



E-Discovery

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

## E-DISCOVERY

### Introduction

Rule 12 (1) of Order 31 of the Irish Rules of the Superior Courts, which govern procedures in the High Court, states:

*“Any party may apply to the Court by way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession, power or procurement relating to any matter in question therein.”*

This is, and has long been, the foundation of the discovery process in the Irish courts. While the rules in relation to discovery are extensive and have increased over the years, there has been little provision for the format in which the majority of documentation is now created and stored; that is, electronically.

### New Rules on E-Discovery

That position has now changed and Order 31 has been amended by S.I. 93 of 2009 dated 22 March, 2009 which introduces the concept of Electronically Stored Information or ESI. Usefully, the new rules now provide that where an order for discovery includes ESI the party seeking the order must specify whether they require the information in searchable format and, if so, whether they require inspection and search facilities using the IT systems owned or operated by the party controlling the ESI.

The court can order that the information is provided in searchable format or, if it cannot be searched without the party seeking discovery incurring unreasonable expense, the court can direct the party ordered to make discovery to make available search and inspection facilities using their own IT systems.

Where the ESI in question comprises sensitive non-discoverable data, the court may attach conditions to ensure this information is secured and not discoverable or may order that an independent expert carry out the inspection and search for the relevant information. The costs of the independent expert will be met by the party seeking discovery.

The question of the cost of this type of discovery will clearly be an issue for clients and where the cost of giving discovery becomes excessive or onerous then the party giving discovery can apply to the court to vary the order.

Another helpful provision of the amended order is that documents must now be listed or provided in a sequence corresponding with the manner in which the documents or data has been stored or kept in the usual course of business. In practice this is likely to result in discovery being provided on a series of discs with a searchable index or catalogue of documents and it is imagined that this will be one of the provisions which will be of consolation to those practitioners whose task it is to review the discovered documents thus reducing client costs.

## Judicial Approach to Discovery Unchanged

While these innovations will certainly have their effects, it should be noted that the restrictive approach of the Irish courts to discovery remains in place. There has long been a desire to discourage general discovery requests which result in time wastage and unnecessary costs for the parties engaged in litigation. This imperative has been closely guarded by the judiciary who are highly critical of broad, generic requests for discovery or “fishing expeditions.” Accordingly, all discovery requests must be framed precisely stating the category of documents being sought and the reason why it is considered that such documents are material to the issues to be considered.

Each category of document contained in a discovery request is judged on relevance to the matters in question in the action and on necessity. In addition, documentation will not be discovered if it is available to the requesting party through other sources. As with soft copy documentation, requests for the disclosure of electronic documentation should be specific and should disclose the rationale for the belief that the documentation requested is needed.

## Role of *Peruvian Guano* Test in the E-Discovery Era

One issue which will be of concern to both clients and practitioners is the retention of the so-called *Peruvian Guano* (*Compagnie Financiere du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55) test of relevance in relation to E-Discovery. The classic, and oft quoted, statement of Brett LJ in that case is as follows:

*"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences. In order to determine whether certain documents are within that description, it is necessary to consider what are the questions in the action: the Court must look, not only at the statement of claim and the plaintiff's case, but also at the statement of defence and the defendant's case."*

The report of Lord Woolf, MR, to the Lord Chancellor on the civil justice system in England and Wales in 1996 stated that "[t]he result of the *Peruvian Guano* decision was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is." The English Civil Procedure Rules 1998 which implemented Lord Woolf's reforms largely replaced the *Peruvian Guano* Test in that jurisdiction.

Nevertheless, the *Peruvian Guano* test has been re-affirmed numerous times in the Irish courts and remains the test of relevance in this jurisdiction. It remains to be seen how the test will be applied in respect of E-Discovery where the sheer volume of "metadata" (so-called "data about other data") stored on electronic files which is "indirectly" or potentially relevant may threaten to swamp the entire E-Discovery process.

## Costs

Finally, it should also be noted that a party seeking discovery is obliged to convince the courts that discovery is necessary, either for disposing fairly of the case or for saving costs. As a result, the courts may take into account the costs involved in complying with a discovery request prior to making its decision and this may affect the willingness of the courts to grant E-Discovery in certain instances.

## Conclusion

Given the increase in complex litigation which continues to be a corollary of the worldwide downturn it is to be hoped that E-Discovery will be easier, cleaner and more cost-efficient (not to mention more environmentally friendly) for all concerned. The amended Order 31 is a welcome and long awaited step which, if used properly by the courts and practitioners, should aid enormously in streamlining the discovery process.

**Date:** July 2009  
**Author:** Paul Kennedy

 CONTACT US

## Our Offices

**Dublin**

33 Sir John Rogerson's Quay,  
Dublin 2,  
Ireland.  
Tel: +353 1 667 0022  
Fax.: +353 1 667 0042

**Cork**

8 Webworks Cork,  
Eglinton Street,  
Cork, Ireland.  
Tel: +353 21 425 0630  
Fax: +353 21 425 0632

**Boston**

26th Floor,  
225 Franklin Street,  
Boston, MA 02110,  
United States of America.  
Tel: +1 617 217 2866  
Fax: +1 617 217 2566

**New York**

245 Park Avenue  
39<sup>th</sup> Floor  
New York, NY 10167  
United States  
Tel: +1 212 792 4166  
Fax: +1 212 792 4167

**Tokyo**

12th Floor,  
Yurakucho Itocia Building  
2-7-1 Yurakucho, Chiyoda-ku  
Tokyo 100-0006, Japan  
Tel: +813 6860 4885  
Fax: +813 6860 4501

e-mail: [enquiries@dilloneustace.ie](mailto:enquiries@dilloneustace.ie)  
website: [www.dilloneustace.ie](http://www.dilloneustace.ie)

## Contact Points

*For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.*

**Kieran Cowhey**

**e-mail: [Kieran.cowhey@dilloneustace.ie](mailto:Kieran.cowhey@dilloneustace.ie)**  
**Tel : +353 1 667 0022**  
**Fax: + 353 1 667 0042**

## DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

## Copyright Notice:

© 2009 Dillon Eustace. All rights reserved.

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

33 Sir John Rogerson's Quay, Dublin 2, Ireland.  
[www.dilloneustace.ie](http://www.dilloneustace.ie)

In alliance with Arendt & Medernach