

APPENDIX 4

RULES OF THE SUPERIOR COURTS (DISCOVERY) 2009 (S.I. NO. 93 OF 2009)



STATUTORY INSTRUMENTS

S.I. No. 93 of 2009



RULES OF THE SUPERIOR COURTS (DISCOVERY) 2009

(Prn. A9/0402)

RULES OF THE SUPERIOR COURTS (DISCOVERY) 2009

We, the Superior Courts Rules Committee, constituted pursuant to the provisions of the Courts of Justice Act 1936, section 67, by virtue of the powers conferred upon us by the Courts of Justice Act 1924, section 36, and the Courts of Justice Act 1936, section 68 (as applied by the Courts (Supplemental Provisions) Act 1961, section 48), and the Courts (Supplemental Provisions) Act 1961, section 14, and of all other powers enabling us in this behalf, do hereby make the following Rules of Court.

Dated this 30th day of October, 2008.

Richard Johnson

Joseph Finnegan

Elizabeth Dunne

Paul McGarry

Mary Cummins

Patrick Groarke

Patrick O'Connor

Noel Rubotham

Maeve Kane

I concur in the making of the following Rules of Court.

Dated this 22 day of March, 2009.

DERMOT AHERN
Minister for Justice, Equality and Law Reform

*Notice of the making of this Statutory Instrument was published in
"Iris Oifigiúil" of 27th March, 2009.*

RULES OF THE SUPERIOR COURTS (DISCOVERY) 2009

1. The Rules of the Superior Courts are hereby amended:

(i) by the substitution for rule 12 of Order 31 of the following:

“12. (1) 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. Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery which shall:

(a) verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs;

(b) furnish the reasons why each category of documents is required to be discovered, and

(c) where the discovery sought includes electronically stored information, specify whether such party seeks the production of any documents in searchable form and if so, whether for that purpose the party seeking discovery seeks the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested.

(2) On the hearing of such application the Court may:

(a) either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or by virtue of non-compliance with the provisions of sub-rule (6), or

(b) make an order for discovery either in terms of some or all of the categories of documents sought or limited to certain documents or classes of documents within any or all of those categories, or otherwise as may be thought fit, and on terms as to security for the costs of discovery or otherwise, and for this purpose may adjourn the application in part;

(c) where the discovery ordered includes electronically stored information and the Court is satisfied that such electronically stored information is held in searchable

form and can be provided in the manner hereinafter referred to without significant cost to the party from whom discovery is requested:

- (i) further order that the documents or classes of documents specified in such order be provided electronically in the searchable form in which they are held by the party ordered to make discovery, or
 - (ii) where the Court is satisfied that such documents or classes of documents, or any information within such documents, could not, if provided electronically, be subjected to a search by the party seeking discovery without incurring unreasonable expense, further order that the party ordered to make discovery make available inspection and searching facilities using its own information and communications technology system, so as to allow the party seeking discovery to avail of any search functionality available to the party ordered to make discovery.
- (3) (a) Any order made under sub-rule (2)(c) may include such provision or restriction and be subject to such undertakings from any party or person as the Court may consider necessary to ensure that documents discovery of which has not been ordered are not accessed or accessible, and otherwise to secure the information and communications technology system concerned.
- (b) Such order may in particular include a provision that the inspection and searching of documents shall be undertaken by an independent expert or person agreed between the parties, or appointed by the Court in default of agreement (instead of being undertaken by the party seeking discovery), who may conduct such inspections and searches as may be required and report the results to the party seeking discovery.
- (c) Where such order makes provision for inspection and searching of documents in the manner referred to in paragraph (b), the party seeking the order shall indemnify such independent expert or person in respect of all fees and expenses reasonably incurred by him, and the fees and expenses so indemnified shall form part of the costs of that party for the purposes of Order 99.

- (4) (a) Documents of the same or a similar nature and not in electronic form, when numerous, shall so far as possible be grouped together and numbered or otherwise sufficiently marked so as to be identifiable.
- (b) Parties providing discovery shall list documents or categories of information, and shall provide documents and information for inspection, in a manner corresponding with the categories in the agreement or order for discovery and, subject to any such agreement or order, in a sequence corresponding with the manner in which the documents or information have been stored or kept in the usual course of business by the party making discovery.
- (5) An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.
- (6) An order under sub-rule (2) directing any party or under rule 29 directing any other person to make discovery shall not be made unless:
- (a) the applicant for same shall have previously applied by letter in writing requesting that discovery be made voluntarily—
 - (i) specifying the precise categories of documents in respect of which discovery is sought,
 - (ii) furnishing the reasons why each category of documents is required to be discovered,
 - (iii) where the discovery sought includes electronically stored information, specifying whether the applicant seeks the production of any documents in searchable form and if so, whether for that purpose the applicant seeks the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested, and
 - (b) a reasonable period of time for such discovery has been allowed, and
 - (c) the party or person requested has failed, refused or neglected to make such discovery or has ignored such request.

Provided that in any case where by reason of the urgency of the matter or the consent of the parties, the nature of the case or

any other circumstances which to the Court seem appropriate, the Court may make such order as appears proper, without the necessity for such prior application in writing.

(7) Any such discovery sought and agreed between parties or between parties and any other person shall, subject to sub-rule (9), be made in like manner and form and have such effect as if directed by order of the Court.

(8) In any case in which discovery has been sought and agreed and has not been made within the time agreed, the party who has sought same may make application pursuant to rule 21 provided that when seeking discovery the party requested was informed that:

(a) such voluntary discovery was being sought pursuant to Order 31, rule 12;

(b) agreement to make discovery would require it to be made in like manner and form and would have such effect as if directed by order;

(c) failure to make the discovery may result in an application pursuant to rule 21;

and the Court may if satisfied that it is proper so to do, make such order under this rule, rule 19 or rule 21 as is appropriate or such other order as appears just in the circumstances.

(9) An application for discovery whether under sub-rule (1) or (6) shall be made not later than twenty-eight days after the action has been set down or in matters which are not set down, twenty-eight days after it has been listed for trial provided that the Court may order or the party requested may agree, to extend the time for the application for discovery in any case in which it appears just and reasonable to do so.

(10) The costs of an application to Court for discovery in any case in which prior written application has not been made or in which application has not been made within the time provided, shall be in the discretion of the Court.

(11) Any party concerned by the effect of an order or agreement for discovery may at any time, by motion on notice to each other party concerned, apply to the Court for an order varying the terms of the discovery order or agreement. The Court may vary the terms of such order or agreement where it is satisfied that—

(i) further discovery is necessary for disposing fairly of the case or for saving costs, or

(ii) the discovery originally ordered or agreed is unreasonable having regard to the cost or other burden of providing discovery.

(12) An order under sub-rule (11) shall not be made unless:

(a) the applicant for same shall have previously applied by letter in writing to the other party specifying the variations sought to the order, furnishing the reasons why each variation is sought and requesting that party's agreement to the variations sought, and

(b) a reasonable period of time for agreement has been allowed, and

(c) the party or person requested has failed, refused or neglected to agree to such variation or has ignored such request.

(13) "documents", for the purposes of this rule and rule 29, includes all electronically stored information, and the reference to "business documents" in rule 20 shall be construed accordingly."

(ii) by the substitution for sub-rule (1) of rule 20 of Order 31 of the following:

"(1) Where inspection of any business documents is applied for, the Court may, instead of ordering inspection of the original document, order a print or copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the print or copy with the original entries, and such affidavit shall state whether or not there are in the original documents any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such print or copy has been supplied, the Court may order inspection of the documents from which the print or copy was made.", and

(iii) by the substitution for Form No. 10 in Appendix C of the Form appended.

2. These Rules shall come into operation on the 16 day of April 2009.

3. These Rules shall be construed together with the Rules of the Superior Courts 1986 to 2008 and may be cited as the Rules of the Superior Courts (Discovery) 2009.

O. 31, r. 13

AFFIDAVIT AS TO DOCUMENTS

[Title of action]

Imake oath and say as follows:—

1. I have in my possession, power or procurement the documents [*and electronically stored information*]* relating to the matters in question in this suit and falling within the relevant categories of documents specified

*in the letter requesting voluntary discovery dated.....20..

*in the order of the Master of this Honourable Court made on20..

set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents [and electronically stored information]* set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession, power or procurement the documents [*and electronically stored information*]* relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last mentioned documents [*and electronically stored information*]* were last in my possession, power or procurement on [*state when*].

6. That [*here state what has become of the last-mentioned documents or information, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, power or procurement or in the possession, custody or power of my solicitors or agents, solicitor or agent, or in the possession, custody or power of any other persons, or person on my behalf, any document of any kind or any electronically stored information, or any copy of or extract from any such document or information, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, and falling within the relevant categories of documents specified

*in the letter requesting voluntary discovery dated.....20..

*in the order of the Master of this Honourable Court made on20..

other than and except the documents [*and information*]* set forth in the said first and second schedules hereto.

8. I understand that the obligation on a party giving discovery is to discover all documents and electronically stored information within his/her/its possession, power or procurement within the categories agreed or ordered to be delivered that contain information which may enable the party receiving the discovery to advance its own case or to damage the case of the party giving discovery or which may fairly lead to a train of inquiry which may have either of those consequences.

Sworn, &c.

Note—

- (i) Documents of the same or a similar nature, when numerous, must so far as possible, be grouped together and numbered or otherwise sufficiently marked so as to be identifiable.
- (ii) Parties providing discovery shall list documents or categories of information, and shall provide documents and information for inspection, in a manner corresponding with the categories in the agreement or order for discovery, or in a sequence corresponding with the manner in which the documents or information have been stored or kept in the usual course of business by the party making discovery.

* Insert where appropriate

EXPLANATORY NOTE

(This does not form part of the Instrument and does not purport to be a legal interpretation)

The Rules amend Order 31, rule 12 and rule 20 of the Rules of the Superior Courts and in particular make provision for the discovery of electronically stored information.