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UPDATE

BVI Costs: An update on the recoverability of overseas lawyers' fees

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Two recent court decisions have provided further clarity on the recovery of costs in the BVI: *Gany Holdings*[1], a decision of the Eastern Caribbean Court of Appeal and *Crown Treasure*[2], a decision of the BVI Commercial Court.

Given the cross-jurisdictional nature of disputes litigated in the BVI, it is common for parties to instruct overseas legal counsel as well as a firm of BVI legal practitioners. The overseas lawyers are commonly instructed in the client's home jurisdiction (perhaps due to translation needs or conflicting time-zones), where the dispute originated or where assets are situated. Multiple law firms and/or jurisdictions may be involved in a single dispute.

Gany Holdings and *Crown Treasure* deal with recovery of costs for work carried out by overseas lawyers in relation to BVI court proceedings and add to the growing number of decisions which deal with the proper interpretation of the relevant provisions of the Legal Profession Act 2015 (as amended) (the **LPA**).

The LPA

The LPA was enacted in November 2015 and introduced a new regime under which an individual commits an offence if they undertake or perform the functions of a legal practitioner in the BVI without first having been admitted to practice in the BVI, and added to the register of BVI legal practitioners (the **Roll**), and such a party is not entitled to recover their fees.

Section 18 of the LPA makes it an offence for a person whose name is not on the Roll to *inter alia* practice BVI law or act '*in any respect*' as a BVI legal practitioner.

Section 18(3) further states that '[n]*o fee in respect of anything done by a person whose name is not registered on the Roll or to whom subsection (2) relates*[3]*, acting as a legal practitioner, is recoverable in any action, suit or matter by any person.*'

[1] *Gany Holdings (PTC) SA and Asif Rangoonwala v Zorin Khan & Others*, BVIHCMAP 2018/0045 and BVIHCMAP 2018/0048, 30 March 2020.

[2] *Yao Juan and Kwok Kin Kwok v Crown Treasure Group Ltd*, BVIHC (COM) 2013/0162, 23 April 2020.

[3] Namely, a person who is not entitled to act as a BVI legal practitioner.

Developments since the introduction of the LPA

The Eastern Caribbean Court of Appeal (COA) handed down two decisions on recovery of overseas lawyers' fees in quick succession in 2016 and 2017[4].

Garkusha[5]

In June 2016, the COA handed down a decision in which it held that the introduction of the LPA abolished the practice of recovering overseas lawyers' fees as disbursements in BVI legal proceedings, rendering those fees irrecoverable (unless the fees relate to the provision of expert evidence on foreign law to the BVI court). The COA based its decision on sections 18(3) and 2(2) of the LPA.

Section 2(2) of the LPA, as originally enacted (see below), stated:

> '*Save as the context otherwise requires, any reference in this Act to practising law, shall be construed to include a reference to practising Virgin Islands law outside the Virgin Islands.*'

Whilst section 18(3) of the LPA, which deals with recoverability of fees, was in force at the time (and still is), section 2(2) was never brought into force and was repealed in January 2016. The status of section 2(2) was not brought to the attention of the COA and this led certain commentators to question the correctness of *Garkusha* and whether, notwithstanding the terms of section 18(3), overseas lawyers' fees might still be recoverable. Others (including Mourant) were of the view that section 18(3) alone was sufficient to conclude that the reasoning of the *Garkusha* decision was correct.

Shrimpton[6]

The COA revisited the question of overseas lawyers' fees in *Shrimpton*. This appeal was heard 10 months after *Garkusha* and the COA handed down its decision in February 2017.

The COA considered whether the costs of an English firm, which was assisting the claiming party's BVI law firm with the conduct of BVI proceedings, could be recovered as a disbursement of the BVI firm, or whether that common law right of recovery had been abrogated by the LPA, as decided in *Garkusha*.[7]

Having noted the status of section 2(2) of the LPA, the COA considered the terms of section 18(3) and held that, given its clear terms, overseas lawyers' fees are not generally recoverable in BVI proceedings (again, the exception being the provision of expert evidence on foreign law).

The COA's approach to the interpretation of '*acting as a legal practitioner*' in the context of section 18(3) of the LPA is noteworthy. The COA panel which heard *Shrimpton* appeared to indicate that a slightly narrower interpretation of '*acting as a legal practitioner*' might have been adopted had they not been bound by the earlier decision in *Garkusha* (in which a differently constituted panel took a wide approach). Such an interpretation would, we think, have opened the door to arguments regarding the type of work carried out by overseas lawyers in relation to BVI proceedings, the division of labour between overseas lawyers and BVI legal practitioners, and whether it is reasonable or necessary for particular tasks to be completed by the overseas team and vice versa.

The decision in *Shrimpton* provided welcome clarification of the legal position. However, as with *Garkusha*, it appeared to overlook the role of overseas lawyers in BVI proceedings, proceedings which commonly feature complex, cross-jurisdictional disputes and thus require both legal input and support from overseas lawyers across the globe.

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4 The decisions are discussed in detail in our updates of September 2016 and March 2017 which can be accessed here and here.

5 *Dmitry Garkusha v Ashot Yegiazaryan & Others*, BVICMAP 2015/0010, 6 June 2016.

6 *John Shrimpton et al v Dominic Scriven et al*, BVIHCMAP 2016/0031, 3 February 2017.

7 For a more detailed discussion of the COA's consideration of whether *Garkusha* had been decided per *incuriam* due to the status of section 2(2) and whether the Judge at first instance who heard *Shrimpton* had properly, or mistakenly, regarded himself as being bound by that decision please see our update on *Shrimpton* (linked at footnote 4 above).

Recent developments

More recently, *Gany Holdings* and *Crown Treasure* were decided during the first half of 2020.

Gany Holdings

Gany Holdings was handed down by the COA on 30 March 2020. There were two aspects to the appeal:

(1) Can a litigant recover fees incurred by overseas lawyers prior to the enactment of the LPA in November 2015 but assessed after that date?

(2) Were the costs incurred in respect of an overseas costs draftsman recoverable under the LPA?

On the former question, the Court of Appeal, confirming the decision of the BVI Commercial Court at first instance, held that section 18(3) does not have retrospective effect.

Neither the Roll nor the concept of a 'BVI legal practitioner' existed prior to November 2015. As such, the prohibition on recovery of overseas lawyers' fees contained in section 18(3) could not, on any logical interpretation, apply to work carried out prior to the enactment of the LPA. Plainly, section 18(3) could not have retrospective effect. As such, the claiming party was allowed to recover the fees incurred by his overseas lawyers prior to the enactment of the LPA in November 2015.

When considering the latter question the COA confirmed that:

> '*by its very nature, section 18(3) requires an examination of the circumstances in which costs claimed were incurred… the requirement that costs were incurred while a person was 'acting as a legal practitioner' can only be sensibly assessed by examining the work for which the costs are claimed, as against conduct that amounts to 'acting as a legal practitioner*'.

Guiding principles can be distilled from the COA judgement:

(ii) the BVI court is permitted, by section 18(3), to consider the nature of the work carried out (putting to bed arguments, such as those made in *Gany*, that such an examination was not permitted by section 18);

(iii) this requires the Judge to examine the specific activities undertaken ('*the work done by the persons whose costs are claimed, against the roles and functions of a legal practitioner*') in order to determine whether the overseas lawyer was (or was not) '*acting as a legal practitioner*'; and

(iv) assessing whether costs are irrecoverable under section 18(3) involves '*a close examination of the facts of each case*'.

In *Gany*, the costs incurred by the overseas costs draftsman employed by the claiming party were irrecoverable. The COA, having examined the work carried out, concluded that the work claimed for was the work of a legal practitioner and fell foul of section 18(3):

> '*the costs draftsman's work was more than clerical and involved some consideration of the law and practice of costs; this is inherently the function of a legal practitioner*'.

The COA was careful to emphasise that their decision was not to be taken as confirmation that the fees of costs draftsmen will always be irrecoverable, explaining that in each case a determination should be made, on the facts of the case, regarding the recoverability of the costs sought.

Crown Treasure

Crown Treasure was heard by the BVI Commercial Court and the decision was handed down on 23 April 2020. One of the issues decided by the court[8] related to the dispute centred on proper interpretation of section 18(3),

[8] The other issue, interpretation of a Court of Appeal order on costs, is not discussed in this Update.

in particular whether fee earners working in the Hong Kong office of the claiming party's BVI counsel (in-house overseas lawyers) were '*acting as a legal practitioner*' and whether the costs they incurred were recoverable.

The fee earners in question were not admitted to the BVI Roll during the relevant period. As a consequence they were not BVI legal practitioners for the purposes of section 18 when the costs were incurred. They were however working under the supervision their BVI colleagues who were BVI legal practitioners.

The paying party argued that as the in-house overseas lawyers carried out legal work but were not legal practitioners for the purposes of the LPA, their costs were irrecoverable under section 18(3), relying on *Garkusha* and *Shrimpton*. The court distinguished those earlier decisions of the COA on the basis that they concerned:

> '*external lawyers, in other words, practising on their own account outside the BVI law firm, whose fees the BVI law firm seeks to recover as a disbursement. None concern lawyers internal to the BVI law firm, whose work the BVI firm seeks to recover as fees of the BVI firm itself*'

opining that Garkusha and Shrimpton '*are authorities for the irrecoverability as a **disbursement** of a non-enrolled lawyer's fees*.'

The court also considered *Gany*, noting that *Gany* is not inconsistent with the earlier COA decisions but, given its emphasis on the nature of the work carried out, required the court to consider:

(i) whether the work of an in-house fee earner ought to be examined in the same way as the work of the costs draftsman in *Gany*; and

(ii) had the costs draftsman been an in-house costs draftsman (a fee earner directly employed by the firm of BVI legal practitioners), would the outcome have differed?

The court had regard to the equivalent English law provisions[9] (the terms of which are the same as section 18[10]), citing several authorities decided by the English courts which illustrate a narrow interpretation of '*acting as a solicitor*' and make plain that the costs of unqualified clerks, paralegals and trainees are (and always have been) recoverable under English law.

The court held that the fees of in-house overseas lawyers are recoverable. Such fees are not being paid to the overseas lawyer directly but to their firm. The court equated the work of an in-house overseas lawyer to an agent or trainee solicitor to whom certain tasks are delegated by a qualified lawyer. The in-house overseas lawyer is not holding themselves out as a BVI legal practitioner nor are they 'acting as a [BVI] legal practitioner'. Rather, they are acting as non-qualified fee earners, assisting with the conduct of the litigation as directed by and under the supervision of a qualified BVI legal practitioner. In this regard, Justice Jack referred to *Gudavadze*[11], a decision handed down in July 2016 in which Justice Leon held that:

> '*Garkusha makes clear that… a foreign legal practitioner – as well as a BVI paralegal, law clerk or legal assistant, a lay person or anyone else, wherever located – can assist by doing work under the ultimate supervision of a BVI legal practitioner who is ultimately responsible for the final work product*'.

Conclusion

As the decisions discussed above show, the courts appear to have sought to strike an appropriate balance, navigating their way through the issues that have arisen since the LPA was introduced in November 2015 and parties litigating in the BVI have the comfort of a properly regulated profession and costs regime.

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[9] The Solicitors Act 1974 and its predecessors.

[10] Section 25 of the 1974 Act and s18(3) of the LPA are in substantially the same terms.

[11] *Inna Gudavadze & Otrs v Carlina Overseas Corporation & Otrs* BVIHC (COM) 2012/0011, 21 July 2016.

In *Gany*, the court commented on the mischief that the LPA, and section 18 in particular, aimed to prevent:

> '*some overseas firms treated the BVI firm which was on the record as a mere front or letterbox. One of the effects was that the economic benefit of having a Commercial Court in this Territory was being harvested by overseas firms. The gain to the Virgin Islands of having a flourishing Commercial Court was being lost to the local economy.*'

It is only right and proper that BVI cases should be conducted by BVI qualified legal practitioners and the BVI court and the COA have been careful to protect the standing of the BVI court and of the BVI legal profession by interpreting the provisions of the LPA accordingly. Those provisions are not unusual. Jurisdictions around the world seek to protect court users and the users of legal services more generally by seeking to regulate who may practice law (and how they recover their fees from clients and opposing parties).

Equally, it is important that the BVI remains competitive, including in respect of the costs involved in litigating in the BVI, and therefore that the practices adopted by BVI legal practitioners are in line with those in other jurisdictions where, for example, the use of non-qualified staff to reduce costs is commonplace, as is the use of overseas staff to provide seamless 24/7 service (not to mention the fact that delegation of work to junior staff is not merely a cost-saving measure - it also plays a vital role in the training and development of junior fee earners).

The decision in *Gany* raises the spectre of costs disputes over recovery of costs incurred on outsourced legal and quasi-legal services such as costs draftsmen – for example, it is conceivable that the costs of disclosure consultants might be challenged in certain circumstances. Given that whether such disputed costs fall foul of section 18(3) will be decided on the facts before the court it is important to seek BVI law advice before incurring the expense in question.

The position in our other jurisdictions

- In the Cayman Islands, the point of departure is that the fees of a foreign lawyer are not generally recoverable, unless the foreign lawyer has been temporarily admitted as an attorney in the Cayman Islands under the limited admission regime and the work was done after such admission. It is common practice for UK barristers to act as leading counsel on cases in the Cayman courts following limited admission. On taxation, the taxing officer will investigate the work done by foreign lawyers and will disallow any duplication of work or any increase in the cost of proceedings as a result of the instruction of foreign lawyers. The overriding principle is that a paying party should not be required to pay more because the successful party has engaged a foreign lawyer as opposed to only local attorneys.
- In Guernsey, only locally qualified advocates have rights of audience in the Royal Court and Courts of Appeal however, it is not uncommon for foreign lawyers to be consulted on larger and more complex cases. The court has discretion to permit the recovery of foreign lawyers' costs and disbursements provided they have been reasonably incurred and are reasonable in amount. As a matter of principle, however, they are not ordinarily recoverable as in most cases the use of foreign lawyers will be unnecessary. They will only be allowed in appropriate and exceptional cases. The Royal Court has given non-exhaustive example situations, including where there is no local expertise for a highly specialist field of law, or where foreign lawyers exist with some pre-existing pool of knowledge that common sense would dictate should be taken advantage of (which would be rare), or where a case involves a large amount of documents that is reasonably beyond the resources of a local firm to manage. Public interest dictates that such cases will be relatively few and the reasonable expectation is that litigation should be conducted in Guernsey without costs being increased by resort to external lawyers, unless their involvement is quite plainly justified.
- In Jersey, although only Jersey qualified advocates have rights of audience in the Royal Court, it is not uncommon for Jersey lawyers to be assisted in their conduct of larger cases by lawyers from other jurisdictions, in particular England and Wales (solicitors and/or barristers). The recoverability on taxation of the costs of overseas lawyers is the subject of a specific provision in the Jersey procedural rules - the Royal Court Rules. RCR 12/7 provides that the cost of advice obtained from or work done by lawyers outside the jurisdiction is allowable on taxation. If the advice or work done by the overseas lawyers could, in the

context of the relevant proceedings, reasonably have been obtained from or done by a Jersey lawyer, the costs allowable on taxation will be no greater than those allowable on taxation in respect of a Jersey lawyer's fees; but where that advice or work done could not, in the context of the relevant proceedings, reasonably have been obtained from or done by a Jersey lawyer (eg, where the advice is of a particularly specialist nature), the allowable costs will be determined on the basis of what is reasonable in all the circumstances of the case.

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