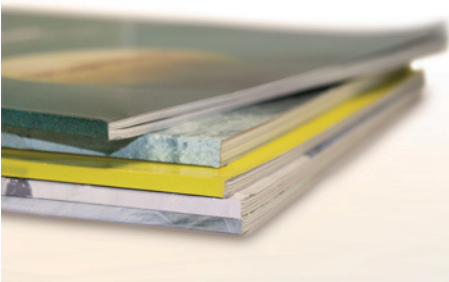


No Fishing Here – Letters of Request and How to Use Them

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Discovery, as it is still known in Jersey, is generally limited to the parties involved in the particular dispute before the court. However, in certain circumstances, it is possible to obtain an order against a non party outwith the jurisdiction of the Royal Court. This is achieved through a letter of request. This article examines the procedure for obtaining documents from a party in England.

The procedure is for the applicant to issue a representation. This is an originating document, as the application is not made in the context of the existing proceedings. It briefly sets out the basis of the application and the terms of the order sought. It should also state that if produced, the documents would be admissible in the Jersey proceedings. It is supported by an affidavit which sets out the background to the application as well as the relevance of the documents sought.

Whilst not strictly necessary, it is generally advisable to contact the proposed witnesses first to see if they would give the disclosure voluntarily. If they will, clearly this will save time and costs. If they will not, the correspondence can be exhibited to the affidavit to show that efforts have been made. The documents sought should be listed specifically as any attempt at a fishing expedition will not be countenanced by the Royal Court. Furthermore, a list too widely drawn

may also be disallowed by the receiving court or challenged by the proposed witnesses themselves, as to which see below.

The application is made *ex parte* and presented to the Royal Court on a Friday afternoon when it conducts its general business. The Royal Court deals with matters such as these under its inherent jurisdiction. Annexed to the representation should be a draft of the letter of request itself, which would be signed by the Bailiff and two jurats, and addressed to the Senior Master of the Queen's Bench Division. Once the letter has been approved by the Royal Court and signed, it is transmitted via official channels as between the two court systems.

Official Channels

In England, the matter is dealt with under the **Evidence (Proceedings in Other Jurisdictions) Act 1975** ("the 1975 Act"). The applicant should instruct English solicitors who will issue an application notice which is supported by a written statement. It is very similar to the affidavit sworn in the Jersey application. The application is made on paper, though the Master may want to discuss matters briefly with those making the application.

The principles which an English Court will apply were summarised by a commercial court judge in **Smith v. Philip Morris** [2006] EWCH 916 (QB), and clearly they are relevant to an applicant in Jersey who must ensure that any outgoing letter of request complies with these principles. They are set out briefly below:-

- *“... if the court receives a Letter of Request that it is defective in that it does not comply with the provisions of the 1975 Act, the court will be prepared to make an order subject to limitations or conditions if it can properly do so and thereby remedy the defect ...”*
- *“If the court has jurisdiction to make an order, it has a discretion whether or not to do so.”*
- *It will not exercise its discretion “if it is satisfied that the letter of request is mainly of an investigatory character ... even though the witness may be able to give some relevant and admissible evidence.”*
- *“Subject to this limitation, the approach of the English Court is to seek to assist the foreign court whenever it is appropriate to do so ...”*
- *“... the court is generally disposed to exercise its discretion in favour of granting requests unless it would be unfairly oppressive upon the witness to do so or there is other powerful reason not to do so.”*

Any order made will contain a penal notice warning the recipients that if they do not obey they may be found to be guilty of contempt of court and fined. The order will specify the following:-

- the names and addresses of those to give the disclosure;
- the precise documents to be disclosed;
- that the recipients may apply to set aside the order within a specified time;
- that the applicant will pay their reasonable costs of compliance which will be assessed if not agreed.

Four to Six Weeks

If the witnesses are in England, then one can expect the time between issue of the representation and order by the Master to be approximately four to six weeks. On top of that, the witnesses would generally be given at least 14 days in which to comply.

Once the documents have been produced to the applicant, they will have to be subject to one more check for relevance and then disclosed in the usual way in the Jersey proceedings by list verified by affidavit (as they are still known).

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