

## Search Orders – Coming Ready or Not!

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### **Abstract**

*In the article "Gathering the Evidence – Follow the Money" (CREDIT CONTROL, Volume 26, Number 2 2005), Dan Morrison and Ben Gallagher looked at the issues surrounding the start of an investigation and how you can take legal steps to "follow the money" by using disclosure orders. In the second of their articles, the authors look at how the victim of a fraud can take the results from an initial investigation and use them to obtain Court orders which could catch the fraudsters "red handed".*

*"Search orders" have been described by judges as a "nuclear weapon" for litigants in the English Courts. This article considers what the search order allows you to do, how the order is obtained and factors that can help you decide whether it is the right option to take in any given case.*

Imagine getting a knock on the front door of your home or business premises at 9.00 am in the morning. When you open the door there is a man in a suit stood there, brandishing a document with a red seal on the front. He tells you that he is holding a Search Order and that it entitles a team of lawyers to enter the premises, search everywhere they want to look and then take away with them any evidence of wrongdoing that they find. It is a disconcerting experience and has just the right kind of impact with which you could open your case against the fraudster.

### **A civil search warrant**

A search order can be considered as the civil law equivalent of a police search warrant. Its purpose is to entitle the claimant's lawyers to enter and search premises owned or used by the defendant. Once inside the premises, the lawyers may search for and seize evidence of the fraud perpetrated against the claimant and evidence of what has become of any assets that have been stolen from the claimant.

The order allows the search team to search everywhere on the premises – when searching a residential home that includes everything from the attic, to the garden shed and clothes drawers as well as the larger rooms and shelves/cupboards. In office premises it means every nook and cranny. In either case, the order can be drafted so as to allow the search teams also to inspect any bags or cases belonging to people on the premises, their cars parked outside and even allows us to require them to turn out their pockets. No stone is left unturned

Any computers on the premises will not be ignored. Computers are often, these days, the most fruitful source of incriminating evidence – especially because the fraudster may believe that he has deleted the incriminating information only to discover that computer forensic experts are quite capable of recovering that data from the hard drives long after its supposed "deletion". Because it would be extremely inefficient to start up the computer on the day of the search and look for incriminating data on it there and then, the search order will typically allow for an expert to take an "image" of the hard drive – a forensic copy of every piece of data stored on the computer. The "images" can then be inspected at a later date. The same is true of PDAs, mobile telephones and any other form of

electronic data storage device that may be found on the premises.

The aim of all this activity is to find evidence of the fraud committed by the defendant and any information about what the defendant has done with his ill-gotten gains. A practical side benefit lies in the fact that if you come away from the search with “slam dunk” evidence that incriminates the defendant you will be in an excellent position to secure an early settlement on very favourable terms. When the defendant knows that he is “bang to rights” there is very little incentive for him to struggle on and pay lawyers to engage in what is sure to be a hopeless fight.

Throughout the day, a supervising solicitor appointed by the Court will be there to make sure the claimant’s solicitors do not exceed the authority given to them by the order (and to explain to the defendant what consequences he faces for non-co-operation, which can include arrest and imprisonment).

### **How do you get a search order?**

An application for a search order is not something to be undertaken lightly. It requires careful preparation and you must have the advice of experienced lawyers in order to avoid falling into some of the traps that can catch out an unwary claimant. To obtain the order, you must be able to demonstrate to the court that:

1. You have a “good arguable case” – this doesn’t mean you have to persuade the court that you will certainly win the case (if that were so you wouldn’t need the search order in the first place) but just that there is good evidence that suggests at the initial stages that the named defendant really is the fraudster and that you have a reasonable expectation of winning eventually;
2. You have suffered serious actual or potential damage – just because you haven’t suffered identifiable damage yet doesn’t mean you will not get the order – the wrongdoer may have stolen confidential information belonging to you but if you have responded quickly enough he may not yet have had a chance to profit from it;
3. There is “good evidence” that the defendant will in fact have incriminating documents or items in his possession – if you can’t persuade the judge that the search is likely to come up with something then he will be unwilling to allow the severe invasion of privacy that a search order entails.
4. A “real possibility” that the defendant would hide or destroy the documents/evidence and not disclose them in due course unless the claimant is given the opportunity to go in and secure those documents from mischief – factors which may assist here would include such things as the use of false addresses/names or other forms of deception in the commission of the fraud itself; and
5. The harm caused to the defendant (for instance, the invasion of privacy and disruption on the day of the search) will not be disproportionate to the harm the claimant would suffer if the search was not allowed (for instance, the impact of the fraudster getting away free because the evidence of wrongdoing could never be secured).

An application for a search order is made in secret to a judge. Clearly there would be no point if the defendant was given advance notice of the search! When an application is made in secret the defendant has no opportunity to put his side of the story to the judge at the initial hearing. The claimant is therefore required to obey a duty of “full and frank disclosure”.

This means that when making the application, any relevant “bad” points must be drawn to the attention of the judge as well as all the “good” ones. You must be

even handed. If there are any skeletons in your closet which might have an impact on whether or not the judge would decide to grant the order, then they must be brought out and fronted up.

A failure to comply with the duty of full and frank disclosure is the most commonly used route for a defendant to attack the search order after the fact. If the defendant can persuade the Court that you were not entirely frank with the judge when making the application, then the order might be discharged. The result of a discharge is that everything found on the search will be handed back, and that you will have to pay the defendant's legal costs. Care and proper advice is essential.

#### **Should you get a search order**

Obtaining a search order is an expensive business. Costs in litigation these days are increasingly "front loaded" as a result of the preparation that must be carried out before the case gets into court. A case in which you will make an application for a search order will require an even greater level of early expenditure.

As can be seen from the previous section, you will require evidence to satisfy the Court on a number of separate "tests" before the order will be granted. And throughout the process you must ensure that the duty of full and frank disclosure is complied with. Then there are the costs of the team carrying out the search itself.

That said, there is no bigger "bang for your buck" than a search order. Finding the incriminating evidence can end the case on the same day as the search. Take the example of someone who has stolen a customer list to set up in competition. If that wrongdoer is found in possession of the list during the search he has little incentive to keep fighting.

Before you commit to the legal spend, you will want to know that the evidence you have so far (or could obtain before making the application) will give you a good chance of getting the order. This is not an area in which to "take a punt".

You will also need to keep "full and frank disclosure" in mind. Skeletons in the closet might not be issues that would expose you to legal liability, but if there is a risk of negative PR you may want to take a different approach to the search order.

Each case turns on its own facts but one general rule is that there is very little that has such a powerful psychological impact on a defendant than a search of his premises. With the right evidence, nothing beats putting the fraudster on the back foot right from the start and then keeping him there until you have achieved the result you were after.