

# REVIEW



## Cart before the Horse – How to Obtain Early Evidence in Litigation



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*Advocate Damian Molyneux explores the options available to Manx litigants who need information relevant to their claim before starting proceedings including from those who are unlikely to be parties to the litigation.*

*“The oldest and strongest emotion of mankind is fear, and the oldest and strongest kind of fear is fear of the unknown”*

- H.P. Lovecraft

What percentage chance of a win do we have and how much will it cost? Two of the most difficult questions to answer a lawyer can face, but in the context of the sentiment expressed in the quote above, perfectly understandable. Lawyers must not forget that on each new instruction a client stands at the edge of a chasm with only a limited view. Who would not be fearful? Lawyers should not become numb to the fear a potential litigant faces.

Of course, some cases are more straightforward than others. A client might be well armed with proof. Carefully collected documents, recordings. Evidence. Sometimes though a client might know that evidence probably exists, even where to find it, but has not seen it and does not have access to it. If their hunch about the evidence is correct, they might have a good case. What then to be done about getting it?

There are various mechanisms, dependent upon the type of claim and/or information needed, which can be deployed within the jurisdiction of the Isle of Man to obtain information prior to court proceedings being issued (and after) and/or from a party who is unlikely to be involved in a case which might assist one party's conduct of it.

### **Section 35 of the High Court Act 1991 (Act of Tynwald)**

In claims arising from personal injury or death, the Isle of Man High Court has the power to order a non-party who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the claim:

- to disclose whether they are in his possession custody or power;
- to produce such of the documents which are in his possession custody or power to the applicant's legal advisers etc.

There are limits to this power. It does not apply to all documents. Firstly, the power is only likely to apply to documents relating to matters in question in the proposed action or relating to any matter in question in the cause or matter. Secondly, the present tense is used in the statutory wording so the power does not apply therefore to documents which are no

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longer in the possession custody or power of a person/entity.

Thirdly, the documents must be ‘relevant to an issue’ arising out of proposed proceedings which, in this context, would likely be determined as any document which would on the face of it throw light on a claimant’s case.

Fourthly, the court may look to ensure that the documents are likely to support the applicant’s case or adversely affect another’s case and that disclosure is necessary to fairly dispose of the claim or determine an element of it.

### Norwich Pharmacal Orders

A person who is innocently caught up in the wrongdoing of another so that they are merely witnesses can be compelled to disclose the identity of the alleged wrongdoer (*Norwich Pharmacal Co. v Commissioners of Customs & Excise [1974] AC 133*). Although an English case, the Manx court applies similar principles.

Such orders have been granted to enable claimants to discover whether or not a wrong has been committed and to enable them to pursue other legitimate purposes connected with the action, even though the disclosure sought might not identify any wrongdoers. The jurisdiction of such an order has therefore grown over time and now for example includes enabling a party to seek disclosure of information to bring enforcement proceedings.

It may take any form and usually requires the production of documents, but it may also include a requirement to produce affidavits, answer interrogatories or attend court to give oral evidence.

Three conditions must exist for a court to grant the relief:

- (1) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
- (2) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
- (3) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

This is often a relief sought without notice to the potential wrongdoer.

### Pre action disclosure

Manx rules of court provide that applications may be made for disclosure of documents before court proceedings start. The court may make such an order where a respondent is likely to be a party to proceedings, the applicant is likely also to be a party, if proceedings had already begun then the respondent would be under a duty to disclose the documents

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requested per the usual manner and pre-action disclosure is desirable to dispose fairly of anticipated proceedings or to assist the dispute to be resolved without proceedings or to save costs.

The Manx case of *Kiernan v Minarex ORD 50/2014 [27 February 2015]* neatly summarised the law in this area, in particular adapting the usual test in light of the absence of pre action protocols here. Deemster Corlett stated:

*...the requirement that the applicant and respondent are "likely to a party to subsequent proceedings" has been formulated in several different ways in the numerous cases which have addressed the issue. On the one hand, it was held in PHD Modular Access Service v Seele, GmbH [2011] EWHC 2210 at [10] that there must be a real prospect that there will be proceedings between the parties. "Likely" means no more than "may well" (Black v Sumitomo Corporation [2001] EWCA Civ 1819 at paragraph 72). In some cases the test has been expressed in terms of having to show that the substantive claim has a "real prospect of success" (Rose v Lynx Express Ltd [2004] EWCA Civ 447 at paragraph 4). Another approach, say the learned authors at para 3.36, is to adopt a less stringent test with the applicant having to show some sort of prima facie case which is more than a speculative punt (Kneale v Barclays Bank [2010] EWHC 1900). I respectfully agree*

*with the authors' view that this approach accords with principle, as often the whole purpose of the application is to ascertain whether to bring a claim or not...*

*...As to the further jurisdictional requirement that disclosure will be ordered in relation to documents which would be the subject of standard disclosure, it is inevitable that in order to determine this issue the Court must be clear what the issues in the litigation are likely to be. The application should specify in a focussed manner exactly what documents or classes of documents are sought...*

*...As to whether disclosure is desirable in order to dispose fairly of the anticipated proceedings, to assist the dispute to be resolved without proceedings, or to save costs... this jurisdictional requirement may be satisfied where the disclosure would enable there to be a fully pleaded and particularised claim from the start and should make resolution easier to achieve as it would enable the parties to have a real appreciation of the extent of any claim...*

And finally:

*... the question of discretion has to be considered on all the facts and not merely in principle, but in detail. Once again, the Claimant must show that the circumstances are such that the case differs from the normal case where pre-action disclosure is not the norm. It is worth emphasising that pre-action*



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*disclosure should not be granted as a matter of course. It remains an unusual, though not exceptional, order. Having said that, there is an argument that the absence of pre-action protocols in the Isle of Man might militate in favour of pre-action disclosure orders.*

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### Conclusion

That first step into the abyss takes mettle. The role of the litigation lawyer is to hand hold and guide the potential litigant across. Sometimes the advice has to be to turn back; it is not worth going in this direction. The purpose of the remedies summarised above are to allow potential litigants to ensure they have turned every stone they can and make informed decisions. This is definitely within the spirit of the overriding objective enshrined in Manx court rules and which require for example parties (or potential parties) to save expense, consider court time and expense and thus deal with a matter proportionately.

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