

BVI CROSS-BORDER LITIGATION:



THE CURRENT STATE OF COST RECOVERY

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The Legal Profession Act 2015 (as amended) (the “LPA”) introduced significant changes to regulation of the legal profession in the British Virgin Islands (BVI)¹, including restrictions aimed at preventing persons not admitted in the BVI from recovering fees². This article reviews the leading cases on recoverability of fees of non-admitted persons since enactment of the LPA, highlighting uncertainties addressed by the courts and issues that require regulatory intervention.

Key statutory provisions

The important statutory provisions related to recoverability of fees are sections 2(1) and 18 of the LPA. Section 2(1) defines a legal practitioner as a person whose name is entered on the register of legal practitioners, known as the Roll, and states that “*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...*” before or after commencement of the LPA. Sections 18(1) and (2) impose criminal sanctions

for unlawful practice, while section 18(3) prevents recovery of fees “*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...in any action, suit or matter by any person.*”

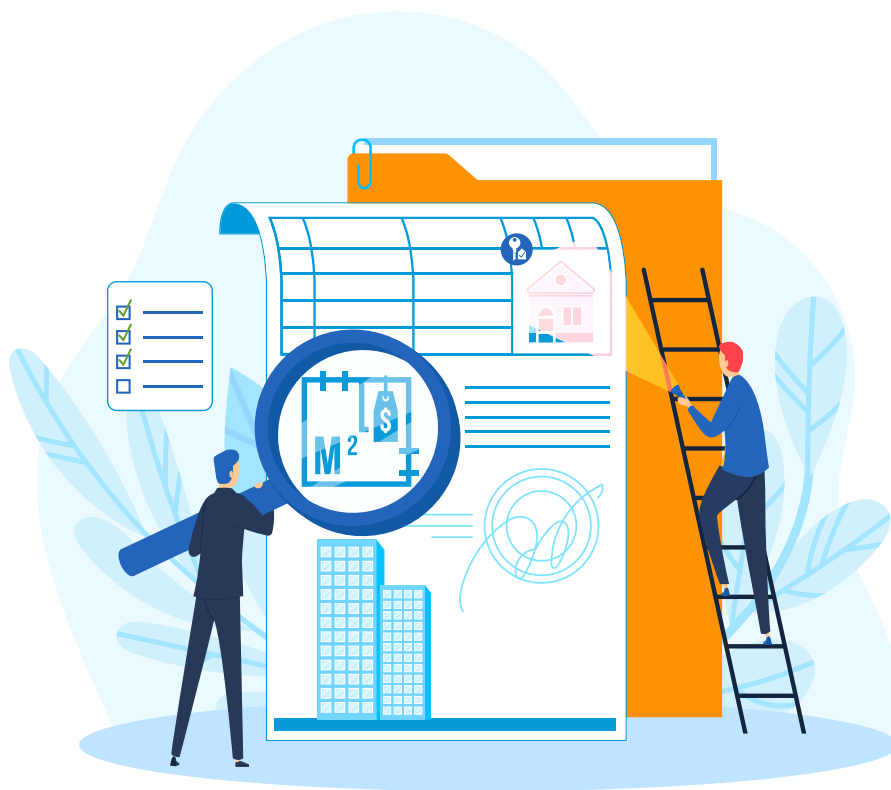
Litigants should be aware that these statutory changes have significantly impacted cost recovery in cross-border commercial disputes in the BVI and important points of statutory interpretation have been determined by the courts.



Abrogation of the common law

Prior to enactment of the LPA, the fees of non-admitted foreign lawyers were recoverable at common law as

¹ Those changes included introduction of a General Legal Council, a Code of Ethics and a Disciplinary Tribunal.
² See sections 15 and 18 of the LPA.



disbursements. Following enactment of the LPA, the Court of Appeal in *Dimitry Vladimirovich Garkusha v. Ashot Yegiazaryan and Others*³ (“Garkusha”) decided that the common law right to recovery was abrogated by the LPA. On the facts of Garkusha, the fees of the non-admitted overseas lawyers were incurred providing expert evidence of foreign law and assisting with the defence to an application for security for costs.

In considering sections 2 and 18 of the LPA, the Court of Appeal reasoned that, “assisting local lawyers with the advice and conduct in a BVI matter must be regarded, as a matter of BVI law, as practising BVI law, albeit from outside the BVI”⁴, contrary to section 18.

As a result, only the fees related to provision of expert evidence were recoverable.

In *John Shrimpton and Another v. Domonic Scriven and Others*⁵ (“Shrimpton”), the Court of Appeal decided that Garkusha was not *per incuriam* for failing to appreciate that section 2(2) of the LPA⁶ was not in force. The Court reasoned that abrogation of the common law could have been supported by independent consideration of section 18(3). As a result, the Court held that it would not have been compelled to a different conclusion in Garkusha, had it known that section 2(2) was not in force. In relation to recoverability, the work performed by the non-admitted, overseas lawyers in Shrimpton included assisting a BVI firm with advice.

The Court analysed section 18(3) and opined 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.”

The Court concluded that section 18(3) broadly imposes a prohibition against recoverability, albeit without criminal sanction. Notably, in *Sonera Holding B.V. v Cukurova Holding A.S. and Others*⁷ (“Sonera”) the High Court (Commercial Division) opined that it was bound by Garkusha and Shrimpton, which meant that the common law concept of agency in *McCullie v Butler* [1962] 2 QB 309 had been abolished in the BVI. Consequently, on the facts in Sonera the Court disallowed all fees and disbursements of non-admitted, overseas lawyers who assisted with advice and conduct of BVI proceedings.

Acting as a legal practitioner

Given the broad interpretation of section 18(3) in Garkusha and Shrimpton, did the court’s power to examine the nature of work performed survive abrogation of the common law and enactment of section 18(3)? The Court of Appeal in *Gany Holdings (PTC) SA and Another v. Zorin Sachak Khan and Others*⁸ (“Gany”) decided that section 18(3) was not retrospective⁹ and held that section 18(3) required examination of the nature of work performed by a non-admitted costs draftsman¹⁰ as against conduct that amounts to “acting as a legal practitioner”. The Court opined that section 2 provided non-exhaustive guidance as to what constituted ‘acting as a legal practitioner’, but ultimately this was a question of fact in each case.

3 BVIHMAP2015/0010 judgment in 2016

4 Paragraph 70 of the judgment

5 BVIHMAP2016/0031 judgment in 2017

6 A provision purporting to create extra-territorial illegality

7 Claim No. BVIHC (COM) 2011/119 judgment in 2018

8 BVIHMAP2018/0045 and 0048 judgment in 2020

9 This was relevant to whether fees for pre-LPA work was recoverable

10 Notably, there was no requirement for the costs draftsman to be admitted as a legal professional in his home jurisdiction in England and Wales, such that he could not be admitted on the Roll in the BVI

On the facts in *Gany*, the Court concluded that the costs draftsman's qualification was not determinative and the nature of the work performed¹¹ prevented recovery. The approach in *Gany* seems logical, since the court must be able to consider the work performed to determine whether a person was 'acting as a legal practitioner'¹².

In *Yao Juan v. Kwok Kin Kwok and Another*¹³ ("Kwok") the Court of Appeal was required to determine whether fees incurred by overseas lawyers who were not admitted in the BVI were recoverable, where they performed legal work as employees of the Hong Kong office of a firm with a substantive BVI presence¹⁴. The Court endorsed the approach in *Gany* (albeit *obiter*) and held that direct supervision of such lawyers by BVI admitted lawyers was no point of distinction. The Court appeared to reinforce the breadth of the prohibition under section 18(3) (as interpreted by *Garkusha* and *Shrimpton*) by concluding that it was unnecessary to dissect the work performed having found that the non-admitted lawyers were 'acting as legal practitioners'. The Court further opined that, "any administrative tasks would be incidental to anything done by them if done to assist in the conduct of the litigation".

Conclusions

Garkusha and *Shrimpton* provide clear authority that the fees of legally qualified, non-admitted persons are no longer recoverable in the BVI as disbursements at common law, except fees related to provision of expert evidence of foreign law. *Gany* confirms that the work performed by non-admitted persons who are not legally qualified may be examined for recoverability under section 18(3) as against conduct that amounts to 'acting as a legal practitioner'. The overseas qualification of such persons is not determinative. *Kwok* confirms that direct supervision by a BVI-admitted person of non-admitted persons who are legally qualified is not relevant to recoverability, such that detailed examination of the work performed by such persons is unnecessary if they are performing legal work. The administrative tasks performed by such persons will be considered incidental to assisting with the conduct of litigation.

More recently, in *The Matter of Summerfame Ltd. (In Liquidation)*¹⁵, the Commercial Court opined that examination of the work performed (as prescribed by *Gany*) applies to work done by BVI-based paralegals. The

Court further highlighted the risks of criminal sanction to paralegals, trainees and unqualified clerks working in the jurisdiction under the current law. Given the functions such persons perform in fostering the administration of justice, there are strong policy arguments in favour of urgent regulatory intervention to prevent unintended consequences. In the final analysis, the effect of the current law on cost recoverability in cross-border litigation in the BVI requires practitioners and litigants to be aware of the attendant risks. Since the procedure to get suitably qualified persons admitted in the BVI remains relatively straightforward it may be prudent to consider at an early stage whether BVI admission is appropriate as part of the overall litigation strategy.

11 The work performed by the costs draftsman was reviewing files and preparing a cost schedule in accordance with the ECSC Rules and Practice Directions.

12 Notably, section 2 qualifies "practise as a legal practitioner" or performing the "functions of a legal practitioner" by the words "as recognised by any law".

13 BVIHCCMAP2018/0042 judgment in 2021

14 The connection between the overseas lawyers and a BVI firm in this case appears to be the main factual distinction between *Gany* and the facts in *Garkusha* and *Shrimpton*

15 Claim No. BVIHC (COM) 2020/0055 judgment in 2021

