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Search Orders: Back to the Future

Introduction

On 8 September 2020 the Court of Appeal handed down its judgment in [TBD \(Owen Holland\) Limited v Simons & Ors \[2020\] EWCA Civ 1182](#). This important judgment will likely catalyse a change of approach that may well result in “imaging orders” largely replacing old fashioned search orders.

Summary

This case marks a significant step in the evolution of the search order jurisdiction. The Court held that, in the modern era, an imaging order should be able to meet the needs of a more traditional search order. Indeed, if an imaging order is justified, the presumption is that a search order is not required (unless the contrary is shown). This change firmly moves the search order jurisdiction into the digital age. This, combined with the direction to the Civil Procedure Rules Committee to produce a standard form imaging order (endorsed by Richards LJ), means this case will be welcomed by practitioners, clients and respondents alike.

Background

TBD (Owen Holland) Limited (“**TBD**”), makes products used in the aviation industry, such as baggage trolleys. The first Defendant, Mr Simons worked for TBD from 2007 - 2016. After leaving their employment he worked for the second Defendant, G2A – a competitor to TBD.

In 2018 TBD learned that G2A was approaching its customers with promotional material which included TBD’s photographs and technical drawings. TBD suspected Mr Simons was responsible and commenced proceedings against him and G2A. In so doing they obtained an injunction requiring Mr Simons and G2A to declare if they held any of TBD’s material in their possession.

Mr Simons swore an affidavit on behalf of G2A and himself confirming that neither he nor G2A held any such material. However, TBD later became aware of evidence that caused them to doubt that affidavit’s veracity. As a result, they applied for a without notice search order against Mr Simons and



G2A. Following the execution of this search order, and in a dramatic about-face, Mr Simons filed a further affidavit stating that *“The entire content of paragraph 5 of my first affidavit is false and untrue. I have deliberately misled the Claimant and the court and made gross errors of judgement.”* Accompanying this affidavit were 9 lever-arch files of documents, some of which Mr Simons had taken from TBD.

For the purposes of this article, the relevant issue on appeal was the interpretation of the search orders in this case.¹

The Search Order

As the search order was central to the issues on appeal its terms were set out in detail.² For present purposes however, it is sufficient to note that while much of the search order was in the standard form, it also departed from it in material respects. This was due to the fact that it also permitted the searching party to take “forensic images of the data” (and the current precedent order does not envisage this step).

Following the execution of the search order, solicitors for the Claimant wrote to some of the counterparties in an attempt to agree the parameters for their client’s search of the documents that had been copied. In doing so, they suggested a list of keywords in an effort to focus the searches. However, the list offered was in fact quite broad and it included generic terms such as “quote”, “brochure and “manual”.³

In due course, Mr Simons responded to the keyword list proposed. He argued that it went beyond the terms of the order and given the keywords included, was likely to impinge on his privacy rights as well as those of third parties.

The Claimant’s solicitors did not meaningfully engage with Mr Simons’ arguments and instead dismissed his responses. His Lordship found this course of action from the Claimant’s solicitors to be lacking due to the fact that Mr Simons was a litigant in person and that his objections were well founded.⁴

In 2019, the Claimant’s solicitors instructed forensic experts to carry out keyword searches of the copied documents. This was done without the agreement of Mr Simons or G2A or any court order. The Claimant relied on documents obtained from these searches to write a number of letters to third parties, serve draft Amended Particulars of Claim and issue applications for the committal of Mr Simons and Mr O’Boyle (a director of G2A). It also subsequently became clear that many privileged documents were included in those obtained from the copied documents.

Search Order Law

Arnold LJ comprehensively reviewed the development of the law of search orders from before *Anton Piller* until the present day and concluded that *“three fundamental points...emerge from the survey of the law.”*⁵ In summary, they are:

¹ For completeness, the Court of Appeal also considered issues relating to committal proceedings and litigation privilege.

² See paragraphs [20] – [28].

³ Given its considerable breadth, Arnold LJ considered this list to be, *“on any view, extraordinary”*. See paragraph [44].

⁴ See paragraph [58].

⁵ See paragraphs [127] – [175].



- 1) The purpose of a search order is to preserve evidence in order to stop the defendant from destroying or hiding it. The purpose of inspecting documents during a search is to identify which documents should be preserved;
- 2) Facts that justify a search order being made may also justify the making of without notice orders for the disclosure and inspection of documents and/or the provision of information. However, these “two types of orders are distinct, require separate justification, have different effects and must not be conflated”;⁶ and
- 3) All orders identified in 1 and 2 above must contain proper safeguards for the respondent and those safeguards must be respected.

Imaging Orders

Search orders originated in a different time. Indeed in that “*analogue era*” most documents existed solely in paper form. Since then, the ubiquity of digital storage devices, as well as cloud computing, means that most documents are now in digital form. As Arnold LJ noted, “*The relevance of this transformation to search orders has been insufficiently appreciated*”.⁷ Put simply, the law has not kept up with the technology.

For some time now, computer experts have been able to copy, or “image” the contents of hard drives. Nevertheless, the implications of this technology in respect of search orders has often been overlooked. Indeed, it is increasingly common for claimants to seek both search orders and imaging orders in cases similar to this one. However, in Arnold LJ’s view:⁸

any court confronted with such an application should first consider whether to grant an imaging order. If the court is prepared to grant an imaging order, then it should be presumed unless the contrary is shown that a traditional search order is unnecessary. Even if the court is prepared to grant a search order at all, careful consideration should be given as to the scope of the order having regard to the imaging order.

Arnold LJ went on to note that in his view, “*there is an urgent need for the Civil Procedure Rules Committee to promulgate a standard form of imaging order*”⁹ so that appropriate safeguards for respondents are not overlooked.¹⁰

The basic protection for a respondent is that the images should be kept in the safekeeping of the computer expert and not searched or inspected by anyone, until the return date. Deviations from this default position will require significant justification and will be the exception, rather than the rule. At the return date, the method of disclosure and inspection will be determined, with the presumption that the defendant will give disclosure in the normal way (nevertheless, this presumption may be departed from). In any event, the search methodology must be agreed between the parties or approved by the court and no inspection should be undertaken unilaterally.

⁶ At paragraph [175].

⁷ At [176].

⁸ At [180].

⁹ At [181].

¹⁰ Arnold LJ had also observed at [174] that, “*The standard form of search order, which has been developed over more than 25 years, should be used unless there is good reason to depart from it. The problems that can be caused by a too-ready departure from the standard form are well illustrated by the present case.*”

**Word of warning**

Separate from its impact on search orders however, this case also offers another more subtle but no less striking lesson. The first Defendant took the Claimant's property, lied about having it and then confessed to intentionally misleading the court and Claimant. Despite this, it appears that it is the Claimant who lost the sympathy of the court. Indeed it was ordered to give security for costs and pay for a review of the documents it prematurely obtained from the imaged data. Such an outcome is a valuable reminder of the risks of conducting litigation "*over-aggressively*"¹¹, particularly against a litigant in person.

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For access to the full text of the judgment please click [here](#).

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¹¹ See paragraph [225].