IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0031

BETWEEN:

[1] JOHN SHRIMPTON
[2] PITCAIRN LIMITED

Claimants/Appellants

and

[1] DOMINIC SCRIVEN
[2] ALEXANDER PASIKOWKI
[3] INTERNATIONAL FINANCE CORPORATION
[4] SOCIETE DE PROMOTION ET PARTICIPATION
[5] PUR LA COOPERATION ECONOMIQUE

Defendants

[1] DRAGON CAPITAL GROUP LIMITED

Defendant/Respondent

Before

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. James Collins, QC with him, Ms. Marcia MacFarlane for the Appellant
Mr. Steven Arthurton, QC for the Respondent

2016: November 21;
2017: February 3.

Commercial appeal – Whether fees of foreign lawyers not registered on Roll of attorneys recoverable as disbursement in BVI – Whether common law right of recoverability abrogated by section 2 and 18 of Legal Profession Act – Whether Court of Appeal decision in Garkusha v Ashot Yegiazaryan & Ors BVIHCMAP2015/0010 decided per incuriam – Whether learned judge bound by Garkusha decision

An order for costs was made against the respondent/fifth defendant ("the Company") following the dismissal of an application ("the Application") made by the Company seeking certain declaratory relief. The learned judge ordered that costs with respect to the Application be summarily assessed. The appellants provided written submissions in relation to costs and submitted schedules of costs for their BVI lawyers, Harneys Westwood & Riegels ("Harneys") for fee earners based both in the BVI and Hong Kong, and for a firm of Hong Kong lawyers with no BVI connection, Herbert Smith Freehills ("HSF") which assisted and provided advice to Harneys. On 30th June 2016, the learned judge delivered his decision and found that the costs for the overseas lawyers, HSF, were irrecoverable in light of the recent decision of this Court of Appeal in Garkusha v Ashot Yegiazaryan & Ors.[1] The learned judge held that the Garkusha decision was binding on him. Further, the learned judge was not satisfied that on the material available, the fees of HSF were justified as a reasonable expense incurred in and about the conduct of the case in the BVI. Accordingly, he disallowed the fees of the overseas lawyers and summarily assessed the appellants' costs in the sum of US$150,350. The appellants, dissatisfied with the decision, appealed on a number of grounds.

The appellants' main contention was that the learned trial judge erred by disallowing the HSF costs by applying Garkusha, alleging that Garkusha was not binding on him, it having been plainly decided per incuriam and not directly relevant having been based on section 2(2) of the Legal Profession Act, 2015 ("LPA") which had never been brought into force and was repealed with effect from 29th January 2016. As such, the appellant submitted that the accepted position at common law prior to the passing of the LPA obtains, that is, that foreign lawyers' fees are in principle recoverable in assessment proceedings in the BVI.

In response, the respondent submitted that for Garkusha to be properly regarded as having been rendered per incuram, it would have to be shown that had the Court of Appeal been aware that section 2(2) was not in fact in force it would have been compelled to reach a different conclusion. The respondent suggested that had the Court appreciated that section 2(2) was not in force it would not have been so compelled to arrive at a different conclusion. The issue for this Court was whether the costs of the foreign lawyers could be recovered as a disbursement, or whether that common law right had been abrogated by the LPA or by the Garkusha decision. The Court also had to consider whether Garkusha was decided per incuriam.

Held: dismissing the appeal and awarding costs to the respondent to be assessed if not agreed within 21 days, that:

1. The per incuriam principle is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, or a decision of a court of

[1] BVIHCMAP2015/0010 (decision delivered 6th June 2016, unreported).

coordinate jurisdiction. It does not relate to its right to disregard a decision of a higher appellate court or (more relevant to this case) the right of a judge of the High Court to disregard a decision of the Court of Appeal, as such a right does not exist. The Court of Appeal decision in **Garkusha** was binding on the High Court and the learned judge was therefore correct in holding that he was so bound.

Cassell & Co Ltd v Broome and Another [1972] AC 1027, **per Lord Diplock** applied; **Miliangos v George Frank (Textiles) Ltd** [1976] AC 443 applied.

2. The standard rule is that this Court is bound to follow its own decisions. However, if the judgment of this Court in **Garkusha** was rendered per incuriam, the strict rules of stare decisis cease to apply and this Court would be at liberty to depart from its earlier decision. For the decision in **Garkusha** to be properly regarded as having been rendered per incuriam, it would have to be shown that, had this Court been aware that section 2(2) was not in force, it would have been compelled to reach a different conclusion. Thus, it must be shown that the Court would have been compelled to conclude that the common law right had not been abrogated and that the fees of the foreign firm were recoverable as disbursements of the BVI lawyers to the extent that they were reasonable.

   Young v Bristol Aeroplane Company Limited [1944] 1 KB 718 applied; **Duke v Reliance Systems Ltd** [1988] QB 108 applied.

3. In determining whether **Garkusha** had been decided per incuriam this Court would be bound by the findings in **Garkusha** that were not in any way dependent on section 2(2). This Court determined in **Garkusha** that by assisting the appellant with his defence the foreign lawyers were performing the functions of a legal practitioner and must be regarded, as a matter of BVI law, as practising BVI law. That determination was not dependent on section 2(2) and this Court would be bound by that determination in its consideration of whether **Garkusha** was decided per incuriam.

4. Section 18 (3) of the LPA on its own provided a basis for supporting the Court's decision in **Garkusha** and could have led the Court to the same conclusion that is, that the fees of a foreign lawyer (whose name is not on the Roll) can no longer be recovered as a disbursement of the local lawyer. Such recovery is prohibited under section18 (3). In order to trigger this statutory prohibition against recovery contained in section 18(3) all that is required is that the act in question is done by a person whose name is not registered on the Roll and that person must have been acting as if he were a legal practitioner. Thus, the conclusion in **Garkusha** would not have been affected by the inoperability of section 2(2). As such, **Garkusha** was not decided per incuriam.

Garkusha v Ashot Yegiazaryan & Ors BVIHCMAP2015/0010 (delivered 6th June 2016, unreported) followed.

JUDGMENT

[1] **GONSALVES JA [AG.]**: This is an appeal against paragraphs 4 and 7[2] of the order of Honourable Justice Sir Bernard Eder dated 30th June 2016. The appeal is against a costs order which, though not remarkable in quantum, involves very important questions of law for the British Virgin Islands (" BVI").

Background

[2] The order for costs was made in relation to the respondent/fifth defendant's ("the Company") application ("the Application") for certain declaratory relief that (a) the Company is a substantive defendant in the substantive proceedings, those proceedings being a minority shareholders' claim under section 184(1) of the **Business Companies Act 2004**,[3] and (b) the directors of the Company be permitted to cause the Company to bear the past, present and future costs in defending the proceedings including costs associated with the disclosure of documents. The Application was dismissed by Eder J with costs awarded against the Company. At the insistence of the appellants,[4] Eder J ordered that the costs with respect to the Application be assessed summarily. The appellants provided written submissions in relation to costs and submitted schedules of costs for both their BVI lawyers, Harneys Westwood & Riegels ("Harneys") for fee earners based both in the BVI and Hong Kong, and for a firm of Hong Kong lawyers with no BVI connection, Herbert Smith Freehills ("HSF"). On 30th June 2016, Eder J delivered his decision. In so doing His Lordship held as follows:

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[2] The notice of appeal filed on 23rd August 2016 stated paras. 3 and 6 but reproduced the contents of paras. 4 and 7 of the order dated 30th June 2106.

[3] Act No. 16 of 2004, Laws of the Virgin Islands (as amended by Act No. 26 of 2005, Laws of the Virgin Islands).

[4] See respondent's written submissions at para. 4, and p. 226, lines 10-14 of the transcripts contained in the supplemental record of appeal.

> "[2] On behalf of the 5th Defendant [it is understood that the correct reference should have been to the claimants] it was submitted that instead of carrying out a summary assessment (as I had previously ordered), I could and should reconsider my previous order; and that the best course was that the costs should be dealt with by way of a detailed assessment and an interim payment rather than by way of summary assessment.
> [3] …Although the assessment of costs here involves an important point of principle (see below), the law in that regard is clear-at least so far as this Court is concerned…
> [4] The point of principle referred to above concerns the Claimants' claim for the cost of overseas lawyers-item C above. In my view, these costs are irrecoverable in the [sic] light of the recent decision of the Court of Appeal in Garkusha v Ashot Yegiazaryan & Ors BVIHCMAP2015/0010. Although that decision is controversial and despite forceful submissions on behalf of the 5th Defendant [it is understood that the correct reference should have been to the claimants] that it is incorrect, it is binding on me. In any event, on the material available, I am not satisfied that the fees of HSF HK are justified as a reasonable expense incurred in and about the conduct of the case in the BVI.
> ……
> [7] In the result, I would summarily assess the Claimants' costs in the sum of US$90,000+ US$350+US$60,000 =US$150,350."

[3] According to Mr. Collins, QC in his oral submissions, the essential question in this appeal is whether the BVI common law right of a winning party to recover his fees[5] expended in relation to services provided by an overseas firm (in relation to a BVI matter) as a disbursement has been taken away by the **Legal Profession Act, 2015** [6] ("the LPA"), or by the decision of this Court in the case of **Dimitry Vladimirovich Garkusha v Ashot Yegiazaryan and Ors** ("**Garkusha**").[7] Otherwise stated, can the costs of foreign lawyers who assist a BVI firm in a local matter be recovered as a disbursement, or has that common law right been abrogated by the LPA or by the case of **Garkusha**?

[5] It is understood here to mean the winning party's costs.
[6] No. 13 of 2015, Laws of the Virgin Islands.
[7] BVIHCMAP2015/0010 (delivered 6th June 2016, unreported).

[4] In **Garkusha** this Court decided[8] that the LPA, by necessary implication, intended to do away with the common law practice of litigants being able to recover the fees of overseas lawyers in costs recovery proceedings. The reasoning was that the common law right could not survive sections 2[9] and 18 of the LPA which had the effect of making the practice of BVI law by overseas lawyers without being on the Roll unlawful, and this effect was incompatible with still allowing the recovery of fees of those lawyers in assessment proceedings in the BVI. The two things could not stand together. It is now accepted that section 2(2) was not in force at the time **Garkusha** was decided and the appellants contend that as a consequence **Garkusha** was decided per incuriam.

[5] The appellants submit that Eder J erred in his decision in relation to paragraphs 4 and 7 of his order and they rely in essence on 4 grounds set out at paragraphs 3.1 through 3.5 of the notice of appeal. The grounds of appeal can be summarised as follows:

(1) (a) That Eder J erred in law by disallowing the HSF costs by applying **Garkusha**, (a) which was not authority binding on him, it having been decided per incuriam, and (b) which was not directly relevant having been based on section 2(2) of the LPA which had never been brought into force and was repealed with effect from 29th January 2016;

(b) That Eder J failed to address or give any adequate reasons for rejecting the applicants' submissions as to the non-binding nature and immateriality of **Garkusha**;

(c) That Eder J should have held that the statement in **Garkusha** of the established common law principle in the BVI that the fees of

[8] At para. 73 of the judgment.
[9] The Court there considering both sections 2(1) and 2(2) to be relevant.

foreign lawyers are recoverable as disbursement of the local practitioner was clear authority for the recovery of said fees;

(d) That Eder J should not have determined such an important and difficult point of principle in the context of a summary costs assessment with written submissions alone but should have deferred the issue to a detailed assessment with oral argument;

(2) That Eder J should have held that foreign lawyers providing assistance in this case were not "practising [BVI] law" for the purposes of the statutory prohibition as they were not providing BVI law specific services, the conduct of the litigation being in the hands of the BVI attorneys;

(3) That Eder J ought to have held that the appellants were entitled to recover the fees of HSF as legal practitioners providing advice and assistance to local lawyers in a BVI matter;

(4) That when Eder J stated that in any event on the material available before him he was not satisfied that the fees of the foreign lawyers were justified as a reasonable expense incurred in or about the conduct of the case in the BVI His Lordship erred because:

(a) On established common law principles the fees were clearly prima facie recoverable; and

(b) His Lordship gave no or no adequate reasons for his decision that the fees were not justifiable, and the recoverability of the fees was an important issue.[10]

[10] This is a combination of grounds 4 and 5. See paras. 3.4 and 3.5 of notice of appeal filed on 23rd August 2016.

[6] Ground 1 (a) through (d) are all predicated on two interrelated propositions; firstly that **Garkusha** was decided per incuriam, and secondly that, it having been decided per incuriam, Eder J was not bound to follow it. However, the insurmountable obstacle faced by the appellants here is that the per incuriam principle is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, or a decision of a court of coordinate jurisdiction. It does not relate to its right to disregard a decision of a higher appellate court or (more relevant to this case) the right of a judge of the High Court to disregard a decision of the Court of Appeal.[11] No such right exists. This was explained in **Miliangos v George Frank (Textiles) Ltd**.[12] There Bristow J thought, (rightly according to Lord Wilberforce), that the decision of the majority of the Court of Appeal in one case[13] conflicted with the unanimous decision of the House of Lords in another case.[14] Faced with the irreconcilable decisions of the Court of Appeal and the House of Lords, Bristow J followed the decision in the House of Lords case, holding that Court of Appeal decision in the other case to have been decided per incuriam. Lord Wilberforce, while expressing some sympathy for the position in which Bristow J found himself, held[15] that he was wrong, stating:

> "Greatly as I sympathise with Bristow J. in his predicament, I feel bound to say, with all respect, that he was wrong. In the first place, it involved misapplication of the concept of a decision given per incuriam. In the second place, it involved such departure from the rule of binding precedent based on a gradation of courts as both offends legal and constitutional principle and is potential of grave practical disadvantage.
>
> A previous decision of the same appellate court (emphasis added) is not binding if it is given per incuriam: Young v Bristol Aeroplane Co. Ltd. [1944] K.B. 718."

[11] Cassell & Co Ltd v Broome and Another [1972] AC 1027 at 1131, per Lord Diplock.
[12] [1976] AC 443.
[13] Schorsch Meier G.M.B.H. v Hennin [Plaint No. 7351630] [1975] QB 416.
[14] In re United railways of Havana and Regla Warehouses Ltd [1961] AC 1007.
[15] At p. 477.

[7] In the circumstances the per incuriam principle would have had no application. The **Garkusha** decision was binding on the High Court and Eder J was therefore correct in holding that he was so bound. The appellants would consequently fail in relation to ground 1(a) through (d).

[8] In relation to grounds 2, 3, and 4, these are all premised on what the appellants contend Eder J ought to have done. However, the fundamental difficulty is that having determined that Eder J was correct in considering himself bound by **Garkusha**, Eder J would have had no latitude whatsoever to arrive at the conclusions suggested in these grounds. The results relative to these grounds would have been dictated by **Garkusha**. In relation to grounds 2 and 3 the appellants contend that Eder J should have held that the foreign lawyers providing assistance in this case to a client engaged in litigation in the BVI conducted by BVI attorneys, were not "practising [BVI] law" for the purposes of the statutory prohibition.[16] The appellants argue that the conduct of the BVI litigation is in the hands of the BVI attorneys and that the foreign lawyers are not providing "BVI law specific services". Therefore, the appellants argue that, Eder J ought to have held that they were entitled to recover the fees of HSF as legal practitioners providing advice and assistance to local counsel. The difficulty with this is that it flies directly in the face of what was decided by **Garkusha**. **Garkusha** determined that the acts of the foreign firm Berwin Leighton Paisner ("BLP") in assisting Mr. Garkusha ("G") generally with his defence of an application for security for costs constituted the practise of BVI law. At paragraph 49 of the judgment Webster JA [Ag.] delivering the judgment of the Court, noted that the lawyers at BLP "…assisted Mr. Garkusha generally with his defence of the application for security for costs." At paragraph 69 of the judgment the learned Justice of Appeal stated:

> "[69] The first step is to determine whether Berwin Leighton and Paisner lawyers were practising BVI law (emphasis added)

[16] The statutory prohibition would be in section 18 of the LPA.

when they assisted Mr. Garkusha from their offices in Moscow. A person whose name is not on the Roll commits an offence under sub-paragraph (b) of sub-section (1) if he "practises law". That expression is defined in two ways in section 2, both of which are relevant to this case:

(i) Sub-section 2(1) defines "practising law" as practising as a legal practitioner or undertaking or performing the functions of a legal practitioner. This would cover the work that the overseas lawyers were doing (emphasis added) because they are not legal practitioners within the meaning of the Act and they are performing the functions of a legal practitioner.

(ii) Sub section 2(2) states that "practising law" includes a reference to "practicing Virgin Islands law outside the Virgin Islands"

[9] The reference by Webster JA [Ag.] to "the work that the overseas lawyers were doing" could only have been a reference to His Lordship's earlier description of the work actually carried out by the overseas lawyers, which was "assisting Mr. Garkusha generally with his defence of the application for security for costs."[17] Here and in His Lordship's analysis of section 2(1) above, His Lordship was concerned with the definition of the activity of "practising [BVI] law" and not with the geographical area from which it was so practised. His Lordship's conclusion in this regard was general, that is, that assisting a BVI attorney with a BVI case would constitute practicing BVI law. That determination, admittedly, would have been rather broad in its scope. However, this Court having made that broad determination of what constituted "practising [BVI] law" no scope whatsoever would have been left for Eder J to conduct an examination of the activities undertaken by the foreign lawyers to determine what matters involved an application of BVI law, (or, to use the words of the appellants, were BVI law specific) and what matters did not. For this reason, the appellants fail in relation to grounds 2 and 3.

[17] See para. 49 of the judgment.

[10] In relation to grounds 4 and 5, these are premised on the suggestion that Eder J erred in not applying common law principles. However, the decision in **Garkusha** was that the common law right to collect foreign lawyer's fees as a disbursement of local counsel had been abrogated. Eder J had already determined (and correctly so) that he was bound by **Garkusha** not to allow the costs of HSF. Consequently, his reference to the alternative reason for his disallowance of the HSF costs would have been redundant and of no assistance to the appellants because even if he erred in his application of what would otherwise have been the correct common law principles, by virtue of **Garkusha** the common law right to recover the foreign lawyers' fees as a disbursement of the local lawyer had been abrogated. Consequently, the appellants fail in relation to these grounds.

Was Garkusha decided per incuriam

[11] Counsel for both parties were ad idem that if the appellants failed in relation to their first ground of appeal, that is, if this Court found that Eder J was obliged to follow **Garkusha**, that this Court could and should go on to determine whether **Garkusha** was in fact decided per incuriam.

[12] The standard rule is that this Court is bound to follow its own decisions. However, if the judgment of this Court in **Garkusha** was rendered per incuriam, the strict rules of stare decisis cease to apply and this Court would be at liberty to depart from its earlier decision.[18] However, for the decision in **Garkusha** to be properly regarded as having been rendered per incuriam, it would have to be shown that, had this Court been aware that section 2(2) was not in force, it would have been compelled to reach a different conclusion. As was stated by Sir John Donaldson M.R. in **Duke v Reliance Systems Ltd**.[19]

[18] Young v Bristol Aeroplane Company Limited [1944] 1 KB 718 at 729.
[19] [1988] QB 108 at 113. See also Limb Union Jack Removals Limited (In Liquidation)[1998] 1 WLR 1364 at [33]–[34], Desnousse v Newham LBC [2006] QB 831 at [71], Miliangos v George Frank (Textiles) Limited [1976] AC 433 at 477.

> "I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in absence of knowledge of a decision biding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision. That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion. That appears to be the position at which we have arrived today."

[13] Otherwise stated, it would have to be shown that this Court would have been compelled to conclude that the common law right had not been abrogated and that the fees of the foreign firm were recoverable as disbursements of the BVI lawyers in that case, to the extent that they were reasonable. If the decision was in some other way sustainable, or if at best the Court might have arrived at a different decision, the decision would not be per incuriam**.**

The Garkusha Decision

[14] The background facts surrounding the claim in **Garkusha** are not relevant. It is sufficient for our purposes to note that G had obtained permission to serve the claim form out of the jurisdiction on Mr. Yegiazaryan ("Y") and Vitaly Gogokhiya ("V") and had also obtained an ex-parte freezing order. Upon applications made by Y, the service out order was set aside and the freezing order was discharged, with costs being awarded to Y to be assessed if not agreed. The court gave G leave to appeal. Following the grant of an adjournment of the appeal (the adjournment order), Y applied for security for costs on the appeal. G resisted that application using local attorneys, and foreign attorneys from the firm of BLP. The names of the attorneys from BLP were not entered on the Roll of Attorneys licensed to practise law in the BVI under the LPA.

[15] Y's application for security for costs was dismissed and this Court proceeded to hear the appeal. At the conclusion of the hearing of the main appeal, the

parties were invited to file written submissions on the assessment of the costs of the adjournment order, and the costs order on the application for security for costs. The Court assessed the costs in relation to the adjournment order which decision it decided to give in a separate order. The Court delivered its decision in respect of the costs on the security for costs application and it is that decision and the legal analysis utilised by the Court which concerns us.

[16] In that case G's local solicitors had submitted a bill of costs setting out a figure for the costs of the local firm and also a figure for the costs of the foreign firm. Y objected to the bill on 3 grounds. It is only ground 2 that concerns us and this was expressed as follows:

> "Any fees incurred by Berwin Leighton Paisner are not recoverable because they are foreign lawyers and are not entitled to practise BVI law."

[17] At paragraph 48 of the judgment, Webster JA [Ag.] explained the foregoing objection of G as follows:

> "The second objection to the fees of Berwin Leighton Paisner is that they were incurred by lawyers working in a firm who are not licensed under the provisions of the Legal Profession Act, 2015 ("the Act") to practise BVI law and as such those fees cannot be recovered in an assessment of costs in BVI proceedings"

[18] At paragraph 49 of the judgment Webster JA [Ag.] continued:

> "Berwin Leighton Paisner has offices in Moscow where Mr. Garkusha lives, and in London. Mr. Khodykin is a partner in the firm. Apart from arranging and obtaining the expert evidence of Mr. Khodykin the lawyers at Berwin Leighton Paisner assisted Mr. Garkusha generally with his defence of the application for security for costs. The respondent objected to the fees for this additional work on the ground that the lawyers at Berwin Leighton Paisner are not licensed under the Act to practise Virgin Islands law and the recovery of such fees in the BVI is unlawful.

[19] Webster JA [Ag.] noted G's responses to this objection, which were as follows:

(a) that G was faced with a complex application for security for costs that involved elements of Russian law and expert evidence of Russian Law. He had to instruct his lawyers in Russia and in the BVI, on short notice, to assist him in putting together a proper defence to the application. Therefore it was necessary for him to instruct the lawyers at BLP; and

(b) that as a matter of BVI law, the Court in the BVI has the power, outside of the LPA, to allow litigants in a case before the courts of the BVI to recover fees paid to lawyers in foreign firms working on the case. The fees are treated as disbursements of the local firm and awarded as such. The LPA has not changed this position nor taken away this right. Put another way the court has the power to order a paying party in an assessment of costs to pay the fees incurred by the receiving party in retaining foreign lawyers to assist him or her generally in the BVI court.

[20] Having recited the positions of both sides, Webster JA [Ag.] identified his next step at paragraph 53 of the judgment when His Lordship stated "The first step is to determine the common law position regarding fees of overseas lawyers firstly in England and then in the BVI." His Lordship referred to a number of cases[20] and having considered these cases, concluded at paragraph 56 that:

> "These cases adequately and accurately set out the English position on the recovery of the fees of foreign lawyers - they are recoverable as a disbursement of the local solicitors and not as the fees of solicitors entitled to practice in England".

[21] His Lordship then considered the BVI position and at paragraph 57 of the judgment stated, "The BVI position, though not as clear in the past, is now

[20] Slingsby v The Attorney General [1918] p. 236, Mccullie v Butler [1962] 2 QB 309 (in which Slingsby v Attorney General was cited with approval), and Societa Finanziaria Industrie Turistiche SpA v Manfredi Lefebvre D'Ovidio De Clunieres Di Balsorano et al [2006] EWHC 90068 (Costs).

settled along the lines of the English cases." After considering a number of BVI cases, His Lordship summarised the BVI common law position at paragraph 59 as follows:

> "The following principles relating to the fees of foreign lawyers in an assessment of costs under CPR are derived from the cases:
>
> (i) The fees of overseas lawyers are generally recoverable as a disbursement of the local legal practitioners.
>
> (ii) The fees must be justified and reasonable.
>
> (iii) The bill of costs must give full details of the charges incurred by the foreign lawyers, and in the case of matters in the Commercial Court, the bill must comply with the requirement for details in rule 69B.11(3).
>
> (iv) The fees should be calculated at the appropriate rates of charge in the foreign country, but, as with all disbursements, must be proportionate and necessary judged by local standards."

[22] At paragraph 60 of the judgment, His Lordship stated*:*

> "I have set out my findings of the relevant principles in detail because they form the basis of my opinion that there is an established common law principle in the BVI that the fees of foreign lawyers are recoverable as a disbursement of the local practitioner, and there are clearly defined principles, practices and procedures for recovering such fees (emphasis provided)**.** This is important in the context of this case and the respondent's submission that the passage of the Act has the effect of making these fees irrecoverable on an assessment. In other words the Act has taken away an established right of the appellant and other persons wishing to recover fees paid to overseas lawyers. To do this the respondent has to show that the Act, either expressly or by necessary implication, abrogated this right."

[23] Webster JA [Ag.] then proceeded to examine what he considered to be the relevant provisions of the LPA. In His Lordship's opinion a determination of the question whether the LPA expressly or by necessary implication abrogated the common law right required him to refer to only a few sections of the LPA. The sections to which His Lordship referred were as follows:

(a) The preamble which read: "An Act to provide for the admission of legal practitioners to practise law, for the legal education and discipline of legal practitioners and connected purposes".

(b) Section 2(1) and specifically the following definitions:

"costs" includes fees for any legal business done by a legal practitioner;

"fees" includes…disbursements…;
"legal practitioner"…means a person whose name is entered on the Roll…
"practise law" means to practise law 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 Register.

[24] His Lordship also referred to section 2(2) which stated that any reference in the LPA to "practising law" includes a reference to "practising Virgin Islands law outside the Virgin Islands". His Lordship also referred to sections 10 to 15 of the LPA that dealt with issues relating to the admission of persons to practise BVI law and section 16 of the LPA that permitted the issue of practising certificates to persons resident outside the BVI but working in an overseas affiliate of a local firm.

[25] His Lordship noted that G was not suggesting that the BLP lawyers were entitled to charge fees as legal practitioners for providing advice and assistance to local lawyers in a BVI matter. They were relying on the common law right to receive such fees as a disbursement payable to a foreign professional or agent, and submitted that the LPA had not abrogated that right.

[26] His Lordship noted that Y submitted that the BLP lawyers are not on the Roll and were practising BVI law by assisting the BVI lawyers for G, that this is contrary to section 18 of the Act and therefore their fees for doing work that is contrary to the Act should not be recoverable, even as a disbursement of the local legal practitioners.

[27] Webster JA [Ag.] then went on to consider section 18 to ascertain whether it had the effect of abrogating the common law right of the litigant before the courts of the BVI to recover fees paid to overseas lawyers as a disbursement of the local practitioner's costs. Section 18 reads as follows:

> "18.(1) Subject to this Act, where a person whose name is not registered on the Roll
>
> (a) practises law;
> (b) willfully 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 recognised 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.
>
> (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 to so 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.
>
> (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"

[28] His Lordship proceeded to consider (at paragraph 69) as his first step whether the BLP lawyers were practising BVI law when they assisted Mr. G.

from their offices in Moscow. In seeking to define the phrase "practises law", His Lordship stated:

> "That expression is defined in two ways in section 2, both of which are relevant to this case:
>
> (i) Sub-section 2(1) defines "practising law" as practising as a legal practitioner or undertaking or performing the functions of a legal practitioner. This would cover the work that the overseas lawyers were doing because they are not legal practitioners within the meaning of the Act and they are performing the functions of a legal practitioner".
>
> (ii) Sub-section 2(2) states that "practising law" includes a reference to practising Virgin Islands Law outside the Virgin Islands."

[29] At paragraphs 70-73 of the judgment His Lordship stated:

> "70. On a plain reading of the sections 2 and 18 I am satisfied that an overseas lawyer who assists local lawyers with the advice and conduct in a BVI matter [the practising law] must be regarded, as a matter of BVI law, as practising BVI law, albeit from outside the BVI. Such practice is contrary to section 18 of the Act and is unlawful unless he or she is registered on the Roll. The Berwin Leighton Paisner lawyers are not registered on the Roll and so they were engaged in an unlawful practice of BVI law when they assisted Mr. Garkusha.
>
> 71. The next step in the interpretive process is to decide if the prohibition in section 18 of the Act against practising BVI law by persons who are not on the Roll and recovering the fees for such practice is sufficiently wide to have the effect of abrogating the common law right to receive such fees.
>
> 72. The relevant rule of interpretation is set out above [referencing paragraph 60 of the judgment]. It is that Parliament is presumed not to take away an established common law right except by clear words or by necessary implication. There is nothing in the Act that amounts to an express abrogation of the right of a litigant to recover the fees of overseas lawyers as a disbursement of the local practitioner. However, the Act has provisions that show a clear intention to regulate the persons who can practise BVI law in the BVI and overseas, and charge fees for such practice. The analysis above shows that overseas lawyers assisting in a BVI matter are performing the functions of a legal practitioner and therefore are practising BVI law for the purpose of the Act. The Act, and in particular section 18, makes the practice unlawful.

> "73. In the circumstances I find that the Act, by necessary implication, intended to do away with the practice of litigants being able to recover the fees of overseas lawyers in costs recovery proceedings. The right could not survive the passing of sections 2 and 18 which have the effect of making the practise of BVI law by overseas lawyers without being on the Roll unlawful, and still allow the recovery of the fees of those lawyers in assessment proceedings in the BVI. The two things cannot stand together."

The Appellants' Arguments

[30] The appellants submit that **Garkusha** was plainly decided per incuriam. The key to its reasoning, they suggest, was the finding that the effect of sections 2, including in particular sub-section (2), and 18 of the LPA was to make the practice of BVI law by overseas lawyers without being on the Roll unlawful. The appellants stated that section 2(2) of the LPA provided that "practising law" includes a reference to practising Virgin Islands law outside the Virgin Islands. But, they argue, section 2(2) had never been brought into force, and was in any event repealed with effect from 29th January 2016. Accordingly, they argue, the accepted position at common law prior to the passing of the LPA still obtains: namely that foreign lawyers' fees are in principle recoverable in assessment proceedings in the BVI.

[31] The appellants argue that Webster JA [Ag.] reached his conclusion first by construing section 2(1) and 2(2) of the LPA, as if section 2(2) were in force. That is, that even the interpretation of section 2(1) was affected by the assumption that section 2(2) was in force. Their argument continued that His Lordship at paragraphs 69-70 of the judgment construed sections 2(1) and (2) together in reaching the conclusion that foreign lawyers assisting local lawyers with advice and conduct in a BVI matter contravened the prohibition in section 18 of the LPA. The appellants argue that as section 2(2) was not in force this undermined Webster JA's [Ag.] analysis that foreign lawyers were acting contrary to the prohibition.

[32] The appellants further argue that the fact that section 2(2) had been excepted from the statutory instrument bringing the LPA into effect indicated that the prohibition was not (for the time being, i.e. pending a decision as to whether to bring sub-section 2 into force) intended to apply to lawyers practising Virgin Islands law outside the Virgin Islands. They submitted that even if there had been room for doubt as to whether the LPA applied to foreign lawyers practising Virgin Islands law abroad, the established common law right to the recoverability should not be taken as abrogated: that would require a clear express wording or implication, as explained by Webster JA [Ag.] himself. The implication here would be that without section 2(2) there was no such clear implication.[21]

[33] Further, the appellants argued, criminal jurisdiction is generally territorial and there is a very strong presumption against a legislative intention to make acts done by foreigners abroad triable offences in the home territory.[22] Now, with the repeal of section 2(2) post **Garkusha**, the common law position obtains, and it is yet clearer that the intent of the legislature is not to prohibit foreign lawyers practising (BVI) law abroad.

The Respondent's Arguments

[34] In its submissions, the respondent similarly referenced what it considered to be the relevant sections of the LPA, focusing on sections 2 and 18.

[35] According to the respondent, the Court in **Garkusha** read sections 2 and 18 together and concluded that BLP had "practised BVI law" by giving advice to the BVI law firm and assisting it in the conduct of the BVI proceedings, even though none of the BLP personnel were licensed under the LPA to practise BVI law.

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[21] It would have to be clear implication and not by express wording in any event as even relying on section 2(2) Webster JA [Ag.] had held there was no clear express wording abrogating the common law right.
[22] Cox v Army Council [1963] AC 48 at 67 per Viscount Simonds, R v Jameson [1896] 2 QB 425 at 430 per Lord Russell, Air India v Wiggins [1980] 1 WLR 815 at 819 per Lord Diplock and Lord Scarman.

[36] The respondent submits that it is plain that the effect of section 18 of the LPA is to render it a criminal offence for legal practitioners that do not appear on the register of BVI lawyers (the Roll) to practise BVI law within the jurisdiction of the Territory of the BVI. The respondent accepts that the LPA does not purport to extend its reach beyond the territory of the BVI as regards the imposition of a criminal sanction. The respondent submits that however:

(a) it cannot be doubted that the tasks undertaken and the role fulfilled by HSF in relation to the Application constituted "the practise of BVI law" within the meaning of the LPA (by reference to the description of the work done by HSF as contained in the appellants' schedule of costs);

(b) that such conduct (eg. drafting affidavits to be filed in the High Court by Harneys under Harneys' name, drafting correspondence that was sent out under Harneys' name and drafting written submissions in opposition to the Company's case, which submissions were lodged with the High Court under Harneys' name, instructing and liaising with the claimant's/appellants' lead and junior counsel, and directing the general conduct of the claimant's/appellants' opposition to the BVI Application in the BVI) constituted acts undertaken in the High Court and were therefore acts undertaken within the BVI, that is by reference to the relevant wording of section 18(2) in that HSF had performed the functions of a BVI legal practitioner, "in any action or matter in any court in the name or through the agency of a legal practitioner entitled so to act…"

(c) All such activity was directly and solely related to an application in the BVI Court, involving only BVI law. It could (and should) have been carried out by Harneys as the claimants'/appellants' BVI legal practitioners. The contention here is that by undertaking the work that they did (as was apparent from their narratives, which describe for example drafting

correspondences in the litigation and submission and evidence for filing in the BVI court and service in the BVI), HSF were, notwithstanding their location in Hong Kong, conducting the practise of BVI law in the BVI contrary to both sections 18(1) and 18(2) of the LPA. In that case HSF's fees are plainly not recoverable pursuant to the terms of the LPA, specifically section 18(3). To buttress its argument, the respondent submits that it would be a nonsensical position if the effect of the LPA was that non-BVI lawyer fees would be recoverable if the work was being undertaken in another jurisdiction, but would not be recoverable if the same work was being undertaken in the BVI.

[37] The respondent submits further that for **Garkusha** to be properly regarded as having been rendered per incuriam it would have to be shown that had the Court of Appeal been aware that section 2(2) was not in fact in force it would have been compelled to reach a different conclusion, i.e. the common law right had not been abrogated and that that the fees of BLP the foreign firm, were recoverable as disbursements of the local BVI firm at least to the extent that they were reasonable. The respondent suggests that had the Court appreciated that section 2(2) was not in force it would not have been compelled to come to a different conclusion as to the non-recoverability of BLP's fees, because:

(a) Webster JA [Ag.] correctly concluded that BLP was plainly practising law within the meaning of section 2(1) of the LPA in such a manner which if conducted in the BVI could only have been conducted by registered BVI legal practitioners;

(b) The application of sections 2(1) and 18 to the circumstances of BLP's involvement was sufficient for the Court of Appeal to have concluded that the fees of BLP were irrecoverable, in particular by reference to and in reliance upon section 18(3) which is unequivocal in its terms;

(c) As such, whether or not a person is committing or has committed an offence under section 18(2) (and whether or not section 18(2) does or was intended to have extra-territorial effect whether by virtue of section 2(2) of the LPA or otherwise) was irrelevant to the reasoning as to whether the fees of BLP were recoverable. As is made clear by section 18(3), where foreign lawyers practise BVI law (whether within or without the jurisdiction of the BVI) the fees of the foreign lawyers so incurred are not recoverable;

(d) As stated by Webster JA [Ag.] at paragraphs 72 and 73 of the judgment, the relevant terms of the LPA (i.e. sections 2(1) and 18) are sufficient to "do away with the practice of litigants being able to recover the fees of overseas lawyers in costs recovery proceedings." [23]

Analysis

[38] It is accepted by both sides that at the time of the **Garkusha** judgment section 2(2) had not been brought into force. Having reviewed the judgment in detail and specifically paragraphs 43 to 75, and having considered the submissions of both parties, I am of the opinion that Webster JA [Ag.] did in fact consider section 2(2) to be essential to his decision that the LPA had abrogated the common law right to recover the fees of a foreign lawyer as a disbursement of local lawyer. My reasons are as follows:

(a) At paragraph 69 of the judgment Webster JA [Ag.] expressly stated that both sections 2(1) and 2(2) were relevant to the case;
(b) At paragraph 70 of the judgment, Webster JA [Ag.] referred to and thereby relied on what he described to be "a plain reading of

[23] The respondent refers to sections 2(1) and 18 but Webster JA [Ag.] referred to sections 2 and 18, thus including section 2(2).

sections 2 and 18". Firstly, section 2 involved both sections 2(1) and 2(2). By making no distinction between the two, one is left to conclude that he considered both to be essential to his decision. Secondly, Webster JA [Ag.] used the words "On a plain reading of the sections..." An interpretation obtained from a plain reading would be one that is manifest or readily apparent on the face of the words used. Other than in section 2(2) which extended the definition of "practising law" to include a reference to practising Virgin Islands law outside the Virgin Islands, nowhere in section 2 or in section 18 are there any plain words which on their face state that any activities by a person outside the Virgin Islands would be caught within the definition of "practising law". Section 2(2) apart, any conclusion that activities by a person outside the Virgin Islands would be caught under section 2(1) and/or section 18 would arise only upon a more refined legal construction, not on a plain reading.

[39] The question then arises, had that Court appreciated that section 2(2) was not in force would that Court have been compelled to conclude that the LPA had not abrogated the common law right. It is important to remember that it must be shown that the Court must have reached a contrary decision, and that the per incuriam doctrine does not apply where if different arguments were made or if different material was placed before the Court it only might have reached a different conclusion.[24] In determining that question, I am considering myself bound by those findings of that Court which were not in any way dependent on section 2(2). It is against that backdrop that I should consider whether knowledge of the inoperability of section 2(2) would have compelled a different result.

[24] Limb v Union Jack Removals (In Liquidation) and Anor [1998] 1 WLR 1354 at 1364.

[40] Having carefully considered the submissions of both parties and having closely examined the relevant provisions of the LPA, and in particular sections 2 and 18, I am of the position that although the Court might have reached a different decision, the Court would not have been compelled to a different conclusion, as its conclusion in **Garkusha** that the common law right was abrogated could have been supported on other grounds. My reasoning is set out below.

[41] In His Lordship's decision, Webster JA [Ag.] centered on the illegality of a foreign person practising BVI law, by virtue of section 2(2). There are multiple references by His Lordship to the unlawfulness of the stated activities of the foreign lawyers that guide me in understanding His Lordship's thinking. In this regard see His Lordship's reference to "…if the prohibition in section 18…" in paragraph 70, "…make the practice unlawful…" in paragraph 72 and "…without being on the Roll unlawful" and "The Act, and in particular section 18, make the practice unlawful" in paragraph 73 of the judgment. His Lordship's thought process was most clearly demonstrated in paragraph 74 where His Lordship stated "In our case the statute has created an illegality in the work done by Berwin Leighton Paisner in advising and assisting Mr. Garkusha and his local lawyers. **By creating the illegality** the lawmakers must be presumed to have intended to abrogate the practice of recovering fees of overseas lawyers for such work as a disbursement."

[42] After setting out the primary element of "illegality" at paragraph 70 of the judgment, at paragraph 71 of the judgment, Webster JA [Ag.] stated:

> "The next step in the interpretative process is to decide if the prohibition in section 18 of the Act against practising BVI law by persons who are not on the Roll and recovering the fees for such practice is sufficiently wide to have the effect of abrogating the common law right to recover such fees."

[43] Webster JA's [Ag.] emphasis was therefore centered on the primary illegality under sections 18(1) and 18(2) leading to the inference that Parliament must have intended also to prevent recoverability as set out under section 18(3). Webster JA [Ag.] did not consider section 18(3) on its own, that is, without any reference to any primary illegality. Section 18(3) reads as follows:

> "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."

[44] Leaving aside the reference to section 18(2), on a literal interpretation, in order to trigger the prohibition against recovery contained in section 18(3), there is no requirement that an illegal act should have occurred. All that is required is that the act in question is done by a person whose name is not registered on the Roll, and that, that person must have been acting as if he were a legal practitioner. Disbursements would be caught as under section 2(1) "fees" is defined to include, inter alia, disbursements. A foreign lawyer whose name is not on the Roll would be "…a person whose name is not registered on the Roll". This then brings us to a consideration of what is meant by the phrase "acting as a legal practitioner." As I stated earlier, in determining whether the decision was rendered per incuriam, I would have to consider myself bound by the findings of the Court that were not predicated on section 2(2). At paragraph 69 of His Lordship's judgment, Webster JA [Ag] held in relation to the BLP lawyers, "…they are performing the functions of a legal practitioner" and by this His Lordship was referring to the activities of the BLP lawyers assisting G with his defence. By the phrase "they are performing the functions of a legal practitioner" I interpret Webster JA [Ag.] to mean "they are performing the functions of a BVI legal practitioner." The phrase "assisting with his defence" which describes the questioned activity is undeniably wide and

general and may incorporate any number of activities. That conclusion by Webster JA [Ag.] did not permit for an examination of how exactly the BLP lawyers were assisting G with his defence. An examination might have revealed that they were conducting activities that a BVI attorney could and should do (in which case it is arguable that the applicable fees might very well not have been recoverable as proper disbursements of the local attorney even based on common law principles).[25] Alternatively, an examination might have revealed that the BLP lawyers were carrying on activities that, although related to the BVI case, could not properly have been carried out by a BVI lawyer. Such activities might not have been captured by a narrower interpretation of "acting as a legal practitioner" if that phrase was restrictively interpreted to mean carrying on such activities as a BVI lawyer could be expected to carry on in the BVI. Such an interpretation might have left the common law right as defined by Webster JA [Ag.] intact in that it might have allowed for the recoverability of foreign lawyers' fees as disbursements in relation to activities that were necessary and proper[26] for a foreign lawyer to carry out in relation to a BVI case. But Webster JA [Ag.] found, that by assisting G with his defence, the foreign lawyers were "performing the functions of a legal practitioner". This determination would have satisfied the element of "acting as a legal practitioner" contained in section 18(3). Importantly, this conclusion would not have been affected by the inoperability of section 2(2). 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 constituted carrying on activities that could or

[25] See Agassi v Robinson [2006] 1 All ER 900 on whether fees in respect of the very services that would have been rendered by a legal representative if one had been appointed fell properly within the definition of "disbursements".

[26] McCullie v Butler [1962] 2 QB 309 at 312, or "reasonable and necessary" at p. 314.

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.

[45] Consequently, the foregoing interpretation of section 18(3) could have led the Court to the same conclusion in **Garkusha**, that is, that the fees of a foreign lawyer (whose name is not on the Roll) can no longer be recovered as a disbursement of the local lawyer, as such recovery is prohibited under 18(3). The decision in **Garkusha** that the common law right would necessarily be abrogated would still be the same. Further, a reading of section 18(3) shows that it is not concerned simply to deny a person whose name is not registered on the Roll from recovering any fee in respect of anything done by him acting as a legal practitioner, but to deny anyone from so recovering. It would appear therefore to contemplate a claim to recovery by a winning party against a losing party of any such fee, which is precisely the situation in **Garkusha**.

[46] It is undeniable that especially with modern technology a person not registered on the BVI Roll can, from outside the BVI, carry on what would be considered to be the activities of a legal practitioner in the BVI, in relation to a BVI case. To interpret the prohibition against recoverability of fees in section 18(3) as not applying to such a person, simply because he is outside the BVI, while applying it to a person who performs the activity while within the BVI, would leave a gaping hole within the legislation and make nonsense of the provision. It certainly would not further the purpose of the LPA which is to regulate the practice of BVI law and the persons who are permitted to practise such law.

[47] Applying the foregoing interpretation to section 18(3) would not infringe the presumption that Parliament does not intend to have its criminal laws apply extraterritorially. Section 18(3) is a prohibition against recoverability. It does not impose a criminal sanction. In response to the submission of the

appellants on this point, the fact that Parliament did not see it fit to bring into force section 2(2) (and its eventual repeal) does not necessarily lead to the conclusion that section 18(3) was intended to operate only in relation to things done by a person when acting as a legal practitioner from within the BVI. The initial inoperability and eventual repeal of section 2(2) can more readily or at least equally be explained by Parliament's desire simply not to criminalise activity outside of the BVI. But the operation of section 18(3), the reference to section 18(2) apart, does not depend on any illegality.

[48] For these reasons, I am of the conclusion that had the Court in **Garkusha** appreciated that section 2(2) was not in force, it would not necessarily have arrived at a different decision. Section 18(3) on its own provided a basis for supporting the Court's decision and **Garkusha** was therefore not decided per incuriam.

[49] The respondent is to have its costs in this appeal to be assessed if not agreed within 21 days.

I concur
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar