

[2003–04 Gib LR 527]

**IN THE MATTER OF LETTERS OF REQUEST FROM
STAFFORD CROWN COURT**

SUPREME COURT (Schofield, C.J.): December 16th, 2004

Evidence—assistance to foreign court—costs—witness's costs and expenses—no power to award costs of preparation for giving evidence under letter of request—costs limited by Evidence Ordinance, s.10(5) to costs for attendance to give evidence

Letters of request were issued by a court in the United Kingdom requesting the Supreme Court to obtain evidence in Gibraltar to assist that court in a criminal trial.

It was alleged that various UK companies had processed illicit transactions through a named bank in Gibraltar. Pursuant to the letters of request, the Supreme Court made an order requiring the bank to give evidence to a special examiner relating to a number of its clients.

At a preliminary directions hearing, the bank accepted that it was obliged to comply with the order but sought an undertaking from the Attorney-General that he would meet all the costs of compliance.

The Attorney-General applied for directions on the issue of costs. He submitted that the Evidence Ordinance (1984 Edition), s.10(5) limited them to those incurred in attending the hearing before the special examiner: it did not authorize an award for those involved in preparing for the hearing. Moreover, the application for additional costs was contrary to the spirit of mutual legal assistance and, if granted, would

mean that Gibraltar was not fulfilling its international obligations. In any case, the bank should accept its liability to pay such costs as part of its normal operating overheads.

The bank submitted that it should be entitled to the full costs of preparing for the hearing. These included gathering the information requested, organizing it into a presentable format and seeking legal advice.

Held, refusing the bank its costs of preparing for the hearing before the special examiner but awarding its costs of attending:

(1) There was nothing in the Evidence Ordinance which provided authority for the award of costs incurred by a witness in preparing evidence pursuant to a request from a foreign court, nor was there any other authority for making such an award. Section 10(5) provided only that awards could be made for those expenses incurred in attending a hearing (para. 9).

(2) It was in the spirit of mutual legal assistance that financial institutions in those countries which provided it should accept the costs involved in preparing details of their clients' financial dealings, particularly when criminal activity was alleged (para. 10).

Cases cited:

- (1) *Galadari's Receivers v. Zealcastle Ltd.*, English Ch. D., 1986, unreported, distinguished.
- (2) *Panayiotou v. Sony Music Entertainment (UK) Ltd.*, [1994] Ch. 142; [1994] 1 All E.R. 755, distinguished.
- (3) *Shannon v. Country Casuals Holdings plc.* (1997), 94(20) L.S. Gaz. 37; [1997] T.L.R. 316; *The Times*, June 16th, 1997, distinguished.

Legislation construed:

Evidence Ordinance (1984 Edition), s.10(5): The relevant terms of this sub-section are set out at para. 4.

C. Rocca for Jyske Bank (Gibraltar) Ltd.;
R.R. Rhoda, Q.C., Attorney-General, *Ms. K. Khubchand*, Crown Counsel,
and *E. Phillips* for the Government of the United Kingdom.

1 **SCHOFIELD, C.J.:** A prosecution has been commenced in Stafford Crown Court in England against various individuals for offences of cheating the public revenue and conspiracy to furnish false information. This led Warner, J. of that court to issue letters of request to this court. The prosecution has evidence that various companies involved in the offences have sent money through Gibraltar entities and the purpose of the letters of request is to obtain information about various allegedly illicit transactions. Pursuant to such letters of request, an order was made on January 26th, 2004, for the appointment of a special examiner to

examine an officer of Jyske Bank (Gibraltar) Ltd. and for that officer to provide testimony on seven named companies.

2 The bank was prepared to comply with this court's order but only subject to an undertaking being given by the Attorney-General that all its costs and expenses arising from compliance would be met by him. Accordingly, the Attorney-General applied for directions on the question of costs. At the initial directions hearing, the bank accepted that its officer would, whatever the order of this court, have to comply with the order of January 26th, 2004, and the matter was adjourned for full argument on the issue. In the meantime, the bank has complied with the court's order.

3 The bank's position is that it has expended a great deal of time and incurred commensurate expense in locating the relevant information, compiling the information in a presentable manner and making copies of it, and furthermore incurred expense in taking legal advice. The request is extremely wide and the bank argues that it would be unjust to burden a witness with the costs involved in complying with it. The Attorney-General, on the other hand, argues that the bank's application for costs flies in the face of the ethos of mutual legal assistance and if acceded to could make it impossible for Gibraltar to fulfil its international obligations.

4 Section 10 of the Evidence Ordinance gives this court power, on a request made by a foreign court or tribunal, to give assistance to that court or tribunal by ordering evidence to be obtained and requiring any person specified in the order to take such steps as are appropriate for the purpose of giving effect to the request. Section 10(5) of the Ordinance reads:

“A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct money and payment for expenses and loss of time as on attendance as a witness in civil proceedings before the court.”

5 My reading of this provision is that it requires the Attorney-General in this case to pay the witness his expenses for his attendance before the special examiner. I do not think this is in issue. But s.10(5) does not require the Attorney-General to pay the bank's expenses in preparing for the special examination. Of course, the expenses in such preparation far exceed the expenses of the witness in attending the examination.

6 Mr. Rocca's argument is that this court has an inherent power to order the payment of a witness's expenses in preparing for his evidence and that this is an appropriate case in which to do so. Mr. Rocca referred me to the English High Court decision in *Shannon v. Country Casuals Holdings plc.* (3). The claim was for damages for wrongful dismissal. The claimant issued a subpoena against a merchant bank requiring it to produce all

documents in its possession, custody or power between certain dates relating to the claimant's employment and/or cessation of employment with the defendant. The merchant bank applied to set aside the subpoena and also applied for the costs of complying with it, including its legal costs in connection therewith. In the course of his judgment, Garland, J. referred to the decision in *Panayiotou v. Sony Music Entertainment (UK) Ltd.* (2) and said (*The Times*, June 16th, 1997):

“That case was a decision of Sir Donald Nichols [*sic*], as he then was, as Vice Chancellor. It dealt with letters of request, but the decision was very firmly that letters of request and subpoenas should be approached with exactly the same principles in mind, but there was no valid distinction to be drawn between them.”

7 However, Garland, J. made this statement in the context of his decision on the first issue of whether to set aside the subpoena and in particular on his consideration of whether the subpoena was too widely drawn. I do not take this statement to refer to the second issue of whether he should give the merchant bank its costs of preparing for its evidence.

8 Later in his judgment (*ibid.*), when considering the second issue before him, Garland, J. cited the following passage from the unreported 1986 decision of Scott, J. (as he then was) in *Galadari's Receivers v. Zealcastle Ltd.* (1):

“I find it difficult to see why the High Court should not have an inherent power to order a party before it who has put a witness to expense in complying with a subpoena to pay the costs of that witness. If the power is there, I think that as a normal practice justice would require that the power be exercised, because I cannot see the slightest reason why witnesses should be required to shoulder substantial costs in sorting out documents in order to comply with subpoenas *duces tecum*. Of course, if a party has to bear the expense of a witness in complying with a subpoena *duces tecum*, the party's costs in doing so would represent part of his costs of the action, and if he succeeded in the action could, subject to taxation, be recovered from the other party to the action.”

Garland, J. held that the jurisdiction exists to make an order for costs in favour of a witness and, indeed, in that case made the order sought by the merchant bank.

9 Section 10(5) of the Evidence Ordinance does not provide me with the authority to award the costs sought by the bank. Nor do I consider that the case of *Shannon* (3) provides such authority. Garland, J.'s decision on the order for costs of the witness related to ordinary civil actions and does not provide authority for such an award on an order made in pursuance of letters of request.

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10 There is a clear distinction between a witness being required to give evidence, and prepare for that evidence, in an ordinary civil action where one party claims and the other party defends a claim for damages and in which costs may be awarded to either party on the one hand, and a witness being required to give, and prepare for, evidence pursuant to a request from a foreign court on the other. In the second case, the witness is assisting the jurisdiction to fulfil its mutual legal assistance obligations (see now Mutual Legal Assistance (European Union) Ordinance 2005). I agree with the submissions of the Attorney-General that financial institutions which set up business in countries which provide mutual legal assistance should accept as part of their overheads the cost involved in providing details of their clients' financial dealing particularly where criminal activity is alleged.

11 The bank may have its costs of attending the hearing before the special examiner but I do not allow it the costs of preparing for the special examination or of taking legal advice.

Order accordingly.
