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UPDATE

Recoverability of foreign lawyers' fees

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In *Shrimpton*, the Court of Appeal considered and upheld its earlier decision in *Garkusha* that overseas lawyers' fees are not generally recoverable in the BVI. It did so on the basis that the *Garkusha* decision was not decided *per incuriam*, because that decision could have been reached on the basis of section 18(3) of the LPA (which was and remains in force) alone.

This update looks at the recent BVI Court of Appeal decision in *John Shrimpton & Anor v Dominic Scriven & Ors* BHIHCMAP 2016/0031, which provides some further clarity on the subject of recoverability of foreign lawyers' fees following the decisions in Garkusha, as analysed in our September 2016 update.

Garkusha

As a reminder, the Court of Appeal in *Garkusha* held that the Legal Profession Act 2015 (**LPA**) had abrogated the practice of recovering the fees of overseas lawyers as disbursements in BVI Proceedings and rendered those overseas lawyers' fees irrecoverable.

As pointed out in our previous update, some commentators had correctly observed that, in *Garkusha*, the Court of Appeal's attention had not been drawn to the fact that section 2(2) of the LPA (which states that 'practising law' includes a reference to 'practising Virgin Islands law outside the Virgin Islands') was never brought into force and was subsequently repealed. Therefore the Court of Appeal, which had partly based its decision on section 2(2), had inadvertently overlooked the important factor that this section was not and had never been in force.

Those commentators suggested that this oversight called into question the correctness of the *Garkusha* decision that the LPA renders overseas lawyers' fees irrecoverable.

We had argued that the position was probably more nuanced and that the overlooked status of section 2(2) of the LPA:

'... throws considerable doubt upon the correctness of the Court of Appeal's conclusion that an oversees lawyer who assists BVI lawyers with the advice and conduct in a BVI matter must be regarded as having committed an unlawful act under section 18 of the Act. Indeed, it was precisely those types of extra-territoriality concerns that led to section 2(2) not being brought into force.

It is less clear that the absence of section 2(2) should impact on the recoverability of overseas lawyers' fees (as has been suggested by other commentators). Section 18(3) of the Act deals with recoverability. It was in force when *Garkusha* was decided and it still remains in force.'

Shrimpton

The impact of the overlooked status of section 2(2) of the LPA has now been considered, by the Court of Appeal, in *Shrimpton*.

Shrimpton concerned an appeal against a costs order at first instance whereby the Judge (Eder J) disallowed the fees of overseas lawyers in a summary assessment. In reaching this decision, he considered himself bound by the decision of the Court of Appeal in *Garkusha*.

On appeal, the question for the Court of Appeal in *Shrimpton* was whether foreign lawyers' costs (those of Herbert Smith Freehills – who were assisting a BVI law firm) could be recovered as a disbursement, or whether that common law right had been abrogated by the LPA, as decided in *Garkusha*.

In answering this question, the Court of Appeal also had to consider whether the *Garkusha* judgment had been decided *per incuriam* [literally translated as 'through lack of care'], given that the Court had not realised that section 2(2) of the LPA was not in force.

The Court of Appeal also had to consider, if the *Garkusha* decision had been made *per incuriam*, whether that meant the first instance judge in *Shrimpton* had properly, or mistakenly, regarded himself as being bound by the *Garkusha* decision

Shrimpton - The Court of Appeal's Judgment

The Court of Appeal dismissed the appeal, and upheld the Commercial Court's ruling that the overseas lawyers' fees were irrecoverable in this case.

In reaching this conclusion, the Court of Appeal held as follows:

1. Whether or not a Court of Appeal judgment was decided *per incuriam*, the lower court remained bound by it. The *per incuriam* principle is relevant only to the right of an appellate court to decline to follow one of its previous decisions.[1]
2. In any event, before the Court of Appeal could be satisfied that the *Garkusha* decision was decided *per incuriam* (such that the Court of Appeal was therefore not bound to follow it) it would need to be persuaded both that:
    2.1. the Court of Appeal in *Garkusha* was not aware that section 2(2) of the LPA was not in force; and, crucially
    2.2. that if the Court of Appeal in *Garkusha* has been so aware, it would have been compelled to reach a different decision on the recoverability of overseas lawyers' fees.
3. It was clear that the Court of Appeal in *Garkusha* had regarded section 2(2) of the LPA as essential to its decision. However, this did not mean that if the Court of Appeal had appreciated that section 2(2) was not in force, it would have been compelled to reach a different decision.

    Section 18(3) of the LPA, which contains a prohibition on recovery of fees for anyone acting as a legal practitioner, but whose name is not on the Roll (of BVI legal practitioners) was in force at the time *Garkusha* was decided and remains in force now.[2] It, on its own, provides a basis for supporting the Court of Appeal's decision in *Garkusha* that overseas lawyers' fees are irrecoverable.

    Therefore, although the Court of Appeal in *Garkusha* might have reached a different decision if it had appreciated the correct position regarding section 2(2) of the LPA, it would not have been compelled to do so. Therefore the judgment in *Garkusha* was not decided *per incuriam* and the Court of Appeal in *Shrimpton* was bound to follow it.

Notwithstanding this conclusion, the Court of Appeal in *Shrimpton* commented that the Court of Appeal in *Garkusha* had adopted a wide definition of 'acting as a legal practitioner' under section 18(3) of the LPA. It stated:

'This Court is not entitled to interfere with that finding even if it considers that the phrase "acting as a legal practitioner" could have been narrowly defined so as to admit an approach that might have required an examination of the particular work carried out by the foreign lawyer to determine what parts if any

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[1] *Cassell & Co Ltd v Broome and Another* [1972] AC 1027 at 1131 per Lord Diplock.

[2] Section 18(3) of the LPA provides: 'No fee in respect of anything done by a person whose name is not registered on the Roll or to whom subjection (2) relates, acting as a legal practitioner, is recoverable in any action, suit or matter by any person.'

constituted carrying on activities that could or could not have been carried out by a BVI lawyer, that is, activities that were reasonable and necessary for a foreign lawyer to have carried on.'

In making this observation, the Court of Appeal in *Shrimpton* appears to indicate that, if it had not been bound by the *Garkusha* decision, it may well have arrived at a narrower definition of 'acting as a legal practitioner'. If that narrower definition had been adopted, it is more likely that some overseas lawyers' fees would now be recoverable in BVI proceedings.

Conclusion

The Shrimpton decision confirms the correctness of the *Garkusha* decision and underlines that, as matters stand, overseas lawyers' fees are generally not recoverable in BVI proceedings.

One rather narrow exception to this rule is, as stated in *Garkusha*, where the overseas lawyer is not practising BVI law, but instead provided expert evidence of foreign law to the BVI Court.

Notwithstanding that the Court of Appeal in *Shrimpton* regarded itself as bound by the previous Court of Appeal decision in *Garkusha* on this issue, it also highlighted that the phrase 'acting as a legal practitioner' in section 18(3) of the LPA might have been more narrowly defined than it was in *Garkusha*. It will be interesting to see what the Privy Council makes of this point, if this issue ever makes its way that far.

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