

BVI: Court of Appeal confirms foreign lawyer fees are unrecoverable

John Shrimpton et al v. Dominic Scriven et al, BVIHCMAP2016/0031

Summary

The Court of Appeal of the Eastern Caribbean Supreme Court (the 'Court') has upheld a recent ruling that the common law right to claim the fees of foreign lawyers as a disbursement of BVI counsel was abrogated by s. 18(3) of the Legal Profession Act 2015 ('LPA'). As a consequence, the current position is that the fees of foreign lawyers are no longer recoverable in proceedings conducted in the BVI, regardless of whether the foreign lawyer's activities were 'reasonable and necessary' for a foreign lawyer to carry out in relation to the BVI case.

Background

In June 2016, in a costs order in the case of *Garkusha v. Yegiazaryan et al*, the Court held that the LPA had abrogated the common law right to recover the 'reasonable and necessary' fees of foreign lawyers. The Court's reasoning was based in substantial part on s. 2(2) of the LPA, which defined the practice of BVI law to include its practice outside the BVI. In the Court's view, this had the effect of rendering unlawful the practice of BVI law by overseas lawyers that were not included on the Roll of Legal Practitioners in the BVI and, therefore, the common law right to recover foreign lawyers' fees in BVI proceedings was abrogated by necessary implication. In addition, the Court noted that s. 18(3) of the LPA expressly prohibited recovery of fees by any person 'acting as a legal practitioner' that was not on the Roll of Legal Practitioners. In the Court's view, a foreign lawyer who assisted in a client's defence in BVI proceedings was impermissibly 'acting as a legal practitioner' within the meaning of s. 18(3) of the LPA and therefore that person's fees were unrecoverable. The Court did, however, allow the fees of one of the foreign lawyers, insofar as it involved his preparation of an opinion on matters of Russian law.

The Court's judgment in *Garkusha* generated some controversy within the BVI legal community, as s. 2(2) of the LPA had never been brought into legal force, with some suggesting it had been decided per incuriam. Moreover, subsequent to the hearing in *Garkusha*, s. 2(2) was repealed altogether, which called into question whether the Court's ruling in *Garkusha* would retain any relevance going forward.

The instant appeal

In *Shrimpton*, the Appellant's claim for the costs of its Hong Kong solicitors had been dismissed by the trial judge, who considered himself bound by the Court of Appeal's

previous ruling in *Garkusha*, notwithstanding the apparent error in the application of s. 2(2) of the LPA.

In its appeal, the Appellant argued that since s. 2(2) of the LPA had never entered into force, and the Appellant's Hong Kong solicitors were located outside the BVI, they could not be said to be engaged in the unlawful practice of BVI law. Moreover, it could not be said that the common law rule had been abrogated by 'necessary implication' in circumstances where the practice of BVI law by persons based abroad had not been rendered unlawful by the LPA.

The Court's reasoning

The Court acknowledged the error in *Garkusha* as to the application of s. 2(2) of the LPA, as the provision had never been brought into effect and indeed was subsequently repealed. However, the Court did not stop its analysis there, since it was not open to the Court to interfere with its previous decision in *Garkusha* if the judgment could have been supported on other grounds.

Here, the Court of Appeal concluded that s. 18(3) of the LPA provided a sufficient basis to conclude that the common law rule had been abrogated, even without reference to s. 2(2) of the LPA. Section 18(3) of the LPA provides that

"No fee in respect of anything done by a person whose name is not registered on the Roll or to whom subsection 2 relates [i.e. a person acting as legal practitioners without authorisation in the name or through the agency of a legal practitioner], acting as a legal practitioner, is recoverable in any action, suit or matter by any person."

The Court of Appeal concluded that its ruling in *Garkusha*, in which it held that assisting in a client's defence in BVI proceedings was the function of a legal practitioner, and therefore amounted to 'acting as a legal practitioner', was a permissible interpretation of s. 18(3) of the LPA and therefore it could not interfere with the Court's conclusion that the common law right to recover a foreign lawyer's fees had been abrogated. In doing so, the Court of Appeal acknowledged that a more narrow interpretation of s. 18(3) of the LPA (e.g. to exclude activities that a BVI lawyer could not carry out) might have left the common law rule intact.

Outlook

Although the Court of Appeal's ruling supplies welcome clarity on the recoverability of fees of foreign lawyers, its approach is likely to remain controversial.

In particular, the Court has concluded that the prohibition on recoverability of fees in respect of a person whose name is "not registered on the Roll... acting as a

legal practitioner” includes persons previously covered by the common law rule, i.e. persons providing legal services that would be ‘reasonable and necessary’ for a foreign lawyer to perform in relation to a case in the BVI. Since the definition of “*legal practitioner*” under the LPA only refers to persons on the Roll of Legal Practitioners in the BVI, the question arises as to whether it is reasonable or proper to include the performance of functions that are necessary for a foreign lawyer to carry out within the meaning of ‘acting as a legal practitioner’ at s. 18(3) of the LPA. Indeed, in *Garkusha* itself the Court permitted recovery of the fees of one of the applicant’s foreign lawyers who had provided an opinion on Russian law. Moreover, given the Court of Appeal’s conclusion that the term ‘acting as a legal practitioner’ allowed for varying interpretations, it is unclear how such a provision could lead to the abrogation of a common law rule by ‘necessary implication’. Watch this space.

Drew Holiner is a registered legal practitioner in the BVI, and acted for the Respondent in the Garkusha case cited.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.