

# PART 34

## WITNESSES, DEPOSITIONS AND EVIDENCE FOR FOREIGN COURTS

### CONTENTS OF THIS PART

#### I WITNESSES AND DEPOSITIONS

Scope of this Section	Rule 34.1
Witness summonses	Rule 34.2
Issue of a witness summons	Rule 34.3
Witness summons in aid of inferior court or of tribunal	Rule 34.4
Time for serving a witness summons	Rule 34.5
Who is to serve a witness summons	Rule 34.6
Right of witness to travelling expenses and compensation for loss of time	Rule 34.7
Evidence by deposition	Rule 34.8
Conduct of examination	Rule 34.9
Enforcing attendance of witness	Rule 34.10
Use of deposition at a hearing	Rule 34.11
Restrictions on subsequent use of deposition taken for the purpose of any hearing except the trial	Rule 34.12
Where a person to be examined is out of the jurisdiction – letter of request	Rule 34.13
Letter of request – Proceeds of Crime Act 2002	Rule 34.13A
Fees and expenses of examiner of the court	Rule 34.14
Examiners of the court	Rule 34.15

#### II EVIDENCE FOR FOREIGN COURTS

Scope and interpretation	Rule 34.16
Application for order	Rule 34.17
Examination	Rule 34.18
Dealing with deposition	Rule 34.19
Claim to privilege	Rule 34.20
Order under 1975 Act as applied by Patents Act 1977	Rule 34.21

#### III TAKING OF EVIDENCE – MEMBER STATES OF THE

## EUROPEAN UNION

Interpretation	Rule 34.22
Where a person to be examined is in another Regulation State	Rule 34.23
Evidence for courts of other Regulation States	Rule 34.24

**I WITNESSES AND DEPOSITIONS****SCOPE OF THIS SECTION**

- 34.1 | (1) This Section of this Part provides –
- (a) for the circumstances in which a person may be required to attend court to give evidence or to produce a document; and
  - (b) for a party to obtain evidence before a hearing to be used at the hearing.
- (2) In this Section, reference to a hearing includes a reference to the trial.

**WITNESS SUMMONSES**

- 34.2 | (1) A witness summons is a document issued by the court requiring a witness to –
- (a) attend court to give evidence; or
  - (b) produce documents to the court.
- (2) A witness summons must be in the relevant practice form.
- (3) There must be a separate witness summons for each witness.
- (4) A witness summons may require a witness to produce documents to the court either –
- (a) on the date fixed for a hearing; or
  - (b) on such date as the court may direct.
- (5) The only documents that a summons under this rule can require a person to produce before a hearing are documents which that person could be required to produce at the hearing.

**ISSUE OF A WITNESS SUMMONS**

- 34.3 | (1) A witness summons is issued on the date entered on the summons by the court.
- (2) A party must obtain permission from the court where he wishes to –
- (a) have a summons issued less than 7 days before the date of the trial;
  - (b) have a summons issued for a witness to attend court to give evidence or to produce documents on any date except the date fixed for the trial; or
  - (c) have a summons issued for a witness to attend court to give evidence or to produce documents at any hearing except the trial.

- (3) A witness summons must be issued by –
  - (a) the court where the case is proceeding; or
  - (b) the court where the hearing in question will be held.
- (4) The court may set aside<sup>(GL)</sup> or vary a witness summons issued under this rule.

## WITNESS SUMMONS IN AID OF INFERIOR COURT OR OF TRIBUNAL

- 34.4
- (1) The court may issue a witness summons in aid of an inferior court or of a tribunal.
  - (2) The court which issued the witness summons under this rule may set it aside.
  - (3) In this rule, ‘inferior court or tribunal’ means any court or tribunal that does not have power to issue a witness summons in relation to proceedings before it.

## TIME FOR SERVING A WITNESS SUMMONS

- 34.5
- (1) The general rule is that a witness summons is binding if it is served at least 7 days before the date on which the witness is required to attend before the court or tribunal.
  - (2) The court may direct that a witness summons shall be binding although it will be served less than 7 days before the date on which the witness is required to attend before the court or tribunal.
  - (3) A witness summons which is –
    - (a) served in accordance with this rule; and
    - (b) requires the witness to attend court to give evidence,
 is binding until the conclusion of the hearing at which the attendance of the witness is required.

## WHO IS TO SERVE A WITNESS SUMMONS

- 34.6
- (1) A witness summons is to be served by the court unless the party on whose behalf it is issued indicates in writing, when he asks the court to issue the summons, that he wishes to serve it himself.
  - (2) Where the court is to serve the witness summons, the party on whose behalf it is issued must deposit, in the court office, the money to be paid or offered to the witness under rule 34.7.

## RIGHT OF WITNESS TO TRAVELLING EXPENSES AND COMPENSATION FOR LOSS OF TIME

- 34.7
- At the time of service of a witness summons the witness must be offered or paid –
- (a) a sum reasonably sufficient to cover his expenses in travelling to and from the court; and

- (b) such sum by way of compensation for loss of time as may be specified in the relevant practice direction.

## EVIDENCE BY DEPOSITION

- 34.8 | (1) A party may apply for an order for a person to be examined before the hearing takes place.
- (2) A person from whom evidence is to be obtained following an order under this rule is referred to as a ‘deponent’ and the evidence is referred to as a ‘deposition’.
- (3) An order under this rule shall be for a deponent to be examined on oath before –
- (a) a judge;
  - (b) an examiner of the court; or
  - (c) such other person as the court appoints.
- (Rule 34.15 makes provision for the appointment of examiners of the court)
- (4) The order may require the production of any document which the court considers is necessary for the purposes of the examination.
- (5) The order must state the date, time and place of the examination.
- (6) At the time of service of the order the deponent must be offered or paid –
- (a) a sum reasonably sufficient to cover his expenses in travelling to and from the place of examination; and
  - (b) such sum by way of compensation for loss of time as may be specified in the relevant practice direction.
- (7) Where the court makes an order for a deposition to be taken, it may also order the party who obtained the order to serve a witness statement or witness summary in relation to the evidence to be given by the person to be examined.

(Part 32 contains the general rules about witness statements and witness summaries)

## CONDUCT OF EXAMINATION

- 34.9 | (1) Subject to any directions contained in the order for examination, the examination must be conducted in the same way as if the witness were giving evidence at a trial.
- (2) If all the parties are present, the examiner may conduct the examination of a person not named in the order for examination if all the parties and the person to be examined consent.
- (3) The examiner may conduct the examination in private if he considers it appropriate to do so.
- (4) The examiner must ensure that the evidence given by the witness is recorded in full.

- (5) The examiner must send a copy of the deposition –
  - (a) to the person who obtained the order for the examination of the witness; and
  - (b) to the court where the case is proceeding.
- (6) The party who obtained the order must send each of the other parties a copy of the deposition which he receives from the examiner.

## ENFORCING ATTENDANCE OF WITNESS

- 34.10 |
- (1) If a person served with an order to attend before an examiner –
    - (a) fails to attend; or
    - (b) refuses to be sworn for the purpose of the examination or to answer any lawful question or produce any document at the examination, a certificate of his failure or refusal, signed by the examiner, must be filed by the party requiring the deposition.
  - (2) On the certificate being filed, the party requiring the deposition may apply to the court for an order requiring that person to attend or to be sworn or to answer any question or produce any document, as the case may be.
  - (3) An application for an order under this rule may be made without notice.
  - (4) The court may order the person against whom an order is made under this rule to pay any costs resulting from his failure or refusal.

## USE OF DEPOSITION AT A HEARING

- 34.11 |
- (1) A deposition ordered under rule 34.8 may be given in evidence at a hearing unless the court orders otherwise.
  - (2) A party intending to put in evidence a deposition at a hearing must serve notice of his intention to do so on every other party.
  - (3) He must serve the notice at least 21 days before the day fixed for the hearing.
  - (4) The court may require a deponent to attend the hearing and give evidence orally.
  - (5) Where a deposition is given in evidence at trial, it shall be treated as if it were a witness statement for the purposes of rule 32.13 (availability of witness statements for inspection).

## RESTRICTIONS ON SUBSEQUENT USE OF DEPOSITION TAKEN FOR THE PURPOSE OF ANY HEARING EXCEPT THE TRIAL

- 34.12 |
- (1) Where the court orders a party to be examined about his or any other assets for the purpose of any hearing except the trial, the deposition may be used only for the purpose of the proceedings in which the order was made.
  - (2) However, it may be used for some other purpose –

- (a) by the party who was examined;
- (b) if the party who was examined agrees; or
- (c) if the court gives permission.

## WHERE A PERSON TO BE EXAMINED IS OUT OF THE JURISDICTION – LETTER OF REQUEST

34.13

- (1) This rule applies where a party wishes to take a deposition from a person who is –
  - (a) out of the jurisdiction; and
  - (b) not in a Regulation State within the meaning of Section III of this Part.
- (1A) The High Court may order the issue of a letter of request to the judicial authorities of the country in which the proposed deponent is.
- (2) A letter of request is a request to a judicial authority to take the evidence of that person, or arrange for it to be taken.
- (3) The High Court may make an order under this rule in relation to county court proceedings.
- (4) If the government of a country allows a person appointed by the High Court to examine a person in that country, the High Court may make an order appointing a special examiner for that purpose.
- (5) A person may be examined under this rule on oath or affirmation or in accordance with any procedure permitted in the country in which the examination is to take place.
- (6) If the High Court makes an order for the issue of a letter of request, the party who sought the order must file –
  - (a) the following documents and, except where paragraph (7) applies, a translation of them –
    - (i) a draft letter of request;
    - (ii) a statement of the issues relevant to the proceedings;
    - (iii) a list of questions or the subject matter of questions to be put to the person to be examined; and
  - (b) an undertaking to be responsible for the Secretary of State’s expenses.
- (7) There is no need to file a translation if –
  - (a) English is one of the official languages of the country where the examination is to take place; or
  - (b) a practice direction has specified that country as a country where no translation is necessary.

## LETTER OF REQUEST – PROCEEDS OF CRIME ACT 2002

- 34.13A | (1) This rule applies where a party to existing or contemplated proceedings in –
- (a) the High Court; or
  - (b) a magistrates' court,
- under Part 5 of the Proceeds of Crime Act 2002<sup>1</sup> (civil recovery of the proceeds etc. of unlawful conduct) wishes to take a deposition from a person who is out of the jurisdiction.
- (2) The High Court may, on the application of such a party, order the issue of a letter of request to the judicial authorities of the country in which the proposed deponent is.
- (3) Paragraphs (4) to (7) of rule 34.13 shall apply irrespective of where the proposed deponent is, and rule 34.23 shall not apply in cases where the proposed deponent is in a Regulation State within the meaning of Section III of this Part.

## FEES AND EXPENSES OF EXAMINER OF THE COURT

- 34.14 | (1) An examiner of the court may charge a fee for the examination.
- (2) He need not send the deposition to the court unless the fee is paid.
- (3) The examiner's fees and expenses must be paid by the party who obtained the order for examination.
- (4) If the fees and expenses due to an examiner are not paid within a reasonable time, he may report that fact to the court.
- (5) The court may order the party who obtained the order for examination to deposit in the court office a specified sum in respect of the examiner's fees and, where it does so, the examiner will not be asked to act until the sum has been deposited.
- (6) An order under this rule does not affect any decision as to the party who is ultimately to bear the costs of the examination.

## EXAMINERS OF THE COURT

- 34.15 | (1) The Lord Chancellor shall appoint persons to be examiners of the court.
- (2) The persons appointed shall be barristers or solicitor-advocates who have been practising for a period of not less than three years.
- (3) The Lord Chancellor may revoke an appointment at any time.

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<sup>1</sup> 1977 c.37.

## II EVIDENCE FOR FOREIGN COURTS

### SCOPE AND INTERPRETATION

- 34.16 | (1) This Section applies to an application for an order under the 1975 Act for evidence to be obtained, other than an application made as a result of a request by a court in another Regulation State.
- (2) In this Section –
- (a) ‘the 1975 Act’ means the Evidence (Proceedings in Other Jurisdictions) Act 1975<sup>(1)</sup>; and
- (b) ‘Regulation State’ has the same meaning as in Section III of this Part.

### APPLICATION FOR ORDER

- 34.17 | An application for an order under the 1975 Act for evidence to be obtained –
- (a) must be –
- (i) made to the High Court;
- (ii) supported by written evidence; and
- (iii) accompanied by the request as a result of which the application is made, and where appropriate, a translation of the request into English; and
- (b) may be made without notice.

### EXAMINATION

- 34.18 | (1) The court may order an examination to be taken before –
- (a) any fit and proper person nominated by the person applying for the order;
- (b) an examiner of the court; or
- (c) any other person whom the court considers suitable.
- (2) Unless the court orders otherwise –
- (a) the examination will be taken as provided by rule 34.9; and
- (b) rule 34.10 applies.
- (3) The court may make an order under rule 34.14 for payment of the fees and expenses of the examination.

### DEALING WITH DEPOSITION

- 34.19 | (1) The examiner must send the deposition of the witness to the Senior Master unless the court orders otherwise.
- (2) The Senior Master will –

<sup>1</sup> 1975 c.34.

- (a) give a certificate sealed with the seal of the Supreme Court for use out of the jurisdiction identifying the following documents –
  - (i) the request;
  - (ii) the order of the court for examination; and
  - (iii) the deposition of the witness; and
- (b) send the certificate and the documents referred to in paragraph (a) to –
  - (i) the Secretary of State; or
  - (ii) where the request was sent to the Senior Master by another person in accordance with a Civil Procedure Convention, to that other person,
 for transmission to the court or tribunal requesting the examination.

## CLAIM TO PRIVILEGE

34.20

- (1) This rule applies where –
  - (a) a witness claims to be exempt from giving evidence on the ground specified in section 3(1)(b) of the 1975 Act; and
  - (b) That claim is not supported or conceded as referred to in section 3(2) of that Act.
- (2) The examiner may require the witness to give the evidence which he claims to be exempt from giving.
- (3) Where the examiner does not require the witness to give that evidence, the court may order the witness to do so.
- (4) An application for an order under paragraph (3) may be made by the person who obtained the order under section 2 of the 1975 Act.
- (5) Where such evidence is taken –
  - (a) it must be contained in a document separate from the remainder of the deposition;
  - (b) the examiner will send to the Senior Master –
    - (i) the deposition; and
    - (ii) a signed statement setting out the claim to be exempt and the ground on which it was made;
- (6) On receipt of the statement referred to in paragraph (5)(b)(ii), the Senior Master will –
  - (a) retain the document containing the part of the witness's evidence to which the claim to be exempt relates; and
  - (b) send the statement and a request to determine that claim to the foreign court or tribunal together with the documents referred to in rule 34.17.

- (7) The Senior Master will –
- (a) if the claim to be exempt is rejected by the foreign court or tribunal, send the document referred to in paragraph (5) (a) to that court or tribunal;
  - (b) if the claim is upheld, send the document to the witness; and
  - (c) in either case, notify the witness and person who obtained the order under section 2 of the foreign court or tribunal’s decision.

### ORDER UNDER 1975 ACT AS APPLIED BY PATENTS ACT 1977

- 34.21 | Where an order is made for the examination of witnesses under section 1 of the 1975 Act as applied by section 92 of the Patents Act 1977<sup>1</sup> the court may permit an officer of the European Patent Office to –
- (a) attend the examination and examine the witnesses; or
  - (b) request the court or the examiner before whom the examination takes place to put specified questions to them.

## III TAKING OF EVIDENCE – MEMBER STATES OF THE EUROPEAN UNION

### INTERPRETATION

- 34.22 | In this Section –
- (a) ‘designated court’ has the meaning given in the relevant practice direction;
  - (b) ‘Regulation State’ has the same meaning as ‘Member State’ in the Taking of Evidence Regulation, that is all Member States except Denmark;
  - (c) ‘the Taking of Evidence Regulation’ means Council Regulation (EC) No. 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil and commercial matters.

### WHERE A PERSON TO BE EXAMINED IS IN ANOTHER REGULATION STATE

- 34.23 |
- (1) Subject to rule 34.13A, this rule applies where a party wishes to take a deposition from a person who is in another Regulation State–
    - (a) outside the jurisdiction; and
    - (b) in a Regulation State.
  - (2) The court may order the issue of a request to a designated court (‘the requested court’) in the Regulation State in which the proposed deponent is.
  - (3) If the court makes an order for the issue of a request, the party who sought the order must file –
    - (a) a draft Form A as set out in the annex to the Taking of Evidence Regulation (request for the taking of evidence);

<sup>1</sup> 2002 c.29.

- (b) except where paragraph (4) applies, a translation of the form;
  - (c) an undertaking to be responsible for costs sought by the requested court in relation to –
    - (i) fees paid to experts and interpreters; and
    - (ii) where requested by that party, the use of special procedures or communications technology; and
  - (d) an undertaking to be responsible for the court’s expenses.
- (4) There is no need to file a translation if –
- (a) English is one of the official languages of the Regulation State where the examination is to take place; or
  - (b) the Regulation State has indicated, in accordance with the Taking of Evidence Regulation, that English is a language which it will accept.
- (5) Where article 17 of the Taking of Evidence Regulation (direct taking of evidence by the requested court) allows evidence to be taken directly in another Regulation State, the court may make an order for the submission of a request in accordance with that article.
- (6) If the court makes an order for the submission of a request under paragraph (5), the party who sought the order must file –
- (a) a draft Form I as set out in the annex to the Taking of Evidence Regulation (request for direct taking of evidence);
  - (b) except where paragraph (4) applies, a translation of the form; and
  - (c) an undertaking to be responsible for the court’s expenses.

## EVIDENCE FOR COURTS OF OTHER REGULATION STATES

34.24

- (1) This rule applies where a court in another Regulation State (‘the requesting court’) issues a request for evidence to be taken from a person who is in the jurisdiction.
- (2) An application for an order for evidence to be taken –
  - (a) must be made to a designated court;
  - (b) must be accompanied by –
    - (i) the form of request for the taking of evidence as a result of which the application is made; and
    - (ii) where appropriate, a translation of the form of request; and
  - (c) may be made without notice.
- (3) Rule 34.18(1) and (2) apply.
- (4) The examiner must send –
  - (a) the deposition to the court for transmission to the requesting court; and

- (b) a copy of the deposition to the person who obtained the order for evidence to be taken.