

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION**

IN THE MATTER OF OLIVE GROUP CAPITAL LIMITED

AND IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004

Claim No. BVIHC (Com) 2015/115

BETWEEN:

OLIVE GROUP CAPITAL LIMITED

Claimant

and

GAVIN MARK MAYHEW

Defendant

Appearances:

Mark Rowlands for Claimant
Tameka Davis for Defendant

2018: March 14

JUDGMENT

**OUTSTANDING ISSUE – FEES AND DISBURSEMENTS OF MR. TIM ROSS
ASSESSMENTS OF COSTS
PURSUANT TO JUDGMENT DATED 21 JULY 2017**

Outstanding issue, reserved on the assessments of costs of the Defendant, was whether the costs in relation to the fees and disbursements of a non-BVI lawyer, in the circumstances of this case, were recoverable notwithstanding two recent Judgements of the Court of Appeal precluding the recoverability of the fees and disbursements of foreign lawyers assisting in relation to BVI litigation.

As the Court expressly declined to define narrowly the phrase "acting as a legal practitioner" 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 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."

It will have to be in a case not involving a foreign lawyer where a court will need to consider the reasoning contained in the Defendant's counsel's submission that "what the LPA did not do was prohibit the recovery of fees in relation to all tasks done in connection with BVI litigation."

The range of examples she provided of people who are not BVI lawyers – whether located in BVI or elsewhere – who regularly perform tasks in connection with BVI litigation, is compelling from a practical perspective.

The cost-effective practice of law in the BVI will be severely impaired if clients cannot recover the costs of people who assist BVI Lawyers such as paralegals and legal assistants who prepare bundles, serve and file documents, record evidence, review documents, review and summarize transcripts, draft (for review by a BVI Lawyer) litigation documents (such as orders, basic types of affidavits and applications) and so on.

- [1] **LEON J:** This Court assessed the costs of the Claimant, pursuant to its application dated 15 August 2016, and the costs of the Defendant, pursuant to his application dated 1 February 2017.
- [2] All aspects of the assessments, with two exceptions, were determined at the assessment hearing, resulting in a Judgment dated 21 July 2017.
- [3] In relation to the costs claimed by the Defendant pursuant to his application, all costs claimed were assessed "save that the costs in relation to the fees and disbursements of Mr. Tim Ross of Bennett Jones" were reserved.
- [4] The costs of both assessments were reserved as well.

Role of Mr. Tim Ross

- [5] This Court considered the role and work of Mr. Time Ross on earlier assessments of costs in relation to prior aspects of the proceeding.¹
- [6] Mr. Ross was the Defendant's principle advisor, as a non-BVI lawyer, in relation to the expropriation and fair value claim, had the direct non-BVI lawyer-client relationship (from a legal and business perspective) and to some degree served as the Defendant's representative in dealing with the Defendant's BVI legal practitioners. He stated in his evidence in connection with the earlier assessments that he had "been embedded in and involved in this matter form the outset" and that "the continuity of my involvement was therefore important and saved costs." He said that the substance of the Defendant's claims in this matter (and the litigation threats that precede the filing of the claim) benefitted from his experience in the matter and familiarity with the Defendant and the issues raised by the Claimant, and also his familiarity with principles of English law, in which he is also qualified.
- [7] He had a longstanding relationship with the Defendant, he said, and was able to provide services including client liaison support as a foreign agent, which support was in his view crucial to the success of the Defendant in this litigation and to the expedition with which it was conducted. He provided, among other things, continuity which was relevant and cost efficient overall; a knowledge of the history of the dispute; international case analysis on common law authorities (which otherwise would have had to have been done by someone else); a sense of the strategy; a pre-existing relationship of trust with the Defendant; contact with the Appraisers; corporate analysis; and active case management.
- [8] In its Judgment on Assessments of Costs dated 29 April 2016 it allowed costs for Mr. Ross' work as a disbursement of the Defendant.

¹ Judgment on Assessments of Costs, 29 April 2016, Leon, J.

[9] Specifically, this Court held:

[96] This Court concludes that in principle Mr. Ross' involvement in the work covered by the costs statements was appropriate and should be part of the costs (as disbursements) to be recovered by Mayhew, with one exception. To the extent Mr. Ross served as Mayhew's representative in receiving and interpreting BVI legal, strategic and tactical advice, his work in doing so effectively was time as "the client" and should not be included in what the Company should pay as costs to Mayhew.

[97] This Court has considered the submissions in that regard in the detailed review of time records and considers that an appropriate deduction would be 25% to reflect Mr. Ross' work in that role as "part of the client" as opposed to part of the legal team and any duplication as a member of the legal team.

Subsequent Court of Appeal Judgments and Parties' Positions Respecting Them

[10] The earlier assessments occurred prior to two Court of Appeal judgments in **Garkusha v Ashot Yegiazaryan & Ors**, BVIHCMAP2015/0010, dated 6 June 2016 (Pereira, CJ, and Webster and Kentish-Egan, JJ.A.) ("**Garkusha**") and **Shrimpton and another v Scriven and others** BVIHCMAP2016/0031, dated 3 February 2017 (Michel, Webster and Gonsalves, JJ.A.) ("**Shrimpton**") which addressed the issue of the ability to recover on an assessment of costs the work of people who are not BVI lawyers pursuant to the **Legal Profession Act, 2015** ("**LPA**").²

[11] In short, the Claimant's position of the assessment of the Defendant's costs is that the judgments of the Court of Appeal in **Garkusha** and **Shrimpton** preclude any recovery of Mr. Ross' fees and expenses.

² No. 13 of 2015, Laws of the Virgin Islands.

- [12] The position of the Defendant is that the preclusion of recovery for the work of non-BVI lawyers established by those judgment is not so broad as to preclude recovery for Mr. Ross' work.
- [13] Counsel for the Defendant submitted that the LPA did not preclude the recovery of fees in relation to all tasks done in relation to BVI litigation than are not done by a person whose name is entered don the Roll in accordance with the LPA ("**BVI Lawyer**").
- [14] She submitted that "[t]he mischief of the Act is to discourage persons who are not registered on the Roll from practising BVI law when they are not qualified to do so and which would uniquely be [sic. the] purview of" a BVI Lawyer. More correctly, the word "discourage" should be "prohibit" or "preclude".
- [15] She went on to submit that "what the LPA did not do was prohibit the recovery of fees in relation to all tasks done in connection with BVI litigation. To do so would be nonsensical."
- [16] Both Garkusha and Shrimpton involved work done by persons who were practising lawyers in other jurisdictions.
- [17] Counsel for the Defendant provided a range of examples of people who are not BVI lawyers – whether located in BVI or elsewhere – who regularly perform tasks in connection with BVI litigation. That is, they assist a BVI Lawyer in his or her conduct of BVI litigation.
- [18] The non-exclusive list submitted by counsel for the Defendant includes paralegals and legal assistants who prepare bundles, serve and file documents, record evidence, and so forth. One might add to that list reviewing documents, reviewing and summarizing transcripts, drafting (for review by a BVI Lawyer) litigation documents (such as orders, basic types of affidavits and applications) and so on.

[19] Of course in a transactional practice involved real estate, estates and wills, commercial transactions, non-BVI Lawyers would perform other tasks to assist a BVI Lawyer in the performance of his or her work as a BVI Lawyer.

[20] Counsel for both parties looked at how courts in other jurisdictions has considered phrases such as "practising law" and "practice of law".

Shrimpton Judgment

[21] The recoverability on an assessment for Mr. Ross' work depends therefore on how broadly the Court of Appeal restricted what a person who is not a BVI Lawyer can do in relation to litigation in the BVI.

[22] The most relevant part of the Court of Appeal's judgment in Shrimpton for present purposes begins at paragraph 44 where the Court began its consideration of what is meant by the phrased in the LPA "acting as a legal practitioner". In Garkusha, the Court had held that the non-BVI lawyers were "performing the functions of a legal practitioner" when assisting Garkusha with his defence.

[23] The Court stated:

[44] ... By the phrase "they are performing the function 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 ... 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.

...

But Webster JA [Ag.] found, that by assisting G with his defence, the foreign lawyers were "performing functions of a legal practitioner". This determination would have satisfied the element of "acting as a legal practitioner" contained in section 18(3).

...

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 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] ... 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 on as a legal practitioner, but to deny anyone from so recovering.

Recoverability in Respect of Mr. Ross

[24] This Court cannot see how the Court of Appeal Judgments in Garkusha and Shrimpton could be read or distinguished as not applying to preclude recovery of the costs in respect of Mr. Ross.

[25] As noted above, both Garkusha and Shrimpton involved work done by persons who were practising lawyers in other jurisdictions.

[26] Particularly as the Court in Garkusha expressly declined to define narrowly the phrase “acting as a legal practitioner” so as, in the words in Shrimpton, “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 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.”

[27] It will have to be in a case not involving a foreign lawyer where a court will need to consider the reasoning contained in the Defendant’s counsel’s submission that “what the LPA did not do was prohibit the recovery of fees in relation to all tasks done in connection with BVI litigation.” The range of examples she provided of people who are not BVI lawyers – whether located in BVI or elsewhere – who regularly perform tasks in connection with BVI litigation, is compelling from a practical perspective.

[28] The cost-effective practice of law in the BVI will be severely impaired if clients cannot recover the costs of people who assist BVI Lawyers such as paralegals and legal assistants who prepare bundles, serve and file documents, record evidence, review documents, review and summarize transcripts, draft (for review by a BVI Lawyer) litigation documents (such as orders, basic types of affidavits and applications) and so on.

[29] In the result, the costs in relation to the fees and disbursements of Mr. Tim Ross of Bennett Jones must be disallowed.

Costs of the Assessments

[30] As the costs of both assessments were reserved by this Court’s Order of 21 July 2017, this Court will hear and determine the costs of both assessments upon the handing down of this Judgment.

Orders

[31] Accordingly, this Court orders that:

1. the Defendant's claim for the costs in relation to the fees and disbursements of Mr. Tm Ross of Bennett Jones are disallowed; and
2. this Court will hear and determine the costs of both assessments upon the handing down of this Judgment.

**Justice Barry Leon
Commercial Court Judge**

Op Benjamin
REGISTRAR, SUPREME COURT