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International E-Discovery

A Global Handbook of Law and Technology

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1. Introduction

In Ireland, e-discovery in litigation and investigations is not only now commonplace, it is the norm. While not quite a national sport, discovery is regarded as strategically crucial in litigation and cases without discovery are rare. There is a significant onus on making full and frank discovery of all relevant documentation, including anything containing relevant information, in whatever format. A failure to make proper discovery may have significant consequences for the solicitor on record and the client in terms of costs, liability and their reputations.

The rules of discovery in Ireland are governed by Order 31 Rule 12 of the Rules of the Superior Courts ('the Rules') which have, since their introduction in 1905, undergone two key reforms, in 1999 and 2009.[1, 2] The 1999 changes introduced a requirement to specify categories of discovery (discussed below). This marked a departure from general or blanket discovery and it was designed to reduce the excessive burden of discovery. Ten years on, with the preponderance of discoverable documents coming from electronically stored information (ESI), the discovery rules were amended and modernised by SI 93/2009 (of the Rules), which introduced specific provisions relating to the discovery of ESI. These included enabling a party seeking discovery to request production of ESI in searchable form and to seek inspection and searching facilities using the information and computer systems owned by the party requested, subject to cost considerations.

Whilst the 2009 amendments put ESI on a legislative footing, the Rules are not overly prescriptive about how the e-discovery process should be managed, and practitioners have come to rely on judicial authority. As far back as 1975, the Irish courts had ordered discovery of a tape recording[3] and in 1979 the Supreme Court defined a document as anything that gives information.[4] In the last two decades, with the explosion of email and the advent of novel and alternative methods to communicate, the judiciary has continued to broaden the definition of what is considered a 'document' in Ireland. It now includes ESI which could not have been envisaged by the Supreme Court in 1979, including video footage, social media, web-based email accounts, cloud technology and instant messaging services. Irish practitioners have also, over the years, sought direction from the courts on the use

1 SI No 233 of 1999: Rules of the Superior Courts (No 2) (Discovery), 1999.
2 SI No 93 of 2009: Rules of the Superior Courts (Discovery), 2009.
3 *Grant v Southwestern and County Properties Limited* [1975] Ch 185.
4 *McCarthy v O'Flynn* [1979] IR 127.

of keyword searches and in 2015 the courts approved the use of technology assisted review (TAR) in e-discovery in Ireland to enable parties to interrogate and analyse large ESI data sets in the most efficient and cost-effective way.[5]

E-discovery practice in litigation has in recent times been guided by the Commercial Litigation Association of Ireland's *Good Practice Discovery Guide* (the '*CLAI Guide*') which provides guidance on best practice.[6] The Chief Justice of the Supreme Court, Mr Justice Clarke, who is a great proponent of the use of technology to increase access to justice, has praised the *CLAI Guide* as a benchmark for best practice in discovery in Ireland. He has described it as a form of 'soft law', which does not bind parties in any formal sense but has found a measure of acceptance in the courts,[7] and he suggests that in such a fast-evolving area of law it is much easier to change guidance than formal rules of court or legislation.

E-discovery is commonplace in investigations in Ireland. As a global hub for many international organisations, Ireland sees its fair share of complex multi-jurisdictional investigations as well as the more standard internal and regulatory reviews. In this context the preponderance of relevant and often most crucial data is stored electronically and may need to be identified quickly. Audio material and text messages have often proved to be a rich repository for relevant information as people tend to be less cautious when speaking and texting as compared to the written word. Such records have featured in a number of high-profile regulatory and criminal investigations and prosecutions in recent years.[8]

Criminal authorities and a number of regulators in Ireland can seize a company's electronic data in the course of an investigation and have powers to inspect and seize electronic evidence from companies without prior notice. More commonly, regulators issue broad document requests to a company which define 'document' as including ESI and may also specify particular forms of ESI including metadata and text messages. Regulators also commonly seek information about e-discovery methodology and/or choice of technology and may comment on or add to keyword searches. Regulators often specify the preferred electronic format for production, having their own e-discovery platforms in place. As with discovery, comprehensive scoping of electronic sources and the use of appropriate technology to extract the relevant data in often tight timeframes are key to carrying out a robust investigation.

2. Scope of discovery obligations

When a party becomes aware of potential or actual legal proceedings it must take reasonable steps to adequately preserve any potentially relevant documents. A court may look unfavourably on a party if potentially relevant documents are not adequately preserved.

There is no obligation to seek discovery. If a party does wish to obtain discovery, it must specify the discovery categories that it requires and the reasons why each category is necessary by reference to the pleadings. Parties must seek to agree voluntary discovery

5 *Irish Bank Resolution Corporation & Ors v Quinn & Ors* [2015] 1 IR 603.
6 Commercial Litigation Association of Ireland, *Good Practice Discovery Guide*, 2nd ed, November 2015.
7 *Ibid* at Foreword.
8 Most notably in *DPP v Bowe & Ors* [2017] IECA 250 (Court of Appeal, Ryan (President), 30 June 2017).

in the first instance, failing which a court application can be brought. With pleadings in Ireland often broadly drafted, parties are vulnerable to broad discovery requests and a vast scope of documents may need to be identified, reviewed and discovered.

The court will decide on the relevance and necessity of particular categories for disposing fairly of the matter or saving costs, if the parties cannot agree on the terms of the discovery to be made. Proportionality is not referenced in the Rules but the courts have made it clear that it is a relevant factor in assessing necessity. Necessity is considered in the context of all the relevant circumstances, including the burden, scale and cost of the discovery sought. If a party wishes to resist a category of discovery, the court will expect it to produce evidence on affidavit as to why it cannot or should not make the discovery sought, including, where necessary, showing that it would be disproportionate given estimates of the size of the potential data universe, the likely hit count following the application of searches and the potential time and cost of review.

Once discovery is ordered or agreed, the accepted test of relevance in Ireland is the Peruvian Guano standard.[9] This means that documents may be relevant and must be discovered even if they are of limited significance in the case, if they either directly or indirectly enable the party seeking discovery to advance its own case or damage its opponent's case, or may lead fairly to a train of inquiry which may have either of those two consequences. While this standard no longer applies in other common law countries, such as the UK, it remains a mainstay of the Irish system. The Irish rules also have burdensome listing and production requirements, which add to the time and cost of discovery. For example, all relevant privileged documents must be listed individually, with sufficient description to enable them to be individually identified in the event of a privilege challenge, and discovery must be made on oath by affidavit. Parties must also list on oath any relevant documents that no longer exist.

An Irish discovery deponent must swear (or affirm) that he/she has discovered all documents and ESI within the possession, power or procurement of the party making discovery. This requires deponents to confirm that 'reasonable' and 'diligent'[10] searches of all documents and ESI have been made and that these searches have revealed no other documents or ESI other than those identified in the affidavit. Solicitors advising on discovery have significant duties as officers of the court to ensure that the client makes full and frank discovery and that an affidavit of discovery does not omit relevant documents, as well as owing a duty to their client:

> *The making of accurate and correct discovery relies to a very great extent upon solicitors who advise clients on the topic. It is to solicitors that the obligation primarily falls to ensure that discovery is made in accordance with both the letter and spirit of the agreement made for such discovery or the court order which directs it. There is a considerable element of trust involved in the whole discovery process. The Court must be entitled to look to its officers to ensure that the process is conducted honestly, ethically and is not abused.*[11]

9 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55.
10 Per Budd J in *Atlantic Shellfish Limited v Cork County Council & Ors* [2006] IEHC 215, at pp5–6.
11 *Balla Leasing Developments Ltd v David Kealing* [2006] IEHC 415, Kelly J.

A balance must also be struck between making full and frank discovery and ensuring that production is not overly broad, including reams of irrelevant or distracting information. This can be a difficult and frustrating duty to discharge in the context of discovering ESI, given the proliferation of electronic data in business communications and the seemingly endless array of electronic data repositories with countless duplicated records, when often only a tiny fraction of the ESI will be material to the issues in the case. It is a challenge for solicitors to advise a deponent with confidence that the affidavit of discovery is complete. Solicitors must ensure that they have the necessary skills and experience to carry out their discovery duties in an efficient, thorough and effective way. This includes ensuring that all likely electronic data sources are identified, forensically processed and searched (not just those that are obvious and easy) and that appropriate technology, e-discovery methodology, search terms and early case assessment (ECA) tools are used as cost-effectively as possible. Perfection is not, however, expected and the courts have made it clear that perfection is an unreasonable and disproportionate expectation.[12] Parties commonly furnish further affidavits as to documents when documents come to light that ought to have been discovered, and it is important that this is done promptly when it arises.

Solicitors should keep informed of developments in e-discovery technology; for example, in respect of the services and search tools available from service providers. Parties are required to use the best method available, otherwise they will be at risk of not recovering costs. In Commercial Court proceedings in Ireland, the obligations undertaken by the solicitor responsible for the conduct of the proceedings extend to the management of the discovery. Failure to comply with directions made by the Commercial Court may result in the responsible solicitor being required to give evidence as to why the directions were not met.

3. Irish and UK rules compared

Whilst the Irish rules were originally modelled on an earlier version of the UK rules the two regimes are now quite different. The UK rules dictate early engagement but tend to place greater emphasis on cooperation between parties than the Irish rules. In spirit, discovery in Ireland is probably closer to the US than the UK approach, in that it is commonly viewed as strategically important and is often deployed aggressively, much as the courts would prefer a more collaborative approach.

3.1 Irish categories/UK basic disclosure

The Irish discovery rules under Order 31, Rule 12 are based on an earlier version of a UK rule, Order 35(1) of the Rules of the Supreme Court in England. The UK rule has, however, been the subject of several amendments over the last two decades and the current equivalent, CPR r.31.5, bears little or no resemblance to its predecessor. The Woolf Report in 1999 led the UK down a general discovery or standard disclosure route which was followed by the Civil Procedure Rules (CPR); these included a provision requiring parties to make 'standard disclosure' and the indirect

12 *CLAI Guide*, Ch 2, Principles.

relevance/train of inquiry test was removed. In July 2010, a practice direction was introduced in England on disclosure of electronic documents which provides a detailed regime for the discovery of ESI.[13] In 2013, the CPR were further amended by the Jackson Reforms to Civil Procedure which allowed parties to choose from one of six types of disclosure order, including standard disclosure. Most recently, a pilot scheme for reforming disclosure has been announced for the Business and Property Court which will see 'standard' being replaced with 'basic' disclosure.

3.2 Reasonable search requirements

The UK rules are more prescriptive than the Irish rules as regards searching for relevant documents. Rule 31.7 of the CPR requires a party making disclosure to carry out a 'reasonable search' for relevant documents and sets out a number of factors that are relevant in deciding the reasonableness of a particular search. These include:

- the number of documents involved;
- the nature and complexity of the proceedings;
- the ease and expense of retrieval of any particular document; and
- the significance of any document which is likely to be located during the search.

The UK practice direction sets out how that requirement is to be applied in the case of ESI. It provides that in some cases it may be reasonable to search only part of a party's electronic storage system, whereas in other cases the entire system may have to be searched.

Significantly, Clause 24 of the practice direction provides as follows:

The primary source of disclosure of Electronic Documents is normally reasonably accessible data. A party requesting … specific disclosure of Electronic Documents which are not reasonably accessible must demonstrate that the relevance and materiality justify the cost and burden of retrieving and producing it.

The UK practice direction envisages the use of supplemented keyword searches "if a full review of each and every document would be unreasonable", with targeted individual review of certain categories of documents, as the injudicious use of keyword searches and other automated search techniques can risk omitting important documents or disclosing excessive quantities of irrelevant documents on the other party at a significant burden or cost.

Whilst the Irish rules are less prescriptive than in the UK about the extent of the duty to carry out searches, the Irish courts have highlighted the need for proportionality between the volume of the documents to be discovered and their potential impact on the case, and have held that a 'reasonable' and 'diligent' search must be carried out[14] and have regard to criteria similar to those set out in Rule 31.7(2) of the English CPR. In *Framus Limited v CRH plc*,[15] Murray J had this to say:

I think it follows that there must be some proportionality between the extent or volume

13 Practice Direction 31B – Disclosure of Electronic Documents.
14 *Atlantic Shellfish Limited v Cork County Council & Ors, supra.*
15 [2004] 2 IR 20 (SC).

of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial.

In *Dome Telecom Limited v Eircom Limited*,[16] the court had to consider whether the defendant should be required to make discovery of detailed metadata regarding telephone calls and billing records in light of certain factual concessions that the defendant had already given. Rejecting the application, and in determining that the concessions already made were sufficient to enable the court of trial to adjudicate on the issue of liability, Kearns J held as follows:

It would be quite wrong in my view not to acknowledge the cost and time/effort involved in the gargantuan task which an order under category 9 would impose on the defendant, notably when that task is weighed against the limited fruits which might emerge from compliance, confined as those fruits would be to quantum of loss only and then only to a period when the defendant was 'closing off' the problem.

3.3 Collaboration between the parties

The UK rules dictate early engagement between the parties through case management conferences. While there is no formal requirement to confer in Ireland, and no culture of conferring, it is encouraged by the courts and the *CLAI Guide* suggests that parties should meet with their opposing party to seek to agree categories and the ambit of searches and data sources, and/or to narrow the matters in dispute to be determined by the court, which inevitably cause delay and cost. The President of the High Court, Mr Justice Peter Kelly, made an observation about this at the Four Jurisdictions Conference in Dublin in May 2017:

Delay and cost are the two great obstructions to the administration of a fair and expeditious system of civil justice. The greatest contributor to both is discovery.

4. Irish and US rules compared

4.1 Proportionality

Given that proportionality is not specifically mentioned in the Rules, the recent importing into the US Federal Rules of express wording on proportionality is of interest from an Irish perspective. In 2015, Federal Rule of Civil Procedure 26(b)(1) was amended to state expressly that to be discoverable, information must be not only relevant, but proportional to the needs of the case. In weighing proportionality, courts are directed to consider the importance of the issues at stake, the amount in controversy, the parties' relative access to the information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

4.2 Spoliation

As in Ireland, if a party in the US fails to take reasonable steps to preserve relevant information, and it can be shown that a company's documents were deliberately

16 [2008] 2 IR 726.

destroyed or spoliated when the company was, or should have been, on notice of the law suit, they may be penalised. In 2015, Federal Rule of Civil Procedure 37(e) was amended to clarify that spoliation sanctions are only permitted for loss of ESI when a party failed to take reasonable steps to preserve. If a party suffered prejudice from the loss of information, the court may order measures no greater than necessary to cure the prejudice. More severe sanctions are reserved for when the party acted with intent to deprive another party of the information's use in litigation. The changes were prompted by a concern that parties were too focused on the risk of failing to produce documentation, and were designed to encourage parties to focus their responses on necessary documentation.

In Ireland, instances of parties being found to have either withheld relevant documents or destroyed potentially relevant data are rare, probably because of the serious consequences involved. In recent debates in Ireland regarding the need for reform of the Rules, however, the impetus seems to be in the direction of a tightening of the sanctions for failure to make full and proper discovery. If the US experience is anything to go by, any such changes could result in parties over-compensating by producing unnecessary documents to avoid sanctions for missing potentially relevant documents.

4.3 Streamlining authentication of ESI

In December 2017, the US Federal Rules of Evidence were amended to add two new categories of self-authenticating documents:

- records generated by an electronic process or system that produces an accurate result – for example, structured data processed from a company database; and
- records copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification – for example, emails verified by hash values.

To be self-authenticating, companies must support these documents with a declaration certifying that they are records of regularly conducted business activity.

In Ireland, the authentication or proving of documents is complicated. Irish law requires that a party seeking to rely on the contents of a document must adduce primary evidence of its contents. This is usually achieved by presenting the original document in court. It should be noted, however, that a duplicate of the original will be considered an original document for this purpose where the original no longer exists; for example, where it has been destroyed in accordance with a data retention policy. Proof of the authenticity of the copy will be required, however, before it is admitted into evidence.

The obligation to produce an original document where possible is an expression of the 'best evidence' rule that has been a feature of the jurisprudence of Ireland and England since the late 18th century. It has now been qualified to a significant extent in certain instances. The oldest and most important exception is contained in the Bankers Book Evidence Act 1879 (as amended 1959). This provides that where evidential material is contained within files and records used in the bank's day-to-

day business, copies of those documents will be admissible in court. The Electronic Commerce Act 2000 was introduced to provide for the legal recognition of electronic contracts, electronic writing, electronic signatures and original information in electronic form as well as the admissibility of evidence in relation to such matters.[17] The 2000 Act also ensures that while electronic evidence still has to meet the thresholds of admissibility faced by all documentary evidence, its evidential value is no longer in doubt simply by virtue of its electronic form.

Similar to the onerous duties placed on practitioners in Ireland to stay abreast of technology offerings in e-discovery, many US states have adopted the duty of technology competence, meaning lawyers must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. No such formal regulatory requirement has been introduced in Ireland.

This is an extract from the chapter 'Ireland' by Karyn Harty and Megan Hooper in International E-Discovery: A Global Handbook of Law and Technology*, published by Globe Law and Business.*

17 As a general proposition in relation to the admission into evidence of electronic documents, Section 19 of the 2000 Act provides that an electronic contract shall not be denied legal effect solely because it is in electronic form or has been concluded by electronic means.

18 [2015] 1 IR 603.