Bermuda Litigation Guide 2025 (Chambers)

Briefing Summary: The guide provide the latest Bermuda legal information on litigation funding, initiating a lawsuit, pre-trial proceedings, discovery, injunctive relief, trials and hearings, settlement, damages and judgment, appeals, costs, alternative dispute resolution (ADR) and arbitration.

Service Area: Dispute Resolution and Litigation, Restructuring and Insolvency

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1 General

1.1 General characteristics of the legal system

Bermuda is a British Overseas Territory. The modern legal system of Bermuda is established by the Bermuda Constitution Order 1968, an Order in Council of the UK. The Constitution established the Supreme Court as the primary court of first instance and the Court of Appeal as the court with jurisdiction to hear appeals from judgments of the Supreme Court. The Appeals Act 1911 further establishes a right of appeal from any judgment of the Court of Appeal to the Judicial Committee of the Privy Council.

Bermuda's legal system is largely based on English common law. The Supreme Court Act 1905 further establishes that (subject to the provisions of any acts of the Bermuda legislature) the common law, the doctrines of equity, and the Acts of the Parliament of England of general application which were in force in England at the date when Bermuda was settled on the 11 July 1612 have force within Bermuda. Trials are conducted using the adversarial model between plaintiffs and defendants, who are represented, in large part, by lawyers making both oral and written submissions.

1.2 Court system

Section 12 of The Supreme Court Act 1905 established the Supreme Court as Bermuda's superior court of record. The Chief Justice is the president of the Supreme Court and puisne judges rank next in precedence (with appointed assistant judges ranking thereafter). The Supreme Court possesses and exercises the jurisdictions of the court of general assize, the court of chancery, the court of exchequer, the court of probate, the court of ordinary and the court of bankruptcy. There is also a Commercial Court, which deals exclusively with commercial (including restructuring and insolvency) and arbitration-related matters.

Appeals from the Supreme Court go to the Court of Appeal. The Court of Appeal currently has a roster of five Justices of Appeal who sit on a revolving basis. The current President of the Court of Appeal is Sir Christopher Clarke. Other renowned jurists on the Court of Appeal include Dame Elizabeth Gloster. Appeals are typically heard by three Justices. The Court of Appeal sits for three sessions per year, with each session lasting about a month.

Under the Appeals Act 1911, appeals from the Court of Appeal go to the Judicial Committee of the Privy Council in London.

The Magistrates' Court is below the Supreme Court. Its jurisdiction is limited to matters in dispute with a value of up to BMD25,000. The Magistrates' Court exercises both civil and criminal jurisdiction (summary only). Appeals from judgments and rulings rendered in the Magistrates' Court lie to the Supreme Court.

1.3 Court filings and proceedings

Save in exceptional circumstances, court proceedings are open to the public. This includes hearings in chambers. Under the Supreme Court (Records) Act 1955, the public has the right, subject to certain exceptions, to access and review the file of any Supreme Court action.

Parties who wish to keep proceedings, or the court file in those proceedings, confidential can apply for an order that the proceedings be held in private, and that the court file be sealed prior to commencing an action. When considering an application for privacy, the court will balance the rights of "open justice" and the public interests against the specific factual circumstances in which the order for privacy is being sought. Typically, where an application is made to protect the interests of minors or certain matters or information relating to a trust, provided the court concludes that the public interest is not served by the hearing being held in public, the courts will grant a confidentiality order. The same applies to a request that the court file be sealed.

1.4 Legal representation in court

Natural persons can represent themselves in court proceedings but unnatural persons (such as limited liability companies and partnerships) must be represented by an attorney. The Bermuda Bar is made up of legally qualified people referred to as "barristers and attorneys" who are admitted to practice at all levels of Bermuda's courts. Barristers and attorneys called to the Bermuda Bar may also act as Commissioners of Oaths. Pursuant to Section 51 of the Supreme Court Act 1905, to be admitted to the Bermuda Bar, a person must, amongst other things:

- have passed the final examinations required for a person to qualify to practise as a barrister or solicitor in England (or the equivalent);
- have completed a period of practical training of not less than 12 months;
- be resident in Bermuda; and
- be either a Bermudian or have the right to work in Bermuda (typically by way of a work permit).

Foreign attorneys

A foreign attorney who meets all of the requirements under Section 51 of the Supreme Court Act 1905, apart from residency, can be admitted to practice law in Bermuda on a temporary basis if it can be demonstrated that they possess a particular expertise not available in Bermuda or that the matter involves questions of law or practice of considerable complexity or public importance. An application for approval for a foreign attorney to be admitted to the Bermuda Bar must be made to the Supreme Court. An application for a work permit for that attorney must be made to the Department of Immigration on behalf of the attorney by a Bermuda law firm. The Minister responsible for labour will consult the Bermuda Bar Council, which is the governing body for barristers and attorneys in Bermuda, as a part of the consideration process. The Bar Council has significant input into the application but the ultimate decision rests with the Minister.

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2 Litigation funding

2.1 Third-party litigation funding

Bermuda has yet to enact legislation relating to third-party funding, but in recent years such arrangements have been blessed by the courts, which have rejected arguments that such arrangements are unlawful.

2.2 Third-party funding: lawsuits

This firm has seen no examples of restrictions being imposed on the type of litigation that can be funded by a third party. Often, parties to restructuring and insolvency proceedings will enter into funding agreements with the liquidators in order to support actions to recover assets from third parties as well as actions against former directors for breaches of fiduciary duties.

2.3 Third-party funding for plaintiff and defendant

Third-party funding is available for both the plaintiff and the defendant.

2.4 Minimum and maximum amounts of third-party funding

There are no minimum or maximum amounts a third party will fund.

2.5 Types of costs considered under third-party funding

The costs a third-party funder will consider funding is entirely a matter between the funder and the party accepting the funding.

2.6 Contingency fees

Contingency fees are prohibited by the Barristers' Code of Professional Conduct 1981, Rule 96.

2.7 Time limit for obtaining third-party funding

There are no time limits with regard to when a party to litigation should obtain third-party funding.

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3 Initiating a lawsuit

3.1 Rules on pre-action conduct

Unlike the modern English Civil Procedural Rules, the Rules of the Supreme Court 1985 (the "Rules") do not impose a rigid pre-action protocol on parties. However, parties to litigation are required, pursuant to the overriding objective set out in Order 1A of the Rules, to assist the court to (among other things) identify issues at an early stage and save expense. To this end, particularly in civil proceedings, parties will typically engage in pre-action correspondence and discussions prior to the issuance of proceedings.

Ultimately, the court is entitled to take into account the reasonableness of the conduct of the parties to any action when determining the issue of costs. Parties who have failed to assist the court in discharging the overriding objective may be at risk of having their entitlement to costs discounted.

3.2 Statutes of limitations

Applicable limitation periods are set out in the Limitation Act 1984. Claims for breach of a contract and in tort are subject to a limitation period of six years. A party bringing a claim based on a contract under seal must do so within 20 years. A 20-year limitation period also applies to claims concerning the recovery of land and the proceeds of the sale of land, or monies secured by a mortgage or a charge.

In contract law, the limitation period typically runs from the date on which the contract was breached. For a tort, the limitation period commences on the date the damage occurred. For claims in defamation, the start of the limitation period is the date of publication.

The Limitation Act 1984 makes provision for latent defects, as well as for cases where the cause of action could not, with reasonable investigation, have been discovered sooner.

Limitation is not an automatic bar to an action or recovery under it. A defendant must raise the Limitation Act 1984 as a defence and specifically plead the same.

3.3 Jurisdictional requirements for a defendant

When determining whether or not a proposed defendant is subject to its jurisdiction, the Bermuda court will consider whether the proposed defendant can be validly served within the Islands of Bermuda or whether a defendant has submitted, or has agreed to submit, to the jurisdiction of the Bermuda courts (for example by contract or by taking steps in the litigation proceedings in Bermuda). It may also consider whether the proposed defendant can be validly served out of the jurisdiction pursuant to Order 11 of the Rules.

3.4 Initial complaint

Subject to the provisions of any enactment and the Rules, civil proceedings in the Supreme Court may be begun by writ, originating summons, originating motion or petition. Which originating process must be used is proscribed by the Rules and depends on the facts and circumstances of each case.

A typical civil action is commenced by filing a generally endorsed writ of summons, which names the parties to the action and provides very brief details of the relief sought. If the defendant defends the claim, then a generally endorsed writ must be supplemented by a statement of claim in which the initiating party provides the facts upon which it relies to found its action.

By contrast, an application by a creditor to wind up an insolvent company must be brought by way of a petition.

A party is permitted to amend its initiating process at any time before service, and subsequent to service it can also be amended with the consent of the defendant or the court.

3.5 Rules of service

Service in Bermuda

The party bringing the action is responsible for service of the lawsuit on the opposing party. In the case of an action in respect of which a company is the defendant, a copy of the proceedings will be properly served if it is left at the registered office of the company in Bermuda. A copy of proceedings against an individual must be left directly with that individual in order for there to be proper service. If, in the case of an individual, service is difficult because, for example, that individual is actively avoiding service, the court can be asked to grant an order for substituted service.

Service out

With respect to parties outside of the jurisdiction, the Supreme Court can be asked to make an order for service outside of the jurisdiction. The "application for service out" is made by way of summons supported by an affidavit setting out why the defendant comes within the criteria of Order 11 Rules 1 and 2 of the Rules, and that it is therefore appropriate for service to be effected outside of the jurisdiction.

3.6 Failure to respond

A defendant who is otherwise validly served with a lawsuit, and who fails to respond as required under the Rules, can have a default judgment entered against them. A plaintiff must file an application demonstrating that service was effected in accordance with Order 11 or in accordance with an order of the court. A default judgment can be set aside on application by a defendant, who must demonstrate to the court that the judgment was wrongly entered against them or that there is otherwise some good reason why they should be entitled to defend the claim.

3.7 Representative or collective actions

Bermuda law and procedure does not recognise the concept of collective or class actions but does recognise representative actions. Plaintiffs can participate in a representative action with the leave of the court. The court must be satisfied, pursuant to Order 15 of the Rules, that:

- if a separate action were brought by or against each applicant, as the case may be, some common question of law or fact would arise in all the actions; and
- all rights to relief claimed in the action are in respect of or arise out of the same transaction or series of transactions.

The parties to a representative action must each consent to such an action being carried on in a representative capacity.

3.8 Requirements for cost estimate

There is no requirement to provide clients with a cost estimate at the outset of any potential litigation. However, pursuant to Rule 92 of the Barristers' Code of Professional Conduct 1981, if a client requests one, the barrister should provide a fair estimate of their fees.

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4 Pre-trial proceedings

4.1 Interim applications/motions

Parties to substantive proceedings in the Supreme Court have the ability to seek interlocutory relief prior to the substantive hearing or trial of the action. Such applications are ordinarily made by summons, supported by affidavit, and are not limited to case management issues. Common interlocutory applications include, but are not limited to:

- applications for additional or specific disclosure;
- interim injunctions;
- summary judgment; and
- strike out of frivolous or vexatious claims (although the Bermuda court has repeatedly confirmed in recent judgments that the legal bar for a strike out application to succeed is a high one).

4.2 Early judgment applications

Parties can apply for part or all of their adversary's case to be determined on an interim basis or be struck out. Such applications can be made at any point before the substantive hearing of the matter (or in some cases at the substantive hearing itself) although the court is likely to criticise an application for such relief in circumstances where it is made well after the facts and information founding the application were apparent (or it appears to have been made for some ulterior purpose).

Summary judgment

An application for summary judgment on some or all of the issues in dispute can be made under Order 14 of the Rules. Such an application must be supported by affidavit evidence confirming that – to the best of the applicant's knowledge, information and belief – the defence is not a viable defence to the claim or the part of it on which judgment is sought, save in relation to the amount of damages claimed.

Strike out

An application to strike out an adversary's case is made under Order 18 Rule 19 of the Rules. Such an application must satisfy the court that the claim:

- discloses no reasonable cause of action; and/or
- is scandalous, frivolous or vexatious; and/or
- could prejudice, embarrass or delay the fair trial of the action; and/or
- is otherwise an abuse of the process of the court.

4.3 Dispositive motions

In addition to applications for strike out and summary judgment, there are also motions upon which the court may order that a claim be struck out on the basis that the party pursuing it has failed to comply with an order of the court or has delayed in progressing the matter such that it has caused prejudice to the other party.

4.4 Requirements for interested parties to join a lawsuit

A third party can be joined in Supreme Court proceedings by a defendant. The defendant will have to have entered an appearance in the action and the third party can be joined in circumstances where the defendant seeks a contribution or indemnity from that party. The leave of the court is required before issuing a third-party notice, unless the action was begun by a writ of summons and the defendant has issued the notice before serving their defence on the plaintiff. The court will allow a third party to be joined when it considers that it is appropriate to do so to allow for the resolution of all matters in dispute.

The courts have also allowed interested parties to intervene in ongoing proceedings in which they have not been joined to allow them to make submissions. The relevant test for intervention is set out in Order 15 rule 6 of the Rules. This test was recently explored and confirmed in detail by the Chief Justice in ***Tatung Company v Chungwha Picture Tubes Limited*** [2023] SC (Bda) Civ. 21 in which Carey Olsen appeared successfully for the intervening parties.

4.5 Applications for security for defendant's costs

A defendant who can demonstrate that the plaintiff (i) is ordinarily resident outside of Bermuda, or is a nominal person suing for the benefit of a third party; and (ii) may be unable to meet an order to pay the costs of the defendant if ordered to do so will be in a position to make an application for security for its costs. The court can also be asked to make a security for costs order if it is apparent that the defendant has changed location or is otherwise taking steps to avoid the consequences of an adverse costs order. The amount of costs required to be paid as security is normally limited to the additional costs a defendant would incur if it was required to enforce an unsatisfied costs order in the event such an enforcement action was required to be taken. Such applications usually require the applicant to adduce expert evidence of foreign law and procedure to justify the costs claimed.

Appeals to the Court of Appeal automatically require the provision of security for costs unless the applicant can establish that they are impecunious. The amount of security is based on an estimate of the costs of the respondent in the appeal.

Security for costs is usually met by the attorney for the party subject to the order giving an undertaking that funds paid into their client account will be held until after the satisfaction of the order.

4.6 Costs of interim applications/motions

Costs orders are at the discretion of the court. Bermuda operates a "loser pays" system, and costs are generally awarded and assessed at the conclusion of the trial of a matter. For this reason, save in exceptional circumstances, interim orders dealing with case management applications to move the matter toward trial will be accompanied by an order for "costs in the cause", meaning the issue of the costs of that interim application will be dealt with as part of the general costs assessment at the end of the trial.

Interim applications that are meant to be dispositive of a matter, or are otherwise of material import to the action, usually attract an order for costs at the end of that application. A contested application concerning document disclosure, for example, which involves the exchange of evidence and a hearing before the court of a reasonable length could result in an order that the costs of the successful party be paid by the unsuccessful party. Such costs are not usually assessed or payable, however, until the end of the substantive proceedings. Orders that costs shall be paid "forthwith" (ie, immediately) are rare and only generally ordered where there is evidence of procedural impropriety on the part of a party.

4.7 Application/motion timeframe

The timing for the hearing of an ordinary application can vary depending on the complexity and nature of the matter. Generally speaking, applications are issued out of the Supreme Court Registry within ten days of filing unless there are exceptional circumstances.

Applications on an urgent basis are possible. The Bermuda courts are generally responsive to such applications. There have been instances of urgent injunctions being granted by way of telephone hearing, for example. Provided there is good reason for the application to be heard on an urgent basis, provision will be made for the same.

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5 Discovery

5.1 Discovery and civil cases

Discovery is a fundamental part of the litigation process in Bermuda. Discovery is automatic in actions begun by writ. It is administered by the parties to the action. The parties are required to mutually exchange a list of all documents relating to matters in question in the action within 14 days of the date of the close of pleadings in the matter, though in practice this deadline is usually extended by consent.

Although the Rules call for inspection of the documents in the list after the lists have been exchanged, generally speaking the modern approach is for each party to provide copies of the documents at the same time as exchanging lists.

A party can ask the court to order the disclosing party to make an affidavit verifying that the list of documents complies with that party's obligations under the Rules. The nature of the discovery is that a party is required to disclose the documents on which it relies for its case, as well as all documents that adversely affect its case. The parties are expected to be diligent in producing all documents that are or have been in their custody, possession or power and are relevant to the action, and they must conduct a reasonable search for such documents. Discovery includes not only documents such as emails, minutes, memos and letters, but also telephone recordings, photographs and anything else that is in a recordable form.

Parties can limit the scope of discovery by agreement.

5.2 Discovery and third parties

It is possible in certain circumstances to obtain discovery from third parties not named as a plaintiff or a defendant in the proceedings if the documents sought are likely to support one party's case or damage the case of their adversary. An application can be made for the issuance of a subpoena requiring the third party to produce the required documents and, if necessary, to attend court.

Norwich Pharmacal orders are also available in Bermuda, by which the court has the power to order that third parties provide documents where such documents are relevant to the proceedings. A Norwich Pharmacal Order is sought by way of summons supported by affidavit on an interlocutory basis.

5.3 Discovery in this jurisdiction

The general rule is that parties to an action are required to disclose all documents relating to matters in question in the action that are or have been in their possession, custody or power. This would include any documents which, it is reasonable to suppose, contain information that may enable the party entitled to the discovery either to advance their own case or to damage that of their adversary – or any document that may fairly lead them on to a train of inquiry which may have either of these two consequences.

5.4 Alternatives to discovery mechanisms

This is not applicable, as discovery is a fundamental part of the litigation process in Bermuda.

5.5 Legal privilege

Documents created in the contemplation of litigation, or otherwise created in the context of advice between a lawyer and their client, attract legal privilege. Although they must be included in the list of documents exchanged in discovery, they are exempt from inspection as a result of such privilege.

Such documents would include:

- letters and other communications passing between a party and its lawyers;
- communications between the lawyer and a third party, which are created in contemplation of litigation or for the purpose of obtaining or giving advice connected to that litigation; or
- communications regarding the collection of evidence to be used in such litigation.

In-house counsel

Legal professional privilege will extend to communications to and from in-house counsel acting in their capacity as a lawyer and not otherwise generally advising the business.

5.6 Rules disallowing disclosure of a document

A party cannot be required to disclose a document that would incriminate or expose them to proceedings that would involve a criminal penalty.

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6 Injunctive relief

6.1 Circumstances of injunctive relief

The court has a broad jurisdiction to grant injunctive relief. Orders can be made on an interlocutory basis to maintain the status quo until a party's substantive rights can be ascertained. Orders can also be made on a substantive or final basis.

An application for an injunction can be made prior to the commencement of proceedings, after proceedings have started or after trial. Injunctions can also be granted in aid of execution of a money judgment (for example, to support the work of a court-appointed receiver by way of equitable execution).

Interim injunctions can be granted on an ex parte basis, but on making such an application the applying party has the burden of full and frank disclosure. The failure to give full and frank disclosure can itself be a basis for discharging the injunction in due course.

The Bermuda courts can order:

- freezing injunctions and worldwide freezing orders (Mareva injunctions) preventing the movement or dissipation of assets;
- prohibitory injunctions requiring a party to refrain from doing something (including anti-suit injunctions); and
- mandatory injunctions requiring a party to do a thing.

Orders can also be made requiring that a party provide information or allowing for a property to be searched.

6.2 Arrangements for obtaining urgent injunctive relief

Within hours, appointments for the hearing of an application for urgent injunctive relief can be made by contacting the Supreme Court Registry and informing the staff of the urgency while seeking an appointment. The papers in support of the application, including any summons and affidavit, can be transmitted to the court electronically in advance of the hearing or, in cases of extreme urgency, the papers can be passed to the court at the hearing. Out-of-hours hearings for injunctive relief are possible and are usually conducted by telephone.

In both instances, a draft of the order being sought is sent directly to the judge hearing the application so that, upon making any orders, it can be immediately signed and served where necessary.

6.3 Availability of injunctive relief on an ex parte basis

Ex parte applications for injunctive relief are possible. They should only be made where there is real basis for believing that notifying the respondent would undermine the effectiveness of the relief sought. Otherwise, notice of an ex parte application for an injunction should be given to the defendant.

It is important to be aware that an applicant in an ex parte application, whether on notice or not, is obliged to provide the court with full and frank disclosure and to provide the respondent with a note of the hearing as soon as practicable after the order is granted. Full and frank disclosure includes a requirement that points that would have been made against the applicant are brought to the court's attention, as well as any information that is adverse to the application. Failure to make full and frank disclosure can be a ground upon which an injunction can be discharged, and an award of costs made against the applicant or their attorneys, or both.

6.4 Liability for damages for the applicant

An applicant for injunctive relief can be held liable for damages suffered by the respondent or a third party if the injunction is discharged at a later date on the grounds that it ought not to have been granted in the first instance. In respect of freezing orders, for example, the court will usually require that the party to whose benefit the order is granted provides an undertaking to meet any such damages incurred if the injunction is later discharged. Although the court retains a discretion to require the payment of security in respect of any such damages ("fortification of an undertaking"), in the ordinary course an undertaking as to damages will be sufficient.

6.5 Respondent's worldwide assets and injunctive relief

The court can grant injunctive relief against the worldwide assets of a respondent. The court can be persuaded to do so in circumstances where the defendant is within the jurisdiction and therefore subject to sanction should the order be breached. A party applying for a worldwide Mareva injunction must demonstrate (among other things) that there is a real risk of dissipation of assets if the order is not granted.

6.6 Third parties and injunctive relief

While the general rule is that injunctive relief can only be obtained against a party to an action, in principle, injunctive relief can be granted against third parties in certain limited circumstances, if, for example, there is evidence that a third party is threatening to aid and abet a contempt of court, or (in Mareva cases) where a third party is shown to be in possession/control of or dealing with the assets of a party already subject to a Mareva injunction.

6.7 Consequences of a respondent's non-compliance

In addition to contempt of court, an injunction affixed with a penal notice notifying those upon whom it is served that a breach of the order will be the subject of sanction can be enforced by way of further order of the court, including the process of execution, compelling a non-compliant respondent to abide by its terms.

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7 Trials and hearings

7.1 Trial proceedings

The adversarial process is the norm for the trial of a writ action. Witnesses for both parties attend on the scheduled day(s). The parties will have already filed written witness statements with the court and exchanged them with the other side. The plaintiff's witnesses are usually tendered for cross-examination first followed by re-examination, with the witnesses for the defendant following thereafter. The written witness statement of a witness is taken to be their evidence in chief. After the cross-examination of witnesses, the parties can then address the court on the law either in written submissions or orally, or both.

7.2 Case management hearings

Case management hearings are normally very short and heard in chambers before a single judge. Oral argument is usually led by the applicant, supported by a skeleton argument where there are particular issues of law for consideration, followed by a response from the respondent and, finally, the applicant is entitled to a final opportunity to respond.

The court is obliged to ensure that matters before it are conducted with reference to the overriding objective as set out in Order 1A/1 of the Rules (see **3.1 rules on pre-action conduct**). The overriding objective is designed to ensure, as much as possible, that the court deals with the case justly.

Preliminary applications on issues such as document discovery in complex commercial litigation, for example, can take the form of longer hearings. Such applications are typically supported by affidavit evidence and skeleton arguments filed in advance of the hearing.

7.3 Jury trials in civil cases

Jury trials are still available in some civil cases but are very rare. For example, in claims for defamation, parties have the choice to proceed by way of trial by jury or before a single judge. When deciding whether or not a matter should be decided by jury, the court will consider, in accordance with Order 33 of the Rules, whether or not the determination of the issues requires any prolonged examination of documents or accounts, or any scientific or local investigation which cannot conveniently be made with or by a jury.

7.4 Rules that govern admission of evidence

The Evidence Act 1905 and the Rules provide guidelines as to the manner in which evidence is admitted in civil actions in Bermuda. As a general rule, apart from opinion evidence (which is dealt with in **7.5 expert testimony**), the court will, as a matter of practice, allow evidence that is not prejudicial to the other side. The court will determine for itself what weight, if any, it gives to evidence submitted.

Hearsay evidence can also be admitted, subject to the service of the requisite notices under the Rules. Ultimately, however, the court will determine whether to allow hearsay evidence should it arise at trial.

7.5 Expert testimony

Expert testimony is permitted at trial with leave of the court, usually pursuant to a direction given in advance of trial as to the scope of the expert evidence to be adduced and the qualifications of the expert themselves. Order 38 of the Rules governs the right of parties to submit and rely upon expert testimony. Expert statements should be exchanged well before trial.

An expert must be sufficiently qualified to give expert evidence on the matters in respect of which they are intending to opine. An expert witness is expected to provide evidence on an objective and independent basis with a view to assisting the court, not the party that has engaged them. Expert evidence that is partisan is likely to be disregarded by the court.

7.6 Extent to which hearings are open to the public

As noted in **1.3 court filings and proceedings**, the default position is that hearings are open to the public. Bermuda courts do not create transcripts of hearings under ordinary circumstances. The Court (Records) Act 1955, however, gives any person the right to request to inspect and take copies of any of the records on the court file, including any transcripts produced, subject to the payment of the requisite fee and other stated exceptions.

7.7 Level of intervention by a judge

Judges are entitled to raise questions and intervene in the proceedings to address matters of case management where it is appropriate and required for the achievement of a fair hearing or otherwise in furtherance of the overriding objective. Judges can also ask questions of witnesses and counsel during a trial in order to clarify or otherwise attempt to narrow or understand the issues before them.

Whether final or interim, judgments and rulings can be given at the time of the hearing. Judges may also reserve judgment for a later time. Whether or not a judgment is given immediately or reserved often depends on the complexity of the issues raised in the case, as well as the urgency required for such a ruling to be provided. When rulings are reserved to a later date, they are ordinarily provided to the parties within six weeks of the hearing.

7.8 General timeframes for proceedings

The speed to trial depends on the attentiveness of the parties and the calendar of the court. Trials can move from originating proceedings through to trial in under a year if there are no large or complex interlocutory applications and the court calendar permits. The ordinary scenario, however, is that the trial of a writ action can take longer than a year from inception to final judgment.

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8 Settlement

8.1 Court approval

Parties are always able to settle an action without court permission. Commercial settlements are of course a feature of Bermuda litigation and can be effected in ways that suit both parties.

A plaintiff in an action begun by a writ may, without the leave of the court, discontinue the action or withdraw any particular claim not later than 14 days after service of the defence. However, if a party wishes to discontinue an action, claim or counterclaim at a later stage (ie, after 14 days have passed) the leave of the court is required. The general rule is that a party that discontinues a claim after a defence has been filed must pay the defendant's costs of the action.

8.2 Settlement of lawsuits and confidentiality

Parties who wish to have the terms of their settlement of an action remain confidential may wish to obtain a Tomlin order, which is an order that simply refers to the fact that the proceedings have been withdrawn or settled in accordance with the terms of an agreement which is held by the parties, thereby keeping the precise terms out of the court record.

8.3 Enforcement of settlement agreements

The terms of a settlement agreement will dictate how it will be enforced. A breach of an agreement to settle will be treated like a breach of an ordinary contract. For additional privacy, the parties to a settlement agreement may consider inserting a clause requiring that any dispute arising out of, or connected with, the settlement agreement be referred to arbitration.

8.4 Setting aside settlement agreements

A settlement agreement can be set aside on the same terms as any other contract.

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9 Damages and judgment

9.1 Awards available to the successful litigant

The courts can award a successful litigant monetary damages for losses suffered as a result of the actions of the defendant. These are awarded on a compensatory basis and can be calculated by reference to money due and owing to the plaintiff or the amount of money required to place the plaintiff in the position they would have been in had the breach not occurred. For personal injury, the court will refer to guidelines for general damages, which will allow the parties to calculate the amount to compensate an injured plaintiff by reference to the injuries suffered.

Generally speaking, the full range of equitable remedies available in English common law are also available to a successful litigant in Bermuda. These include:

- delivery up – an order requiring a party to hand over specific items to the plaintiff;
- specific performance – an order requiring one party to perform its contractual obligations to the other; and
- declaratory relief – a statement by the court as to the law or facts applicable to the parties (or generally).

The Supreme Court can also make orders granting statutory relief pursuant to actions taken under specific statutes. For example, an application for judicial review can result in an order quashing an unlawful decision made by a public authority.

9.2 Rules regarding damages

Damages are awarded to compensate a party for its loss. This means that the court will make an order for the payment of the amount of damages required to put the party into the same position it would have been in had the breach not occurred, or in the case of a tort, had the wrongful act (or omission) not taken place. There is no limit on the amount of damages that may be awarded, although parties are entitled to enter into contracts, the terms of which may limit the amount of damages.

Punitive damages are available under Bermuda law in rare cases. Compensatory damages must be deemed an inadequate remedy and where a defendant's actions can be interpreted as being wilful, wanton, reckless or malicious.

9.3 Pre-judgment and post-judgment interest

A Bermuda court will award both pre- and post-judgment interest.

Pre-judgment interest is normally awarded on a simple basis and is calculated by reference to the date the cause of action arose (as the starting point) and the date of judgment (as the ending point).

Parties to litigation in Bermuda may be awarded post-judgment interest at the rate of 3.5% per annum under the Interest and Credit Charges (Regulation) Act 1975. Such interest can be awarded at the discretion of the court, on a simple or compound basis, and it normally accrues from the date of judgment until payment of the judgment sum.

9.4 Enforcement mechanisms of a domestic judgment

Writ of fieri facias

There are various ways in which a domestic judgment can be enforced provided the judgment is for a sum of money payable on a certain date. One method is by way of a writ of fieri facias, which is a direction to the court-appointed bailiff to seize the property of the judgment debtor in execution of the judgment to satisfy the sum of the judgment debt, together with interest and the costs of execution. This will include the bailiff's fees and costs. The Rules expressly provide that all writs of execution, including a writ of fieri facias, are enforceable as against choses in action.

Charge over property

A money judgment entered against a party in the Supreme Court may be entered as a charge over that party's real property. An application for the appointment of a receiver over that property can be made. Provided the court is satisfied that it is reasonable to make such an appointment, taking into account the amount of the judgment debt owed and the costs of appointing the receiver, upon such an order all debts due to the judgment debtor would be paid to the receiver.

Sequestration of property

There is also the option of sequestration of the property of a non-compliant judgment debtor on the basis that failure to comply with a judgment is a contempt of court. Where the judgment debtor is a body corporate, an order can be made against a director.

Garnishee application

The garnishment of third-party debts owed to a judgment debtor is a well-recognised enforcement procedure in Bermuda. A garnishee order will only be granted in respect of a debt that is due or accruing due to a judgment debtor as at the date a final garnishee order is granted – future debts cannot be garnished. A garnishee order creates an equitable charge over the third-party debt (rather than an express transfer of the property in the debt to the judgment creditor) and binds the debt in the hands of the named garnishee.

Receivers

It is possible to apply to court to appoint a receiver by way of equitable execution to enforce a money judgment. A court-appointed receiver is a discretionary remedy that is generally only available where execution at common law is either prevented or is impracticable. In modern times, the court has followed the practice in many other common law jurisdictions and incrementally expanded the jurisdiction in line with established principles. There are many advantages to the appointment of a receiver by way of equitable execution, which is a remedy inherently capable of great flexibility. For example, unlike a garnishee order a receiver by way of equitable execution can be appointed by the court to collect future receipts from a defined asset belonging to the judgment debtor. Importantly, a receiver by way of equitable execution is an officer of the court, not an agent of the judgment creditor that sought their appointment (though in practice the appointed receiver will usually look to work in collaboration with the judgment creditor in order to fulfil their mandate).

9.5 Enforcement of a judgment from a foreign country

Foreign judgments under the Judgments (Reciprocal Enforcement) Act 1958

The Judgments (Reciprocal Enforcement) Act 1958 allows judgments for the payment of money from the superior courts of the UK and many other Commonwealth countries to be enforced in Bermuda by registration of the judgment in the Supreme Court at any time within six years after the date of the judgment.

The process of registration is straightforward. An application is made to a judge supported by an affidavit exhibiting the foreign judgment (or a certified copy of it), wherein the affiant confirms:

- their belief that the judgment is one to which the 1958 Act applies;
- that there was no fraud practised on the court to obtain the judgment;
- that the person seeking registration is the person in whom the rights under the foreign judgment are vested;
- that the defendant received notice of the foreign proceedings giving rise to the judgment; and
- that the foreign court had the jurisdiction to make the judgment it did.

Foreign judgments outside the Judgments (Reciprocal Enforcement) Act 1958

A foreign judgment that does not fall within the 1958 Act can be enforced in Bermuda at common law. Formal pleadings must be filed in the Supreme Court. The debt obligation created by the foreign judgment can form the basis of a cause of action. However, there is no requirement for the creditor to re-litigate the underlying claim that gave rise to the foreign judgment.

The registration of a foreign judgment and the enforcement under common law can both be subject to challenge.

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10 Appeal

10.1 Levels of appeal or review to a litigation

Appeals of judgments of the Magistrates' Court may be made to the Supreme Court. Supreme Court decisions can be appealed to the Court of Appeal.

Appeals from the Court of Appeal can be made to His Majesty's Order in Council (the Privy Council):

- at the discretion of the Court of Appeal where the issues in the appeal are of significant public importance; or
- as of right where the amount in dispute exceeds BMD12,000 or the appeal concerns fundamental rights under Section 15 of the Bermuda Constitution Order 1968.

10.2 Rules concerning appeals of judgments

A party to civil proceedings dissatisfied with a judgment has the right to appeal final orders without leave. An appeal against interlocutory or interim orders requires that the party wishing to appeal those matters first seek the leave of the lower court and, if refused, then make a renewed application to the higher court.

The test for permission for leave to appeal is whether the appeal has a real prospect of success or if there is some other compelling reason for the appeal to be heard.

10.3 Procedure for taking an appeal

Appeals from the Supreme Court to the Court of Appeal are by notice of motion accompanied by an affidavit that exhibits draft grounds of appeal. The notice of appeal shall be signed by the appellant and shall also set out the nature of the relief sought, names and addresses of parties affected, and specify whether the appeal concerns the entire decision or only a part of it.

In the case of an interim or interlocutory order of the Supreme Court, an application for leave must be made to the Supreme Court within 14 days of the date of the order and, if refused, within seven days to the Court of Appeal.

In the case of a final judgment/order, where leave is not required, a party has six weeks from the date on which the judgment/order was perfected to appeal.

10.4 Issues considered by the appeal court at an appeal

On appeal, the court is normally limited to considering the evidence that was before the lower court. An appeal is a review of the lower court's decision. A notable exception are appeals from statutory tribunals to the Supreme Court, which are usually conducted by way of a rehearing.

If a decision is made by the trial judge exercising their lawful discretion, an appellant is required to show that the exercise of that discretion was unreasonable in order to disturb a ruling on such a basis. The appellate court will consider arguments that the lower court judge took into account something that they should not have, or failed to take into account something that they ought to have when considering an appeal on this basis.

The appellate court can also consider whether there have been procedural errors as a basis of an appeal.

A party will usually only be entitled to raise new evidence if they can establish that such evidence was not available at the time of the trial, or could not have been obtained with reasonable diligence, and that it would have had a material impact on the outcome of the case.

The appellate court can allow new arguments on the law at its discretion.

10.5 Court-imposed conditions on granting an appeal

The court can impose conditions on the granting of an appeal. In addition to the payment of security for costs, which is the usual condition, the court can also require the payment of money due and owing to a party or that such money be paid into court.

10.6 Powers of the appellate court after an appeal hearing

An appellate court can confirm, set aside, or vary the judgment of a lower court. If an appellate court finds that a matter was wrongly decided as a result of matters not raised or determined before the trial judge, or which were determined in such a way that the appellate court does not feel it is appropriate – or that it is unable – to substitute its own judgment for that of the trial judge, the appellate court can also refer the matter back to the trial court for decision.

The appellate court also has the power to make orders as to costs in respect of the appeal and at the trial court level, superseding orders made as to costs at the courts below.

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11 Costs

11.1 Responsibility for paying the costs of litigation

Bermuda operates a loser pays system where, in the ordinary course, the costs incurred in the trial of a matter are ordered to be paid by the loser, save in exceptional circumstances.

All costs reasonably incurred can be claimed by the party to whose benefit a costs order is made. If costs are not agreed between the parties, the Registrar of the Supreme Court is empowered to determine the amount of costs a party is entitled to be paid by way of a taxation hearing, which can be applied for by either party to an action. As a rule of thumb, a party who is the beneficiary of a costs order can expect to recover about 60-75% of its legal and expert costs, plus court fees and expenses incurred if they are taxed on a standard basis.

In circumstances where the behaviour of the losing party has been outside of the norm, or the facts of the claim itself are such that the court considers them to be outside of the norm, an order for indemnity costs can be made, in which case the percentage of costs awarded to a successful party on taxation can increase to 80–100% of the costs claimed.

As mentioned above, the primary mechanism for challenging the reasonableness of the other party's costs bill is by the taxation hearing before the Registrar of the Supreme Court. An application for an award of costs must be made by the filing of a bill of costs with the Registry not less than six months after the conclusion of any matter.

11.2 Factors considered when awarding costs

The court retains discretion when ordering costs. It can take into account the behaviour of the winning or losing party during the conduct of the trial, including any refusal to accept reasonable offers to settle the claim. The court will determine the "winner" of an action by considering which party "in real-life terms" could be said to have been successful. Unless there is some compelling reason to depart from this rule, the court will not attempt to determine success on an issue-by-issue basis in the context of awarding costs.

11.3 Interest awarded on costs

Costs, whether awarded on taxation or agreed, are entitled to interest for the period from which the order is made until it is paid under the Interest and Credit Charges (Regulation) Act 1975.

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12 Alternative dispute resolution (ADR)

12.1 Views of ADR within the country

Arbitration and mediation are the most common forms of ADR in Bermuda. Bermuda is a sophisticated hub for international arbitration (in particular the arbitration of complex insurance and reinsurance disputes) and has incorporated the UNCITRAL Model law into its domestic legislation via the Bermuda International Conciliation and Arbitration Act 1993. A branch of the Chartered Institute of Arbitrators was established in Bermuda in 1996. The Bermuda branch's primary function is to run arbitration training courses and to act as an appointing authority where asked to do so.

The court has repeatedly confirmed in judgments relating to the enforcement of arbitration agreements and awards that it will adopt a pro-enforcement stance on such matters, in keeping with Bermuda's obligations under the New York Convention (which has had the force of law in Bermuda since 1979).

12.2 ADR within the legal system

The use of ADR is not mandated under the Rules but that fact has not prevented the growth of its popularity and use, particularly mediation.

12.3 ADR institutions

The principal institution for ADR in Bermuda is the Bermuda branch of the Chartered Institute of Arbitrators. The Institute has localised procedural rules for mediation and arbitration, which are based on the UNCITRAL Rules.

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13 Arbitration

13.1 Laws regarding the conduct of arbitration

Bermuda has two separate statutes governing arbitration:

- the Arbitration Act 1986; and
- the Bermuda International Conciliation and Arbitration Act 1993.

The 1986 Act governs "domestic" arbitrations (in effect, arbitrations with no international element or parties involved) and is based on an amalgamation of old English statutes. An interesting feature of arbitration conducted under the 1986 Act is that there is a mechanism allowing parties to appeal an award to the Bermuda Court of Appeal on a point of law.

While the 1986 Act does make provision for international as well as domestic disputes, the 1993 Act provides only for international disputes that are of a commercial nature. As stated in **12.1 views of ADR within the country**, the 1993 Act incorporates the UNCITRAL Model Law into Bermuda law. The Model Law provides for the enforcement of arbitration awards on the same basis as the New York Convention.

13.2 Subject matters not referred to arbitration

Apart from criminal matters, there are generally no restrictions on the subject matters that may be referred to arbitration in Bermuda. Although there is certainly room for doubt as to whether matters involving corporate insolvency, minority shareholder and partnership disputes can be arbitrated, this has not yet been tested before the courts.

13.3 Circumstances to challenge an arbitral award

Under the Model Law, a party can seek to set aside an award. In order to do so, the party must prove that:

- as a party to the arbitration agreement, it was under some incapacity, or the agreement was not valid under the law to which the parties had subjected it;
- it was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
- the award deals with a dispute not contemplated by the terms of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitration tribunal or the procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute was not capable of settlement by arbitration under the law of Bermuda; and/or
- the award is in conflict with the public policy of Bermuda.

A party wishing to set aside the arbitration award must apply to the court within three months from the date of receipt of the award.

13.4 Procedure for enforcing domestic and foreign arbitration

Leave to enforce an award is obtained by applying to the court to enforce the award in the same manner as a judgment. An originating summons must be issued on an ex parte basis, supported by an affidavit. The affidavit should set out the basic facts of the arbitration, the fact that there was an agreement to arbitrate and a hearing, and that an award had been made. The relevant exhibits to the affidavit would be the arbitration agreement and the original award.

The application is for leave to enter judgment, and once the order granting leave has been made, a copy of the order is served on the losing party. The order will normally contain the time that the losing party may have if it wishes to set aside the order. If an application is made to have it set aside, there is a hearing. If there is not, then the award can be enforced after the expiration of the period set out in the order as if it were a judgment of the court.

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14 Outlook

14.1 Proposals for dispute resolution reform

At the opening of the 2024 judicial year, the Chief Justice for Bermuda announced the pending procurement of an electronic case management system for use by all levels of the Bermuda court system. The system will incorporate electronic filing and payment of fees and reduce the need for paper filing. The Chief Justice also announced extensive renovations to Bermuda's court rooms, which will result in a dedicated courtroom for the Court of Appeal for Bermuda. There are otherwise no known proposals for dispute resolution reform in Bermuda.

14.2 Growth areas

Regulated entities in Bermuda are experiencing an uplift in activity from regulators, in particular, the Island's pre-eminent financial regulator, the Bermuda Monetary Authority (**BMA**). The BMA has shown a willingness to exercise its powers of enforcement and oversight by, among other things, seeking the appointment of 'light touch' provisional liquidators in an effort to protect investors and/or policyholders.

The introduction of the Digital Asset Business Act in 2018 has contributed to Bermuda's growth as a jurisdiction which supports the digital asset industry. Such growth will inevitably result in a spate of regulatory, commercial and insolvency-related disputes touching on issues relating to digital assets in the jurisdiction.

Finally, Bermuda remains a popular and attractive trust and private wealth jurisdiction. Commentators expect that by 2030, a projected $18.3 trillion in wealth will be transferred globally. We expect this to result in an uptick in significant trust restructuring applications before the Bermuda courts, with settlors and trustees wanting to ensure that their affairs are structured in a way which benefits future generations in the most efficient way. With that will inevitably also come a number of family and intergenerational disputes concerning the division of wealth.

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