Recent decision clarifies recovery of foreign lawyers fees in the BVI (1)

Insights - 20/03/2017

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There have been a series of costs decisions in the British Virgin Islands ("**BVI**") that had created a degree of uncertainty about the recovery of foreign lawyers' fees. They preceded and followed the enactment of The Legal Professional Act, 2015 ("**LPA**"), which changed the way practitioners are regulated and parties may recover costs.

Previous Position at Common Law

With some shifting of positions, the common law position on recovery of foreign lawyers' fees in the BVI, **was reflected in the following cases:**

Michael Wilson & Partners Limited v Temujin International Limited **BVIHCV2006/0307**
Grand Pacific Holdings Ltd v Pacific China Holdings Ltd **BVIHCV 2009/389**
Olive Group Capital Limited v Gavin Mark Mayhew **BVIHC (Com) 2015/115**
Inna Gudavadze & others v Carlina Overseas Corporation & others **BVIHC (Com) 2012/0011**

Broadly, the common law position is:

- Fees of foreign lawyers are generally recoverable as a disbursement of local legal practitioners.
- The fees must be justifiable and reasonable.
- The bill of costs must give full details of the charges incurred by those foreign lawyers.
- The fees should be calculated at the appropriate rates in the foreign country, but must be proportionate and necessary, as judged by local standards.

Post-LPA

LPA came into force on 11 November 2015. It included restrictions on the practice of BVI law to a strict practicing certificate regime. However, s. 2(2) providing that *"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to include a reference to practising Virgin Islands law outside the Virgin Islands*" was not brought into force and was repealed on 29 January 2016.

In **Dmitry Garkusha v Ashot Yegiazaryan & Others BVIHCMAP 2015/0015** (handed down in 2016), the Court of Appeal of construed the LPA and found costs of foreign lawyers irrecoverable and the foreign law firm in that case was found to have breached the criminal law. However, the Court made its decision unaware that s. 2(2) had been repealed. Subsequently, in **John Shrimpton & Anor v Dominic Scriven & Ors (unreported)** : Eder J [Ag] found that the Commercial Court was bound by **Garkusha.**

In **John Shrimpton & Anor v Dominic Scriven & Ors BVIHCMAP 2016/0031** , handed down in February 2017, the Court of Appeal held that, although s. 2(2) was not in force, the Court of Appeal would not have reached a different decision in **Garkusha** and was bound to follow it. S. 18(3) of the LPA means that the costs of a foreign lawyer whose name is not on the Roll can no longer be recovered as a disbursement and may not be acting as a legal practitioner. The common law position therefore should now be disregarded.

What it is 'to do the work of a BVI legal practitioner' is key to the position going forward. It was given a broad interpretation by the Court of Appeal in **Shrimpton**, finding that it is "undeniably wide and general and may incorporate any number of activities". However, no definitive answer was given and it will no doubt be within that broad interpretation that further costs decisions of the BVI Courts develop the law in this area.

The decision clarifies the uncertainty that arose following the decision in **Garkusha** as to the position on foreign lawyers' fees and places the jurisdiction on the same footing for practice requirements as various other jurisdictions, such as Hong Kong, Cayman, and Bermuda.

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