

In the matter of section 10 of the Legal Practitioners Law (2015 Revision)

Advice

1. In this matter, I am asked to advise upon the question of whether, if the partners of a Cayman Islands law firm (persons A and B) employ a person who is overseas (person C) and who has not been properly admitted to practise as an attorney-at-law, in compliance with section 3 of the Legal Practitioners Law (2015 Revision) ("the LPL 2015"), to provide services as an "attorney-at-law" in the Cayman Islands, then persons A and B commit a criminal offence, either as a substantive criminal offence under section 10 of the LPL 2015, or a conspiracy to commit such a criminal offence.

Background

2. I have been referred to the following documents attached to my instructions:
 - a. a letter addressed to the The Hon. Chief Justice Anthony Smellie, dated 17th February, 2017;
 - b. a letter from the The Hon. Chief Justice Anthony Smellie, dated 21st February, 2017;
 - c. a statement, dated 16th January, 2013, made by Mr. Ian Paget-Brown, the Chairman of the Law Reform Commission.
3. The above-mentioned documents have given me an insight into the problem that currently exists within the legal profession in the Cayman Islands. At the root of this problem are the actions of some (not all) Caymanian law firms to circumvent the provisions of sections 10 and 12 of the LPL 2015, by holding out lawyers from (or practising in) foreign jurisdictions as lawyers who are qualified to advise upon matters regulated by Caymanian law.

The relevant laws of the Cayman Islands

4. I have been referred to the following provisions of Caymanian law:
 - a. the Legal Practitioners Law ("the LPL 2015"),
 - b. the Penal Code (2013 Revision)
5. In addition, I have, helpfully, been referred to the following reported cases:
 - a. *Somchai Liangsiriprasert v. (1) The Government of the United States of America and (2) The Lai Chi Kok Reception Centre Co (Hong Kong)* [1990] UKPC 31 (2 July 1990);

- b. *R v Smith (Wallace Duncan) (No.4)* [2004] 2Cr App R 17, [2004] EWCA Crim 631
- c. *R v Simon Guy Sheppard and Stephen Whittle* [2010] EWCA Crim 65;
- d. *Regina v Rogers (Bradley) and others* [2014] EWCA Crim 1680.

6. The above-mentioned authorities have given me a very good insight into the current common law rules regarding jurisdiction in a case in which there is an overseas element. However, for reasons that are mention in paragraph 16 below, I have not had to rely upon the common law for jurisdiction to be founded in this case.

Regulation of the legal profession in the Cayman Islands

7. Regulation of the legal profession in the Cayman Islands is achieved by a combination of legal provisions dealing with: (a) the admission of barristers, solicitors and others to practice as attorneys-at-law; and (b) the requirement that all persons practising as attorneys-at-law must be in possession of a current annual practising certificate. Whilst these two systems of regulation are complimentary, I am of the opinion that they stand separately from each other, dealing with two separate aspects of regulation of the legal profession. The first regulates those persons who are entitled to be admitted to practise as an attorney-at-law; the second deals with the continuing supervision of those who have admitted to practise. Admission is dealt with by the provisions of section 3 of the LPL 2015. The requirement to hold a current practising certificate is deal with by section 12. I shall set out the requirements under sections 3 and 12 separately below.
8. Those instructing me have expressed the opinion that the provisions for admission to practice and the requirement to hold a practising certificate are cumulative and interdependent. Whilst I agree with the proposition that they are complimentary, it is clear from the structure of the legislation and, also, from the separate sanctions provided for by section 10 (a criminal offence punishable with a fine) and section 12(3) (an order suspending an attorney-at-law from practising), that they are distinct from each other.

Admission to practise as an attorney-at-law

9. Section 3(1) of the LPL 2015 deals with the qualifications required for admission, as follows:

"3. (1) Subject to this Law, a judge may admit to practise as an attorney-at- law in the Islands any person who-

- (a) (i) is entitled to practise at the Bar of England and Wales or the Bar of Northern Ireland; and

(ii) having received a certificate of call from either of those Bars, has either-

(A) served twelve months pupillage in England, Wales or Northern Ireland; or

(B) served the term of articles in the Islands required by Schedule 3 of the Legal Practitioners (Students) Regulations (2015 Revision);

(iii) is a member of the Faculty of Advocates of Scotland or a solicitor of the Supreme Court of Judicature of England, Scotland or Northern Ireland;

(iv) is an attorney-at-law of the Supreme Court of Jamaica; or

(v) is a Writer to the Signet of Scotland or a solicitor admitted to practise in Scotland; or

(b) satisfies a judge that he is entitled to practise in any court of any of the Commonwealth and possesses a qualification comparable as to standard law, practice and procedure with those specified in paragraph (a); or (c) is qualified to practise as an attorney-at-law under regulations made under section 20."

10. Section 3(2) of the LPL 2015 deals with the procedure for applying for admission, as follows:

"3(2) A person who is qualified under subsection (1) may apply for admission to practise as an attorney-at-law and such application shall be made in writing addressed to a judge and be filed in the office of the Clerk of Court together with-

(a) the certificate of the applicant's call to the Bar or, as the case may be, of his admission to the Faculty of Advocates or of his admission as solicitor, Writer to the Signet or Law Agent aforesaid, or the corresponding certificate relating to any qualification referred to in paragraph (b) or (c) of subsection (1);

and

(b) an affidavit signed by him in the presence of the Clerk of Court, who shall subscribe his name as a witness thereto, verifying that the certificate is a true certificate and that the applicant is the person named therein and that he is qualified as prescribed by subsection (1) (hereinafter referred to as "the prescribed qualification");

Provided that a judge may exempt any such person from producing the said certificate and from verifying the same if he is otherwise satisfied that the applicant possesses the prescribed qualification."

11. I note that those instructing me have informed me that in order to be "Generally Admitted" (which I take to be a reference to admission under section 3(1), rather than limited admission under section 4), the process requires that the applicant, who is not a Caymanian Status Holder, shall provide evidence of a work permit attached to the affidavit filed in support of the application. I have been informed that without such evidence any application for admission by a non-Caymanian must fail.

However, I am unable to see any statutory basis for the proposition that there is a requirement to exhibit such a work permit. It may be the case that the Court, under its inherent jurisdiction has developed this practice but it does not seem to be a statutory requirement. In any event the only relevance to the problem in issue in this case is that there may have been some elision between the requirements for admission (under section 3(1)) and the requirement (under section 12(2)) for those who do not have Caymanian status to produce a current and valid work permit. However, any such elision does not mean that the requirement for a work permit is relevant to the question of whether an offence may have been committed under section 10 of the LPL 2015. I shall deal with this question in more detail below. However, as stated above, I do not think that this issue affects in any way my opinion in relation to the core matter that I am asked to advise upon; which I have set out in paragraph 1 of this advice.

The criminal offence under section 10 LPL 2015

12. The wording of section 10 is crucial to the question in issue in this matter.

Section 10(1) provides as follows:

"10. (1) Subject to section 4, a person who, not being admitted to practise and enrolled as an attorney-at-law, or otherwise lawfully authorised, shall, either directly or indirectly, for, or in expectation of, any fee, gain or reward, draw or prepare any instrument relating to movable or immovable property or any legal proceeding, or shall receive any fee, gain or reward for drawing or preparing any such instrument or proceeding, commits an offence and is liable on summary conviction to a fine of two hundred dollars."

Sub-sections (2) and (3) are also relevant:

"(2) Subsection (1) shall not extend to –

(a) any public officer drawing or preparing instruments in the course

of his duty; or

(b) any person employed merely to engross or copy any instrument or proceeding.

(3) In this section, "instrument" does not include–

(a) an agreement under hand only;

(b) a letter or power of attorney; or

(c) a transfer of stock containing no trust or limitation thereof."

13. It is, therefore, clear that section 10(1) of the LPL 2015 creates a substantive criminal offence. The actus reus of the offence (i.e. the conduct element of the offence) is committed if the following conduct occurs:
- a. a person who is not admitted *to practice* and is not *enrolled* as an attorney-at-law, either
 - b. directly or indirectly,
 - c. for, or in expectation of, any fee gain or reward;
 - d. draws or prepares any instrument relating to movable or immovable property, or any legal proceeding;
 - e. or receives any fee, gain or reward for drawing or preparing any such instrument or proceeding.
14. It is important to note that the word “instrument” is given a restricted meaning by section 10(3) of the LPL 2015. By section 10(3), instrument does not include –
- a. An agreement under hand only;
 - b. A letter or power of attorney;
 - c. A transfer of stock containing no trust or limitation thereof.
15. It is clear that the conduct element of the offence under section 10(1) must be committed by a person who is not admitted *to practice* and is not *enrolled* as an attorney-at-law. In my opinion, these words relate to not being admitted to practice under section 3 and to not being enrolled under section 5 of the LPL 2015. The offence is not committed where a person is admitted under section 3 and is enrolled under section 5 but does not have an annual practising certificate, required under section 12. I am fortified in this opinion because the sanction for practising or attempting to practise without being in possession of a current annual practising certificate is suspension under section 7(1). This is a regulatory or disciplinary offence and is not a criminal offence. For convenience, I have set out the terms of section 12(3) of the LPL 2015 below.

Practising or attempting to practice as an attorney-at-law without an annual practising certificate

16. Section 12(3) of the LPL 2015 provides as follows:

“2(3) A person who, not being a person practising by virtue of section 4, practises or attempts to practise as an attorney-at-law without being in possession of a current annual practising certificate issued under subsection (2), is liable to suspension under section 7(1).”

Conspiracy under the provisions of Cayman law

17. The provisions of Cayman law dealing with conspiracies are contained in sections 321 and 322 of the penal code. It is necessary and convenient for me to set them out in full.

"321. A person who conspires with another or others to commit any offence or to do any act in any part of the world which if done in the Islands would be an offence punishable with imprisonment and which is an offence in the place where it is proposed to be done commits an offence and is liable, if no other punishment is provided, to imprisonment for ten years, or, if the greatest punishment to which a person convicted of the offence in question is liable is less than imprisonment for ten years, then to imprisonment for such lesser term.

Other conspiracies

322. A person who conspires with another or others to –

(a) prevent or defeat the execution or enforcement of any law or regulation;

(b) cause any injury to the person or reputation of any person or to depreciate the value of any property of any person;

(c) prevent or obstruct the free and lawful disposition of any property by the owner thereof for its fair value;

(d) injure any person in his trade or profession;

(e) prevent or obstruct, by means of any act or acts which if done by any individual person would constitute an offence on his part, the free and lawful exercise by any person of his trade, profession or occupation;

(f) effect any unlawful purpose; or

(g) effect any lawful purpose by any unlawful means,

commits an offence.

Conclusions

18. In my opinion, an agreement between two or more persons to carry out conduct which contravenes section 10 of the LPL 2015 is clearly a criminal offence. However, the conduct which amounts to an offence under section 10 is very limited, as I have explained above. This is so, whether the agreement to carry out the conduct is committed partly within and partly beyond the jurisdiction of the court. This is the case by reason of section 4 of the Penal Code, which provides as follows:

"4. When an act which, if done wholly within the jurisdiction of the court, would be an offence against this Law, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or takes any part in such act may be tried and

punished under this Law in the same manner as if such act had been done wholly within the jurisdiction."

19. It is also a criminal conspiracy where two or more persons agree to prevent or defeat the execution or enforcement of any law or regulation. This is the case by reason of section 322(a) of the Penal Code, which I have set out above. By section 3 of the Penal Code, "law" includes "any order, rule or regulation made under the authority of any law". In my opinion, the provisions of section 12(3) of the LPL 2015 come within the definition of a "law or regulation" and, therefore, an agreement between two or more persons to prevent or defeat the execution or enforcement of the provisions section 12(3) amounts to a criminal offence under section 322 of the Penal Code. In my opinion, the conduct set out in paragraph 1 of my advice necessarily involves preventing or defeating the execution or enforcement of section 12(3) and, therefore, amounts to a criminal conspiracy. Again, by reason of section 4 of the Penal Code, this is so, whether the agreement to carry out the conduct is committed partly within and partly beyond the jurisdiction of the court.
20. Finally, it should be noted that the conduct which would amount to a violation of section 12(3) of the LPL 2015 is much wider in scope than the conduct required to amount to the offence under section 10. The proscribed conduct under section 12(3) extends to any conduct which amounts to practising or attempting to practise as an attorney-at-law without being in possession of a current annual practising certificate. Accordingly, a conspiracy to prevent or defeat the execution or enforcement of section 12(3) extends to all activities amounting to practising or attempting to practise as an attorney-at-law.
21. Should those instructing me wish me to expand upon any of the matters that I have set out above, I would be pleased to do so, either in writing or during a telephone conference.



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