**Introduction**

1. E-Disclosure or E-Discovery is the exchange of information stored in electronic format pursuant to voluntary or court ordered discovery. It entails the identification, preservation, collation, review and disclosure of electronically stored information. This information can be found or stored on a wide variety of media such as websites, mobile phones, PC hard-drives, USB devices, back-up files, servers and lately, cloud-based servers. S.I. No. 93 of 2009 was enacted in Ireland in March 2009 which amended the Rules of the Superior Courts and which now provides for the discovery of “electronically stored information”. In the UK, e-discovery is governed by the Practice Direction and the Civil Procedure Rules. The Practice Direction provides that the parties to litigation must discuss how e-disclosure should be carried out at an early stage in the proceedings and before the first case management conference. In England, there is an ESI disclosure “questionnaire” which can be used by the parties to focus the process and to also set the parameters at a relatively early stage. It deals with the scope, extent and most suitable format for the disclosure of documents. Should such a questionnaire be completed, it must be verified by a statement of truth.

2. Many problems are posed by the introduction of e-discovery into civil litigation. For one, the sheer cost and man-power required to sift through potentially hundreds of thousands of electronically stored documents (with possibly only a fraction of such documents actually relevant to the case) must be considered, as must the more fundamental question of how to go about conducting such a search in the first instance. For example, what search terms should be used? How are such search terms agreed with the other party? How will the parameters of such a search be outlined? Another issue is the fact that even if one deletes a document, a copy of that document may still be found on the hard-drive and, as Hollander on Documentary Evidence notes (10th ed., 2010, Sweet & Maxwell) at pages 185-186, unless you have overwritten the document in question or are a computer expert, that document is likely to be sitting on the hard-drive waiting to be found and restored. A normal search will not reasonably disclose such ghost images but nonetheless, they are capable of being discovered if the search is properly focussed.

3. One of the other points that Hollander makes is that nowadays, email is used like conversation, the only difference being that there is a potentially permanent written record of the most innocuous or incriminating discussions to be found, should one be inclined to look - often written in jest but uncomfortable in recollection.
4. Presently, there does not seem to be any one software programme which is capable of achieving “standard discovery”, in England or Ireland. There are programmes and a number of Accountancy firms have specialised in offering search programmes and assistance. It is submitted in this regard that whilst there are some programmes which purport to make the job of sifting through millions of documents easier; it will be almost impossible to rule out the need to manually review at least some documents before they are deemed appropriate and relevant for discovery. Indeed, the rise of forensic investigators in England was recently documented by Grania Langdon-Down in the Law Society Gazette (2010) LS Gaz, 22nd July 2010. This article cites the global risk consultancy firm, Kroll, which was called in to carry out a forensic investigation of the Icelandic Bank, Glitnir, which resulted in a "$2bn US lawsuit that accuses one of the main figures behind Iceland’s banking boom and bust of a "sweeping conspiracy” which contributed to the bank’s collapse".

THE ENGLISH POSITION
5. As already mentioned, in the UK the Practice Direction dictates that the parties should, prior to the first case management conference, discuss any issues in relation to searching for and preserving electronic documents. There exists a standard disclosure statement which requires details regarding the electronic searches which have and have not been made. Guidelines are also provided as to the factors which must be taken into account when determining whether it is reasonable to carry out a specific kind of electronic search. Furthermore, it is made clear that it may be reasonable to search electronic storage systems i.e. the search for deleted but not removed ghost documents.

6. The leading English case in this area is Digicel (St. Lucia) Ltd and other companies v. Cable and Wireless plc and other companies [2008] All ER (D) 226. The Claimant mobile phone companies brought proceedings against the Defendant telephone operator companies in seven jurisdictions. It was alleged by the Claimants that the relevant Defendant had deliberately delayed interconnection with the Claimants’ network in breach of statutory duty. Following standard disclosure by the Defendants, the Claimants applied for specific disclosure of certain classes of electronic documents pursuant to Rule 31.12 of the Civil Procedure Rules 1998, S.I. 1998/3132. In particular, the Claimants sought an order that the Defendants restore certain back-up tapes for the purpose of searching for the email accounts of certain former employees.

7. As a result of this application for disclosure, an issue arose as to whether, following a comparison of the steps taken by the Claimants versus the steps taken by the Defendants, the Defendants had carried out a “reasonable search” for electronic documents and whether they should be required to take further steps. It was argued by the Defendants that the question of what constituted a “a reasonable search” had to be decided by the solicitor who was in charge of the disclosure process on the basis that Rule 31.12 and paragraphs 2 and 2A of the Practice Direction referred to someone “deciding” what a reasonable search would entail. Therefore, the Defendants argued that when asked to review a search made by a solicitor in this regard, the Court should only reach a different conclusion to the solicitor when that decision was outside the band of permissible reasonable decisions. It was the Claimants’ contention that there
was no warrant for the Defendants approach in the wording of the CPR or the PD and
that the Court should, as a result, reach its own conclusion as to what would be required
by way of a reasonable search.

8. It was held by Morgan J. that what was required by a “reasonable search” was
something which was to be determined by the Court on the wording of the CPR. He
noted that this was something which could be decided by the Court either in advance of
the search being done or after a search has been carried out and the extent of that
search is being challenged by the other party. In the instant case, it was held that the
Defendants had not carried out a reasonable search as they had omitted to search for,
and in, specified email accounts to the extent that those email accounts might exist in
the back-up tapes. Thus, it was ordered that the parties’ solicitors meet to discuss the
best way the restoration of the back-up tapes could be done, followed by a restoration
of the back-up tapes as soon as reasonably practicable.

9. What is most relevant here, however, is the discussion of Morgan J. on “Key word
searches”. In Digicel, the Defendants used positive key word searches to reduce the
number of documents which were then the subject of a manual review as to their
contents. 10 key words were used by the Defendants. In this regard, Morgan J. noted at
paragraph 76 that:

“There is no doubt that it will often be appropriate for a party to search
electronic documents using positive key words. In any event, the Claimants
agree, on this present application, that the Defendants should be permitted to
search their electronic documents using positive key words. The principal issue
between the parties relates therefore to the selection of those key words”.

10. Morgan J. went on to state that the three key words in this context were “Digicel”,
“interconnect” and “interconnection”. He agreed with the Defendants submission that
those three key words were “vital and will identify a very large part of the totality of the
documents which need to be identified.” In this regard, he went on to note that the
word “Digicel” may not have been used to identify the Claimants –

“The Claimants were, or might have been, called “Digi”. The Claimants were or
might have been called “our Irish friends. Further, references to the Claimants
might have involved the use of the name of the individual employee of the
Claimants and no search has been carried out in respect of the names of
individual employees”.

11. Thus, we see Morgan J. indentifying a common and difficult problem in relation to e-
discovery. How does one go about defining or limiting the key word searches to be
used, particularly when, such as in the Digicel case, one is dealing with the contents of
several email accounts, which could, as was the case here, amount to over one million
individual documents? A classic example of the dangers inherent in the selection of ”key
word searches” can be seen from the case of Menolly Homes v. Lagan Concrete. During
the course of that case, a major dispute over the adequacy of discovery arose. There,
the Plaintiff chose a list of 12 key words, including, of all things, the name of the Defendant’s solicitor. Hundreds of thousands of documents were thrown up. What was not on the list was “pyrite”. Massive cost was incurred and the claim was nearly struck out. The case eventually settled, however, in relation to the 650 houses for approximately €25 million.

12. Morgan J. discussed a further problem at paragraph 78 with the use of key word searches which is that if one uses “an ordinary English word as a key word”, “Such a word will throw up many documents which have nothing to do with the issues in the case.”

13. Thus, to address these concerns, Morgan J. adopted the approach of considering the “proportionality of adding an additional key word”. He therefore concluded that one must “form some view as to the possible benefit to the Claimants of adding the key word and the possible burden to the Defendants of doing so”. Expanding on this notion at paragraph 82 he stated:

“On a subject such as proportionality, there is no precise and correct answer. Arguments as to proportionality involve choosing a cut-off point...and there is no single right answer as to where the cut-off point should be”.

14. Morgan J. then went through each key word the Claimants alleged the Defendants should have used in the initial search, applying the proportionality test to each one of them. In considering each word, he balanced the possibility that useful documentation would come to light for the Claimants against the fact that the same word could also throw up more documents which have no relevance but which will still be subject to manual review. It is clear, therefore that this is what such a claim will boil down to – will the inclusion of a key word on balance provide more documents which are relevant than those which are irrelevant but which will still have to be subjected to manual review.

15. The recent case of Omni Laboratories Inc v. Eden Energy Limited [2011] EWHC 2169 in the Court of Technology and Construction before Mr. Justice Akenhead provides some useful insight as to how the issue of key word searches had been approached post-Digicel. This case was a hearing for a pre-trial review at which the Defendant brought an application seeking disclosure in respect of various documents. Specifically, the Defendant sought an order to the effect that the Claimant would have to undertake another electronic search using the word “permeability”, in addition to the searches already carried out. It also sought for the documents which emerged from this additional search to be manually reviewed. As noted by Akenhead J., such a search threw up 40,000 documents. This number was reduced to 20,000 and it was these documents which the Defendant claimed should undergo manual review. However, the Claimant had gone on and had further reduced the 20,000 documents using other key words on the basis that it
"is pointless looking at documents which simply contain the word "permeability" because as I [Akenhead J.] said, a large number will simply be wholly irrelevant."

16. The Defendant’s request was rejected by Akenhead J. who said that the work carried out by the Claimant already

"...is a proportionate amount of work done and it would be wholly disproportionate to require a manual review of documents which in all probability would be irrelevant. That is not to say that one might find one or two documents which have not been disclosed in going through the 20,000 documents, but in all probability it is highly unlikely and, therefore, that part of the application fails.”

17. As can be seen, Akenhead J., like Morgan J. in Digicel, taking a pragmatic approach to the use of key word searches and the manual review of documents. He was of the view that the Claimant was entitled to further limit by the use of additional key word searches the initial documents which were found through the "permeability" word search.

18. Master Whitaker in Goodale & Ors. v. The Ministry of Justice & Ors. [2009] EWHC 3834 provides an excellent summary of, as he put it, “the problem” in relation to electronically stored information (ESI). He draws attention to the myriad of issues raised by ESI:

a) Even in small organisations, huge quantities of ESI may exist. These documents may exist in many different forms and locations. It may therefore my impossible to access such documentation without incurring significant cost.

b) He makes the valid point that it is now common for an individual to have more than one email account with the obvious consequences for e-disclosure.

c) The issue with ESI is often, the parties involved do not know themselves how much ESI they have or where it is located. He notes that while they might have an idea as to which servers ESI is contained upon, it is still difficult to ascertain how much documentation will be revealed by searches of such servers and how much it is going to cost to conduct such a search.

d) He points out that an “ill considered search for ESI may produce far too few documents for review but more likely will produce such volumes that human review of every document is neither proportionate nor practical”.

19. The litigation at issue in Goodale involved the complaints of several convicted prisoners who claimed that because of failures in the prison system, they were each subjected to a "one size fits all" detoxification regime. In other words, if a prisoner arrived who was
being treated with Methadone, instead of continuing this treatment in prison, the prisoner was given other drugs and painkillers which, it was claimed, caused them to detoxify quickly but which also caused unnecessary pain and suffering and indeed, one prisoner died.

20. The issue to be determined by Master Whitaker was whether or not the Defendant could be ordered to carry out a search for ESI. It was the Defendant’s contention that such a search would be disproportionate and produced some “provisional statistics as to the quantity of documents that they may need to search”. In this regard, Master Whitaker noted that there was no legal difference in the “disclosure test to be applied to documents that are held electronically and paper documents.” He did, however, note that in practice, electronic documents

“have a habit of being of far greater volume...so the cost of search for and disclosure of them can be much higher, if sensible provisions for management of the ESI disclosure exercise are not put in place”.

21. That said, however, the learned judge concluded that it was not permissible for the Defendants to simply claim that they should not disclose any ESI on the basis that it is too onerous a task for them. Instead, what would be required of the Defendant is that a search would be carried out but one that was not

“unnecessarily wide at this stage. What is called for in this case as in many others is a considered and staged approach so that the volume of documents that respond to the search will not be too wide.”

22. Thus, Master Whitaker ordered that the Defendant run a limited search without an actual physical review and production of those documents carried out. This, he stated at paragraph 25, would give an indication as to

“how many documents each of the 31 terms are going to through up to establish whether they may require a degree of fine-tuning. We also need to know the total number of documents that respond to this collection of search terms (acknowledging that the same documents may respond to more than one search term in many cases”.

23. He went on to state that:

“It is at that stage, when that crude way of finding out what documents might be in existence is completed that a service provider will have to be agreed between the parties, and will have to be instructed to look at what the next stage of the exercise should involve and how much it is going to cost in order to produce a corpus of documents which is reviewable by both parties.”

24. It can be said that Master Whitaker’s approach is again a very pragmatic one and one which is very alive to the issue of the cost of discovering and collating ESI.
A judgment handed down only last month sheds further light on the issue of e-discovery and ESI. *Patel v. Unite* [2012] EWHC 92 involved a claim brought by Mr. Patel, a British Airways pilot who claimed to have been the victim of a campaign of defamatory allegations and of harassment as a result of comments which had been posted on the BASSA (British Airline Steward and Stewardesses Association, a branch of Unite) forum. Mr. Patel brought the application in the instant case as a result of seven particular “threads” on the forum which contained allegations that, inter alia, he was unsafe to fly with, was unfit to be a captain and was involved in police corruption. An order had been made by another judge that the Respondent carry out a “reasonable search” to locate the information sought by Mr. Patel. It was the Respondent’s contention, however, that this information was no longer available. Mr. Patel therefore sought an application that in the event that the Respondent could not provide some or all of the information sought, an independent expert should be given access to copies of the BASSA forum database and be permitted to make an image of the database and/or any other electronic data on the database, existing or deleted, as the expert considered necessary to prepare a report limited to the identification of the information sought. Specifically, Mr. Patel alleged that the Respondent failed to search for the relevant information and failed to explain the absence of the information requested.

It was submitted on behalf of Mr. Patel that the central issue was whether all of the data on the database which could reveal the information and the identities of those who posted the comments had been irretrievably deleted and whether the relevant searches had been carried out. It is interesting to note in this regard that an invitation had been extended by Mr. Patel to the Respondent to agree to the appointment of an independent forensic expert at Mr. Patel’s expense but that invitation had been declined.

Judge Parkes expressed the view at paragraph 28 that “*The order sought by Mr. Patel is undoubtedly intrusive.*” This was because, as he pointed out, it would require the Respondent to permit an independent expert to access their database and make an image or a copy of the database with a view to compiling report limited to identification of the information sought. The learned judge went on to conclude at paragraph 29 that:

“It must be open to the court, where there is reason to believe that a previous order of the court has not been fully complied with for reasons of lack of technical understanding, to make such further order as is necessary and proportionate to enable the Respondent to comply and to ensure that the earlier order is not frustrated by an innocent failure to understand the technical issues...”

Thus, Judge Parkes concludes at paragraph 31 that:

“It seems to me that the intrusiveness of the order proposed, particularly as regards the innocent members who have not posted any of the material complained of, can be significantly reduced by ordering that the necessary work
should be carried out by an independent expert appointed jointly by the parties, and that the expert should give suitable undertakings...to the effect that he should not disclose to Mr. Patel...any information obtained in the course of copying and examination of the BASSA database except information which identifies those responsible for the posts complained of...On that basis, the order will in my judgment satisfy the requirement of proportionality, and the need to respect so far as possible the privacy and data protection rights of BASSA members”.

THE IRISH POSITION

29. As previously mentioned, S.I. 93 of 2009 brought e-discovery on to a legislative footing in Ireland. Of particular note is Rule 12(2)(c), Order 31 which provides:

“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 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.”

30. It is clear that the amendment has attempted to address the cost of providing e-discovery. Rule 12(3) goes on to provide that undertakings may be required from a party or person to ensure that documents are not made available which have not been ordered by the Court and to “otherwise secure the information and communications technology systems concerned”. It goes on to state that where an order has been made which makes provision for the inspection and searching of documents whether by an independent expert or other person agreed by the parties; 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”.

31. It is clear from the above provisions that much emphasis has been placed in the statute on the issues of costs. This is similar to the English position in relation to costs which is dealt with in Rule 31.7 of the Civil Procedure Rules and which provides that the Court must have regard to the “ease and expense of retrieval of any particular document” when deciding the reasonableness of a search for electronic documents. Rule 37.1 goes on to state that the Court must have further regard to “The cost of disclosing and
providing inspection of any relevant electronic documents.” The Rules as yet have not been tailored to meet the inexorable march of email traffic. What problems that have been encountered to date will be compounded by “cloud based” storage systems and how that will lend itself to review, particularly in relation to ghost images.

32. Rule 12(6)(a)(iii) further provides that where one seeks discovery of ESI, one must specify whether the documents are sought in a searchable form and whether the applicant “seeks the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested.”

33. It is submitted that the provision made in Irish law for e-discovery is not as comprehensive as the provision made in England as it is clear even from a reading of the relevant sections that a more comprehensive approach has been taken. Indeed, it is submitted that in general, the English courts have engaged with this matter in a more detailed fashion. This is clear from the extent of the case law that has been generated in England on e-discovery.

34. One decision which is of note, however, is Dome Telecom Limited v. Eircom Limited [2008] 2 IR 726. Of course, it must be noted that this judgment was handed down before the Rules of the Superior Courts was amended by S.I. 93 of 2009 in March 2009.

35. Here, the Plaintiff was a telecommunications company which operated in the State and sought discovery of details of certain calls which had been made to certain freephone numbers which were operated by its competitors over relevant period. The Plaintiff operated a business whereby its customers dialled a freephone number which was provided by the Defendant in order to access communication services purchased from the Plaintiff. The Defendant introduced charges on certain calls made to these numbers. However, these charges initially affected companies which operated from within the State only. It was the Plaintiff’s contention therefore that this gave companies operating outside of the State which offered the same service within Ireland an unfair advantage over domestic operators.

36. The Defendant argued against the Plaintiff’s application for discovery on the basis that the information sought was only available on a database and therefore, discovery of same would require the Defendant to collate data and documents which were not already in existence. It was further argued that the cost of this process was prohibitively expensive and rendered the discovery oppressive and disproportionate. The Defendant offered instead to concede as a matter of evidence certain matters. The Plaintiff contended that it required a further specific breakdown of the data already provided by the Defendant in order to prosecute its claim properly.
37. In the High Court, McKechnie J. ordered the Defendant to make discovery of the additional information.

38. On appeal to the Supreme Court, the Court vacated the Order of McKechnie J. and held that it was not necessary that the Defendant make such discovery, having regard to the expense involved and the limited benefit in terms of proving liability that the discovery would give the Plaintiff unless and until liability was determined. The Court found that the concessions offered by the Defendant were more than adequate to allow the Plaintiff to make its case on liability if it could in fact do so. If the Plaintiff did succeed in doing so, the application for discovery could be renewed for the purposes of assessing damages.

39. Although the statutory landscape has changed since this judgment was handed down, it is nonetheless instructive to look at the way in which the Court approached the issue of proportionality of discovery.

40. Geoghegan J. (Dissented on the application of the principle of the main issue. He took the view that the discovery was extended to the Plaintiff's case whereas the majority felt the concessions made by the Defendant were sufficient. On the principles, the Court were ad idem.) noted at page 736 that:

   "It is common knowledge that a vast amount of stored information in the business world which formerly would have been in a documentary form in the traditional sense is now computerised. As a matter of fairness and common sense the courts must adapt themselves to this situation and fashion appropriate analogous orders of discovery."

41. Thus, both Geoghegan and Fennelly JJ. took the view that an order of discovery of information contained in electronic format which involved the "creation" of documents which did not exist could be made. This was because, as acknowledged by Geoghegan J. "Otherwise, potential litigants could operate their business computers in such a way that they would be able to evade any worthwhile discovery".

42. A central issue in the judgment was the distinction between the concept that discovery was "proportionate" and discovery was "necessary". In that regard, the Court placed emphasis on the judgment of Fennelly J. in Ryanair plc v. Aer Rianta cpt [2003] 4 IR 264 wherein Fennelly J. held that:

   "The court...should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery
sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation…"

43. In terms of proportionality, the Court further relied upon *Framus Ltd v. CRH plc* [2004] 2 IR 20 wherein Murphy J. stressed the notion that proportionality must attach to the concept of necessity.

44. Kearns J. therefore expressed the view at page 771 that:

“...the assessment of what is necessary or proportionate must take account if any factual admissions or concessions made by either or both parties, notably where liability is totally in dispute and where that issue can conveniently be first determined as a result of admissions or concessions made”.

45. He went on to hold at page 772 that:

“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...It can not always be the case that relevance creates necessity, because otherwise there would be no need to have the two separate concepts of relevance on the one hand and necessity on the other. Necessity is the true threshold where issues of proportionality must be assessed and clearly the more necessary the document is the more proportionate it will be for the requesting party to obtain discovery. It seems to me that the facts and circumstances of the particular case must then also be considered. Is it a case which conveniently lends itself to be decide in modules in the interests of efficiency and cost saving?...It would in my view be wrong to assess issues of necessity and proportionality separately from the liability issue.”

(Emphasis added)

46. It is submitted that despite the changes brought about by the 2009 amendment, the above judgment is still relevant. This is so because although Rule 12 Order 31 now makes some provision as to the the manner in which one must approach the issue of costs in matters of e-discovery; it still does not address the question of proportionality.

**CONCLUSION**

47. Even though not yet part of our Rules of the Superior Courts, the English position in relation to the use of a questionnaire or “menu” should be adopted by the parties on a voluntary basis. A failure to do so will lead to challenges with the added undertone of concealment on the one hand and extraordinary expense on the other. In fact, a review of the rules in this area is well overdue. In England, Lord Justice Jackson has recommended the introduction of the “menu” option into the English rules on e-discovery. This will entail parties to propose a variety of different disclosure options for the Court's approval, ranging from standard disclosure to no disclosure at all. It is also
intended that this “menu” option will result in lower costs and closer court supervision of the disclosure process.

ENDS

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