

# SEARCHING TIMES FOR SEARCH ORDERS?

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Authored by: Jon Felce and Natalie Todd – PCB Litigation LLP

In our article in the first issue of the FIRE magazine concerning the fight against fraud, we asked what the future might hold and raised in particular the practical issues that might be involved in implementing search orders in times of social distancing and self-isolation. As the lockdown gradually lifts, this raises the prospect of parties giving renewed consideration to seeking such orders. In that regard, there are a number of issues that practitioners will need to address.

## Search orders – a recap

Before turning to the practical and legal considerations, a quick recap on search orders. It is often wheeled out that search orders are one of English law's two nuclear weapons (the other being freezing injunctions). They are a vital tool in the fraud practitioner's armoury, enabling documents or materials to be seized in order to ensure that they are preserved. In order to apply for a search order, an applicant needs to demonstrate (i) an extremely strong prima facie case on the merits, (ii) clear evidence that the respondent holds incriminating documents or materials, (iii) a real possibility that such items may be destroyed or disposed of, (iv) the destruction of such evidence would cause very serious potential or actual harm to the applicant, and (v) the order is not excessive or disproportionate.

## Practical aspects involved in making the application

As to the practical aspects of applying for search orders, these include:

- 1 Full and frank disclosure:** Search orders are almost invariably made urgently and without notice being provided to the respondent. Consequently, the applicant will have a duty to make full and frank disclosure and fair presentation to the Court of all material facts and to draw the Court's attention to significant factual, legal and procedural aspects of case. Accordingly, the points that are discussed in this article are precisely the types of issues that will need to be considered and addressed before the hearing of the application for a search order and then raised with the Court at that hearing.
- 2 Plan of action:** Any steps taken during the conduct of the search must be sanctioned by the search order. Therefore, it is important to give consideration before the search as to what is needed and the potential issues that might arise so that they can be catered for in the order itself. This avoids the need to return to Court.

- 3 Entry not guaranteed:** Unlike in the case of a search warrant in a criminal context, the respondent has the ability to refuse entry to the premises the subject of the search order (albeit facing potential sanction for contempt of court as a result). Indeed, it could be the case that the premises are not open at all and therefore available to be searched.

- 4 Alternatives:** The applicant may need to address potential alternatives to search orders and why these are inappropriate. It may be that some lesser form of order is sought as a back-up, such as a doorstep order (requiring disclosure upon service without requiring entry to the premises) or a delivery-up order (requiring delivery within a specified period).

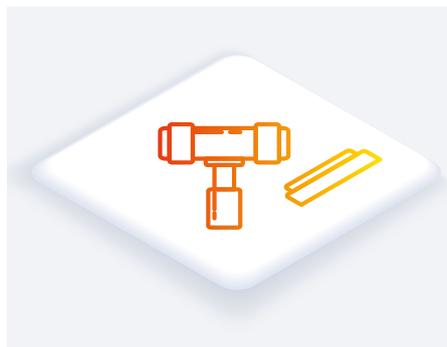
- 5 Supervising solicitor:** The Court will appoint a third party solicitor to act independently of the parties in order to ensure that the order is served, its meaning and consequences are explained, and the carrying out of the order by the applicant's representatives is supervised. It may be prudent to appoint more than one supervising solicitor rather than risk the sole supervising solicitor being incapacitated between the grant of the order and execution of the search.



## Practical aspects involved in executing a search order

There are a number of issues that the applicant will need to address, including:

- 1 Preparation:** Preparation for the search will be key. Usually, a scoping exercise is conducted in advance in order to obtain an idea of the intended subject's movements and/or the premises to be searched, so that the search can be executed efficiently and effectively. Not only may that exercise prove less straightforward than usual, but the pattern of behaviour may be less regular. Flexibility in approach may therefore be required.
- 2 Number of attendees:** The applicant will need to consider how attendance at the premises to be searched reconciles with the then requirements for maximum attendees in one place at any one time. It may be that the Court's sanction of a prescriptive process is expressly needed (which may limit the ability to be flexible: see point 1 above).
- 3 Infected parties:** Consideration will need to be given as to what happens if the respondent or anyone at the premises to be searched (for example, family members or employees) is or may be affected by covid-19 (or is a vulnerable person for the purposes of the Coronavirus legislation). The applicant cannot force entry, but at the same time needs to be live to the possibility of the virus being illegitimately used as



an excuse. Collecting as much contemporaneous information as possible of the reason for the refusal may be paramount, not least if committal proceedings are to ensue. It may be that the scoping exercise conducted prior to (and indeed after) the search itself proves useful in this regard.

- 4 Safeguards:** Conducting the search in a manner that best safeguards against the spread of the virus both during and after the search will be of critical importance. As well as implementing such safeguards, this might include training those due to attend the search in respect of such matters as (i) the effective use of protective equipment and sanitising products and equipment (both during and after the search), (ii) current Government guidance and social distancing requirements, and (iii) how the attendees can best protect themselves and others during the search (including not just the search party but others who may attend, such as the respondents' lawyers). This could include for example screening temperatures on the day of the search and, if possible, testing for the virus in the run-up to the search.
- 5 Electronic access:** Given the increased reliance on electronic means of communication and working, the applicant may consider seeking to conduct the search in a way that effectively manages the period the respondent might be cut off from technology.



## Concluding comments

That criminal search warrants have continued to be granted and executed is indicative of the fact that, in theory, there should be no prohibition on the grant of search orders in the civil context providing that appropriate safeguards are put in place. In order to give more comfort to the Court in these novel times, it will be very important for an applicant to demonstrate that it has properly considered the issues involved and come up with workable solutions.

