

Article

BVI Court of Appeal clarifies key principles for recoverability of costs

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On 1 June 2021, the Eastern Caribbean Court of Appeal handed down its decision in the matter of *Yao Juan v. Kwok Kin Kwok and Crown Treasure Group Limited* which was an appeal of the 23 April 2020 decision of the Hon Justice Jack, who ruled that fees incurred by non-BVI admitted lawyers (employed to a BVI firm and working under the supervision of BVI legal practitioners) were recoverable. See previous discussion of the Hon Justice Jack's decision [here](#).

One of the issues to be determined on appeal was whether costs of three fee earners employed by the legal practitioners for the Respondent to the Appeal in their Hong Kong office who were not BVI admitted were irrecoverable pursuant to section 18(3) of the (BVI) Legal Profession Act, 2015 (the "LPA"). Section 18(3) provides that no fee in respect of anything done by a person whose name is not registered on the BVI roll, acting as a legal practitioner, is recoverable. At first instance, the Court ruled that these fees were recoverable on the basis that the fee earners in question were not "acting as [BVI] legal practitioners" in their own right within the meaning of section 18(3) but were rather working under the supervision of BVI legal practitioners who had ultimate responsibility for the work product. The Court of Appeal rejected this analysis and ruled that it mattered not whether a fee earner was working under the supervision of a BVI legal practitioner, given that the essential question under section 18(3) is whether the fee earner was "acting as a legal practitioner" within the meaning given to that expression while not enrolled as a BVI legal practitioner.

The Court of Appeal affirmed the principles set down in what is now a series of judgments interpreting various aspects of the LPA, namely *Garkusha (BVIHCMAP2015/0010, decided 13 January 2016)*, *Shrimpton (BVIHCMAP2016/0031, decided 3 February 2017)* and *Gany Holdings (2020) 96 WIR 378*. However, the Court acknowledged that none of those decisions concerned the recoverability of fees claimed in respect of lawyers employed by a BVI firm, whose work the BVI firm sought to recover as fees of the firm itself. Ultimately, the Court ruled that allowing the recovery of such costs would undermine the policy objectives underpinning section 18(3) of the LPA, such as the development of the legal profession locally and ensuring that those practising BVI law are properly regulated by the LPA and accountable to the BVI Court. In affirming the position set out in *Gany Holdings*, the Court ruled that the proper approach is to consider the nature of the work carried out by the relevant individuals (regardless of whether they are acting under the supervision of a BVI legal practitioner, which the Court held raised no real point of distinction).

The second issue which the Court determined was whether the court at first instance erred in awarding the Respondent costs of the substantive appeal in the same matter in the amount of two-thirds of the costs in the court below, pursuant to an order of the Court of Appeal awarding the Respondent costs on that basis (the "Order"). The Appellant argued that this award was contrary to the indemnity principle given that two-thirds of the costs in the court below could be in excess of the Respondent's actual costs of the appeal. The Court of Appeal rejected this argument and ruled that the Hon Justice Jack correctly interpreted the Order in accordance with its natural and ordinary meaning. The Court of Appeal observed that "there is a relative dearth of authority on the proper approach to the interpretation of a court order" and therefore considered applicable English authorities which could be used by way of guidance. This led the Court to conclude that "the starting point when interpreting a court order is the natural and ordinary meaning of words which must be considered in light of the syntax, context and background in which those words were used". Applying this approach, it held that the Appellant's recourse, if it was thought that the effect of the Order was unfair, was to appeal the Order rather than seek to challenge its effect before the court below, which was simply required to apply the terms of the Order as it stood.

The Court of Appeal's decision offers a helpful clarification on two important points of principle regarding the recoverability of costs. The Court of Appeal reaffirmed the importance of the public interest objectives underpinning the LPA (confirming its commitment to ensuring that they are given full effect) and set out the applicable test for the interpretation of court orders in the BVI.

Conyers acted for the Respondent to the Appeal. Our team comprised Richard Evans, Partner, and Alecia Johns, Associate in the BVI and Norman Hau, Partner, and Emily So, Associate in Hong Kong.

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