Overseas Lawyers and the BVI - Winds of Change?

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Overseas lawyers and the BVI – winds of change?

A recent judgment handed down by the Court of Appeal of the Eastern Caribbean Supreme Court (**ECSC**) has potentially undermined the ability of lawyers to work on matters before the BVI courts and recover their fees for such work. The judgment, and its implications, are considered below.

Introduction

In November 2015 the BVI passed a new Legal Profession Act (**LPA**) regulating the practice of British Virgin Islands (**BVI**) law. Certain amendments to the LPA were passed on 29 January 2016, which, among other things, widened the scope for English barristers (particularly junior barristers) to practise law in the BVI.

While the LPA was amended to address the admission criteria for overseas barristers wishing to work in the BVI, no such amendments have been passed specifically with respect to overseas solicitors who wish to work on BVI maters. Prior to the LPA the ability of overseas solicitors to work on BVI matters and recover their fees was regulated by case law and the Civil Procedure Rules of the BVI. Generally speaking such overseas solicitors could recover at least a proportion of their fees in a cost assessment provided certain common law criteria were met.

Following the passage of the LPA, however, there has been a tension between the common law and the statutory law in this area. A recent Court of Appeal judgment considered this tension. The analysis set out in the Court of Appeal's judgment has potentially far reaching consequences for overseas solicitors. Set out below is a summary of the common law in this area, the relevant provisions of the LPA and an analysis of the Court of Appeal's recent judgment.

Common Law

In Michael Wilson & Partners Limited v Temujin International Limited et al (2007) BVIHCV2006/0307 it was found by Hariprashad-Charles J that overseas lawyers could not recover their fees for acting

in a BVI matter because they were not admitted to practise in the BVI. An exception was made, however, for the recovery of fees which were chargeable as a disbursement incurred by a BVI firm. For example, fees were deemed to be recoverable in cases where an overseas lawyer was engaged to act as an expert in a particular area of foreign law.

The recovery of overseas lawyers' fees was then reconsidered in the case of Grand Pacific Holdings Limited v Pacific China Holdings Limited (2010) BVIHCV2009/0399. In that case Bannister J found that the fees of overseas lawyers are to be treated as a disbursement and that such fees, while having to be justified as a reasonable expense, could be "appropriate and proper". The Grand Pacific case was regarded in some quarters as a movement away from the strictures of Temujin and towards a more liberal approach to the recovery of overseas legal fees.

LPA

The LPA came into force in November 2015 and contained provisions relating to, among other things, the admission of legal practitioners to practise BVI law.

The LPA provides relevantly as follows:

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"legal practitioner" … means a person whose name is entered on the Roll…;

"practise law" means to practise as a legal practitioner or to undertake or perform the functions of a legal practitioner, as recognised by any law whether before or after the commencement of this Act;

"Roll" means the register of legal practitioners kept by the Registrar…"

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"A person who is not resident in the Virgin Islands shall not be issued with a practising certificate … unless the person to whom the certificate relates is employed in its overseas affiliate, by a law firm that holds a trade licence under the Business Professions and Trade Licences Act and operates

in the Virgin Islands."

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"18(1) Subject to this Act, where a person whose name is not registered on the Roll

a) practises law;

b) wilfully pretends to be a legal practitioner; or

c) makes use of any name, title or description implying that he or she is entitled to be registered or to act as a legal practitioner,

he or she commits an offence and is liable on summary conviction to a fine of not less than fifteen thousand dollars or to imprisonment for a term of not less than three years, or both.

18(2) A person who, not being entitled to act as a legal practitioner, acts in any respect as a legal practitioner in any action or matter or in any court in the name or through the agency of a legal practitioner entitled so to act, commits an offence and is liable on summary conviction to a fine of not less than ten thousand dollars or to a term of imprisonment of not less than two years, or both.

18(3) No fee in respect of anything done by a person whose name is not registered on the Roll or to whom subsection (2) relates, acting as a legal practitioner, is recoverable in any action, suit or matter by any person."

Facts

In the recent Court of Appeal case of Garkusha v Yegiazaryan and others the respondent to an appeal sought security for costs from the appellant. The application for security for costs was heard on 13 January 2016. The appellant successfully defended the security for costs application and submitted its bill of costs in the usual way.

The appellant's bill of costs revealed, however, that the he had engaged a local BVI firm as well as a London firm of solicitors to work on the security for costs application. The London firm's fees constituted over 70% of the costs incurred by the appellant.

On assessment, the respondent submitted that the costs of the London law firm were irrecoverable because none of the London lawyers whose costs had been claimed were admitted to practise BVI law under the LPA. In particular, it was submitted that

a) section 10(1) of the LPA set out the criteria for admission to practise law and provided that a person shall not be admitted to practise law unless they are a BVI "Belonger" or resident in the Virgin Islands; and

b) section 16 of the LPA also made it clear that persons who are not resident in the BVI may not be issued with a practising certificate unless the person is employed by an overseas affiliate of a relevant BVI law firm.

It was submitted by the respondent that none of the London lawyers engaged by the appellant satisfied the above criteria and their costs could therefore not be recovered. The appellant submitted that the LPA was irrelevant to the recovery of overseas lawyers' fees and that the correct approach to such fees was set out in the common law and the BVI Civil Procedure Rules.

Judgment

The ECSC Court of Appeal handed down its costs judgment on 6 June 2016. Judgment was provided by Webster JA. Pereira CJ and Kentish-Egan JA concurred with the judgment. Importantly, between the date of the hearing before the Court of Appeal and its judgment on 6 June 2016 sections 10 and 16 LPA were suspended as part of the legislative reforms mentioned above.

In their judgment the Court of Appeal reviewed the Civil Procedure Rules and the history of the common law in this area and then turned to the LPA. In summary, the Court of Appeal found that:

Analysis

On the face of it the judgment in Garkusha v Yegiazaryan and others is stark and overturns years of convention, a convention by which overseas lawyers could in certain circumstances work on BVI matters and recover at least a portion of their fees on assessment.

The decision raises the prospect that overseas lawyers will not only be unable to recover their fees in BVI matters but, more seriously, that they will be committing a criminal offence if they purport to assist in such matters. The commission of a criminal offence in the BVI would, of course, be a serious matter for any overseas lawyer. Such an offence would also no doubt raise regulatory issues in the "home" jurisdiction of any overseas lawyer guilty of such an offence.

Notwithstanding the apparent clarity of the Court of Appeal's reasoning, however, some within the BVI have suggested that there is an ambiguity in the judgment. The ambiguity arises out of the Court of Appeal's suggestion that section 2(2) LPA was relevant to its decision. Section 2(2) expressly defines "practising law" as "*practising Virgin Islands law outside the Virgin Islands*". Put simply, the Court of Appeal appears to have taken into consideration section 2(2) LPA when making its above findings. The potential ambiguity arises because of the fact that sub-section of the LPA has never been in force in the BVI and was repealed before the Court of Appeal handed down its judgment. The question which some practitioners have raised is whether the Court of Appeal's reference to section 2(2) LPA affects the validity of its judgment.

Conclusion

The Court of Appeal's judgment in Garkusha v Yegiazaryan and others is significant and potentially has far-reaching consequences for overseas lawyers wishing to work on BVI matters.

It is unclear whether the Court of Appeal's judgment will be appealed but pending such appeal there is a real risk for overseas lawyers who wish to work on BVI matters while not being admitted to practise in the BVI. Such lawyers would be well advised to review the Court of Appeal's judgment in full. A link to the Court of Appeal's judgment is provided below. Ogier acted on behalf of the respondent in Garkusha v Yegiazaryan and others.

Read the ECSC's full judgment.

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