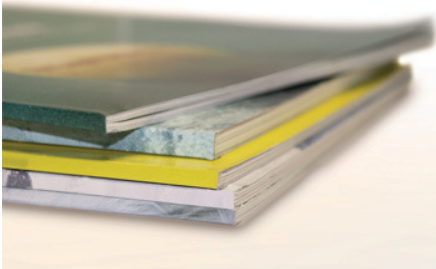


## The Use of Depositions in Cayman

*As originally appeared in Resolution – Offshore, Autumn 2010*



BY GRAEME HALKERSTON AND MARIT HUDSON

**In the course of international litigation a party may seek to depose a future witness of fact using powers available to that litigant under the laws of another jurisdiction or under powers of the domestic court. What approach does a court take to such steps?**

Four recent judgments in the Cayman Islands have considered these issues from the perspective of Cayman law. The judgments confirmed that in appropriate circumstances domestic and foreign depositions will be permitted to assist trial preparation, but confirmed that depositions will only be permitted in exceptional circumstances.

In the United States, Title 28 of U.S. Code s.1782 allows a litigant in non-U.S. proceedings to apply for permission to obtain evidence for use in such proceedings. The litigant must establish that it is an "interested person" in a foreign proceeding, including documentary discovery and the taking of depositions.

### **Anti-suit Proceedings**

An established body of case law has consistently indicated that anti-suit proceedings would be readily granted to restrain s.1782 depositions of intended witnesses largely on the basis that such depositions would constitute unwarranted double cross-examination, including decisions in England (**Omega Group Holdings v. Kozeny** [2002] C.L.C. 132), Australia (**Allstate Life Insurance v. ANZ Banking Group** [1996] FCA 1270) and

Jersey (**United Capital Corporation v. Bender** [2006] JLR 269 (CA)).

However in **Phoenix Meridian Equity Limited v. Lyxor Asset Management S.A** ("Phoenix") (CICA 4 of 2009, 24 September 2009), the Cayman Islands Court of Appeal confirmed the Grand Court's refusal of an anti-suit sought by the Defendant to restrain s.1782 depositions of future witnesses.

The Plaintiff sought s.1782 depositions in New York of two officers of a U.S. company affiliated to the Defendant. It was the Plaintiff's case that there was a significant free-standing litigation benefit in the proposed oral examination.

### **Restrain the Depositions**

The Defendant applied to restrain the depositions on the basis that those officers had provided witness statements in the Cayman action and would be giving oral evidence at the trial of the action. The Defendant argued that the depositions would subject the deponees to unwarranted double cross-examination, that the Cayman trial would suffer from unwarranted duplication and distraction, and that the topics covered by the s.1782 notice were too broad and intrusive.

At first instance, the Grand Court [2009] CILR 342 recognised that when a party has a right to avail itself of a legitimate foreign process, such as s.1782 proceedings, there must be very compelling reasons

for preventing it from doing so (applying **South Carolina Insurance Co v. Assurantie “De Zeven Provincien”** NV [1987 AC24, HL]). The Chief Justice noted that there was no reported Cayman case involving the application of anti-suit principles other than in *forum non conveniens* disputes.

He noted that the Plaintiff was able to identify several reasons why the depositions would constitute discovery in the true sense of the word and why the process could not be dismissed as mere double cross-examination. Furthermore, the Plaintiff was able to identify time and cost saving benefits.

The court also considered the important differences between Cayman civil procedure and the procedures of most other common law jurisdictions. First, GCR Order 24 Rule 16 permits a party to litigation to make an application to the Grand Court for discovery by oral examination of a party or an officer of a corporate party. Second, Cayman law provides oral discovery through the right to seek pre-trial cross-examination of individuals who have responded to interrogatories under GCR Order 26, Rule 5(2). These provisions indicated that Cayman law should not consider the risk of double-cross-examination of a future trial witness as per se an abuse of process.

### **Double Cross Examination**

On appeal, the court of Appeal affirmed the first instance decision, although the court did order that the transcripts of the depositions could not be used at trial without the leave of the court. The Justices of Appeal reiterated that the more appropriate venue for specific arguments of oppression was the U.S. and that the special regime for the taking of depositions under Cayman law was relevant to the exercise of discretion when considering allegations of oppression.

The **Phoenix** litigation also provided two judgments which indicated the restrictive approach, which would be taken under Cayman law for domestic deposition applications under Order 24,

Rule 16. When considering an interim injunction pending the appeal Quin J stated that he considered the rule “...*foreign to all our well-established and well recognised rules governing discovery...*” and that it could be described “...*as an unwanted and unloved orphan that has received little or no use since its introduction...*” ([2009 CILR 353], Quin J).

This approach was subsequently approved in another ruling in **Phoenix** by Foster J (4 August 2009). He held that Order 24, Rule 16 was a very exceptional procedure and that it should be used only in exceptional and unusual circumstances. He further held that other discovery processes could have been used to obtain the information which the Defendant sought by deposition and dismissed the Defendant’s summons.

### **Valuable Guidance**

The **Phoenix** litigation has provided valuable guidance on the availability of depositions in aid of Cayman litigation. The practical effect is that it may be easier to obtain depositions of witnesses resident in foreign jurisdictions using the procedures of those jurisdictions than under Cayman law, provided it can be shown that the taking of such foreign depositions will not constitute oppressive or abusive conduct in the context of the trial of the Cayman action. While this result may seem odd as a matter of initial impression, it is an indirect effect of the role of comity in international litigation. As the decision of the House of Lords in the **South Carolina** case acknowledged, foreign legal systems may offer litigants opportunities to obtain evidence by means which are not available in the domestic legal system, but absent oppression, the domestic court will not step in to prevent the foreign process.

The judgments also indicate the importance of considering specific principles of Cayman law, particularly Cayman and procedure, when applying principles derived from judgments in other common law jurisdictions.

GRAEME HALKERSTON  
Partner – Cayman Islands  
[ghalkerston@applebyglobal.com](mailto:ghalkerston@applebyglobal.com)

*This publication is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.*

October 2010

© Appleby

Bahrain  
Bermuda  
British Virgin Islands

Cayman Islands  
Guernsey  
Hong Kong

Isle of Man  
Jersey  
London

Mauritius  
Seychelles  
Zurich