Foreign Lawyers' Fees Remain Recoverable if Incurred Prior to the Legal Profession Act 2015

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The claim in this matter, **Zorin Sachak Khan et al v Gany Holdings et al BVI HCMAP 2014/0018**, concerns the appropriation of trust property and it sought various trust-related remedies. The main claim was heard by the Judicial Committee of the Privy Council on 14 June 2018 and judgment handed down on 30 July 2018. The Claimants, represented by Ogier and Stephenson Harwood London were successful in opposing the appeal.

The costs of first instance in the Commercial Court and of the Court of Appeal were awarded to the Claimants/Appellants ("**Zorin**"). The assessment of those costs came on for hearing. The costs involved fees incurred since the claim was first issued in 2012. Those costs included fees incurred by the London office of an international law firm since that time and up until the hearing of that appeal in 2015.

On 11 November 2015, the Legal Profession Act 2015 ("**LPA 2015**" or the "**Act**") came into force. This was after the appeal had been heard but before a decision was rendered. Parts of the LPA 2015 limited the ability of a party to recover the fees of a person whose name is not registered on the Roll acting as a 'legal practitioner' (s. 18(3) of the LPA 2015). S. 1(2) of the LPA 2015 which made the practice of BVI law by non-Legal Practitioners a criminal offence was never brought into force and was later repealed. The 'Roll' and 'Legal Practitioner' were terms defined by the LPA 2015.

In the decision of **Dmitry Vladimirovich Garkusha v Ashot Yegiazaryan & Ors BVIHCMAP 2015/0010**, the Court of Appeal held that the fees of foreign lawyers were not recoverable. The judgment carried out an analysis of the LPA 2015. This analysis incorrectly referred to s. 1(2) as though it were in force. This was followed by the case of **John Shrimpton et al v Dominic Scriven et al BVI HCMAP 2016/0031** in which the Court of Appeal confirmed that, while s. 1(2) was incorrectly considered to be in effect in **Garkusha**, this did not render the decision in that appeal per incuriam; the Court of Appeal found that for the decision to be per incuriam the Court would have necessarily had to reach a different decision had the correct statutory position been understood. **Shrimpton** concluded that s. 18(3) was sufficient, independent of the lawfulness

regime in the LPA 2015, to bar recovery of fees for foreign lawyers in costs recovery proceedings. Moreover, the Court in **Shrimpton** adopted a wide interpretation of what it is to 'do the work of a BVI legal practitioner'.

In **Zorin v Gany BVI HCMAP 2014/0018**, the First Defendant ("**Gany**") raised a preliminary issue, claiming that the fees of the London lawyers incurred before the LPA 2015 came into force were not recoverable by the Claimants on assessment. In summary, the argument was that costs are a contingent liability (citing Lord Sumption in **Re Nortel GmbH (in administration) [2013] UKSC 52**) and asserted that, by virtue of being a contingent liability, the right to costs does not vest until specific assessed costs are awarded. Accordingly, said Gany, no right to costs incurred by a person whose name is not on the Roll are recoverable at all, irrespective of when they were incurred. Gany argued the correct interpretation of the Garkusha and Shrimpton cases was that they meant 'any' recovery was prevented, and neither was intended to be limited to fees incurred after the LPA 2015 came into force. Gany argued that the rule against retrospective effect, which requires express words in a statute, was not violated because the right had not vested.

The Court was of the view that neither **Shrimpton** nor **Garkusha** made any comment on 'quasi-retroactive' effect as those types of costs were not before them. The judge held that the LPA 2015 was "an innovation, and … that the intention shown is that such regulation should take effect upon the LPA [2015] coming into force". The Court noted argument that the **Shrimpton** interpretation of **Garkusha** indicates that s.18(3) could be read in isolation, and need not be construed in light of the remaining parts of s. 18, which all have a clear prospective effect only. However, the judge was of the view that s. 18(3) should be read as part of this prospective scheme. The judge also accepted Zorin's arguments on the construction of the LPA 2015, finding that nobody acted as a legal practitioner before 11 November 2015 and that nobody's name was on the Roll before that date. Accordingly the Court held that s. 18(3) excludes recovery of fees in respect of any work done on or after 11 November 2015, by a person practicing BVI law whilst not on the Roll created by the LPA. The Court further observed that the issues regarding contingent liability and crystallization were indeed unlikely to have been in the contemplation of the legislature.

Accordingly the Court allowed recovery of the London lawyers' fees prior to the LPA 2015 coming into force. Further, the Court also allowed the fees for work of a costs draftsman based in the UK to be recovered. While not in the written decision, this was on the basis that this is not the work of a BVI legal practitioner.

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