

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) [REDACTED]

RE THE FEES OF AN ENGLISH BARRISTER

Appearances:

Mr. Usman Roohani, with him Mr. Richard Brown of Carey Olsen for the liquidators

2021 December 1
December 6

JUDGMENT

- [1] **JACK, J [Ag.]:** This judgment follows an application by the liquidators of a BVI company (“the BVI company”) for approval of interim payments of their fees and disbursements pursuant to sections 430(2)(a) and 433(3) of the **Insolvency Act 2003**.¹ All of the fees and disbursements have been approved apart from the fees of Mr. Jamil Mustafa, an English barrister in private practice, who sought to charge £7,012.50 in respect of an opinion written by him jointly with Mr. Tom Smith QC.
- [2] This application is made by the liquidators. Mr. Mustafa is not a party to it. Somewhat surprisingly he only heard that the matter had come before me when I distributed this judgment in draft.
- [3] The shares of the BVI company were owned legally and beneficially by a man (“the director”), who was also its sole director. The director was also the sole legal and beneficial owner and sole director of a company incorporated in England and Wales

¹ Laws of the Virgin Islands, No 5 of 2003.

("the English company"). The English company carried out trades in securities as agent for the BVI company. Unfortunately the trades were unprofitable and both companies became insolvent. The English company was originally put into administration, but was subsequently put into liquidation. The BVI company went directly into liquidation.

- [4] The liquidators of both companies instructed Carey Olsen and a London firm of solicitors. They in turn instructed Mr. Tom Smith QC and Mr. Jamil Mustafa to advise on claims as between the BVI and the English companies and the claims of both companies against the director. Consideration of these various claims involved analysing issues of both English and BVI law.
- [5] Mr. Smith QC is admitted to the BVI bar as well as the English bar. Mr. Mustafa is admitted only to the English bar. They produced a joint opinion running to some 57 pages. I have read the opinion and it is clear on its face that the opinions given are expressed to be the joint opinions of Mr. Smith QC and Mr. Mustafa. There is no differentiation between, for example, the opinion of Mr. Smith as a BVI practitioner and the joint opinion of Mr. Smith and Mr. Mustafa on issues of English law. Both issues of BVI law and English law are expressed as the joint opinion of the two counsel.
- [6] It is right to record that the issues of BVI law are fewer than the issues of English law. Mr. Mustafa says in an email adduced in evidence that the work on the opinion could be split 20 per cent BVI and 80 per cent English law. I do not accept Mr. Roohani's submission that I should take judicial notice that counsel charge by the hour. This is because it is not the case. Different charging mechanisms, such as brief fee and refresher and lump sum agreements, are common. Historically, the minimum fee charged by counsel was one guinea (although the actual cost to the client was £1.3s.6d. because counsel's clerk's fee of 2/6d had to be added), which was not time-related. Nonetheless in my judgment the 20:80 division is a fair division of the work which had to be done in writing the opinion.

- [7] This leads to the issue as to whether Mr. Mustafa's fees are recoverable, notwithstanding that he was not admitted to the BVI bar. The **Legal Practitioners Act 2015** provides:²

"2(1) In this Act, unless the context otherwise requires,

...

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

...

'fees' includes charges, disbursements, expenses and remuneration;

...

'legal practitioner'... means a person whose name is entered on the Roll in accordance with this Act;

'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 whether before or after the commencement of this Act;

...

13(1) Every person whose name is entered on the Roll in accordance with this Act shall be known as a legal practitioner and,

(a) subject to subsection (2), is entitled to practise law and sue for and recover his or her fees for services rendered in that respect;

(b) subject to subsection (2), has the right of audience before any court;

(c) is an officer of the Supreme Court.

(2) No person may practise Virgin Islands law unless his or her name is entered on the Roll in accordance with this Act.

(3) A person who practises law in contravention of subsection (2) or section 15(1) is not entitled to institute or maintain any action for recovery of any fee on account of or in relation to any legal business done by him or her in the course of such practice

...

18(1) Subject to this Act, where a person whose name is not registered on the Roll

(a) practises law;

(b) wilfully 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,

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

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 so to 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.”

[8] There have now been a surprising large number of cases on these provisions. The first Court of Appeal decision was **Demistry Vladivirovich Garkusha v Ashot Yegiazaryan and others**,³ which held that costs were irrecoverable of an English firm of solicitors, Berwin Leighton Paisner, who did work on a BVI case from their Moscow office. The second Court of Appeal decision was **John Shrimpton and another v Dominic Scriven and another**,⁴ which affirmed the holding in **Garkusha**. This was followed by **Gany Holdings (PTC) SA and another v Zorin Sachak Khan and others**,⁵ which concerned the fees of an English legal costs draftsman not admitted to the BVI roll. In each case, the Court of Appeal held that the fees of a foreign lawyer practicing as a BVI legal practitioner were irrecoverable.

[9] This led to the question as to what “practising as a BVI legal practitioner” meant. In **Yao Juan v Kwok Kin Kwok**⁶ I was dealing with two associate solicitors based in Hong Kong who were working for a well-known BVI law firm. Neither associate was admitted to the BVI bar. I held that they were not practicing on their own account. The fees charged in respect of their work were those of the BVI law firm, not their own. I applied a test as to the *capacity* in which the lawyers were working.

³ [2016] ECSCJ No 103, BVIHMAP2015/0010 (determined 6th June 2016).

⁴ [2017] ECSCJ No 15, BVIHMAP 2016/0031 (determined 3rd February 2017).

⁵ [2020] ECSCJ No 105, BVIHMAP2018/0045 and BVIHMAP2018/0048 (determined 30th March 2020).

⁶ [2020] ECSCJ No 148, BVIHC (COM) 162 of 2013 (determined 23rd April 2020).

[10] On appeal, the Court of Appeal held that I was wrong.⁷ The test is a *functional* one. At para [55] Ellis JA (Ag) held:

“A critical component of the **Shrimpton** decision was the Court’s approach to the interpretation of the expression ‘acting as a legal practitioner’ in the context of section 18(3) of the LPA. The panel of judges which heard **Shrimpton** concurred that it was bound by the earlier decision in **Garkusha** which took a wide approach defining the terms as including *any conduct* which was – ‘broadly deemed to be assisting with the conduct of a BVI matter’.” (Emphasis in the original)

[11] As to **Gany**, the Court of Appeal held:

“The costs draftsman concerned was not an enrolled BVI legal practitioner. The costs draftsman was not engaged in the substantive conduct of the litigation. His work, as described in the schedule of costs was limited to ‘reviewing files and drafting schedule of costs in compliance with ECSC Rules and Practice Directions’. He therefore was tasked to prepare a BVI-law compliant bill of costs. Michel JA, who wrote the judgment of the Court, observed that the work of a costs draftsman is ‘solicitors work’ and concluded that it was therefore work which broadly assisted with the conduct of BVI litigation, and thus fell afoul of the recovery provisions in section 18(3).”

[12] The non-admitted Hong Kong associates’ fees were thus irrecoverable, because they were doing BVI practitioner work. In the subsequent case of **Re Summer Fame Ltd (In Liquidation)**,⁸ I held that this rule of irrecoverability applied to legal work carried out in this Territory by paralegals employed by local law firms. In **Re Lenux Group Ltd; JSC Mezhdunarodniy Promyshlenniy Bank v Lenux Group Ltd (No 2)**,⁹ I pointed out that the application of a “functional” test potentially meant that company directors were unable to appear on behalf of their companies, since “[o]ral advocacy in court is a quintessential function of a legal practitioner.”

⁷ [2021] ECSCJ No. 577, BVIHMAP 2018/0042 (determined 1st June 2021).

⁸ [2021] ECSCJ No. 585, BVIHC (COM) 2020/0055 (determined 9th June 2021).

⁹ [2021] ECSCJ No 605, BVIHC (COM) 2020/0188 (determined 28th June 2021) at [14] to [15].

[13] Mr. Roohani in his skeleton submits:

“19. In respect of the advice that was given within the Opinion, which principally concerned questions of English law but admittedly also involved elements of BVI law, it is submitted that Mr. Mustafa’s role as junior Counsel did not involve him in the practice of BVI law.

20. The Court is invited to accept that where an English barrister assists Leading Counsel in the preparation of an opinion which deals predominantly with English law, it does not follow that the presence of more minor elements of foreign law addressed within that opinion means that the junior barrister is to be taken to be ‘practising’ the foreign law himself. This conclusion is further justified in a context where Leading Counsel is qualified to practise that foreign law. Indeed, it is relatively common for barristers and solicitors in both England and the BVI to provide advice to clients that considers the availability of relief both as a matter of English/BVI law and as a matter of foreign law. By providing such an opinion (which will usually be based on advice from lawyers qualified in the relevant jurisdictions) the BVI/English lawyer does not hold himself or herself out as ‘practising’ law in that foreign jurisdiction.

21. In this case, Mr. Smith QC is called to the BVI Bar. In respect of the vast majority of the analysis in the Opinion concerning BVI law, the conclusion is that BVI law is either identical or nearly identical to English law... In a context where Mr. Smith QC is called to the BVI Bar and Mr. Mustafa is not, being called only to the Bar of England and Wales, it is overwhelmingly more likely that Mr. Mustafa’s principal contribution to the Opinion related to the significant analysis of English law, with Mr. Smith QC addressing the minority of points arising under BVI law. In the case of the Opinion in question, this was reviewed by Carey Olsen, who provided comments and input on the sections dealing with BVI law. As such, it is submitted that this case falls not within the ambit of an English lawyer ‘practising BVI law’ *per se*, but relates to an English lawyer contributing to a predominantly English law opinion which takes foreign law issues into consideration, with the benefit of input and advice from suitably qualified lawyers in that jurisdiction.

22. In the premises, the Court is invited to accept that Mr Mustafa was not practising BVI law...”

[14] I agree that it does not necessarily follow that junior counsel assisting a leader with an opinion which touches on foreign law is also advising on that foreign law, but this is fact-specific. If an opinion is dealing with English and Russian law, for example,

and the leader is dual qualified but the junior is not, then it will generally be obvious that it is the leader who contributes the advice on Russian law.

- [15] The current case is, however, quite different. The common law in this Territory is the law of England.¹⁰ Statutory sources of law are different, but statutes in this Territory are interpreted in the same way as UK statutes. BVI law is thus readily accessible to English lawyers and *vice versa*. As I said in **Reniston Ltd v Nedlands Overseas Inc (No 2)**:¹¹

“[7] As to the need for the expert report [on English law], Barrow JA held in **Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd**¹² that ‘courts in this jurisdiction normally determine for themselves, in normal domestic law litigation, the content and meaning of English law without any thought of receiving expert evidence...’ This is because all judges of the Eastern Caribbean Supreme Court are trained in English law and all states and territories within the jurisdiction (with the limited exception of St Lucia) have imported English common law and often much English statute law...

[8] English law is technically foreign law, so if it is relied upon as being different to BVI law, it must be pleaded. However, as an evidential matter, this Court can take judicial knowledge of it, just as in the nineteenth century the English Court would take cognisance of Irish law: **Reynolds v Fenton**.¹³ (See also **Celltech Chiroscience Ltd v Medimmune Inc**,¹⁴ where Jacob J decided points of American patent law on the basis of counsel’s submissions ‘just as if [he] were a US district judge.’)”

- [16] Mr. Roohani submits in para 21 of his skeleton that it is “overwhelmingly more likely” that Mr. Smith QC did the BVI bits of the Opinion whilst Mr. Mustafa assisted with the English law parts. I disagree. There is nothing in the Opinion which suggests any such division of labour. On the contrary, all the opinions offered in the Opinion

¹⁰ Common Law (Declaration of Application) Act 1705, Act of the General Assembly of the Leeward Islands, applicable in this Territory: see *VTB Bank (Public Joint Stock Company) v Miccos Group Ltd* [2020] ECSCJ No 193, BVIHC (COM) No 2018/0067 (23rd January 2020) at footnote 30.

¹¹ [2020] ECSCJ No 260, BVIHC (COM) 2020/0047 (31st July 2020) (appeal allowed on other grounds [2021] ECSCJ No 459, BVIHC MAP 2020/0016, 3rd February 2021)

¹² HCVAP 2007/027 (determined 22nd April 2008, unreported) at para [3].

¹³ (1846) 3 CB 187 at p 191 *per* Moule J. And see Phipson on Evidence (19th Ed, 2017) at para 3-07, although the footnote appears to be an error.

¹⁴ [2002] EWHC 2167 (Patents) at para [8].

are expressed to be joint opinions. Given the very close similarities between English and BVI law, no presumption can be made that the unadmitted junior did no work on the BVI legal aspects of the case. If an assumption were to be made, it would be that junior counsel was fully engaged with all aspects of the case. He was in my judgment likely to be assisting his leader generally: see Webster JA (Ag)'s formulation in **Garkusha**.¹⁵

[17] I find as a fact that Mr. Mustafa was practising BVI law when he participated in the preparation of the Opinion.

[18] This leads to me to Mr. Roohani's fall-back position, that, even if Mr. Mustafa was practising BVI law when he assisted with those parts of the Opinion which deal with BVI law, he should at least be entitled to 80 per cent of his fees. The difficulty in my judgment is that the contract (or, if Mr. Mustafa was retained on a non-contractual basis, the brief) is one instruction to prepare one piece of work dealing with both English and BVI law. It is not possible to separate it into an unlawful BVI element and a lawful English law element.

[19] If Mr. Mustafa had done the work in this Territory, then he would have committed an offence under section 18(1). A court in this Territory would not in my judgment entertain an action brought by him for 80 per cent of his fees, if he were serving the minimum three year sentence in Balsam Ghut. The fact that the 2015 Act has no extra-territorial reach, so that no criminal offence is committed by Mr. Mustafa, does not affect this point: **Shrimpton v Scriven**.¹⁶

¹⁵ At [49], quoted in the extract from Yao v Kwok above.

¹⁶ At [47].

[20] Accordingly, I disallow Mr. Mustafa's fees in full.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar