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IRISH SUPREME COURT EXTENDS THE SCOPE OF ELECTRONIC DISCOVERY: *DOME TELECOM V EIRCOM*

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Introduction

In *Dome Telecom v. Eircom*¹ the Irish Supreme Court has given guidance on the power of the courts in relation to electronic discovery and in particular whether the courts may require a party to extract, collate and analyse records from a database and to produce a report containing that information.

Factual background

The plaintiff Dome Telecom was in the business of selling call cards to consumers, which enabled them to make cheap telephone calls from any handset (including mobiles and payphones) by first calling a 1800 freephone number. Calls made to this 1800 number would pass over the network of the defendant Eircom, the incumbent telecommunications company and former monopoly that still enjoyed a dominant market share and control of most of the infrastructure.

From May 2000 onwards, Eircom imposed a telecommunications interconnection charge (transit charge) on certain operators in Ireland for calls to freephone (1800) numbers originating from mobile handsets and payphones, a charge that was ultimately borne by the plaintiff and its customers. Dome Telecom alleged, however, that Eircom had imposed this transit charge in a discriminatory manner. In particular, they claimed that Eircom had failed to impose the charge on international operators, so that international providers of call cards enjoyed an overwhelming competitive advantage over domestic providers such as the plaintiff. Consequently they brought proceedings in the High Court alleging that Eircom had acted in breach of, amongst other things, sections 4 and 5 of the Competition Act 1991 and Articles 81 and 82 of the

Treaty of Rome.

Discovery sought

In support of these proceedings, Dome Telecom looked for discovery under twelve different categories. Ultimately, however, the question to be determined by the court was reduced to whether they were entitled to discovery under Category 9, under which they sought:²

‘All documents relating to the 1800 numbers issued by the defendant to licensed operators and/or international carriers and/or other entities from 1 July 2000 to the date hereof to include any and all schedules, lists or database setting out the quantity of 1800 numbers issued per month, the entity to whom they were issued, and the volume of minutes trafficked per month in respect of each 1800 number issued by reference to access method’.

The plaintiff justified this request by submitting that this was necessary to show that international call card operators had benefited from the discriminatory pricing at its expense:

‘Simply put, the explanation of the reasons for seeking this Category 9 ... was that the plaintiff believes that its competitor call card operators, on whom the defendant did not levy the two charges at issue, experienced a huge growth in volumes of minutes over the period of the discriminatory charging. This would be evidenced if the plaintiff can identify the volumes of minutes to each 1800 number used as a method of access on those competing call cards ... [T]his evidence of volumes of minutes per

¹ [2007] IESC 59.

² From the judgment of Keams J.

Instead, to avoid any need for this discovery, the defendant was willing to concede that all of the increase in mobile traffic to 1800 numbers and up to 50 per cent of the increase in fixed line traffic to 1800 numbers was to the benefit of international call card operators.

1800 number would not only show the level of discriminatory charging, but would greatly inform any analysis of the plaintiff's losses as a result of the defendant's discrimination...'

The defendant, however, challenged both the utility and proportionality of this request, and submitted that it went beyond discovery of existing documents and would impose an impermissible obligation to engage in data mining so as to create entirely new documents:³

'There are, in effect, no 'schedules, lists or database setting out' the requested information. Rather, our client has an extremely complex computerised billing system that electronically generates a CDR [*call data record*] for every call made, 24 hours a day, seven days a week across its entire network. Second, if CDRs for all traffic to freephone numbers were to be produced ... every CDR produced by the defendant for each call made during the entire 66 month-period would have to be extracted. To do this, our client's technical personnel have indicated it would be necessary to restore each month in turn to a shadow database ... following which data analysis would have to be run on the extracted records in order to identify the freephone traffic and separate it from non-freephone traffic, as only the former would be discoverable and the defendant would plainly be in breach of its obligation of confidentiality to its clients if it were to provide all the estimated 29,700 million CDRs in question to the plaintiff. Our technical personnel estimate that it would take one person working fulltime for six to eight months in order to complete this exercise.'

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Notwithstanding this concession, the trial judge,

McKechnie J, held that discovery of this information was necessary and proportionate for the purposes of the action. As regards Eircom's argument that this involved the creation of a new document, the trial judge held that the use of existing raw data in this way was still within the scope of Order 31 rule 12 of the Rules of the Superior Courts governing discovery, and if it did go beyond those rules, then such an extension was merited. The trial judge therefore ordered the defendant to make discovery of:⁴

'The volume of minutes trafficked per month from 31st day of August 1999 to 23rd day of December 2003 in respect of each 1800 number by reference to access method by the defendant to international carriers and/or other entities (to be limited for the time being to those identified and set forth in the schedule hereto) where the volume of minutes trafficked to that international carrier and/or other entity in any given month exceeded 5,000 minutes – the documents within the power of the defendant to be created from the defendant's raw data and databases and using the defendant's own database.'

Eircom appealed this order to the Supreme Court, arguing that the power of the High Court to order discovery did not extend to requiring a party to create new documents for the purpose of proceedings where those documents did not already exist at the time the order was made, and that in any event the extent of the order was disproportionate in light of its concessions.

The Supreme Court decision

On appeal, the majority of the Supreme Court (Fennelly and Kearns JJ, Geoghegan J dissenting) held that the unusual burden and heavy cost of the discovery sought in this case, in light of the discovery already had and the concessions made by the defendant, meant that the order sought was unnecessary and disproportionate at this stage of the proceedings. (The majority did hold that the plaintiff could renew the application once

³ From the judgment of Kearns J.

⁴ From the judgment of Kearns J.

liability had been determined if at that stage it was necessary for the assessment of damages.)

However, two members of the court (Fennelly and Geoghegan JJ, Kearns J reserving his position) went on to consider whether in principle such an order could be made. In doing so they had to interpret Order 31 rule 12 of the Rules of the Superior Courts which governs discovery in Ireland and which provides, so far as relevant, that:

‘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 or her possession or power, relating to any matter in question therein.’

While the term ‘document’ is not defined in the Rules of the Superior Courts, there had been little doubt but that it includes computer records⁵ and the Supreme Court confirmed this with Geoghegan J expressing his approval of the judgment of Vinelott J in *Derby v Weldon (No. 9)*⁶ where the English High Court held that a database held on computer in so far as it contained information capable of being retrieved and converted into readable form (and whether stored in the computer itself or recorded in backup files) was a ‘document’.

Of more difficulty, however, was the well established rule in Irish law that a court will only order discovery of existing documents and will not require documents to be created for the purposes of discovery.⁷ While both Fennelly and Geoghegan JJ held that this rule did not prevent the making of the order in the present case, they differed somewhat as to the reason why. Fennelly J held simply that what was involved was not the creation of a new record but simply the presentation in a particular format of existing records which could be covered by ‘adapting’ the rules of court:

‘It is, of course, axiomatic that a court will only order discovery of documents or records which exist. If no record has been made of a relevant conversation, meeting or event, a court will not, for the purpose of discovery, require a party to make one.

That is not what is required by the High Court order in this case. Undoubtedly, the order obliges the Appellant

to take very elaborate, complex and costly steps in order to make information available in a form in which it has not previously existed. But the call data records (CDR’s) exist and are capable of being retrieved. The order is not equivalent to requiring a party to make a record, where one has never existed.

The rules of court have not been adapted so as to make their objectives conformable to modern technology. The courts have, nonetheless, been astute to ensure that genuine discovery can be ordered even when advances in technology have the effect that discovery takes a very different form from that of documents as traditionally understood. In former times, there would have been a written record of every commercial transaction. Old methods of record-keeping could not have coped with the sheer volume of traffic generated by the new means of communications. I accept that failure by the courts to move with the times by adapting the rules to new technology might encourage unscrupulous businesses to keep their records in a form which would defeat the ends of justice. I would, therefore, like Geoghegan J reject this ground of appeal.’

Geoghegan J, on the other hand, took a somewhat broader view, holding at the outset that the court had an inherent power to govern its own procedures, even entirely outside the rules of court, where necessary to ensure a fair trial of the action:

‘My starting point would be that I would reject any idea that the right to discovery of documents should be exclusively based on an interpretation (literal or otherwise) of the relevant rule of court. According to Halsbury’s Laws of England, 4th ed. Vol. 13 para. 1 footnote 3, the discovery of documents “was originally an equitable device employed in the Court of Chancery for obtaining the disclosure and inspection of relevant documents as well as the disclosure and admissions of relevant facts.” It had a more limited history in the common law courts but from and after the Judicature Act, the chancery practice applied in all courts though of course ever since the Judicature Act, there has been a rule of court regulating discovery. In modern times, courts are not necessarily hidebound by interpretation

⁵ See *D. Kelleher and K. Murray, Information Technology Law in Ireland (2nd edn., Tottel, 2007, Dublin) at 794 and McCarthy v O’Flynn [1979] IR 127* where the Supreme Court accepted that an X-Ray film was a ‘document’ within the meaning of the rules on discovery on the basis that, per Kenny J, ‘The main characteristic of a document is that it is something which gives information’. This decision was applied in *Clifford v Minister for*

Justice [2005] IEHC 288 by Budd J to hold that ‘The McCarthy case point concerned the inclusion of x-ray plates or photographs and as they gave information they were regarded as a document and so tape recordings and compact discs and material on computer are now encompassed as containing information which, if relevant to the issues, is to be considered for discovery.’
⁶ [1991] 1 WLR 652.

⁷ For instance, see *Popovici and another v Nicholson and others [2006] IEHC 152* where de Valera J notes that ‘It seems appropriate to point out at this point that only statistics already compiled and available are discoverable – the discovery procedure is not appropriate to seek to force the respondents to compile statistics from information in their possession for the benefit of the applicant.’

of a particular rule of court. More general concepts of ensuring fair procedures and efficient case management are frequently overriding considerations. The Rules of Court are important and adherence to them is important but if an obvious problem of fair procedures or efficient case management arises in proceedings, the court, if there is no rule in existence precisely covering the situation, has an inherent power to fashion its own procedure and even if there was a rule applicable, the court is not necessarily hidebound by it.'

On that basis Geoghegan J went on to hold that fair procedures required that the court have the power to make an order such as the one in the present case, and that the traditional rule against ordering a party to 'create documents' was not appropriate to deal with the retrieval of information from an electronic database:

'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. In order to achieve a reasonable parity with traditional documentary discovery it may well be necessary to direct a party "to create documents" within the meaning of the notice of appeal. It may indeed also be necessary to direct a party "to create documents" within the meaning of the notice of appeal even if such "documents" "do not exist at the time the order is made". I am deliberately using quotation marks because I do not intend to adjudicate on the quasi-metaphysical argument of Mr. Paul Anthony McDermott, counsel for the respondent, that the "documents" do in fact "exist". At any rate that matter can probably be argued both ways but I would be firmly of opinion that an order of discovery can be made which involves the creation of documents which do not exist, made in the kind of context in which it is sought in this case. Otherwise, potential litigants could operate their business computers in such a way that they would be able to evade any worthwhile discovery. In expressing the above views, I accept that superficially I am perhaps going a step further than the English authorities have done in so far as their rule of court can apparently be interpreted to cover computer discovery. I have no hesitation, however, in making that extension.'

Having said that, however, Geoghegan J went on to state that 'the court's discretion in ordering discovery of matters buried in a computer should be directed towards confining the information obtained as far as possible to what should reasonably have been available under traditional documentary storage'. He also indicated that the discretion enjoyed by the court to order this type of discovery would have to be exercised in a way which would take into account the factors mentioned in *Derby v Weldon (No. 9)*⁸ in relation to inspection, so that the discretion:

'would not be exercised so as to give an unrestricted access to another party's computer and ... would be ordered only to the extent that the parties seeking it could satisfy the court that it was necessary for disposing fairly of the cause or matter or for saving costs, in the light of any evidence as to what information could be made available, how far inspection or copying of the database was necessary or whether the provision of printouts would suffice and what safeguards were required to avoid damage to the database and minimise interference with its everyday use.'

Comment

This case is not the first time that the Irish courts have addressed discovery of this sort – that honour appears to belong to the 2006 decision of the High Court in *Used Car Importers of Ireland Ltd. v Minister for Finance*⁹ where Laffoy J ordered the defendant to analyse their computer records to reconstruct car depreciation data which was relevant to the plaintiff's claim. It is, however, the first time that this issue has been considered by the Supreme Court, and is the first case to consider the basis for the court's power to make such an order. The decision is notable, therefore, for the willingness of the majority of the court to fashion a new and expansive form of discovery without any express basis in the Rules of the Superior Courts and one which on the face of it departs from the long standing rule that a court will only order discovery of documents or records which already exist.

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⁸ [1991] 1 WLR 652.

⁹ [2006] IEHC 90.