

Complex Commercial Litigation 2021

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Complex Commercial Litigation 2021

Contributing editor**Simon Bushell**

Seladore Legal

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Complex Commercial Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Bermuda, China, Mexico, Portugal and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Simon Bushell of Seladore Legal, for his continued assistance with this volume.

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BACKGROUND

Frequency of use

- 1 | How common is commercial litigation as a method of resolving high-value, complex disputes?

Bermuda has a well-established commercial court regime and a number of complex, high-value disputes are brought before the Bermuda courts each year. For example, in 2019, 511 actions were initiated, of which the number of cases with a commercial element was between 30 and 40 per cent and the number of commercial court decisions each year varies between 20 and 30.

Litigation market

- 2 | Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

Given that Bermuda is an offshore jurisdiction with over 18,000 companies on the register of companies, litigation involving international parties in Bermuda is common. This litigation tends to involve cross-border related matters, the value of such matters tends to be substantial and the underlying issues tend to be complex.

Legal framework

- 3 | What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

In Bermuda the Supreme Court Act 1905 governs the jurisdiction of the Supreme Court, and the Rules of the Supreme Court 1985 govern the procedure of proceedings before the Supreme Court, which is the superior trial court of first instance for commercial cases. The Court of Appeal Act 1964 and Rules made thereunder govern jurisdiction and procedure for appeals in commercial litigation.

Bermuda has legislative autonomy for all matters except defence and foreign affairs. Bermuda follows the English common law system, and the courts will apply (in general) English case law precedent.

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

- 4 | What key issues should a party consider before bringing a claim?

The key issues that a party should consider before bringing proceedings in Bermuda are: jurisdiction, enforcement and costs risks. Normally complex commercial cases involve multiple parties, many of whom

may have no or little connection to the jurisdiction of Bermuda, with one party (often a Bermuda company) that is subject to the jurisdiction. Often preliminary points are taken with procedural arguments over jurisdiction over the other parties, and service of process, so that it is essential to consider any risks that relate to sustaining jurisdiction over all defendants. This includes the procedural gateways for extraterritorial service, and the practical mechanics of achieving valid service overseas on such parties.

There is no point in embarking upon litigation if there is any serious risk that the judgement or other relief that is obtained in Bermuda will not be (1) capable of enforcement in Bermuda (eg, by the normal enforcement processes available for the enforcement of judgments) or (2) capable of enforcement in another jurisdiction against any of the parties to the Bermuda proceedings, or assets of the defendants to the Bermuda proceedings.

A foreign plaintiff may be required to provide security for costs before being permitted to proceed against Bermuda defendants (or other parties brought before the Bermuda court who are not resident in Bermuda). Following the English system, the losing party pays the costs of the proceedings, except in limited circumstances, which will be assessed, and usually will amount to two-thirds to three-quarters of the actual costs incurred by the successful party. These costs will normally be substantial. Contingency fees are not permitted in commercial litigation, so in general litigants must fund their own costs on an ongoing basis.

Establishing jurisdiction

- 5 | How is jurisdiction established?

Jurisdiction is normally established by domicile, registration or presence within the jurisdiction, but there are gateways that allow jurisdiction to be established against defendants who are not within the jurisdiction under the Rules of the Supreme Court (Order 11) that follows (broadly) the English equivalent of Part 6 of the English CPR.

Broadly, any claim can be brought against a defendant over whom the Bermuda court has jurisdiction as of right, and may bring claims against other parties who are not subject to the Bermuda court's jurisdiction provided that the claim is one of the types of claim that is specifically listed. In general, complex commercial disputes arise out of contractual relations, shareholder rights or tortious liability for breach of a common law duty of care. Where the contract is governed by Bermuda law, or the breach of the contract or duty occurred in Bermuda, or the loss or damage is suffered in Bermuda, the court will accept jurisdiction over the claim. In relation to shareholder rights, the bye-laws of a Bermuda company are a statutory contract between the members and the company and the members inter se and under conventional principles of private international law, the Bermuda court will have jurisdiction over the shareholders and the company in a dispute over shareholder rights.

The Bermuda court will apply conventional principles of English private international law to determine whether it should allow proceedings to proceed in Bermuda where proceedings have already been commenced in another jurisdiction, and may apply conventional English law principles of *lis alibi pendens* and English *forum conveniens* principles as set out in *Spliada Maritime Corp v Cansulex*.

Where there has been a valid choice of law provision in a contract, the Bermuda court will normally give effect to it, and may enjoin a party who has commenced proceedings in another jurisdiction in violation of that provision from pursuing those proceedings and may grant an anti-suit injunction relief in appropriate cases.

Preclusion

6 | Res judicata: is preclusion applicable, and if so how?

The normal English common law rules as to *res judicata* and issue estoppel will be applied by the Bermuda court. However, there will be strict application of the rules that the parties must be the same and the issue to be determined either has been or could have been raised in the prior proceedings must be the same. Where this *res judicata* principle applies, the Bermuda court will either dismiss the proceedings as an abuse of the process of the Bermuda court, or will stay the proceedings.

Applicability of foreign laws

7 | In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

The Bermuda court will apply foreign law where the parties have agreed that a foreign law will apply to govern an issue in the proceedings, or where the Bermuda court has accepted jurisdiction over the dispute on other grounds, and the foreign law is the chosen law, or the law most appropriate for the determination of the dispute. Where there is no evidence of foreign law, the Bermuda court will apply the conventional assumption that the foreign law is the same as Bermuda law.

Where evidence of foreign law is adduced by the parties, the Bermuda court will determine what the foreign law treatment of the issue is as a matter of fact, and will decide the issue in accordance with the view of the foreign law that the Bermuda court has determined is more likely than not to be the correct view.

The tactical use of a foreign law will vary from case to case. The applicability of a foreign law will not avail a party who would seek to obtain multiple damage awards or relief that the Bermuda court could not or would not grant as a matter of public policy, even if that relief is available in the jurisdiction whose law applies to the determination of the issue in dispute. In practice, the difference between the approach taken by a foreign court and the Bermuda court under Bermuda law is not generally a relevant tactical matter.

Initial steps

8 | What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

The initial steps that can be taken to ensure the judgment will be satisfied will vary. Normally where there are assets within the jurisdiction that can be enforced against, the judgment will be enforced by a writ of execution or a winding up order.

Information about the nature and extent of the assets the defendant has within the jurisdiction is a key tactical consideration.

Normally, the court will set aside transactions that are made to render the defendant judgment proof or give relief to a plaintiff who can show on credible evidence that there is a real risk of the defendant disposing of assets to put assets beyond the reach of a legitimate creditor.

However, there is always a risk that a defendant takes these types of steps long before the proceedings are commenced or in a manner that makes the enforcement of a judgment difficult or expensive.

Freezing assets

9 | When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

It is appropriate for a claimant to consider obtaining a freezing order where there is evidence of a real risk of dissipation of assets, or property will be subject to other claims. It will be a precondition to satisfy the court that the applicant has a good and arguable case, that there is a genuine risk of dissipation of assets and that it is just and convenient to grant the freezing order. As with all equitable relief, the applicant must come to court with 'clean hands'.

Pre-action conduct requirements

10 | Are there requirements for pre-action conduct and what are the consequences of non-compliance?

The Supreme Court rules in Bermuda contain an overriding objective that contemplates that parties will come to court as a last resort, making every effort to resolve matters between themselves beforehand. There are potential cost consequences if a party does not engage in such pre-action steps.

Other interim relief

11 | What other forms of interim relief can be sought?

Other forms of interim relief available in Bermuda including those pursuant to Order 29 of the Rules of the Supreme Court, such as orders to preserve and protect property. These orders are available in circumstances such as those where the court has been persuaded that property should be protected pending the outcome of a dispute. Additional interim relief available includes the appointment of receivers.

Alternative dispute resolution

12 | Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

There is no requirement or expectation set by the court for parties to engage in ADR at any stage. There are, however, certain circumstances, such as with insurance litigation, where the contractual arrangements between the parties call for ADR and the court will enforce such provisions.

Claims against natural persons versus corporations

13 | Are there different considerations for claims against natural persons as opposed to corporations?

Generally, no, there are no different considerations. However, there are some claims against natural persons (ie, bankruptcy) that are, technically speaking, more complicated.

Class actions

14 | Are any of the considerations different for class actions, multiparty or group litigations?

There are no considerations for class actions, multi-party or group litigations because Bermuda does not permit such actions. However, Bermuda does permit consolidation of actions on similar facts and representative actions, although strict rules apply to qualify for representative actions.

Third-party funding

15 | What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

Pursuant to the common law rules against maintenance and champerty, third party funding in Bermuda is prohibited. However, in *Stiftung Salle Modulable v Butterfield Trust* [2014] Bda LR 13, then Chief Justice Ian Kawaley suggested that such prohibitions are no longer good law in Bermuda when he said:

The constitutional protected right of access to the court that is implicit in the fair trial rights guaranteed of section 6(8) of the Bermuda Constitution as read with European Convention on Human Rights jurisprudence on article 6 of that Convention suggest that such funding arrangements should be encouraged rather than condemned.

However, the plaintiff's argument in *Stiftung Salle Modulable v Butterfield Trust*, that litigation funding costs should be recovered as contractual damages, was rejected by the court. Therefore, it is unclear whether the costs of litigation funding can be recovered by a third party as part of the litigation.

Contingency fee arrangements

16 | Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

Generally, acting on a contingency fee basis is not permitted in Bermuda at this time. There are certain limited exception to this including lawyers dealing in undefended debt collections or where the Bermuda Bar Council has expressly permitted such arrangement (section 96 of the Barristers' Code of Professional Conduct).

THE CLAIM

Launching claims

17 | How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

In the context of complex commercial litigation, claims are normally launched by the filing of a Specially Endorsed Writ that includes a statement of claim. This depends on the complexity of the matter and issues at hand. The pleading must set out all of the facts, and the pleading of evidence is not permitted. It is important for all material facts to support the claim to be pleaded, otherwise, the claimant risks facing a strike-out application. It is not common for any documents to be appended to the claim, although this can be done in rare cases where a document is necessary to set out the essential facts pleaded properly.

Some commercial claims (including for example petitions for relief for minority oppression under the Companies Act 1981) must be brought by petition, which must be supported by an affidavit that may annex relevant documentary evidence in support. Other claims for relief may be brought by Originating Summons (for declarations as to the interpretation of documents), which is usually supported by an affidavit setting out the facts and which usually exhibits relevant documents.

Serving claims on foreign parties

18 | How are claims served on foreign parties?

Leave must be obtained from the Supreme Court for service of a party that is outside of the jurisdiction. Such application is made under Order 11 of the Rules of the Supreme Court by summons supported by an affidavit indicating the grounds upon which the application is made, where the party is expected to be found and that the deponent believes that the plaintiff has a good cause of action. Order 11, Rule 1 sets out the cases in which service out of the jurisdiction is permissible.

Key causes of action

19 | What are the key causes of action that typically arise in commercial litigation?

The key causes of action include:

- winding up;
- those seeking declaratory relief declaring the rights or parties;
- those seeking specific performance or other equitable relief; and
- those actions by minority shareholders against oppression by majority shareholders.

Claim amendments

20 | Under what circumstances can amendments to claims be made?

Amendments to claims may be made in accordance with the Rules of the Supreme Court, Order 20. If the pleadings have not closed, the claim may be amended without the leave of the court. If the pleadings in the case have closed, leave of the court is required to amend the claim and there may be, depending upon the circumstances and timing of the application, cost consequences for amending the claim.

Remedies

21 | What remedies are available to a claimant in your jurisdiction?

The following remedies are available to claimants in Bermuda:

- temporary or permanent injunctive relief;
- declaratory relief declaring the rights or parties;
- damages;
- specific performance or other equitable relief;
- winding up orders; or
- relief against the oppression of minority shareholders by majority shareholders. In cases where proprietary claims are made, the court may use a combination of these remedies to grant effective relief.

Recoverable damages

22 | What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

Monetary damages are recoverable based on the actual loss sustained together with consequential foreseeable losses that flow from the breach of contract, tort or other breach of duty. Normally these damages are calculated on one of the main categories of loss of bargain, reliance-based damages, consequential losses or of loss of gains. Purely economic losses or losses of profits are not usually recoverable unless they are directly associated with the above categories. The measure of loss is the net value of the benefit contracted for. Multiple damages may not be recovered. Losses can be recovered in any currency.

RESPONDING TO THE CLAIM

Early steps available

23 | What steps are open to a defendant in the early part of a case?

In the early part of a case, a defendant may seek to counterclaim against the plaintiff, challenge the jurisdiction of the court, strike out all or part of the plaintiff's case. Jurisdiction is normally established by domicile, registration or presence within the jurisdiction, but there are gateways that allow jurisdiction to be established against defendants who are not within the jurisdiction under the Rules of the Supreme Court (Order 11) that follows (broadly) the English equivalent of Part 6 of the English CPR, and thus a challenge to jurisdiction would be on one of those bases.

Defence structure

24 | How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

Defences are structured as both a reply to the claim, often by reference to paragraphs of the claim, but also the defendant's opportunity to provide its defence by providing all material facts to support its position. Just as with the filing of a claim, defences must not be statements of evidence. It is not common for any documents to be appended to a defence, although this can be done if the document relates directly to the facts pleaded.

Changing defence

25 | Under what circumstances may a defendant change a defence at a later stage in the proceedings?

A defendant can amend the defence once before close of pleadings without permission and thereafter at any time up to and including trial (with permission). Alternative defences may be pleaded. However, there are strategic risks with pleading defences that are mutually inconsistent, or amending the defence to plead an entirely different defence at a later stage of the proceedings. It is, however, normal for the defence to be reassessed and any amendments made after the exchange of documents provided on discovery.

Sharing liability

26 | How can a defendant establish the passing on or sharing of liability?

A defendant can reduce liability where contributory negligence causing the loss on the part of the plaintiff can be shown. Contributory negligence is not a complete defence to a claim, but the court may reduce the plaintiff's damages by a percentage, reflecting the proportionate contribution to the loss associated with the plaintiff's action or inaction. Further, a plaintiff has a duty to mitigate losses where possible, and this may also reduce the recoverable claim.

A defendant can pass on or share liability with a third party by virtue of a counterclaim, or make a claim against a third party for a contribution or indemnity provisions (Order 15 of the Rules of the Supreme Court). Further, in the context of an officer's liability (especially an auditor's liability), the court may, in certain circumstances, apportion liability among the parties pursuant to section 98(B) of the Companies Act 1981.

Avoiding trial

27 | How can a defendant avoid trial?

Other than by disputing jurisdiction or arriving at a settlement, there are no other means for a defendant to avoid trial. Bermuda does not have procedure permitting a defendant to bring an application for summary judgment.

Case of no defence

28 | What happens in the case of a no-show or if no defence is offered?

If no defence is filed, judgment in default of defence may be sought by the plaintiff. In the case of a no-show, however, this is slightly more complicated given that judgment may only be obtained against a party in the case of liquidated damages. In a case where unliquidated damages are sought, there must be a trial.

Claiming security

29 | Can a defendant claim security for costs? If so, what form of security can be provided?

A defendant can make an application for security for costs where the plaintiff is a foreign plaintiff and has no sufficient assets within the jurisdiction from which to make a payment of an adverse costs award. However, the order for security for costs will be modified where the judgment or award would be capable of enforcement in the defendant's jurisdiction by registration (for example, in the UK or another Commonwealth jurisdiction where the Bermuda court's award of costs would be recognised) such that the amount of the security would be limited to the estimated amount of the additional costs of enforcement.

An order for security for costs will not be used as an instrument of injustice to stultify a valid claim by reason of the plaintiff's ability to provide security for the defendant's costs.

PROGRESSING THE CASE

Typical procedural steps

30 | What is the typical sequence of procedural steps in commercial litigation in this country?

The typical steps to progress the case are the conventional exchanges of pleadings (claim-defence-reply) according to the timetable provided in the Rules or ordered by the court. Where a counterclaim is made, provision is made for the defence to counterclaim and reply, so that the claims and counterclaims proceed on a combined timetable.

Where the issue is suitable for originating summons procedure, the originating summons will set out the relief sought and the grounds upon which the plaintiff relies, with a full supporting affidavit or affirmation by the applicant, to which the respondents will answer by affidavit or affirmation, and the applicant will reply. Disclosure in originating summons procedure is normally more restrictive and focused than in proceedings commenced by writ, but the scope of disclosure ordered will vary from case to case. A case commenced by writ (or originating summons) may be directed to follow the procedure most appropriate to the determination of the issues, irrespective of how it was commenced.

In writ actions, once the pleadings are closed, there is a mutual obligation to disclose relevant materials that relate to the case or put the other side on a train of relevant enquiry. This is done by list, and then production of documents. In modern practice, there will be a directions hearing at which a sophisticated regime of electronic discovery will be ordered, with search parameters and other directions for sample production of evidence may be ordered where the volume of

information to be disclosed could become oppressive, unfair or overwhelming. This will vary from case to case, but the court will expect the parties to make use of technology to expedite and simplify the disclosure process.

Once the disclosure process has been completed, the matter will proceed for listing for trial. Directions for trial will provide for evidence to be provided by witness statement and supporting documentary evidence from each witness, and the exchange of that evidence according to a timetable established by the court at a case management hearing.

Directions will also be given for the exchange of expert evidence, and preparation of a consolidated trial bundle in electronic form for the parties and paper form record for the court.

Prior to the trial, skeletons will be exchanged, with relevant legal authorities and supporting materials. Issues lists can be ordered, but experience shows that these are not usually useful for the court or the parties.

Most commercial cases do not go to trial. In the majority of cases, there will be the conventional commencement of the proceeding by writ or originating summons, and the defence or affidavit in answer will be served, and then interlocutory applications will be made. These interlocutory applications may well delay the action to trial. In some cases, applications to stay, or strike out the claim, or parts of it, may be made as a matter of course.

Bringing in additional parties

31 | Can additional parties be brought into a case after commencement?

Additional parties can be added either as defendants or as third parties. Additional plaintiffs cannot be added without their consent. Once the action has been commenced and properly served on a party within the jurisdiction of Bermuda, any party whom the court considers a necessary and proper party who should be added for the proper and effectual determination of the issue in dispute may be added, whether or not they are within the jurisdiction.

Third parties are normally added where the liability sought to be determined is for indemnity or contribution to the defendant's liability.

Consolidating proceedings

32 | Can proceedings be consolidated or split?

Proceedings can be consolidated where the court considers that it is in the interests of the justice to try cases that involve issues arising out of the same facts or related facts, and between parties or related parties who may not be the same but where the underlying issues are sufficiently closely connected as to make it convenient and in the interests of the efficient administration of justice to consolidate the cases and try them at the same time.

Similarly, where the court considers that it is in the interests of justice for cases between parties to be split into separate trials, the court has power to do so, however this is a power that in practice is seldom used.

Court decision making

33 | How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

The Bermuda court will apply English common law rules of evidence. Generally, the court will only admit direct evidence that is relevant to determining the issues in dispute. Exceptions to the hearsay rules apply to documentary evidence and evidence in electronic form is admissible.

Normally, primary evidence is given by witness statements, which stand as the evidence in chief of the witness. Witness statements are exchanged in advance of trial, and the witnesses are made available for cross-examination at the hearing.

In the context of complex commercial litigation, expert evidence as to matters of foreign law (or other topics of technical or special expertise, such as valuation) is admissible by way of opinion evidence, provided it complies with the normal procedural rules governing the method and form that the expert evidence.

The general rule is that he who alleges must prove, and the standard of proof in civil and commercial cases is on the balance of probability, taking into account all relevant matters, and the judge's assessment of the credibility of the witnesses, tested against the background facts and documentary evidence.

The elements required to be proved may vary from case to case, depending on the key issues to be decided, but in complex commercial cases, the issues usually revolve around (1) the breach of a contractual term or duty; (2) the breach of a duty owed in tort, or breach of a statutory duty; (3) the corporate rights and duties of companies, shareholders and directors; and (4) the establishment and quantification of loss that flows directly from the breach alleged, or that were in the reasonable contemplation of the parties.

34 | How does a court decide what judgments, remedies and orders it will issue?

The Supreme Court has a wide jurisdiction to grant the relief and remedy of the English courts of law and equity. In some cases, the relief that is available is based in a statutory jurisdiction that will proscribe the limits of the relief, for example, specific relief or claims provided for under the Companies Act 1981 or under the Conveyancing Act 1983.

Normally in commercial cases, the relief and remedies will involve:

- temporary or permanent injunctive relief;
- declaratory relief declaring the rights or parties;
- damages;
- specific performance, or other equitable relief;
- winding up orders; or
- relief against the oppression of minority shareholders by majority shareholders. In cases where proprietary claims are made, the court may use a combination of these remedies to grant effective relief.

Evidence

35 | How is witness, documentary and expert evidence dealt with?

Witness evidence is usually given by witness statement and the witness is produced for cross-examination at the hearing when required to do so by the opposing party.

Documentary evidence is normally reduced by the parties after disclosure to trial bundles containing all the documentary evidence that the parties seek to rely upon at trial. Often, the evidence is further reduced to a core bundle of essential evidence, and a master bundle of the other tangential evidence that is not central to the determination of the issues, that is available as required. The court will encourage the parties to agree as many facts as possible, but this is often a difficult process in practice. The court will usually end up deciding the key facts necessary to the determination of the issues.

In complex commercial cases, most of the witnesses will be sophisticated and experienced. The key facts will usually be evidenced in written contracts and correspondence. The explosion in volume of electronic communications usually means that the witness has already expressed his or her thoughts and explained his or her actions contemporaneously with the events.

Documentary evidence is usually considered to be more reliable than the oral testimony of witnesses, and cross-examination usually focuses on the gaps between the two. The key advantage in commercial litigation will be obtaining effective disclosure of emails, WhatsApp messages and other social media to capture as much information as possible. This can be difficult, because these communications are personal to the individual, and often not within the power of the corporate defendant to produce. In some cases, the corporate defendant may be unaware of the existence of this material.

36 | How does the court deal with large volumes of commercial or technical evidence?

The court will give directions for the disclosure of all relevant documentary materials. In cases where the volume of those materials is vast, the court will direct parameters of disclosure of materials, covering sample or representative batches. Often the negotiation of the parameters, and the effective enforcement of the disclosure within those parameters is challenging. It usually takes many months to achieve agreement upon, or a court resolution of, the areas of dispute. The court is required to direct the parties to make effective use of technology to aid the trial process, including discovery and disclosure, but the process can become overwhelming, and favours the well-resourced litigant.

Technical evidence is dealt with by expert evidence and report, so the court will normally only deal with the disputed areas of technical evidence identified in the expert's reports.

37 | Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

A witness who is resident in Bermuda can be compelled to give evidence for a foreign court under the Evidence Act 1905 and the Rules of the Supreme Court 1985. The request for evidence for use in a foreign court is usually sought under a Letter of Request from the foreign court, and the court will appoint an Examiner to take the evidence, approve the transcription of it in writing and certify it before sending it back to the foreign court. Objections as to form and admissibility are determined by the foreign court under its own rules. The witness may not be compelled however to answer questions or give evidence that he or she could not be compelled to give by a Bermuda court in litigation in Bermuda. Evidence for US-style discovery depositions or production of documents for discovery in foreign proceedings will not generally be allowed. The evidence must be required for use at a trial of the foreign proceedings only.

A Bermuda court may seek the assistance of a foreign court to obtain evidence from a witness in a foreign jurisdiction, including documentary evidence, by issuing a letter of request to the foreign court. However, the ability of the Bermuda court to obtain such evidence depends on the ability of the foreign court to give effect to the request under its own domestic law.

38 | How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

The documents produced in the discovery or disclosure process must be certified by the producer's attorneys to be authentic and true copies of the original or copies of original documents. Authenticity may be challenged, but it is normally presumed.

Witnesses can be cross-examined as of right, but usually only key witnesses will be cross-examined in practice. An exception to the rule on cross-examination is in respect of an affidavit verifying production of documents.

Time frame

39 | How long do the proceedings typically last, and in what circumstances can they be expedited?

Complex commercial proceedings usually take between 24 and 36 months to come on to trial, assuming that there are no lengthy interlocutory proceedings that delay the process. In some cases, this timetable can be improved where it is possible to identify discrete issues or remedies that can be dealt with either by way of summary determination or preliminary issue.

Gaining an advantage

40 | What other steps can a party take during proceedings to achieve tactical advantage in a case?

Parties can apply for summary determination of the case either by summary judgment for a claim to which there is no seriously arguable defence, or apply to strike out all or part of a claim on the basis that it discloses no reasonable cause of action, or is an abuse of the process of the court. Judgment in default of appearance can be granted but only in simple money claims. Parties can seek the trial of a preliminary issue if its determination will dispose of the case.

Impact of third-party funding

41 | If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

Although the strict position is that third-party funding in Bermuda is prohibited by the common law rules against maintenance and champerty, recent case law has left the door open to reconsideration, in light of the decision in *Stiftung Salle Modulable v Butterfield Trust* [2014] Bda LR 13.

Impact of technology

42 | What impact is technology having on complex commercial litigation in your jurisdiction?

The Bermuda courts use technology as appropriate to aid the judicial process, including evidence being given by video link. Recently with the covid-19 pandemic, the court's ability to adapt and keep pace with technology has never been more apparent where hearings were able to take place despite remote working and parties, counsel and judges being in different time zones. Zoom hearings have been conducted at both the Supreme Court and Court of Appeal levels and include breakout rooms, screen-sharing with parties viewing materials electronically, and where appropriate, access to the public to view the hearings on YouTube.

Parallel proceedings

43 | How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

Generally, commercial proceedings are stayed while any criminal or regulatory matters are being investigated or heard. This usually leads to long delays in the progress of a civil liability claim. There is no real tactical advantage to be gained in these circumstances and in fact, a party cannot threaten a regulatory complaint or report in order to gain some advantage in commercial proceedings because to do so is contrary to the Barristers' Code of Professional Conduct.

It is possible for a party to bring a private prosecution but the circumstances in which they can be brought are fairly narrow, and would rarely, if ever, be appropriate in the context of a complex commercial claim.

TRIAL**Trial conduct**

- 44 | How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

The trial of the most common types of commercial litigation takes place in the Commercial Division of the Supreme Court in open court. The allocation of the courtroom will depend on the number of counsel, parties and witnesses. The court sits between 9.30am and 4.30pm with a 90-minute break for lunch and a mid-morning break. A normal commercial trial will last between five and 10 court days, but longer trials have been held, ranging between four and six weeks, and in the past, over two years.

Use of juries

- 45 | Are jury trials the norm, and can they be denied?

The Supreme Court sits with a single judge, without a jury in commercial cases. Juries are only used in a small category of cases, including defamation and malicious prosecution. The court can order a jury trial in cases of fraud, but this is rarely done.

Confidentiality

- 46 | How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

The Bermuda court sits in public and any evidence that is given in open court may be reported or divulged. Affidavits or affirmations submitted and other documents that appear on the court file can be accessed by the public after the proceedings are concluded.

The writ, originating summons and petition (or other form of originating process) can be accessed by the public, as well as any other pleadings including affidavits or affirmations that are filed with the court.

The court may order that portions of evidence that are commercially sensitive or personal information that is inappropriate for publication to be anonymised or redacted. In certain cases, the court can impose reporting restrictions, or sit in camera, but this is rarely, if ever, done in commercial cases.

Media interest

- 47 | How is media interest dealt with? Is the media ever ordered not to report on certain information?

The Bermuda court sits in public and unless it would be contrary to the national interest or contrary to the interests of defence, all information that is disclosed in the proceedings is public. However, the media may be given directions on reporting commercially sensitive information, but this is rarely, if ever, done.

Proving claims

- 48 | How are monetary claims valued and proved?

The Bermuda courts will rely on expert evidence on valuation.

Split trials are not common in the commercial context Bermuda, although they can be done if the circumstances warrant it.

POST-TRIAL**Costs**

- 49 | How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

In broad terms, the successful party is entitled to its costs and the court does not tend to have an issue-based approach when considering costs. It is fairly typical for the court to indicate in its judgment that the parties have the opportunity to be heard on costs. Judgments in commercial court cases are comprehensive judgments and are publicly available.

Appeals

- 50 | When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

The most common grounds of appeal include that the judge: erred in law, erred by taking into account matters that he or she should not have, erred by failing to take into account matters that he or she should have, or made a factual finding that is inconsistent with the evidence.

Appeals against a final judgment in the Supreme Court may be brought to the Court of Appeal by filing a notice of appeal with the Supreme Court Registry within six weeks of the judgment. To appeal an interlocutory decision of the Supreme Court, the intended appellant must seek leave to appeal from the judge of first instance. If leave is refused, the application may be made to the Court of Appeal. An application for leave to appeal must be brought within 14 days of the date of the decision. If leave is obtained, a notice of appeal must be filed within seven days of the grant of leave.

The Court of Appeals hold sessions three times per year and appeal hearings range from half day to two to three-day hearings depending upon the issues involved.

Enforceability

- 51 | How enforceable internationally are judgments from the courts in your jurisdiction?

Bermuda judgments may be reciprocally enforced in the United Kingdom and other commonwealth jurisdictions.

- 52 | How do the courts in your jurisdiction support the process of enforcing foreign judgments?

The Bermuda courts support the enforcement of foreign judgment by way of the Judgments (Reciprocal Enforcement) Act 1958, which applies only to judgments given in the countries listed in the Judgments Extension Order 1956, or enforcement at common law.

Under the Judgments (Reciprocal Enforcement) Act 1958, the Supreme Court will enforce the judgment of a foreign court with regard to in personam claim if: the foreign judgment is final and conclusive as between the parties, is for a certain sum of money, not being a sum in respect of taxes, fines, penalties or other charges of a similar nature and the foreign court had jurisdiction to give the judgment.

Other judgments may be enforced by a common law action, meaning the judgment creditor must issue proceedings in Bermuda that replicate the foreign proceedings and seek summary judgment under Order 14 of the Rules of the Supreme Court.

OTHER CONSIDERATIONS

Interesting features

- 53 | Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

Given that Bermuda is based on the British legal system, this offers a degree of certainty. Both the Supreme Court and Court of Appeal are known for producing sound judgments but in addition, Bermuda's final appeal court is the Privy Council. Additionally, the court process moves at a relatively quick pace compared with onshore jurisdictions, offering parties the opportunity to obtain judgment more promptly.

Jurisdictional disadvantages

- 54 | Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

The physical infrastructure of Bermuda's courts makes a difficult to have a large-scale commercial litigation case. Although other arrangements off-site can be made, the court facilities themselves ideally require enlargement and some updating. However, satisfactory arrangements have been made to accommodate larger cases, and reasonably modern courtroom facilities are available at the Dame Lois Browne-Evans Building.

Additionally, there is no equivalent of a charging order remedy in commercial cases, which means enforcement of judgments is typically by way of judgment summons, writ of execution or winding up.

Special considerations

- 55 | Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

Special rules allow for the admission of specialist foreign counsel in cases involving legal issues of complexity and difficulty and in most complex commercial litigation, foreign counsel are admitted for the trial. This applies for both plaintiff and defendant and ensures that parties have the counsel of their choice at the appropriate level. However, the local commercial bar is highly experienced and, in many cases, complex commercial matters are handled by local counsel. Where overseas counsel is required, special arrangements need to be made well in advance, and require both immigration approval from the government, as well as approval by the Bar Council.

UPDATES AND TRENDS

Key developments of the past year

- 56 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The case of *Siddiqui and Others v Athene Holding Ltd* the Bermuda Court of Appeal addressed the position of the ability of directors and officers to rely upon the indemnity provisions of the bye-laws of a Bermuda company, confirming that the court will usually assume that the bye-law extends to the officers unless there is a contractual relationship that sets out the rights of the parties, which will displace this assumption.



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Coronavirus

- 57 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In response to the covid-19 pandemic, the Bermuda government has offered unemployment relief, guidance regarding tenancy concerns, payroll tax relief for the hardest-hit sectors and pension withdrawals and suspensions. Additionally, given that its number of covid-19 cases is low, Bermuda has provided the opportunity for individuals to reside for up to one year while they work remotely for non-Bermuda companies. To achieve these relief options, a number of legislative changes have been made and regulations passed that has required the Bermuda legislature to respond promptly to address these issues. This has meant that the legislature has met virtually to achieve these necessary steps.

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