of “acting as a solicitor” so as to include the approach adopted by Phillips J in *Cornall v Nagle* [1995] 2 VR 188, a decision of the Supreme Court of Victoria. In the course of a comprehensive judgment, he said at p 208:

“In my opinion, the giving of legal advice, at least as part of a course of conduct and for reward, can properly be said to lie at or near the very centre of the practice of the law, and hence of the notion of acting or practising as a solicitor which is itself central to s.90. If the public is to be adequately protected from those lacking relevant qualifications, then, in the context of a regulated legal profession, the giving of legal advice professionally is, I think, to be regarded as exclusively the province of those properly trained in the law and having the necessary expertise. It is thus something required to be undertaken only by the legally qualified, and not by those not properly qualified. Nor, if the protection of the public is to be adequate, can that protection be left to depend (as does the

Sanderson test) upon whether the unqualified one declares that he has no legal training; otherwise, it would be enough to prohibit a false claim to the relevant qualification, which is the provision found in s. 92 of the L.P.P.A [Legal Profession Practice Act]. But s. 90 goes beyond s. 92 and, in my view, by prohibiting any unqualified person “acting or practising as a solicitor” s.90 should be taken to encompass the giving of legal advice, at least in circumstances where there is a course of conduct involving the giving of that advice for reward.”

47. Section 90(1) of the Legal Profession Practice Act 1958 provided that “no person shall be qualified to act or practice or shall act or practice as a solicitor unless.....” The “*Sanderson* test” was derived from the judgment of Cussen J in another Victoria case *In re Sanderson* [1927] VLR 394, 397, where he said:

“What I do decide is that if a person does a thing usually done by a solicitor and does it in such a way as to lead to the reasonable inference that he is a solicitor – if he combines professing to be a solicitor with actions usually taken by a solicitor – I think he then acts as a solicitor”.

48. In line with this statement, Phillips J summarised his view (at pp 207-8) that there would be no contravention of the Act –

“... unless it can be said that the act was done in such circumstances *as to lead to the reasonable inference that that person was a solicitor*. In contrast, I have said that there is no need for such an inference when the conduct in question involves something which the law requires to be done exclusively by a duly qualified solicitor.” (emphasis added)

Although Phillips J had previously cited Potter J’s test with apparent approval, the emphasised words based on the “*Sanderson* test” seem to us wider in scope.

49. In any event, so far as we are aware, the approach adopted by Phillips J to determining the meaning of “acting as a solicitor” has never been adopted by our courts. Having regard to (a) the need to give section 20(1) a restrictive interpretation and (b) the approach to the meaning of “acting as a solicitor” that has been adopted in the cases (as encapsulated in *Piper Double Glazing*), we would hold that the *Piper Double Glazing* test should be applied in the present case.
50. We have already referred to section 22. An “instrument” has been held to include pleadings and formal documents lodged with the court. Thus in *Powell v Ely* (unreported, 19 May 1980, Divisional Court), the court held that a divorce petition and statement of arrangements were “instruments” within the meaning of section 22(1). Waller LJ quoted with approval the following passage from para 19.14 of the Benson Report:

“In this context, “instrument” means any formal document. It would therefore be an offence for an unqualified person for or in expectation of a fee or reward, to settle a writ, statement of claim or defence or any other document of a similar character on behalf of another person.”

51. It is also convenient at this point to say that certain acts are required by the CPR to be done either by the party or his “legal representative”. This term is defined by CPR 2.3(1) to mean:

“A barrister or a solicitor, solicitor’s employee or other authorised litigator (as defined in the Courts and Legal Services Act 1990) who has been instructed to act for a party in relation to a claim.”

52. There are many references to legal representatives in the CPR and the Practice Directions, and to the obligations imposed on legal representatives if they have been appointed. By s 51(6) and (7) of the Supreme Court Act 1981 the court has power to impose costs sanctions on legal or other representatives (a phrase defined to mean any person exercising a right of audience or a right to conduct litigation on behalf of a party (s 51(13)). If a court considers that wasted costs should be paid by a representative who does not possess these rights, it must resort to its general jurisdiction to order costs to be paid by a non-party (s51(3): *Aiden Co Ltd v Interbulk Ltd* [1986] AC 965). Among the things that must be done by the party or a legal representative are signing a statement of truth (CPR 22.1(6)) and signing an acknowledgement of service (CPR 10.5).

The right to conduct litigation: the 1990 Act

53. Depending on the context, the word ‘proceedings’ may have a very wide ambit (see *Callery v Gray* (No1) [2001] EWCA Civ 1117 at [54]; [2001] 1 WLR 2112; and, for an extreme example, see *Crosbie v Munroe* [2003] EWCA Civ 350 at [34]). In the present context the word undoubtedly includes ancillary applications and appeals in the course of litigation. Only a litigant in person or an authorised litigator may issue proceedings. But what is the scope of the right “to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)”? The background material to the 1990 Act that we have been shown sheds no light on the meaning of these words. Mr Drabble and Mr Carr rely on the statutory objective and the general principle stated in section 17 in support of the submission that the words should not be given a narrow meaning. They submit that there are powerful policy reasons why litigation which is not being conducted by litigants in person should be conducted by authorised litigators. The scheme introduced by the 1990 Act was intended to make provision for new and better ways of conducting litigation and a wider choice of persons providing them “while maintaining the proper and efficient administration of justice”. It is an essential part of the scheme that the enlargement of the class of persons available to conduct litigation is properly regulated.
54. We recognise the importance of these considerations. But the language of section 119 must be interpreted in accordance with the usual rules for statutory interpretation. These include that the starting point is that words should be given

their plain and natural meaning. It is also important to bear in mind the penal nature of section 70. If a person purports to exercise the right to conduct litigation when he is not entitled to do so, he commits an offence. This is not directed at the person who pretends that he is entitled to exercise the right to conduct litigation: that is the subject of the separate offence created by section 70(3). Section 70(1) is directed at the person who, whatever his state of mind, actually issues proceedings or performs any ancillary functions in relation to proceedings when he is not in fact entitled to do so.

55. If Parliament had intended to introduce a broad definition of the right to conduct litigation, it could have defined it as the right “to issue *and conduct* proceedings before the court”. That would have been all-embracing and the second limb of the definition that was adopted would have been unnecessary. Instead, Parliament decided to limit the first limb of the definition to the initial formal step in proceedings, namely their issue. It then added a second limb, which, if its meaning is ambiguous or otherwise unclear, should be construed narrowly.
56. The word “ancillary” indicates that it is not all functions in relation to proceedings that are comprised in the “right to conduct litigation”. The usual meaning of “ancillary” is “subordinate”. A clue to what was intended lies in the words in brackets “(such as entering appearances to actions)”. These words show that it must have been intended that the ancillary functions would be formal steps required in the conduct of litigation. These would include drawing or preparing instruments within the meaning of section 22 of the 1974 Act and other formal steps. It is not necessary for the purposes of this case to decide the precise parameters of the definition of “the right to conduct litigation”. It is unfortunate that this important definition is so unclear. But because there are potential penal implications, its very obscurity means that the words should be construed narrowly. Suffice it to say that we do not see how the giving of legal advice in connection with court proceedings can come within the definition. In our view, even if, as the Law Society submits, correspondence with the opposing party is in a general sense “an integral part of the conduct of litigation”, that does not make it an “ancillary function” for the purposes of section 28.

Lawful activities: a summary

57. The interrelationship between the 1974 and 1990 Acts seems to us to be as follows. An authorised litigator is not an unqualified person within the meaning of the 1974 Act: section 28(6) of the 1990 Act. A person who is not an authorised litigator may not exercise the right to conduct litigation within the meaning of the 1990 Act and may not act as a solicitor within the meaning of section 20(1) of the 1974 Act and may not draw or prepare an instrument contrary to section 22(1) of the 1974 Act. If he purports to do any of these things, he will not be entitled to recover his costs for doing so. A person who does not have a current practising certificate and who is not an authorised litigator within the meaning of the 1990 Act acts as a solicitor in breach of section 20(1) of the 1974 Act at least if he (a) issues proceedings; (b) performs any ancillary functions in relation to proceedings or (c) draws or prepares an instrument relating to legal proceedings contrary to section 22(1) of the 1974 Act.

The third issue: are Tenon’s fees recoverable as costs under the general costs provisions or CPR 48.6?

58. Section 51 of the Supreme Court Act 1981 provides:

“Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –

- (a) the civil division of the Court of Appeal;
- (b) the High Court, and
- (c) any county court

shall be in the discretion of the court”.

59. By CPR 43.2(1), costs are defined as including “fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 48.6...”. The CPR do not define “disbursements”.

60. By CPR 44.3(1), the court has discretion as to “(a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid”.

61. CPR 48.6(3) provides that:

“48.6(3) The litigant in person shall be allowed –

(a) costs for the same categories of --

- (i) work; and
- (ii) disbursements,

which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person’s behalf;

(b) the payments reasonably made by him for legal services relating to the conduct of the proceedings; and

(c) the costs of obtaining expert assistance in assessing the costs claim.”

62. The special costs regime for litigants in person long predates the 1990 Act and the CPR. The Litigants in Person (Costs and Expenses) Act 1975 was designed to reverse the effect of *Buckland v Watts* [1970] 1 QB 27, in which it was held (in the words of the headnote) that –

“a litigant in person other than a solicitor was not entitled to claim costs in respect of the time which he had expended in preparing his case, but only his out of pocket expenses”.

Section 1(1) of the 1975 Act provides:

“Where, in any proceedings to which this subsection applies, any costs of a litigant in person are ordered to be paid by any other party to the proceedings or in any other way, there may, subject to rules of court, be allowed on the taxation or other determination of those costs 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.”

“Litigant in person” is not defined.

63. Notwithstanding the new CPR regime, made under the Civil Procedure Act 1997, it seems to us that the 1975 Act continues to provide the legal foundation for CPR 48.6. Accordingly, “litigant in person” is to be read in the same sense as in that Act. The actual term “litigant in person” is not used by section 28(2)(d) of the 1990 Act. Since Mr Agassi’s right to conduct litigation was derived solely from that provision, his right to recover costs from the opposing party must be found in CPR 48.6.
64. Mr Speaight’s primary submission is that the costs recoverable in respect of Tenon’s charges are recoverable as a disbursement under the general rules as to costs, rather than under CPR 48.6. He submits that the discretion given to the court by these provisions is broad enough to permit recovery of the cost of administrative support provided by a third party to a litigant as a disbursement. We shall come to the meaning of “disbursement” later. The broad discretion given by section 51 is expressly made subject to rules of court. The question is, therefore, governed by the CPR. In our judgment, the costs recoverable by a litigant in person are determined in accordance with CPR 48.6. There is no room for applying different principles to a litigant in person by reference to other rules.
65. So how should CPR 48.6 be applied in principle in the present case? It is common ground that the fees of counsel are a disbursement within the meaning of CPR 48.6(3)(a)(ii). What about Tenon’s fees? Mr Speaight, supported by Mr Way, submits that these, too, are disbursements. Mr Drabble and Mr Carr dispute this, although we believe that they might accept that some of the items in Tenon’s bill (eg such as the cost of couriers, telephone and fax and court filing fees) are “expenses” within the meaning of section 1 of the Litigants in Person (Costs and Expenses) Act 1975. But they submit that many of the items are the provision of legal advice and not properly classifiable as disbursements.
66. We shall assume for present purposes that, in advising the appellant on the law, discussing the issues arising on the appeal with counsel and generally performing the role that would have been performed by a competent solicitor if one had been instructed by the appellant, Tenon was not acting in breach of section 20(1) or 22(1)(b) of the 1974 Act or purporting to conduct litigation in breach of section

70(1) of the 1990 Act. On this hypothesis, Tenon was entitled to be paid its fees by the appellant. The question is whether they are recoverable from the Revenue under CPR 48.6(3)(a)(ii).

67. The argument advanced on behalf of the appellant and by Mr Speaight is simple. The CPR contains no definition of “disbursements”. They rely on what Sir Gordon Willmer said about disbursements in *Buckland v Watts* [1970] 1 QB 27, 37G: “...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”. On the face of it, the fees payable by the appellant to Tenon is money which he has had to pay out to his professional advisers.
68. But it is submitted by Mr Drabble and Mr Carr that a litigant in person is not entitled to recover costs in respect of assistance given by non-legally qualified persons. In the pre-CPR days, as Sir Gordon Willmer explained in *Buckland v Watts* [1970] 1 QB 27, 37G- 38B, an order for costs entitled the successful party to recover under two headings. First, disbursements. Secondly, “costs”. Costs covered remuneration for the exercise of professional legal skill for which costs were allowable for the reasons explained by Bowen LJ in *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872, 876. Nobody other than a solicitor had ever been held to be entitled to make any charge in respect of the exercise of professional legal skill. Counsel’s fees were always treated as disbursements. See also per Buxton J in *Jonathan Alexander* at p 526H.
69. CPR 48.6(3)(b) allows the successful litigant in person to receive costs in respect of legal services i.e. those provided by or under the supervision of a legal representative: see *United Building and Plumbing Contractors v Malkit Singh Kajila* [2002] EWCA Civ 628, para 14. The right to payment in respect of disbursements is defined by CPR 48.6(3)(a). It is the right to be allowed costs for the same categories of disbursements which would have been allowed if the disbursements had been made by a legal representative on the litigant in person’s behalf. To take an obvious example: counsel’s fees are a category of disbursement which would have been allowed if counsel had been instructed by a legal representative on behalf of the litigant in person. So too would the fees payable to an expert witness. But what about someone whose fees are in respect of the very services that would have been rendered by the legal representative if one had been appointed?
70. This question was answered by this court in *United Building*. At para 14, Tuckey LJ (with whom Rix LJ agreed) said:

“14. Looking at the wording of the rule, sub-paragraph (a) deals with the litigant in person’s own time and disbursements which he has made which would have been recoverable if made on his behalf by a legal representative. This is not apt to cover fees paid or due to Mr Whiteland to assist with the litigation, since no such disbursement would be made by a legal representative. Sub-paragraph (b) relates to “legal services”, which are not defined by the rules. The notes in the White Book suggest that this sub-paragraph was intended to cover partial legal services; in other words

some legal advice or assistance short of full representation. But I think the sub-paragraph is referring to services which are “legal”; that is to say, services provided by or under the supervision of a lawyer. On the face of it, Mr Whiteland was not providing such services. Therefore the judge had no jurisdiction to award the respondent any part of Mr Whiteland’s fees.”

71. In that case, Mr Whiteland, who was the director of a debt collection company, claimed fees for assisting the claimant, a litigant in person, with the litigation. Mr Speaight submits that this decision is wrong, or alternatively that it is distinguishable because the language of the rules has since been changed. CPR 48.6(3), in its original form as considered in *United Building*, stated: “costs allowed to the litigant in person shall be – (a) such costs as would have been allowed if the work had been done or the disbursements made by a legal representative on the litigant in person’s behalf”. Mr Speaight draws attention to the change from “such costs” to “costs for the same categories”. We cannot accept that this modest change of wording affects the reasoning in *United Building*.
72. In our judgment, that reasoning is binding on this court, and is in any event correct. It is, indeed, in line with pre-CPR decisions of this court (not discussed in argument): see, for example, *Hart v Aga Khan Foundation (UK)* [1984] 1 WLR 994, 1003-4, per Cumming-Bruce LJ; and see also a decision of the House of Lords in a different but analogous context: *R v Legal Aid Board ex p Bruce* [1992] 1 WLR 694. Mrs Bruce, though not a qualified lawyer, was an acknowledged expert in welfare law, whose business consisted in providing specialist advice to solicitors on that subject. It was accepted by the House that she was providing a “valuable service at reasonable cost” (p 701E). Nonetheless, such “bought-in legal advice”, however meritorious, was not a permissible charge on the Legal Aid Board’s Green Form scheme, and in particular her fees could not be treated by the solicitors as “disbursements” for the purposes of section 10(3) of the Legal Aid Act 1988. Although the statutory context was different, the decision gives no support for stretching the restrictive provisions of the costs rules to cover cases, however deserving, which do not fall naturally within them.
73. It is true that the rule refers to costs which would have been allowed as a disbursement *if* the disbursement had been made by a legal representative. But this does not require the court to make a fanciful hypothesis as to what disbursements a legal representative might have made. The rule contemplates allowing as costs only those categories of disbursements which would normally have been made by a legal representative. If the expenditure is for work which a legal representative would normally have done himself, it is not a disbursement within the language of CPR 48.6(3)(a)(ii).
74. A clear distinction has always been recognised between disbursements made and work done by a legal representative. The fact that an element of the legal representative’s work is delegated to a third party does not mean that it may be regarded as a disbursement. The point can be illustrated by reference to the treatment of solicitors who employ the services of other solicitors to act as their agents. The charges of such agents are not allowable as disbursements, and must

always be itemised as part of the principal solicitor's bill of costs. This was made clear, for example, in *In re Pomeroy & Tanner* [1897] 1 Ch 284. A country solicitor had employed a London agent. The country solicitor delivered a bill of costs to his client. It included a lump sum for the agent's fees. It was contended that they were recoverable as a disbursement and there was no need to deliver a detailed statement of the agent's charges. This contention was rejected by Stirling J. He said at p 287:

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

75. It follows in our view that the appellant is not entitled to recover costs as a disbursement in respect of work done by Tenon which would normally have been done by a solicitor who had been instructed to conduct the appeal. This means that the appellant is not entitled to recover for the cost of Tenon providing general assistance to counsel in the conduct of the appeals.
76. But it seems to us that it does not necessarily follow that the appellant is not entitled to recover costs in respect of the ancillary assistance provided by Tenon in these appeals. Mr Mills is an accountant who has expertise in tax matters, especially in the kind of issues that arose in the present case. It may be appropriate to allow the appellant at least part of Tenon's fees as a disbursement. It may be possible to argue that the cost of discussing the issues with counsel, assisting with the preparation of the skeleton argument etc is allowable as a disbursement, because the provision of this kind of assistance in a specialist esoteric area is not the kind of work that would normally be done by the solicitor instructed to conduct the appeals. Another way of making the same point is that it may be possible to characterise these specialist services as those of an expert, and to say for that reason that the fees for these services are in principle recoverable as a disbursement.
77. It seems to us that the dividing line between legal services and the provision of expert advice in this area is a matter of some difficulty. Specialist accountants such as Mr Mills may well have far greater expertise in esoteric areas of tax law and practice than solicitors. The treatment of the accountant's fees in *Factortame (No 8)* (see para 37 above) gives some support for a reasonably flexible approach to specialist assistance of this kind. However, that judgment was not directly concerned with the assessment of costs, and there has been some disagreement in subsequent cases at first instance of the precise scope of that decision (see, for

example, *Sisu Capital Fund Ltd v Tucker* [2005] EWHC 2321 (Ch) at [25] – [27], per Warren J).

78. It would be wrong to seek to develop the point further or to express even a tentative view as to whether, by reason of the specialist nature of some of the services they supplied, any part of Tenon's fees are in fact recoverable as a disbursement, since this was not the subject of argument before us. Indeed, very little was said by counsel about the detail of Tenon's schedule of costs at all. This is obviously not a case in which it would be appropriate to conduct a summary assessment of costs.

Conclusion

79. We annex to this judgment a document which purports to set out in some detail precisely what services were rendered by Tenon to the appellant. As we have said, it was not subjected to detailed scrutiny during the course of argument. There will have to be a detailed assessment of costs conducted in the light of such guidance as we have been able to give in this judgment. But having regard to the discussion earlier in this judgment, we have not been given any reason to believe that any of the items of work involved any breach by Tenon of sections 20(1), 22(1) or 25 of the 1974 Act or section 70(1) of the 1990 Act. It is also our view that none of the items are legal services which fall within CPR 48.6(3)(b). But it may be that some of the items could properly be allowed as a disbursement under CPR 48.6(3)(a)(ii). We direct that the assessment be referred to the Senior Costs Judge.

Postscript

80. In principle, it is obviously desirable that members of organisations such as the Chartered Institute of Taxation who are responsible and skilled persons should be encouraged to use the Licensed Access Scheme. As we have said (see para 16 above), the Lord Chancellor has approved the arrangements by which they may instruct barristers direct in a limited range of cases as a new and a better way of providing advocacy services. The advantages of these arrangements are clear. These persons have specialist expertise in the field of tax law, often far exceeding that of solicitors. We were told by our assessor that the fees charged by a firm of solicitors for the work done in respect of these two appeals might well have been three times as high as Tenon's charges. There is nothing in our decision that will prevent Mr Agassi employing Tenon in future in the way he has done, nor prevent other members of the Chartered Institute of Taxation from taking advantage of the Licensed Access Scheme. It simply limits the extent to which it can be done at the expense of the opposing party. In effect this brings the position in the High Court closer to the position before the Special Commissioners, where the winning party will normally bear his own costs in any event.
81. At first sight, it might seem regrettable that the appellant should not be entitled to recover all of Tenon's fees, provided that they are reasonable and proportionate. But so to hold would undermine the delicate balance struck by CPR 48.6(3) and conflict with the established understanding of what is allowable as a disbursement. Furthermore, as has been pointed out by Mr Drabble and Mr Carr, if the appellant is entitled to recover Tenon's reasonable and proportionate fees under CPR 48.6,

so too would a litigant in person be able to recover the reasonable and proportionate fees of any person who provides general assistance in litigation. In view of the restricted ambit of section 20(1) of the 1974 Act and of the definition of the “right to conduct litigation” in the 1990 Act, there would be ample scope for any unqualified and unregulated person to provide general assistance in litigation, secure in the knowledge that the litigant in person, if successful, would recover the cost of that assistance as a disbursement. It may be said that there is nothing wrong with that, since the court can exercise control by limiting recovery to what is reasonable and proportionate. But, important though this mechanism of control undoubtedly is, it would at best be an imperfect tool for controlling the activities of unskilled and unregulated persons, who are immune from the specific sanctions inherent in the wasted costs jurisdiction of the court. In any event, it should not be overlooked that most cases settle out of court.

82. The obvious solution to the problems raised by this case is for an organisation such as the Chartered Institute of Taxation to become an “authorised body” within the meaning of section 28(5) of the 1990 Act, and for those members who wish to conduct litigation to become authorised litigators and thereby “legal representatives” within the meaning of CPR 2.3(1). Section 28 would permit the Institute to limit its application to a right to conduct a particular category of litigation, such as litigation falling within the scope of the permission granted by the Bar Council under the Licensed Access scheme. The reasonable and proportionate fees of any such litigator would be recoverable by a litigant in person as legal services under CPR 48.6(3)(b).
83. The adoption of this course could lead to the members of the Institute being qualified to conduct litigation in this small and carefully defined field pursuant to the statutory arrangements set out in ss 28 and 29 of the Act. Until this happens, there will be a limited range of functions (such as issuing a notice of appeal or issuing some preliminary applications) which its members may not perform, because this is work that can only be performed by a solicitor or the litigant in person himself.
84. The importance of restricting the right to conduct litigation to those granted such rights by an authorised body is that those who exercise such rights owe an overriding duty to the court to act with independence in the interests of justice (s 28(2A)), together with a duty to comply with rules of conduct of that body which have been approved for the purposes of s 28. This is why the CPR make so many special provisions that embrace the rights and duties of the litigant’s legal representative, if appointed, and do not give similar rights and duties to a representative of the litigant who is not a legal representative. So long as members of the Institute continue to act as Tenon acted in this case without the rights and duties that flow from the possession of a statutory right to conduct litigation (in however limited a field), then this will disadvantage their clients as compared with those who instruct an authorised litigator. But this is very much a matter in relation to which the Institute (and other similar bodies) must weigh up the advantages and disadvantages of seeking the status of authorised litigator for its members.