

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM No: BVIHC (COM) 2020/0055

IN THE MATTER OF SUMMER FAME LTD (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 2003

EX PARTE RUSSELL GRANT CRUMPLER, JEFFREY STOWER AND PATRICK
COWLEY (in their capacity as joint liquidators of Summer Fame Ltd (in
Liquidation))

AND CLAIM No: BVIHC (COM) 2020/0056

IN THE MATTER OF HAODE INVESTMENT INC (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 2003

EX PARTE RUSSELL GRANT CRUMPLER, JEFFREY STOWER AND PATRICK
COWLEY (in their capacity as joint liquidators of Summer Fame Ltd (in
Liquidation))

Determined on paper with no pre-judgment written submissions

2021 June 9

JUDGMENT

[1] **JACK, J [Ag.]**: By two applications filed on 3rd June 2021 the liquidators, who were appointed the same day in respect of two companies, Summer Fame Ltd and Haode Investments Inc, seek orders under section 430(2)(a) and 433(3) of the **Insolvency Act 2003**¹ approving the liquidators' fees and expenses between 16th June 2020

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

and 28th February 2021 on an interim basis in the sums of \$220,662.07 for Summer Fame Ltd and \$986,141.85 for Haode Investments Ltd. The applicants ask for the matter to be dealt with on paper.

[2] This is a substantial liquidation arising out of what is said to be a major fraud at Luckin Coffee Inc, a Cayman company which controls, or at least controlled, a large café business in the People's Republic of China. The liquidators have been in contact with creditors, the overwhelming number of whom approve their fees, but it is not entirely clear what notice has been given of the current application to the few other creditors. The Court needs to consider whether to make an order under section 430(3)(c)(ii) for notice to be given to the few remaining creditors. In addition, since this is the first application for an interim order in a substantial liquidation, it is desirable that the Court is informed orally of the progress of the liquidation. I shall thus adjourn the matter for an oral hearing.

[3] The reason for putting this judgment in writing is an issue which arises from the recent decision of the Court of Appeal in **Yao Juan v Kwok Kin Kwok**.² The sums for which the liquidators seek sanction include the fees of Maples & Calder, a BVI law firm. Most of the work done by Maples was done by partners and associates, all admitted to the BVI bar, but some work was done by two paralegals charged out at \$300 per hour. Neither paralegal appears to be admitted to the BVI bar.

[4] **Yao v Kwok** was in fact an appeal from a decision of mine.³ The relevant issue was the recoverability of fees in respect of two associates of Conyers, a BVI law firm. The associates were based in Hong Kong. Neither was admitted to the BVI bar.

[5] The **Legal Practitioners Act 2015**⁴ provides:

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

² BVIHMAP2018/0042 (delivered 1st June 2021, unreported).

³ [2020] ECSCJ No 148, BVIHC (COM) 162 of 2013 (23rd April 2020)

⁴ No 13 of 2015, Laws of the Territory of the Virgin Islands.

...

'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,

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."

[6] I held, in reliance on a number of English authorities, that, because it was the BVI law firm who were demanding fees in respect of the work of the two Hong Kong associates, there was no breach of the prohibition on non-practitioners practising BVI law. It was, I held, the BVI law firm which was practising BVI law, not the unadmitted associates. The Court of Appeal held that this was wrong. At para [72] Ellis JA (Ag) said:

“In view of the restricted ambit of section 18 of the LPA, and of the broad definition of the ‘acting as a legal practitioner’ applied by this Court in **Garkusha**⁵ and **Shrimpton**,⁶ there is no scope for a local law firm employing an unregistered and unregulated person to provide assistance with the conduct of litigation, secure in the knowledge that if successful, the client would recover the cost of such assistance.”

[7] Now in the current case, the exact work done by the paralegals will need to be investigated, because what constitutes “practising [BVI] law” is fact-sensitive. However, some entries on their face seem to involve practising law. On 13th July 2020 in Summer Fame, one of the paralegals is recorded as having “[f]inalised orders for sealing for counsel review.” Now it is true that not all work or perhaps not even the majority of the work of “an unqualified clerk, paralegal or trainee” is practising law: see **Kwok** in the Court of Appeal at para [86]. However, some may well be.

[8] If that work did constitute “practising law”, then the fees claimed in respect of it would be irrecoverable. Indeed the firm may be on something of a Morton’s fork. If the work did not constitute “practising law”, then Maples may be in difficulty justifying the \$300 an hour fee charged in respect of the paralegals’ work. Normally administrative work is an overhead of the firm; not something which can be charged separately.

⁵ Demitry Vladivirovich Garkusha v Ashot Yegiazaryan and others [2016] ECSCJ No 104, BVIHCPMAP2015/0010 (decided on 6th June 2016, unreported).

⁶ John Shrimpton and another v Dominic Scriven and another [2017] ECSCJ No 15, BVIHCPMAP 2016/0031 (decided on 3rd February 2017).

[9] If the work constituted “practising law”, the position becomes even worse. In **Kwok** the associates were based outside the jurisdiction. The criminal offences created by section 18(1) and (2) of the Act do not apply to the practice of BVI law outside the jurisdiction: see **Shrimpton** for the legislative history. However, the offences of practising BVI law within the jurisdiction without being enrolled do potentially apply in my judgment. The paralegals would be potentially liable to the heavy minimum fines or substantial minimum terms of imprisonment for which the legislation provides. In addition, their supervising partners (and possibly others in the firm) would be liable for aiding and abetting the offence, and probably for counselling and procuring the forbidden behaviour as well.

[10] Ellis JA (Ag) dealt with the point in this way:

“[70] Mr. Chaisty [QC, counsel for the receiving party] has also submitted that this conclusion would have dire consequences for local law firms because it effectively means that they would be breaching section 18(1) if they instruct their paralegals to assist in tasks which can be considered to be legal work. According to Counsel, construing section 18(3) in the manner proposed by the Madam Yao would impact the application of section 18(1) because one cannot distinguish between the terms ‘practise law’ under section 18(1) and 2(2) and ‘acting as a legal practitioner’ under section 18(3). He further argued that construing the relevant provisions in such a way would have the unintended consequence of stifling the development and upward mobility of local trainee lawyers and paralegals.

[71] I can find no force in these arguments. There is no need to conflate the subsections. This Court in **Shrimpton** has made it plain that 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 under section 18(1) or 18(2). Under section 18(3) the court is concerned with the question of recoverability of fees and in that respect the position is plain: fees charged by persons whose name is not registered on the Roll but who purport to act as a legal practitioner are not recoverable. It seems to me that the obvious recourse open to the local law firm is for it to ensure that the relevant fee earners are duly admitted to the Roll in the BVI. Indeed, the regime under the LPA is relatively permissive to this end. Moreover, I fail to see how the development and mobility of local professionals could be assisted where local law firms are permitted to employ unregistered lawyers or unqualified persons in their overseas offices to work on BVI cases and applying BVI law.”

- [11] I agree of course in the light of **Shrimpton** that irrecoverability of fees under section 18(3) does not require proof that an offence under section 18(1) or (2) has been committed. The contrary proposition that no offence will be committed under section 18(1) and (2) if there is a breach of section 18(3), however, does not follow. “Acting as a legal practitioner” on the Court of Appeal’s construction necessarily involves “practising BVI law.” Practising BVI law is a reserved activity for BVI enrolled practitioners. If the breach of section 18(3) comes from practising BVI law whilst “acting as a legal practitioner” not abroad but rather in the BVI, then there will be a breach of the two earlier sub-sections. Indeed Ellis JA recognises this when she urges local law firms “to ensure that the relevant fee earners are duly admitted to the Roll”.
- [12] The learned justice of appeal advances public policy arguments in relation to overseas unadmitted lawyers. It may be that different policy considerations apply to BVI-domiciled paralegals, where working one’s way up from being a paralegal has long been recognised as an honourable route into the legal profession. These cannot, however, in my judgment affect the point of construction of section 18 determined by the Court of Appeal.
- [13] If there is a *prima facie* breach of section 18(1) and (2), then it is likely to be my duty to refer the papers to the Director of Public Prosecutions. Any breach of the LPA is serious, because breaches affect the administration of justice in this Territory. Now those potentially affected at Maples have my sympathy. In the light of my first instance decision in **Kwok** and the earlier decision of Leon J in **Inna Gudavadz et al v Carlina Overseas Corporation et al**⁷, it was not unreasonable to conclude that no criminal offence was being committed when paralegals did legal work. Any considerations as to whether it is in the public interest to prosecute are, however, matters for the Director of Public Prosecutions, not for me.

⁷ [2016] ECSCJ No. 262 (delivered 21st July 2016).

- [14] Given the importance of this point, it may be that the Bar Council will want to appear on any substantive hearing. Indeed the Director of Public Prosecutions or the Attorney-General may want to make submissions as well.
- [15] I shall list this matter initially for a short half hour hearing to consider the liquidators' application, but on the basis that the issue regarding fees in respect of paralegals' work shall be adjourned to a longer hearing.
- [16] I should add that I distributed a draft of this judgment to Maples, who made a number of representations which I have accepted. They asked as well that the judgment be completely anonymized. They point to the potential reputational damage to themselves of having the judgment published without redactions. I sympathize with them. Most of the law firms in this jurisdiction who employ paralegals are likely to be in the same position as Maples. It is Maples' bad luck that the current applications were the first to come before me after the Court of Appeal decision in **Kwok** was handed down. However, there are no sufficient grounds in my judgment to anonymize the judgment.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar