

Obtaining Evidence in Bermuda for use in Foreign Proceedings

Over the years since the end of the Second World War Bermuda has become a centre for international business and is presently the place of incorporation of a large number of companies which are engaged in international trade or business. Inevitably, from time to time a Bermuda exempt company becomes embroiled in disputes with others either in the Bermuda arena or in a foreign jurisdiction or both. When the dispute erupts into litigation in a forum outside Bermuda the lawyers involved in the litigation will sometimes require the assistance of a Bermuda lawyer. Two forms of assistance are usually requested (a) to provide expert evidence (usually by affidavit) on some aspect of Bermuda Law; or (b) to obtain the evidence of a witness and/or the production of documents for use in connection with the foreign proceedings by or from a person who is unable or unwilling to appear in the foreign court. This article deals with the second type of assistance. It is hoped that it will give a general view of how Bermuda courts view such applications to obtain evidence. In some cases there may be no need to invoke the jurisdiction of the Bermuda court to compel the attendance of a witness. The witness may be quite willing to attend an examination in Bermuda voluntarily to give the evidence required. This is usually the case where the evidence is of a formal uncontroversial nature in which case the opposing counsel in the foreign litigation does not need to cross-examine the witness and may not even attend the hearing.

Where on the other hand the coercive power of the Bermuda court is likely to be required the usual method of obtaining the evidence from a Bermuda witness is by Letters Rogatory. This is essentially a request for judicial assistance from the foreign court addressed to the Supreme Court of Bermuda. The Bermuda lawyer makes an ex parte application to the Supreme Court. The evidence is by affidavit to which is exhibited the Letter of Request issued by the foreign court. The resulting order will require the appearance of the witness at a particular place at a particular time before an examiner (usually a Bermuda lawyer nominated by the person applying for the order) for the purpose of being examined on oath. The order must be personally served on the witness whose attendance may be enforced by committal proceedings.

The order may be (and usually is) coupled with an order that the witness produce certain documents. The opposite party in the foreign proceedings may, however, apply to the Bermuda Court to set aside the order if there is some ground for believing that the Letter of Request does not conform with the requirements of Bermuda Law.

One of the most frequently relied upon grounds for seeking to set aside such an order in the Bermuda Court is that the information or documents sought to be obtained is part of the discovery process of the foreign court. The Bermuda Evidence Act 1905 which, inter alia, establishes the jurisdiction of the Supreme Court in this regard requires that it be shown that "the evidence to which the application relates is to be obtained for the purposes of civil proceedings which have been instituted before the requesting court" [s. 27P(b)]. Furthermore, s.27Q(3) states:

"(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the Court (i.e. the Bermuda Court)."

It is recognized that the purpose of this provision (which applies both to oral and documentary evidence) is to distinguish between evidence in the nature of proof to be used for the purposes of the trial and evidence in the nature of pre-trial discovery to be used for the purposes of leading to a train of inquiry which might produce direct evidence for the trial. The intention of the Bermuda legislature is not to give effect to letters of request issued for the purposes of obtaining pre-trial discovery of documents.

Section 27Q(4) provides as follows: "(4) An order under this section shall not require a person

- a) to state what documents relevant to the proceedings to which the application relates are or have been in his possession, custody or power; or
- (b) to produce any documents other than particular documents specified in the order as being documents appearing to the Court to be, or to be likely to be, in his possession, custody or power.

"The words "particular documents specified" have been construed judicially as meaning individual documents separately described. The Bermuda courts will not countenance a request for "any memoranda correspondence or other documents relevant thereto". Such a description would be held to be too wide. The request may contain a description of a category of documents if the category is defined with precision, i.e., "bank statements for the months October to December (inclusive)". Where the Bermuda court is satisfied that as a whole the foreign request is in conformity with the Evidence Act in that it is for evidence in the nature of proof to be adduced at the trial, it may be able to strike out parts of the request which are too wide either in relation to documents or witnesses allowing the non-offending parts to remain.

Generally speaking, it is advisable to obtain the advice of a Bermuda lawyer before the application to the foreign court for the issuance of a letter of request is made. This may help ensure that the request is properly drawn so that the Bermuda court can give effect to it. It will also reduce the risk of an application to set aside the order of the Bermuda court pursuant to the request which if successful may cause a great deal of waste in time and money.