Review of the Administration of Civil Justice

Chair: The Hon. Mr. Justice Kelly, The President of the High Court.

Reviewing the law of discovery

Submission from the Commercial Litigation Association of Ireland

---

Introduction

1. The Commercial Litigation Association of Ireland (*"CLAI"*) was founded in 2010 to support the promotion of best practice in commercial litigation in Ireland and to provide legal education and training to commercial litigation practitioners. The CLAI's membership consists mainly of solicitors and barristers who specialise in commercial litigation.

2. The CLAI welcomes the establishment of the Review of the Administration of Civil Justice and respectfully echoes the words used by the Chief Justice in a recent speech in which he welcomed the creation of the Review Group by remarking *"that at least some aspects of our civil procedural model are beyond their sell-by dates"* and that reform of the rules of civil procedure may require *"a radical reappraisal to identify better ways of doing things."*[1]

3. It is also to be noted that the initiatives currently being organised by the Bar of Ireland in conjunction with IDA Ireland in promoting the legal services sector in Ireland in light of Brexit[2] will be likely to lead those doing business in the EU to consider whether the Irish civil justice system provides an efficient and reasonably cost effective forum for resolving commercial disputes.

4. The CLAI believes that the aspect of civil procedure which most contributes to the time and cost of resolving litigation is the discovery process. The Chairman of the Review Group, the President of the High Court Mr. Justice

[1] Irish Times, 27th September, 2017: "Rules must be changed to widen access to justice – Chief Justice" by Conor Gallagher. See also Interview with the Chief Justice, Mr. Justice Frank Clarke, on *The Marian Finucane Show*, RTE Radio 1, 30th September, 2017.

[2] *"Opportunities to Increase the Market for Legal Services in Ireland"* – proposal to Department of Justice and Equality presented by The Bar of Ireland and IDA Ireland. See also Financial Times, 12th January, 2018: "Ireland joins race to be EU's post-Brexit legal hub".

Kelly made an observation this effect in a speech given at the 2017 Four Jurisdictions Conference in Dublin,[3] when he stated: *"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."*

5. It is to be noted that since the court rules (*"the Rules"*) regarding discovery were first introduced in 1905[4], the procedures for discovery have only been substantially amended twice, in 1999[5] and 2009[6] respectively. However those amendments did not significantly alter the substantive rules governing the circumstances in which a document or class of documents will be discoverable or the manner in which discovery is to be made. In contradistinction, the equivalent in England and Wales of Order 31 Rule 12, i.e. Order 35(1) of the Rules of the Supreme Court, has in the last two decades been the subject of several amendments such that the current equivalent, CPR r. 31.5, bears little or no relationship to its predecessor.[7]

6. It is with the intention of proposing changes which could be made to the Rules to reduce the time and costs of making discovery that the CLAI presents this Submission to the Review Group. In 2017, the CLAI formed a formed a Sub-Committee consisting of practitioners with experience in the field of discovery[8] for the purposes of preparing a Discussion Document identifying the main drivers of the costs and delay that arise in the discovery process and setting out possible solutions to address those problems. The Discussion Document was presented to CLAI members at a public seminar on the 5th December, 2017 which was chaired by the Chief Justice, Mr. Justice Clarke. This Submission represents the CLAI's formal proposal to the Review Group for

---

[3] Four Jurisdictions Conference, Dublin, 5th to 7th May, 2017.
[4] Order XXXI of the Rules of the Supreme Court (Ireland) 1905, (introduced under s. 61 of the Supreme Court of Judicature (Ireland) Act 1877) was reproduced almost verbatim in Order 31 of the Rules of the Supreme Court 1986.
[5] S.I. No. 233 of 1999: Rules of the Superior Courts (No. 2) (Discovery), 1999.
[6] S.I. No. 93 of 2009: Rules of the Superior Courts (Discovery) 2009.
[7] In 1999, the Woolf Report (*"Access to Justice: Interim Report"*, 1995, Ch. 3, Lord Woolf) led to the introduction of the Civil Procedure Rules which included a provision that required parties to make what is known as *"standard disclosure"* in every case and removed the requirement to discover documents which were indirectly relevant to the issues in the case, i.e. *"train of inquiry"* documents. In 2013, CPR r. 31.5 was further amended by the Jackson Reforms to Civil Procedure (*"Review of Civil Litigation Costs – Final Report"*, Sir Rupert Jackson, 2009), which allowed the 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 disclosure"* being replaced with *"Basic Disclosure"*. (*Draft Practice Direction: Disclosure Pilot for the Business and Property Courts"*, available at https://www.judiciary.gov.uk/announcements/disclosure-proposed-pilot-scheme-for-the-business-and-property-courts/).

reforming the Rules relating to discovery in light of the discussions which took place at the seminar and the contributions from members which have been received since then.[9]

Discovery as a driver of cost and delay in litigation

7. The CLAI has identified the following areas in which the discovery process as it is currently framed contributes to legal costs and to the delays in resolving litigation:

(a.) *Electronically stored information:*

(i.) One of the most commonly cited reasons why making discovery can be a costly and time consuming process is the fact that so much of the material that parties are required to discover does not comprise documents in a physical, hard copy format and more frequently comprises electronically stored information (*"ESI"*) which is stored in a variety of mediums and devices and may in many cases be held by several different custodians who are situate in different locations.

(ii.) The consequence of this is that unless the parties agree some form of appropriate limitation, the party making discovery will have to carry out a wide search for relevant material held by all of the document custodians across all geographical locations and data repositories. Once collated, all of this material must be reviewed for the purposes of determining whether it *inter alia* falls within any of the categories of documents which are to be discovered or whether it is privileged.

---

[8] Comprising Brian Murray SC, Jonathan Newman SC, Andrew Fitzpatrick SC, Helen Kilroy (McCann FitzGerald), Karyn Harty (McCann FitzGerald), Eileen Roberts (A&L Goodbody), Lisa Broderick (DAC Beachcroft) and Richard Willis (Arthur Cox).

[9] It is recognised that the proposed new rules may not be appropriate for certain forms of litigation (e.g. judicial review proceedings) and that more specialised rules may be required for discovery in technology/ intellectual property actions and certain types of competition law cases. For example, SI 43/ 2017 – European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017, which gives effect to Directive No. 2014/104 EU of the European Parliament and of the Council, makes specific provision for the disclosure of evidence in actions where there is a claim for damages for breach of competition law.

(iii.) Disagreements can also arise between parties regarding the methods to be employed in carrying out the discovery review process (e.g. whether Technology Assisted Review/ TAR is suitable for reviewing the document universe).

(b.) *The obligation to request and make discovery of categories of documents:*

(i.) The requirement that parties should seek discovery of *"precise categories of documents*", and explain their reasons for so doing, was introduced by an amendment to the Rules in 1999.[10] In 2009[11] a further amendment was made which required the parties to specify each category of document into which each document being discovered falls. The changes were introduced following comments made by the Supreme Court in *Brooks Thomas Ltd v Impac Limited*,[12] but as Judge Kelly noted in his speech to the Four Jurisdictions Conference, *"this fairly significant change to the Rules did not achieve much success."*

(ii.) The experience of the CLAI Sub-Committee has been that basing the obligation to make discovery on categories of documents has contributed to the delays in the discovery process and also to the cost of making discovery. There are three principal reasons for this.

(iii.) Firstly, the requirement to seek discovery of categories of documents leads to disputes about the wording of those categories of documents and such disputes frequently have to be resolved by way of a motion for discovery. This increases the legal costs involved and, because of the time it can take to get a hearing date for a motion, the litigation as a whole is delayed. Moreover, because the motions concern the wording

---

[10] S.I. No. 233 of 1999: Rules of the Superior Courts (No. 2) (Discovery), 1999

[11] S.I. No. 93 of 2009: Rules of the Superior Courts (Discovery) 2009.

of the categories and are wholly divorced from the content of the actual documents, in many cases the motions transpire to have been a waste of court time because it turns out that the quantity of documents to be discovered has been largely unaffected by the outcome of the dispute on the wording of a particular category.

(iv.) Secondly, even when the parties have reached agreement on the wording of the categories to be discovered, those categories are usually phrased in quite broad terms. This leads to high volumes of documents that must be reviewed, redacted and discovered because they technically fall within the wording of one or more of the categories, although they are not material to the issues between the parties.

(v.) Thirdly, the obligation to specify each category of documents into which each document being discovered falls requires that document reviewers must not only determine whether the documents relate to the matters at issue in the case, but must also consider which of the categories each individual document falls within. This requirement lengthens and therefore increases the costs of the document review process. Moreover, as technology platforms cannot easily cope with disparate categories, it makes it harder to save costs through the use of technology assisted review.

(c.) *"Peruvian Guano" relevance*:

(i.) Under Order 31, Rule 12 in its current form, the primary test of discoverability is that a document must be relevant to the matters at issue in the proceedings. The definition of relevance was drawn in particularly wide terms in *Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company*[13] (*"Peruvian Guano"*) where it was held that a document will be relevant where it is reasonable to suppose

[12] [1999] 1 I.L.R.M. 171.
[13] (1882) 11 Q.B.D. 55.

that it contains information which may either directly or indirectly enable the party seeking discovery either to advance his own case or damage his opponent's case, or it is a document which may fairly lead him to a train of enquiry which may have either of those two consequences.

(ii.) The effect of the *Peruvian Guano* test is that a document will require to be discovered not only where it is directly relevant to an issue in case but also where it is indirectly relevant to that issue or where its relevance may not be immediately obvious but it may lead the party on a train of enquiry which may lead to it being relevant. This has obvious consequences for the time and costs of making discovery because it increases the number of documents which have to be reviewed and which ultimately have to be discovered.

(d.) *Broadly worded pleadings:*

(i.) The pleadings in a case are the touchstone for determining what documents are discoverable because the primary test of discoverability is that the document must relate to a matter at issue and the issues in a case are framed by the pleadings.

(ii.) However, practitioners tend to draft pleadings with the intention of ensuring that the issues in a case are kept as broad as possible for as long as possible. The direct consequence of this practice for the discovery process is that if the effect of the wording of the pleadings is that the range of the matters at issue in a case is very broad, then the quantity of documents that will require to be discovered will also be broad.

(e.) *The obligation to list every document over which privilege is claimed:*

(i.) The requirement to list as being subject to litigation privilege documents which were created after the date on which proceedings were first commenced appears to add little benefit

to the discovery process but increases the cost and time involved in making discovery.[14]

Proposed reforms to the Rules

8. The CLAI proposes the following reforms to the Rules for the purposes of reducing the time and cost of making discovery.

9. *Requiring parties to deliver narrative statements with pleadings*

(a.) A detailed consideration of possible reforms which may be made to the current procedure for pleading in the High Court is beyond the scope of this paper, which deals principally with the Rules insofar as they concern discovery. However, the CLAI believes that such is the significance of the connection between the pleadings and the scope of the discovery that is to be made in a case, it will not be possible to achieve real progress in making discovery cheaper and faster without also changing the basis on which parties to an action are required to plead their respective cases.

(b.) It is suggested that the principal aim in any reform of the system of pleading should be to require the party delivering the pleading to consider at an earlier point than has hitherto been the practice what are the real issues in the case and what evidence is likely to be available to address those issues. The CLAI believes that requiring parties to interrogate their own cases at any early stage will lead to a better, and earlier, awareness of what documents they will actually need for the purposes of presenting their cases in court.

(c.) One possible method of achieving this objective would be to require each party to deliver with their Statement of Claim or Defence: (i.) a narrative statement (subject to a word limit) which summarises the evidence which the party intends to lead in court in support of the facts

[14] E.g. the practice, which is not uncommon, of individually listing correspondence from solicitors and counsel in the privilege section is patently of little benefit and also increases costs.

which are pleaded in the Statement of Claim or Defence;[15] and (ii.) the documents which are referred to in the pleading and or in the statement concerned and to which they intend to refer in evidence at trial.

(d.) The proposal at paragraph 9(c)(ii.) will be considered in more detail at paragraph 10(b) but the CLAI believes that requiring parties at an early stage to analyse what evidence is likely to be available to them to support their case and to disclose to their counterparts some or all of the documents on which they intend to rely at trial, will enable both parties in the case to have from an earlier stage a more accurate idea of what discovery is truly necessary in the case.

10. *Replacing the requirement to seek and make discovery of categories of documents with a general obligation to discover pre-determined classes of documents at fixed points in the proceedings*

(a.) The CLAI proposes that instead of requiring parties to agree upon the particular categories of documents that are to be discovered in each case, the Rules should be reformed so as to provide that the parties must at specified stages in the litigation make discovery of pre-determined classes of documents.

(b.) Firstly, as referred to at paragraph 9(c)(ii) above, it is proposed that provision should be made in the Rules that where a document is referenced in a pleading, a copy of that document is delivered with the said pleading and that all such documents are listed in an accompanying schedule arranged in chronological order which references the placement of same in the pleadings.

(c.) The obligation to disclose documents at this stage could be broadened to include not only documents which are referred to in pleadings but also documents which were considered or relied upon in producing the pleadings. For example, the draft Practice Direction which is proposed for the English Business and Property Court, includes an obligation to disclose *"the key documents on which [the party] has relied (expressly*

[15] Provision could be made to allow parties to apply to court to be exempted from the requirement to deliver this narrative statement in exceptional cases.

or otherwise) in support of the claims or defences advanced in its statement of case…".[16] By way of further example, Article 3(1) of the IBA Rules on Taking Evidence in International Arbitration requires each party to disclose *"all Documents available to it on which it relies."*

(d.) While the introduction of an obligation to discover documents which the party intends to rely upon at trial would mark a significant change in the High Court Rules, it is already a requirement in the District Court.[17] Further, there is no doubt that a rule of this sort would lead to greater quantities of documents being disclosed at an earlier stage in High Court litigation.

(e.) Secondly, it is proposed that the Rules should require parties within a specified period following the close of pleadings (e.g. within 28 days of the time limited for the delivery of a Reply and/ or Defence to Counterclaim) to disclose additional pre-determined classes of documents which would be the same in every case. The advantages of this reform are that it would: (i.) eliminate the need for the parties to reach agreement on the categories of documents to be discovered; (ii.) eliminate a large volume of wholly tangential documents that are produced because they fit within categories rather than because they are material to the issues in dispute; and (iii.) reduce the time and cost involved in completing the discovery review process.

(f.) In England, these pre-determined classes are defined with reference to *"standard disclosure"* which CPR, r. 31.6 defines, broadly speaking, as documents: (a.) upon which the disclosing party relies; (b.) which adversely affect the case of the disclosing party or another party; or (c.) support the case of another party.

(g.) The draft Practice Direction which is being proposed for the English Business and Property Court replaces *"standard disclosure"* with an obligation to make *"Basic Disclosure"* which, is defined to require disclosure of *"the key documents"*: (a.) on which the disclosing party has relied (expressly or otherwise) in support of their pleadings; and

[16] Paragraph 5.2(2) of the draft Practice Direction also requires disclosure of *"the key documents that are necessary to enable the other parties to understand the case they have to meet."*

(b.) that are necessary to enable the other parties to understand the case they have to meet.

(h.) On balance, the CLAI favours a requirement to disclose classes of documents consisting of the following: (a.) documents which the party making disclosure has relied upon (whether expressly or otherwise) in preparing their pleadings; (b.) documents which adversely affect the case being made by a party to the proceedings, including the party making disclosure; and (c.) documents which support the case being made by a party to the proceedings, including the party making disclosure. However, the CLAI is concerned that limiting a party's discovery obligations to only these classes would pose certain risks.

(i.) For example, the experience of some members of the Sub-Committee in dealing with UK lawyers is that documents which are in fact relevant to the issues in a case are excluded because they do not fall within the strict confines of any of the specific classes of standard disclosure. The possibility that this would be a risk was highlighted by Judge Kelly in his speech to the Four Jurisdictions Conference: *"It would be possible, I believe, for a highly material document to exist which would be outside standard disclosure but within Peruvian Guano."*

(j.) Therefore, in order to address the concerns that requiring parties to make discovery of pre-determined classes of documents might lead to the omission of material documents, there should be an obligation to disclose an additional class of documents which are material to the issues and/ or the outcome of the case. This proposal is discussed in the next section.

Replacing the obligation to make discovery of "Peruvian Guano" documents with an obligation to discover documents which are "material" to the issues in a case and/ or its outcome

11. At present, the obligation to make discovery of relevant documents is defined with reference to the broad test set out in *Peruvian Guano* which obliges a party to make discovery of documents which may be directly or indirectly

[17] Order 40, Rule 5 DCR.

relevant or which may be reasonably supposed will lead to a train of inquiry which will result in the documents being seen to be relevant.

12. The *Peruvian Guano* test has long since ceased to be the basis of the test for discoverability of documents in most common law jurisdictions and it does seem necessary that some effort should be made to narrow the test in this jurisdiction as to when a document will be discoverable. One possible solution would be to require each party to make discovery of documents which are *"material"* to the issues in the case. In order to avoid the concept of materiality being confused or overlapped with *Peruvian Guano* relevance, the term could be defined so as to expressly exclude *"train of inquiry"* documents and to include only documents which are directly relevant to the issues in a case.

13. One additional element of materiality could be to include an obligation to disclose documents *"which provide essential context to the issues in the case"*. Alternatively, Article 3(3) of the IBA Rules on Taking Evidence in International Arbitration refers to an obligation to disclose *"documents which are relevant to the case and material to its outcome."*

14. Allowing a court hearing an application for discovery to consider not only whether documents are relevant to the issues in the case but also whether they are material to its outcome would be likely to narrow, perhaps considerably, the range of documents which would ultimately be discovered. It should also be noted that to permit the court at an interlocutory stage to decide whether a particular document will be likely to influence the outcome of the trial would significantly extend the jurisdiction of the court on interlocutory motions.[18] However, as stated above the CLAI believes that significant changes to the Rules are warranted in order to address the obstacles that the discovery process poses to the efficient and fair disposal of litigation.

Making discovery: an obligation to conduct a reasonable search; eliminating the obligation to discover documents in a party's "procurement"; and refining the obligation to list documents which are privileged.

[18] In *Hartside Ltd v Heineken Ireland Ltd* [2010] IEHC 3; Clarke J. (as he then was), held that a court hearing a motion for discovery should determine the relevance of a document only by considering whether it relates to an issue in the pleadings and should not consider whether that issue is likely to arise at trial.

15. It has been acknowledged in previous decisions of the High Court that the obligation of a party making discovery is to take reasonable steps to ensure that all documents falling within the categories are discovered.[19]

16. However, the Rules as currently framed do not reflect the judicially expressed sentiment that discovery should be a process which is conducted with regard to the requirement of proportionality in which the party making discovery is required to carry out a reasonable search for the purposes of discovering documents.

17. The CLAI therefore proposes that the Rules should be amended to require that when making discovery, the party concerned should conduct a search of its documents which is reasonable having regard to the circumstances of the case, including the complexity of the issues in the case; the value of the case, the costs that are likely to incurred in carrying out broader searches than that actually carried out; the volume of documents likely to be involved if broader searches are carried out; and the likely relevance to the issues of the documents that will be encompassed in a broader search.

18. The party making discovery will, prior to making discovery, describe in correspondence the parameters[20] it proposes to apply to its search of documents and explain why, having regard to the factors listed at paragraph 17 above, it considers those parameters to be reasonable. In the event that it is not possible to reach agreement on the parameters to be applied, the party making discovery will proceed to do so on the basis which it proposed and will describe the parameters so applied in its affidavit of discovery. The party to whom discovery is made will, if it deems it appropriate, then be entitled to challenge the adequacy of the parameters by bringing an application for directions under the provision described in paragraph 22.

[19] In *Thema International Fund plc v HSBC International Trust Services*, [2011] IEHC 496, Clarke J. held, at para. 2.10, that the obligation is to disclose *"… insofar as it may be reasonably possible, all documents which come within the categories …".* In *Anglo Irish Bank Corporation Ltd v. Browne*, [2011] IEHC 140 Kelly J. (as he then was) agreed, at pp. 2 and 3, that *"the public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy."*

[20] These parameters would include: (a.) the identities of the document custodians who are considered relevant to the issues in the case; (b.) the date range that the search of documents would cover; (c.) details of the data sources which it is proposed to search (e.g. on-site servers, Cloud storage, email accounts, personal devices etc.); and (d.) whether technology assisted review procedures had been employed.

19. Separately, the CLAI proposes that a party making discovery should be required to discover only documents which are within its *"possession"* or its *"power"* and that the obligation to discover documents which are within its *"procurement"* should be deleted from the Rules. A document has been held to be within the procurement of the party making discovery where the document is in the possession of a third party but it is likely that that party will accede to a request to provide the documents.[21] This is an unwieldy definition which can give rise to problems in practice in identifying discoverable documents.

20. While the term *"possession, power or procurement"* has for many years been commonly used to describe a party's discovery obligations, in fact the term *"procurement"* was only inserted into the Rules in 2009.[22] In *Thema International Fund plc v HSBC International Trust Services*,[23] Clarke J. (as he then was) noted that the wording of the Rules prior to this change provided a clearer statements of a party's discovery obligations and had *"the considerable merit of certainty."*[24]

21. Finally in this section, in order to address the issues discussed at paragraph 7(e)(i.), it is proposed the party making discovery would be required to list each individual document over which a claim of privilege is being asserted, and to describe the basis of the claim to privilege only for documents generated before the date on which proceedings were commenced.

Provision for additional discovery, alternatives to discovery or no discovery

22. Where discovery as outlined above has been made, the party to whom discovery has been made may be concerned that the party making discovery has omitted discoverable documents either deliberately or because he has misunderstood what the issues in the case are or because the parameters

[21] *Northern Bank Finance Corporation v Charlton* (unreported, High Court, Finlay P., May 26, 1977); *Yates v Ciba Geigy Agro Ltd* (unreported, High Court, Baron J., April 29, 1986).
[22] S.I. No. 93 of 2009: Rules of the Superior Courts (Discovery) 2009.
[23] [2011] IEHC 496; unreported, High Court, Clarke J., October 17, 2011.
[24] *ibid.*, at para. 5.19. Clarke J. held: "The position adopted in most of the common law jurisprudence to which reference has been made and also adopted under the former rule in this jurisdiction under *Johnson v Church of Scientology* has, in my view, the considerable merit of certainty. A party either has documents in its possession or has the legal entitlement to require possession. In those circumstances the document must be discovered. In all other circumstances, the document does not have to be discovered."

which have been applied in the search for documents were not reasonably adequate. Further, it may be necessary to order additional discovery of a distinct class or classes of document.

23. Separately, there will be many cases where the costs of ordering a party to make discovery of all documents relevant to a particular issue could safely be avoided if the party was instead ordered to answer interrogatories dealing with that issue or to deliver a sworn affidavit/ *précis* of evidence which deals with a particular point. There may also be cases where it is not necessary to have discovery at all.

24. It therefore seems sensible that any amendments which are to be made to the Rules would allow parties to apply for directions to be made as to how the case should be brought to trial with provision for further discovery or without discovery at all or with limited discovery dealing with some issues and alternative procedures to be followed to deal with other issues.

25. The orders which may be sought could include any of the following:

   (a.) an order directing that further and better discovery be made or that a party make supplemental discovery of a specific class or classes of documents. In considering whether to make orders of this sort, the court could be required to have regard to a core requirement that the discovery sought should be proportionate to: (i.) the issues in the proceedings; (ii.) the likely evidential value of the discovery being sought; (iii.) the likely costs that will be involved in making discovery; and (iv.) whether the burden or expense of making discovery is likely to outweigh the benefit of discovery to the fair disposal of the cause or action. Further, where the party to whom discovery has been made applies to the court for an order requiring further and better discovery without first requesting a meeting with the party who has made discovery to discuss the request, the court could be empowered to make an order requiring the party bringing the application to bear the costs of the motion;

(b.) an order dispensing with the requirement to make discovery at all and listing the case for trial, with any directions as may appear appropriate as to the manner and form of trial;

(c.) an order providing that the parties should make discovery only of particular documents or of documents held by specific individuals;

(d.) in cases where fraud is pleaded or in other cases which the court is satisfied are exceptional, an order requiring discovery of all documentation which is relevant on a *Peruvian Guano* basis;

(e.) an order directing the provision of further information in place of discovery, whether by way of Replies to Particulars, Replies to Interrogatories, the delivery of a précis of intended evidence or the filing of an affidavit or otherwise as appropriate;

(f.) an order adjourning the application, in whole or in part, or staying any obligation to make discovery until after the provision of further information as directed by the court;

(g.) an order making directions as to the manner in which any discovery is to be made, including as to:-

(i.) what searches are to be undertaken, of where, and for what, in respect of which time periods and by whom, and the extent of any search for electronic documents;

(ii.) what meetings might helpfully take place as between legal teams and any technical experts that may be assisting them;

(iii.) the format in which documentation is to be discovered and whether the documentation is to be individually identified;

(iv.) any direction in respect of documentation that once existed but no longer exists; and

(v.) any limitations in respect of the inspection of the documents listed in the Affidavit of Discovery, or as to redaction of documentation, or such other restrictions or limitations as may

be appropriate having regard to the confidentiality of or privilege attaching to, information contained therein.

26. *Electronically Stored Information*

(a.) Given the speed at which the technologies relating to the storage, review and disclosure of ESI change, there is a limit to the extent to which the Rules can be amended to include detailed procedures dealing with how ESI is be dealt with in discovery. It would be unhelpful if changes which were made to the Rules to cater for ESI were rendered obsolete soon afterwards.

(b.) However, amendments could be made to include in the Rules some procedures which should remain capable of being applied irrespective of how technology changes over time. For example, as applies in England, the Rules could be amended so as to require parties to discuss and seek to agree upon limiting the scope of searches of ESI with regard to the following:

(i) Identities of relevant data custodians;

(ii) the date range that the searching of data should cover;

(iii) the forms of electronic communications in use by the parties during the date range concerned;

(iv) the details of the keyword searches or other forms of automated searching processes that the parties intend to form when making discovery;

(v) details of the data sources in which the data of the relevant custodians is held; and

(vi) any policies which may relate to the storage of the data of relevant custodians, including any jurisdictional considerations.

(c.) Similarly, the Rules could be amended to include a requirement that parties must use technology assisted review processes in making discovery unless the technology in question is not reliable, efficient, cost effective or affordable.[25]

Motions to strike out proceedings/ Defences where there has been a failure to make discovery

27. The threshold which an applicant on a motion to strike out proceedings/ Defence for failure to make discovery must meet is quite high. In effect, it must be shown that the failure to make discovery has arisen due to wilful default or negligence.[26]

28. The CLAI believes that if parties understood that a failure to make adequate discovery was likely to result in real sanction, they would be more likely to adopt a greater degree of rigour in making discovery. To address this, the CLAI proposes that the Rules be amended to provide that where a second motion to strike out for failure to make proper discovery is brought, the proceedings/ Defence must be struck out save in exceptional circumstances or where the interests of justice require it.

[25] Technology assisted review/ TAR cannot easily cope with the requirement to make discovery under separate categories and it is anticipated that the elimination of the requirement to make discovery of categories would make it easier for parties to avail of TAR when making discovery.
[26] *Mercantile Credit Company of Ireland Ltd v Heelan* [1998] 1 I.R. 81. *Go2Capeverde Limited and Balwerk Ix LDA v Paradise Beach Aldemento Turistico Algodoeiro S.A.* [2014] IEHC 531.