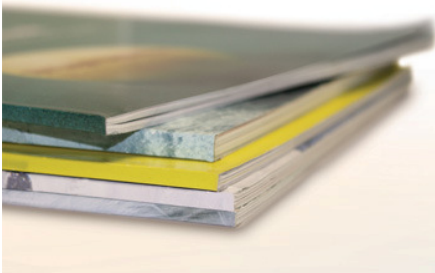


Fishing in Bermuda – Letters of Request from the Family Division

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BY JOHN RIIHILUOMA

In *Jennings v. Jennings* [2009] SC (Bda) 62 Civ, the Supreme Court of Bermuda reconsidered its approach to letters of request directed to Bermuda trustees from the English Family Court. In so doing the Bermuda Court reversed its December 2005 decision in *Charman v. Charman* where the Court, acting upon a Bermuda trustee’s application, set aside an order for document production made pursuant to a letter of request from the English Family Court.

The issue in ***Charman*** and ***Jennings*** was whether the rules governing the scope of document production requests contained in letters of request in ordinary litigation applied to financial relief claims in the English Family Court. The House of Lords in ***Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation*** [1978] AC 547, limited document production requests in ordinary litigation to documents which can be proved to exist. In ordinary litigation a document production request in respect of conjectural documents is therefore not allowed. In both ***Charman*** and ***Jennings*** the documents sought in the letters of request from the English Family Court included conjectural documents.

Husband’s Appeal

The English Court of Appeal in ***Charman v. Charman*** [2006] 1 WLR 1053, considered the

husband’s appeal against the grant of letters of request for documents and oral evidence from a Bermuda trustee.

The husband’s primary ground of appeal was that the document request should be set aside because it sought conjectural documents. The English Court of Appeal in ***Charman*** ruled that the limitation on requests for conjectural documents did not apply in matrimonial litigation. This was because the **English Matrimonial Causes Act** imposed upon the court a “*quasi-inquisitorial role*” to investigate and have regard to the parties’ financial resources. The court could not be fettered in discharging these duties by limiting the scope of letters of request to existing documents. Wilson LJ gave the leading judgment and said at page 1069:

“In my experience - plentiful in relation to inspection appointments, although exiguous in relation to letters of request - the wife will very seldom have the knowledge with which to prove the existence of a document which, if it does exist, may have a crucial bearing on the outcome of the financial application”.

In an unpublished decision of the Bermuda Court, Bell J set aside the document production order made pursuant to the letter of request that had been upheld by the English Court of Appeal in ***Charman***.

Whilst Bell J's decision is unpublished, the English Court of Appeal's judgment in respect of the **Charman** ancillary relief award [2007] EWCA Civ 503, indicates that Bell J set aside the document request on the grounds that the applicant failed to establish that the documents sought under the letter of request existed. In that judgment, the Court of Appeal referred to the decision of Bell J to set aside as "*unexpected*".

Decision Reconsidered

Bell J reconsidered his **Charman** decision in **Jennings** on an application by a Bermuda trustee to set aside an order made for document production and oral examination pursuant to a letter of request from the English Family Court. The **Jennings'** letter of request was in substantially the same terms as the **Charman** letter of request. Bell J concluded that his decision in **Charman** had been wrong and he refused to set aside the document production order.

Bermudian Statutes

In **Jennings**, Bell J took into account the fact that the Bermudian statutes governing the taking of evidence for a foreign court and matrimonial proceedings were taken from English legislation, and were in substantially the same terms as the English legislation. The decision of the English Court of Appeal in respect of the outgoing letter of request in **Charman** was therefore highly persuasive because it involved the construction of common statutes.

Bell J decided that he ought to have followed the reasoning in the English Court of Appeal's judgment

in respect of the outgoing letter of request in **Charman** in his earlier decision. The Judge was particularly influenced by the fact that the principles determinative of an application for the grant of outgoing letters of request is the same as those which govern the giving of effect to incoming letters of request.

Incoming Letter of Request

The English Court of Appeal had effectively determined that a letter of request in the terms of the **Charman** letter of request would be accepted as an incoming letter of request in England. Bell J was unable to find that the English Court of Appeal's judgment in respect of the **Charman** outgoing request was wrong and stated and page 12:

"...in the context of financial proceedings following divorce, the need for the request to seek production only of actual documents (i.e. those which on the evidence exist or did exist) does not pertain; it is sufficient, given the quasi inquisitorial role of the judge in ancillary relief litigation for the request to refer to conjectural documents, that is to say documents which might or might not exist".

It is also worth noting that in **Jennings**, Bell J found that the trust accounts sought were not conjectural documents in any event because the trustee was under a duty at law and under the trust deed to keep accounts.

John Riihiluoma appeared for the wife.

JOHN RIIHILOUMA
Partner – Bermuda
jriihiluoma@applebyglobal.com

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