Proceed with caution: BVI recoverable costs still not crystal clear

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Given that the BVI is an international business and financial centre, disputes usually have a cross-jurisdictional element to them. As a result, parties often instruct overseas legal counsel in addition to BVI practitioners. In such cases multiple firms and jurisdictions may be involved, including different jurisdictional offices within the same firm. Sometimes separate offices step in to assist as a result of workloads, client requirements and time zone considerations.

This does beg the question: what are the rules governing the recoverability of costs? This question has become more urgent following the introduction of the Legal Profession Act, 2015 (the '**Act**').

The Act

The Act came into force in November 2015 and introduced a regime under which it is likely that an offence is committed if an individual undertakes or performs the functions of a legal practitioner in the BVI without first having been admitted to do so and having been added to the register of BVI Practitioners (the '**Roll**'). In such a situation the relevant party is unlikely to be entitled to recover their fees from an opposing party upon any award of costs by a BVI Court.

Following the introduction of the Act, the BVI Commercial Court and the Eastern Caribbean Court of Appeal have been grappling with various issues as to costs, including those costs that are recoverable under the Act and, in a more general sense, the impact of the Act on practice and procedure in commercial litigation in the BVI itself.

Cases considering costs

The first decision to be handed down which focussed on those issues was *Dmitry Garkusha v Ashot Yegiazaryan & Others* BVICMAP 2015/0010, 6 June 2016. Here, the Court of Appeal held that the introduction of the Act abolished the previously accepted practice of recovering overseas lawyers' fees as disbursements within BVI proceedings.

The Court of Appeal based its decision on sections 18(3) and 2(2) of the Act. However, in January 2016, section 2(2) was repealed (having never actually been brought into force).

This was not brought to the attention of the Court of Appeal which led to significant industry commentary surrounding the correctness of the decision in *Garkusha*, leading others to question whether or not overseas lawyers' fees may still be recoverable, notwithstanding section 18(3) of the Act.

Some 10 months later, *John Shrimpton et al v Dominic Scriven et al* BVIHCMAP 2016/0031 came before the Court of Appeal, bringing with it the question of whether or not the costs of an English law firm, who were assisting the BVI law firm, could be recovered as a disbursement of the BVI firm, or whether that common law right had now fallen away as a result of *Garkusha*.

The status of section 2(2) had now been brought to the attention of the Court of Appeal and it therefore considered the terms of section 18(3) of the Act. It held that overseas lawyers' fees are generally not recoverable in BVI proceedings, with the exception of experts giving evidence on matters of foreign law.

Two subsequent cases have recently been delivered by the BVI Courts dealing with these issues and, in particular, the question of costs in relation to section 18(3) of the Act and the interpretation of "acting as a legal practitioner". These cases are discussed further below:

Recent interpretation of section 18(3) of the Act

Yao Juan and Kwok Kin Kwok v Crown Treasure Group Ltd, (BVIHC (COM) 2013/0162)

One of the issues before the BVI Commercial Court centred around the proper interpretation of section 18(3) of the Act and in particular whether fee earners working in the Hong Kong office of the claimant party's BVI Counsel were "*acting as a legal practitioner*" and thus whether costs in relation thereto were recoverable.

The fee earners in question were not admitted to the 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 of their BVI colleagues who were registered BVI legal practitioners.

The paying party based its arguments on the decisions of *Garkusha* and *Shrimpton* but, in delivering its decision, the Court distinguished those decisions on the basis that those previous decisions concerned "*external lawyers…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.*"

The Court concluded that the fees of the overseas lawyers within the same firm were recoverable. This, the judge said, was because the lawyers in the other jurisdiction were not holding themselves out to be BVI practitioners, nor were they acting as such. They were acting as non-qualified fee earners (by virtue of not being admitted in the BVI), assisting with the conduct of litigation as directed by, and under the supervision of, a BVI qualified practitioner. He regarded this as perfectly proper.

Yao Juan v Kwok Kin Kwok and Crown Treasure Group Limited (BVIHC (MAP) 2018/0042)

On Appeal, however, the Court of Appeal held that the judge in the first instance decision had erred in his interpretation and application of the Act to the facts before him and, in doing so, had wrongly concluded that the costs were recoverable. The Court of Appeal held that the foreign lawyer costs were irrecoverable as a matter of law under the Act.

Justice of Appeal Ellis ('**Ellis JA**') considered the argument of the foreign lawyer effectively acting as an "in-house practitioner" and

decided that it did not make a difference for costs purposes, nor did it matter whether he or she was employed or supervised while doing so.

Ellis JA further expressed her views in relation to the restricted ambit of section 18 of the Act by stating:

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

In my view, it is no answer to say that the supervising partner in the law firm would ultimately be responsible and liable for any negligence or misconduct of his or her juniors..."

Ellis JA noted that if law firms in the BVI were able to employ lawyers in another jurisdiction to effectively "act as a legal practitioner" in relation to the conduct of BVI litigation, it would effectively undermine the intent and purpose of the Act, the policy and public interest, which it was clearly designed to protect.

Conclusion

Clients and practitioners alike should proceed with caution. It is still wholly unclear whether the above decisions will mean that section 18 precludes the recoverability of fees incurred by unregistered and unregulated persons providing assistance in the conduct of BVI litigation.

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