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Search and seizure orders, and the key role of supervising solicitors

Part 1

Happily, perhaps, it is not every day that a civil litigator in England and Wales has to search, like ‘Sarah Lund’, for evidence in a suspect’s house, garage, attic, car or office.

However, even in these difficult times where legal spend is often restrained, search and seizure orders granted by the English civil courts are seemingly not in short supply.

In recent times, we have been involved in several search orders in cases ranging from fraud to matrimonial proceedings, to misuse of confidential information by employees (often conspiring with a business rival seeking a competitive edge). On one occasion, in order to recover stolen confidential documents, we searched, plastic-gloved, through a house piled high with bags of rubbish. While on another occasion, we spent weeks searching through vast offices for evidence of fraud.

Search/Anton Piller orders – in a nutshell

- Defendant required to permit entry, search and seizure of specified materials from their premises (both domestic and commercial) so that evidence or property is preserved.
- For law and procedure, see section 7(1) of the Civil Procedure Act 1997, CPR Part 25 and Practice Direction 25A.
- Made without notice because it is thought that if the defendant knew that the order was about to be made, they would conceal, remove or destroy the documents or articles in question.
- Order often requires the defendant to answer questions immediately.

A search order is probably the most draconian order the English civil courts can make: ordering a defendant to permit a search of their home, office, mobile phone and/or computer. In cases of extreme urgency, an application can be made by telephone, without any or much paperwork and out of court hours, 365 days of the year. The first the defendant knows of it is a knock on the door

and service of the order. While the claimant cannot ‘kick the door down’ (as sometimes is asked by an over enthusiastic claimant though entry cannot be forced), if the defendant refuses to obey the order and permit entry, they may be in contempt of court. The courts have in recent times been ready to imprison convicted contemnors for defying its orders.

The criteria for seeking search orders are set out below. It is a weapon that, understandably, the English courts are guarded in giving. Strong evidence is needed. The courts also ensure that this court-sanctioned intrusion into a person’s private life is heavily regulated and supervised.

The criteria	
Does the claimant have a strong prima facie substantive case?	✓
Has there been serious damage caused to the claimant?	✓
Is there clear evidence that the defendant possesses relevant material?	✓
Is there a real risk that the defendant will destroy that material?	✓
If the answer to all of these questions is YES, then the claimant should have sufficient grounds to obtain a search order.	

Search orders consume a lot of time and can require a very large team. The costs are, therefore, usually high, not least because of the court’s requirement that an independent solicitor be appointed to supervise the execution of the search (see **Part 2** below).

Without reliable evidence or intelligence there are, however, no guarantees of finding the ‘smoking gun’. In one search order with which we were involved recently as supervising solicitor, the search yielded no relevant evidence from the house searched. Had the search stopped there it would have been an utter waste of time and money and a rather bad start for the claimant.

It is also hard to predict where search orders may lead. One conducted fairly recently was meant to last one day. In the end, it went on for

over a month as we moved, from premises to premises, following the document trail.

So, search orders can have high costs associated with them but often such orders are the only way to secure the necessary evidence. Also, while there is a front loading of costs, in the long run a search order can often save costs by ‘heading off’ weeks, if not months, of obfuscation and evasion by defendants. In one recent case, arriving unannounced at a business’s premises and searching its computers, we found devastating evidence that the directors were forging documents to cover up their breach of duty and fraud. A settlement swiftly followed.

Advanced planning

From a claimant’s perspective, ‘joined-up’ thinking and forward planning are essential, as injunctions, properly obtained, can put a claimant in the strongest position from day one. Often the reality is that once a claimant has established grounds to obtain a search order and successfully executed it, it is difficult for the average defendant to challenge it and recover.

A trick is to get the blend of applications and relief right from the outset. Depending on the circumstances of the case, it may be appropriate to apply for the following extra orders:

- freezing and asset disclosure orders;
- delivery up of passport/restraint from leaving the UK;
- gagging order restraining the defendant from informing third parties, such as co-conspirators, of the order;
- disclosure of information leading to the identification of wrongdoers or to allow assets to be traced; and
- disclosure of information about the location of documents or assets.

A claimant needs to balance its aspirations, however, against its financial position. Before unleashing the exceptional powers of the courts, a claimant needs to make sure they are powers that it can control and afford. You cannot easily rein in this kind of litigation once it is unleashed. Search orders are only the beginning and the claimant is obliged to ‘crack on’ with its substantive action to trial. So, a claimant needs to make sure in its planning that there is a sufficient budget post-execution and that there is a ‘new head of steam’ to replace or supplement the team who obtained and executed the order.

Our experience is that claimants are sometimes quick to seek remedies and to compel disclosure, but slower to analyse what

they have obtained. The danger is that key tracing steps are not taken and/or not taken in time because the team has focused on the initial ‘big push’ and does not react sufficiently strongly. Search orders should be used as part of an overall case strategy and followed-up with other appropriate orders, such as orders for the cross-examination of the defendant.

In fraud cases, where obtaining summary judgment on the merits is extremely difficult, we are also seeing a rise in applications for committal where orders have not been obeyed or where lies have been told. Claimants are then using any committal finding to obtain judgment against the convicted contemnors, thereby short-cutting the action by dispensing with the usual requirement for disclosure of relevant documents (including those that hinder the claimants’ case) and the exchange, pre-trial, of witness statements.

‘Make haste slowly’

It is important that claimants make haste slowly and ensure the evidence justifies the order and will withstand attack by defendants.

Well-funded claimants can be tempted to do extreme things to win. There have been cases where over enthusiastic claimants have based their search order application on illegally obtained evidence, for example, ‘blagging’ personal data such as bank details or tracing phone calls.

The general rule in England is that evidence unlawfully obtained which comes to the claimant will be admitted (subject to the discretion of the court) so long as the route by which it was obtained is fully set out in any injunction application.

Dubai Aluminium Limited v Al Alawi was a vivid example of the pitfalls a defendant can exploit. The defendant applied to discharge a search and freezing order claiming the claimant’s private investigators had acted in breach of the Data Protection Act and Swiss Banking Law and sought disclosure of the investigator’s reports, which the court ordered.¹

Once obtained, evidence of improper conduct may be a fertile ground for attack by defendants, leading to the discharge of injunctions and damages. In *St Merryyn Meat*, evidence of the defendant’s fraud was obtained through bugging the home telephone and the claimant sought to cover this up. The injunction was discharged irrespective of the strength of the claimant’s case.² The claimant might also face the risk of criminal prosecution in these circumstances.

Part 2 – the supervising solicitor

Duties and obligations of the supervising solicitor

The supervising solicitor plays a key, protective role in the execution of a search order. The duties and obligations of the supervising solicitor are heavily prescribed.³ For example, the supervising solicitor must be experienced in the operation of search orders and it must be the supervising solicitor, not the claimant, who serves the search order personally on the defendant, together with the evidence in support. If the defendant is likely to be an unaccompanied woman, the supervising solicitor should also be a woman or if not, should be accompanied by a woman.

It is the supervising solicitor who is required (by the undertakings they give to the court) to explain the terms and effect of the search order to the defendant in ‘everyday’ language, and who then must advise the defendant:

- of their right to take legal advice and to apply to vary or discharge the search order; and
- that they may be entitled to avail himself/herself of legal professional privilege and the privilege against self-incrimination.

The supervising solicitor must allow the defendant a period of time, generally two hours, to obtain legal advice and to gather together any documents over which they want to claim the privileges.

As the name suggests, once the search order is served and is being executed, the supervising solicitor must supervise all searches being undertaken by the claimant’s solicitors and forensic consultants and any questions asked of the defendant.

The supervising solicitor must ensure that any items or documents removed from the premises are listed (and checked by the defendant).

Soon after the search is over the supervising solicitor must prepare a detailed written report to the court on the execution of the search

The supervising solicitor’s report often has to be submitted to the court within as little as 48 hours of the search taking place. This means that, after a full day, the supervising solicitor has to then prepare a detailed report which should include the following:

- the date, time and location of the search;
- who was there and when they arrived;
- who was present at the premises when the search order was served on the defendant and the time of service;

- confirmation that the supervising solicitor explained the meaning and effect of the search order to the defendant, including his right to take legal advice and to withhold incriminating or privileged documents;
 - a report of any statements made by the defendant and any relevant discussions that took place between the defendant and those who executed the order;
 - a full account of the search;
 - a full list of the items that were removed from the defendant’s premises and by whom, plus confirmation that the defendant was given an opportunity to check the list and received a copy of it; and
 - confirmation that the search complied with all the specific terms of the search order.
- Knowing that the supervising solicitor will be reporting to the court what takes place during the search often usefully moderates unreasonable behaviour by the claimant and the defendant.

The supervising solicitor’s undertakings

The English court requires the supervising solicitor to give a number of undertakings. For example, the supervising solicitor undertakes to safe-keep disputed items and the computer image of all electronic data until the court otherwise directs. Undertakings to the court are of course serious and breach of them by the supervising solicitor can result in the supervising solicitor being in contempt. The supervising solicitor is often attacked at the ‘return day’ hearing by defendants.

Trips and traps

As surprise and lack of advance warning are of the essence of search order tactics, an immediate entry and search is essential. As referred to above, however, the search team cannot force entry. Difficulties can arise, therefore, if entry is not permitted straightaway and the supervising solicitor is left to stand and negotiate on the doorstep of the premises in the middle of winter. In these circumstances, it is essential to try to ensure, if possible, that no-one else is in the premises while the supervising solicitor is serving and explaining the terms of the search order to the defendant. Stories abound of laptops being thrown over the back fence to a cooperative neighbour (this contempt was prosecuted and the defendant was imprisoned for 28 days), or USB memory sticks being hurriedly hidden in impossible to locate nooks and crannies.

The supervising solicitor should also be vigilant and prepared for the defendant's need to make a telephone call. Not only can this be in breach of the gagging order for the defendant to tell a friend of the existence of the search order and the execution of the search, but it is not uncommon for sophisticated defendants to have already made anticipatory arrangements with friends or accomplices such that a seemingly innocent call made by the defendant after the execution has begun results in the friend or accomplice remotely deleting relevant data.

Tech savvy

Increasingly, the subject matter of search orders is data or information stored electronically, and these days it is common for the 'search party' to include, as well as the supervising solicitor and the claimant's solicitors, also IT forensic experts retained by the claimant to access and image computer data. While some reliance may be placed on the claimant's forensic experts, it is important for the search team and the supervising solicitor to be technologically savvy. For instance, the range of devices on which data can be stored these days includes not only the tablet (such as iPads), smart phone (such as iPhones), laptop (such as MacBooks) and desktop (such as iMacs), but also could include a camera, external hard drive, iPod, Nintendo Wii, Sony PlayStation and Microsoft Xbox, or the humble (or not so humble but disguised) USB memory stick or flash drive, CD, DVD or minidisc. The defendant's data may also be stored or held offsite, whether in archives or on servers held in a shared basement of the defendant's office tower or separate storage facilities. Of course, data can also be stored not in a physical storage device at all, but for instance in cloud storage, such as iCloud, or in simple webmail accounts such as Hotmail or Gmail, or the many social networks through which messages can be sent such as Facebook or LinkedIn.

Part 3 – practical considerations on the day of execution

'Be prepared'

At the really practical level, the supervising solicitor and search party may find themselves carrying out the search order, in the most basic of premises, for many, many hours. A good 'tool box' for the execution would consist of the following:

- copies of the practising certificates of the solicitor members of the search party;
- extracts from the Law Society's or SRA's website proving the independence of the supervising solicitor;
- a list of contact details for local solicitors to give the defendant;
- a pre-prepared letter to the defendant which can then be annexed to the supervising solicitor's report to the court so there can be no doubt the supervising solicitor explained the search order and gave the defendant the proper advice;
- it is also useful to have at least a skeleton of the supervising solicitor's report to the court already in soft copy on the supervising solicitor's laptop, which the supervising solicitor can update or progress during the course of the search;
- protective clothing and rubber gloves – the search team and supervising solicitor may find themselves searching or supervising the search of the defendant's rubbish, or worse! We have heard of searches of bat-infested attics;
- other practical items such as: flat-pack boxes, evidence bags, digital voice recorder, camera, USB memory sticks, post-it notes, marker pens, mobile chargers, folders and a trolley on which to carry everything seized; and
- sufficient provisions for the team, such as sandwiches, water, coffee and chocolate!

Conclusion

Finally, the search team and supervising solicitor should remember to expect the unexpected – a one day supervisory role has been known to morph at the court's order into a month long sole search role, encompassing 4,000 square feet of office space and more than 35 desktop computers. As much preparation as possible, in the often limited amount of time available, will therefore be the key to successfully discharging the important role of the independent supervising solicitor. And for the claimant and its solicitors, the fact that an independent supervising solicitor must be retained for search orders in the UK (and many other common law jurisdictions) needs to be remembered and factored in to the claimant's pre-planning and, importantly, its considerations of cost.

Notes

- 1 [1998] EWHC 1202 (Comm).
- 2 [2001] CP Rep 116.
- 3 See, CPR Part 25 and PD 25A. By way of comparison, we note that very similar rules and template orders, including the necessity to have a supervising solicitor, are in place in Australia, New Zealand and Canada.