

# Search Orders: An Introduction

Gerard McMeel, Guildhall Chambers

## Statutory Basis of Search Orders - Section 7 of the Civil Procedure Act

“(1) The court may make an order under this section for the purpose of securing, in the case of any existing or proposed proceedings in the court—

(a) the preservation of evidence which is or may be relevant, or

(b) the preservation of property which is or may be the subject-matter of the proceedings or as to which any question arises or may arise in the proceedings.

(2) A person who is, or appears to the court likely to be, a party to proceedings in the court may make an application for such an order.

(3) Such an order may direct any person to permit any person described in the order, or secure that any person so described is permitted—

(a) to enter premises in England and Wales, and

(b) while on the premises, to take in accordance with the terms of the order any of the following steps.

(4) Those steps are—

(a) to carry out a search for or inspection of anything described in the order, and

(b) to make or obtain a copy, photograph, sample or other record of anything so described.

(5) The order may also direct the person concerned—

(a) to provide any person described in the order, or secure that any person so described is provided, with any information or article described in the order, and

(b) to allow any person described in the order, or secure that any person so described is allowed, to retain for safe keeping anything described in the order.

(6) An order under this section is to have effect subject to such conditions as are specified in the order.

(7) This section does not affect any right of a person to refuse to do anything on the ground that to do so might tend to expose him or his spouse to proceedings for an offence or for the recovery of a penalty.

(8) In this section—

“court” means the High Court, and

“premises” includes any vehicle;

and an order under this section may describe anything generally, whether by reference to a class or otherwise.

## **The Civil Procedure Rules - CPR 25.1(1)**

“The court may grant the following interim remedies:

(h) an order (referred to as a ‘search order’) under section 7 of the Civil Procedure Act 1997 (order requiring a party to admit another party to premises for the purpose of preserving evidence, etc)....”

### **The Grounds of the Application**

The judge in *Indicii Salus Ltd (in receivership) v Chandrasekaran [2006] EWHC 521 (Ch)*, at para [85], identified the following grounds which need to be satisfied before a search order is made:

- (1) “extremely strong prima facie case”
- (2) “damage potential or actual must be very serious for the applicant”
- (3) “there must be clear evidence that the defendants had in their possession incriminating documents or thing”
- (4) “there is a real possibility that the defendants may destroy such material before an on notice application is made”
- (5) “the harm likely to be caused by the execution of the search order on the respondent in his business affairs must not be out of proportion to the legitimate object of the order”
- (6) the applicant’s obligation to make full disclosure.

# Search Orders: Don't forget your toothbrush (or good practice points)

Ben Daniels, Beachcroft LLP

## 1. Introduction

- 1.1 A search order is not only the most draconian order that the court can make; it is also the most difficult to administer. A Claimant should never lose sight of the fact that the order is permitting steps to be taken that interfere with a Defendant's freedoms and privacy. There are therefore various safeguards for Defendants; and serious consequences for Claimants if they overstep the mark.
- 1.2 In addition, given the flurry of activity that usually accompanies an application for an injunction, it is easy to be caught up in the moment and forget the simplest of "dos" and "don'ts". This presentation is therefore a consideration of practical points that can often get missed. The bottom line is that if you act like you are Columbo when you are executing a search order, then you are likely to undermine all the good work that secured the order in the first place.

## 2. Preparing the application

- 2.1 I will not spend time here considering the quality of supporting evidence that a Claimant requires; rather, I concentrate below on practical points that often get missed when putting together an application.
- 2.2 At what time is it likely that the search will take place after the order has been obtained? In an ideal world, you would want to commence a search at 9.30am the following day. However, in cases of extreme urgency this may not be feasible. You should therefore be aware of the time of your hearing; the likely length of the hearing; the possibility that the hearing may get put back in the list; and, the time that it will take to seal the order and transport it to the team that will be conducting the search. You should then factor in the time that it may take to execute the search. Unless the court specifically orders that the search order may be served at another time, service should take place between 9.30am and 5.30pm – Monday to Friday (*PD 25.7.4(6)*). If time is likely to run short following the hearing and after all the other steps that need to take place before service can happen, you should consider seeking a specific order that the search order may be served out of hours (provided that you can support that part of the application with appropriate evidence).
- 2.3 Consider in advance the identity of the people who will be carrying out the search as they will need to be named in the order.
- 2.4 The make up of the team of lawyers that is to attend the search is important to determine. Consideration should be given to *PD 25.7.4(5)*, which provides that where the Supervising Solicitor is a man and the Defendant is likely to be an unaccompanied woman, at least one other person named in the Order must be a woman and must accompany the Supervising Solicitor. It is also useful to bear this in mind if the Defendant is a company, because it is not unusual to find women alone in the offices of small companies (notwithstanding that the principal of the company may be a man). It would be a shame to miss the opportunity to conduct a search because you had not catered for this eventuality.
- 2.5 At this stage, you should consider whether you should be accompanied by an independent computer expert. If it is likely that you shall be searching for documents which may be held on a computer, then you should bear in mind that you can only search computers if you have sufficient expertise to do so without damaging the Defendant's computer system (*PD 25.7.5(10)*).

- 2.6 If you are to instruct a computer expert then the skills of that particular expert are important to consider. Do you require someone who is simply an expert in searching through computer systems or do you require an expert with more general searching skills (usually found in ex-law enforcement officers) who will be more attuned to searching for the actual computer devices themselves and also mobile storage media etc.
- 2.7 The use of an independent computer expert also lessens the risk that upon conducting a search of computers, the Claimant may see the Defendant's commercially sensitive information which is unconnected to the case.
- 2.8 The premises that you are to search must be specifically identified in the order. You also need to consider which parts of the premises are under the Defendant's control. It is therefore a good idea to not simply rely upon Land Registry searches, but rather to employ a private investigator to observe the property in advance and to help you to carefully define the buildings that may need to be searched. For example, where is the garage; are there other outbuildings or structures outside of the property boundary; is it possible that information or equipment may be held in the Defendant's car boot? These kind of pitfalls can be anticipated by advance intelligence.
- 2.9 Whilst the draft order must be made in no wider terms than is necessary to achieve the legitimate object of the order, you should consider whether it is appropriate to seek additional orders.
- 2.10 The search order must include: the Claimant's undertakings to the court; a penal notice; and undertakings of the Supervising Solicitor and any independent expert that will be carrying out the search.
- 2.11 However, the following additional orders may also be considered:
- 2.11.1 That the Defendant disclose the whereabouts of any assets and material documents;
- 2.11.2 That the Defendant deliver to the Claimant any documents covered by the search order but which are at addresses other than those stated in the order;
- 2.11.3 That the Defendant disclose addresses (not covered by the order) where relevant documents are stored;
- 2.11.4 That the Defendant deliver to the Claimant (within a specified time) any documents coming into the possession of the Defendant after execution of the order;
- 2.11.5 That the Defendant swear an affidavit verifying that all relevant documents have been delivered up to the Claimant;
- 2.11.6 That the Claimant disclose and verify on affidavit the names and addresses of persons involved in the Defendant's activities;
- 2.11.7 That the Defendant deliver up his passport if he fails to co-operate or answer questions about the whereabouts of listed documents (*all of the above points – 2.11.1 to 2.11.7 - are suggested in "Search Orders: an overview" - PLC Dispute Resolution in association with Allen & Overy LLP*);
- 2.12 You may also consider whether it is appropriate to seek an order which provides for the copying (or removal) of the hard drives of the Defendant's computers, rather than simply permitting the independent computer expert to spend time searching through computers during the search. In my experience, the sheer volume of material held on computers means that there is rarely sufficient time during the search for everyone to sit around a computer with the independent computer expert whilst the hard drive is

searched. The process can sometimes take many hours and this would be best achieved in a controlled environment.

- 2.13 Do not forget to prepare a full and detailed note of the without notice hearing, which should be prepared as a matter of urgency. The Supervising Solicitor is required to use "best endeavours" to serve supporting documents (including the note of the hearing) on the Defendant. In addition, the note should be provided to any party affected "without delay" (*Interoute Telecommunications (UK) Ltd v Fashion Gossip Limited and Others* [The Times, 10 November 1999]).

### 3. Preparing to execute the search order

- 3.1 Firstly, organise the team. It is invaluable to ensure that one of the lawyers in your team is "back at base" in order to deal with correspondence and access research material. If the search is due to take place out of range of your office then your "back at base" lawyer can attend court and deal with the administration of the order whilst the team that is to execute the order can be ready in the locality of the search. In this scenario, it is useful if the "back at base" lawyer and your Counsel do not immediately adjourn to the pub in celebration of a successful application (yes – that has happened to me)!
- 3.2 Another advantage of obtaining intelligence from a private investigator in advance of a search, is that you can establish whether the Defendant is actually at the premises that you are seeking to search. An abortive attempt at service carries a heavy risk of tipping off the Defendant.
- 3.3 If the court is likely to be slow in sealing the order (happily, this is not usually the case in the Bristol Mercantile Court) then it is acceptable to use the draft order initialled by the Judge for service. The downside to this is that a Defendant will often query the provenance of an order that does not bear the court seal; the Supervising Solicitor will need to be prepared to deal with this.
- 3.4 Only the people mentioned in the order may attend the Defendant's premises. Do not be tempted at the last minute to bring along additional people because you have underestimated the size of the task in hand. In terms of the people attending, it is usually best to exclude a representative of the Claimant unless their presence really is essential.
- 3.5 Items to remember to take with you:
- 3.5.1 Change of clothes; mobile phone charger; toothbrush; anything that you might need in the event that you have to stay the night if the search is being conducted out of town;
  - 3.5.2 Out of hours contact telephone number of the Judge;
  - 3.5.3 A camera or video camera (and battery/charger): this can be useful in order to record: evidence of people removing documents; the Defendant acting in contravention of the Order; the location of evidence;
  - 3.5.4 The White Book;
  - 3.5.5 Spare copies of the search order.
- 3.6 The intelligence you receive from a private investigator also makes it useful for you to plan in advance where you will park your car before executing the order. Any knowledge of the local area is useful and ideally you will wish to park in an area that is not in the line of sight of the Defendant's premises. Consider the fact that you (or, more likely, the Supervising Solicitor) may have to transport documents and computer equipment. Suitable transport needs to be arranged in light of the volume of

documents and computers that you are expecting to seize.

- 3.7 Make sure an insurance policy will cover the material seized from the Defendant.
- 3.8 It is worth considering drafting a letter for the Supervising Solicitor to read to the Defendant (it will need to be in draft of course as the Supervising Solicitor may wish to amend it). Although the Supervising Solicitor will hopefully be experienced in this area, do not forget that you will be best placed to fully explain the terms of the order to the Defendant. As for the Defendant's rights, this is clearly something that will be covered by the Supervising Solicitor.
- 3.9 Depending on the circumstances, it is often worth warning the local police force in advance of your search. In my experience, a telephone call is not enough. If you have the time, it is worthwhile to actually attend the police station and explain what is happening. This should be for the police force's information only unless (in exceptional circumstances) a breach of the peace is anticipated.

#### **4. Execution of the order**

- 4.1 Do not underestimate the time that it takes to thoroughly search the Defendant's premises. By way of example, in my experience, it takes five hours to search a relatively small house.
- 4.2 For this reason, you should aim to serve as close to 9.30am as you can in order to permit the Defendant time to obtain independent legal advice. The Defendant may ask the Supervising Solicitor to delay the start of the search for up to two hours (or longer if the Supervising Solicitor permits) to enable him to take such advice and to ask the court to vary or discharge the Order (*paragraph 10, standard form search order annexed to PD 25*). In this scenario, it could easily be midday before the search is in full swing.
- 4.3 Whilst the search of course needs to be absolutely thorough, it should also be conducted courteously and with pragmatism. For example, is it appropriate to search through a coffee jar (in case it hides a memory stick), or to check through hundreds of CDs and DVDs in order to check whether they are rewritable (when a random sample of 10% of the discs could be inspected)?
- 4.4 It is important for there to be a careful note taking during the search. This is why it is useful to have at least two lawyers on the search team: one to observe/make decisions; the other to take notes. It is especially important if documents are discovered that may be privileged, for a note to be taken as to where those documents have been taken from – what privilege has been asserted – and how the Supervising Solicitor has dealt with those documents (e.g. to take them away for inspection). In any event, you should always err on the side of caution when documents are identified. If you inadvertently obtain privilege material during a search, then there is a risk that you could be debarred from continuing to act (e.g. as in *Canada Bearings Ltd v Celanese Canada Inc. [2006] SCC36*).
- 4.5 Similarly, you should be wary of documents in respect of which a Defendant may seek to rely upon privilege against self-incrimination (this is dealt with in Stefan Ramel's section of the talk).
- 4.6 When searching computers, you are entitled to passwords to be revealed to you by the Defendant in the same way that you are as entitled to keys to unlock cabinets etc (*PD 25.7.5(8)*).
- 4.7 You should avoid searching the belongings of the Defendant's family or third parties. The Supervising Solicitor will be alive to such issues but, again, through the use of common courtesy you should easily be able to establish the areas in which you are not entitled to search. Contentious issues can of course be dealt with by the

Supervising Solicitor. That said, it is not unusual for third parties or family members present at the search to indicate that they have no objection to their possessions being searched in order to eliminate any suspicion. Again, when this occurs, the issue needs to be carefully recorded and verified by the Supervising Solicitor.

- 4.8 **Removal of items and documents:** items and documents should only be removed if they are:
- 4.8.1 "Clearly" covered by the terms of the Order (*PD 25.7.5(1)*);
  - 4.8.2 removed in the presence of the Defendant or the Defendant's responsible employee – in the event that the Defendant is a company - (*PD 25.7.5(2)*);
  - 4.8.3 retained for only two days (unless permitted by the Court or the Defendant) (*PD 25.7.5(3)*).
- 4.9 A list of the material removed from the Defendant's premises shall be drawn up by the Supervising Solicitor. This should be double-checked against your own notes of the search and ultimately checked by the Defendant before material is removed from the Defendant's premises (*PD 25.7.5(6) and (7)*).

## 5. Unexpected twists

- 5.1 Be prepared to advise your client of the position in the event that a Defendant disobeys the search order and refuses you entry. Some clients are surprised that committal proceedings for contempt of court is the only remedy (and that a Claimant cannot force entry to the premises). Expectations need to be managed.
- 5.2 That said, it is possible that the court may, in exceptional circumstances, grant an additional order permitting the police to gain entry to the premises if it appears that the Defendant is at the premises but is seeking to evade detection by not answering the door (and is therefore avoiding being affixed with notice of the terms of the order). In such circumstances, arrangements should be made for a locksmith to attend to immediately secure the premises as it is unlikely that the police will make the necessary arrangements.
- 5.3 In the event that there is a requirement to involve the police in the search then the following matters should be explained to the police officers who attend the premises:
- 5.3.1 The police officers cannot carry out a police warrant at the same time as the search;
  - 5.3.2 The police cannot use the search as an excuse to search the premises themselves for evidence of crime;
  - 5.3.3 You should take care to explain to the Defendant why the police are attending and confirm that the police are not conducting the search;
  - 5.3.4 The police should be encouraged to remain outside the premises while the search is being carried out.
- 5.4 In the event that the premises are empty (and entry is possible) then no search can be carried out.

# Search Orders: Advising the Respondent to the Order

Stefan Ramel, Guildhall Chambers

## Introduction

1. It is not in doubt that the “Search Order” is one of the most powerful weapons in the court’s armoury when it comes to ensuring that a fair trial of a claimant’s cause of action is not rendered impossible by the destruction, at the behest of the defendant, of key documentary or other contemporaneous evidence then in the defendant’s possession or under his control. Search orders thus perform a vital and necessary function in the litigation process.
2. However, it is also right to recognise that the execution of a search order will unavoidably result in a violation of the defendant’s home and / or his business premises. Although a search order thus necessarily results in a breach of the respondent’s rights under Article 8(1) of the European Convention on Human Rights, such a breach can be justified under Article 8(2) (see *Chappell v United Kingdom* [1989] F.S.R 617, ECHR). It is also frequently the case that in executing the search order, the Supervising Solicitor or the applicant’s solicitor may collaterally become aware of material which, although not within the scope of the order, is commercially sensitive or the subject of legal professional privilege or would tend, if disclosed to third parties (e.g. the Police, a regulatory authority such as the FSA), to incriminate the Defendant and render him at risk of criminal prosecution or disciplinary proceedings.
3. The purpose of the following paragraphs in this note is to set out some of the matters to which a legal advisor who has been retained by the respondent to a search order might usefully have regard to in order to most effectively preserve and enforce such legal rights as the respondent may have.

## 2 Hours and Counting

4. An applicant who has successfully obtained a search order is required to allow the Supervising Solicitor to serve the order personally on the respondent between 9.30am and 5.30pm Monday to Friday unless the court has ordered otherwise (see paras. 7.4(1) & (6), Practice Direction – Interim Injunctions to Part 25 of the CPR). When serving the search order, the Supervising Solicitor can only be accompanied by those individuals who act on behalf of the applicant as are identified in the order (para. 7.4(3) of the PD).
5. Moreover, the Supervising Solicitor is required, prior to the commencement of the search (see para. 9 of the standard form of order), to:
  - 5.1 explain the terms and effect of the search order to the respondent in everyday language (para. 7.4(4) of the PD);
  - 5.2 advise the respondent of his right to take legal advice (para. 7.4(4)(a) of the PD);
  - 5.3 advise the respondent of his right to apply to vary or discharge the search order (para. 7.4(4)(a) of the PD);

- 5.4 inform the respondent that he may be entitled to the benefit of either legal professional privilege or the privilege against self-incrimination (para. 7.4(4)(b) of the PD).
6. Upon being informed of the various matters set out in paragraph 5 above, the respondent is entitled to ask the Supervising Solicitor to delay the search for a period of up to two hours (see para. 10 of the standard form of order). The search order ought to also make provision for the respondent to negotiate a longer period of time during which the search cannot commence. This might for instance be necessary in the event that it is proving difficult to instruct a local solicitor to attend at the premises at short notice. It also follows, and this is the first point to bear in mind for a solicitor who has been instructed at short notice by the respondent, that it is open to that solicitor to invite the Supervising Solicitor to delay the search for a longer period of time if necessary to properly protect the respondent's legal rights. In any event, and whatever steps the respondent's solicitor intends to take, it is necessary for him to keep the Supervising Solicitor informed (see para. 12 of the standard form of order).
7. There are broadly two areas which a solicitor instructed on behalf of a respondent should immediately seek to investigate:
- 7.1 the extent to which it is necessary or open to the respondent to apply to the court to vary or discharge the order;
- 7.2 the extent to which it is necessary or open to the respondent to immediately seek to protect from disclosure documents or evidence which either do not fall within the scope of the search order or which do come within the scope of the search order but are privileged or if disclosed would tend to incriminate the respondent.

### **Consequence of Failing to Comply with Search Order**

8. A failure by the respondent on being served with a search order to either permit entry to the Supervising Solicitor and the applicant's solicitors to the premises or to comply with whatever disclosure obligations are included in the search order is likely to be a contempt of court (see *LTE Scientific Limited v Thomas* [2005] EWHC 7 (Q.B.), *Daltel Europe Limited v Makki* [2005] EWHC 749 (Ch)). The respondent should also be made aware that a refusal to comply with a court order (for instance because an application will be made to vary the search order) could still result in a finding of contempt of court even if the application to vary the search order is later successful (*Bhimji v Chatwani* [1991] 1 WLR 989). Having said that, the court in *Bhimji* was inclined to the view that, in order to found a contempt of court, the breach would have to be more than technical or trivial. In particular, in the event that the respondent has offered reasonable and sensible undertakings to the applicant's solicitors to protect the existence of any documents caught by the search order pending an application to court to vary the order, it is arguable that a court would reject any subsequent allegations of contempt of court (see *Adam Phones v Goldschmidt* [2000] FSR 163).

### **Applying to Vary / Discharge the Order**

9. In addition to informing the respondent of the matters which I have identified in paragraph 5 above, it is also necessary for the Supervising Solicitor to supply the following documents to the respondent in addition to the actual order (and if he doesn't they should be specifically requested):

- 9.1 the evidence which was filed at court in support of the application as well as any documents which are capable of being copied (see para. 7.4(1) of the PD);
  - 9.2 a note of any allegation of fact made orally to the court where such allegation is not contained in the affidavits or draft affidavits read by the judge (see the Supervising Solicitors undertaking in the standard form of order); and
  - 9.3 a copy of the skeleton argument produced to the court by the Applicant's counsel (see the Supervising Solicitors undertaking in the standard form of order).
10. The purpose of requiring the documents listed in paragraph 8 above to be supplied to the respondent is plainly to enable the respondent's legal adviser to consider those documents and seek to identify any obvious errors, omissions, or instances in which it is possible that the applicant has not discharged his duty of full and frank disclosure. For instance, is the order in the correct form, has it been sealed, etc...
  11. The Court of Appeal, in *Indicii Salus Ltd v Chandrasekaran* [2008] EWCA Civ 67 has recently restated the duty of full and frank disclosure imposed on an applicant for a search order in the following terms:

“Mr Crampin relies on the undoubted principle, to which the courts have very clear regard, that the obligation on an applicant for a search and seizure order -- certainly as much as, if not more, than an applicant for any other ex parte order -- **must give full and frank disclosure of all relevant matters to the judge before whom he is appearing**, as he is, for one side only with the other side absent; and that goes as much to the substance of the injunctive relief that is asked for as also to any cross-undertaking in damages.”

(see at para. 8) (emphasis added)
  12. In addition to considering whether a breach of the duty of full and frank disclosure has taken place, it is also possible to argue for the variation or discharge of the search order on any of the following bases:
    - 12.1 the search order was obtained for an improper purpose or otherwise constitutes an abuse of process (see, e.g., para. 79 in the decision of Warren J in the High Court in *Indicii Salus Ltd v Chandrasekaran* [2006] EWHC (Ch) 521); or
    - 12.2 that properly understood by reference to the relevant facts and law, the applicant does not have a sufficiently strong prima facie case to warrant the making of a search order (see also per. Warren J in *Indicii Salus*);

13. It is important to note that, in the event that the respondent wishes to apply to the court to discharge or vary the search order, it is necessary for the respondent to do so on notice to the claimant and moreover the respondent must also supply the claimant with any evidence that he wishes to rely on in advance of the hearing (see para. 27 of the standard form of order).
14. It appears to be the case that the respondent can apply at any time to vary the search order, which presumably includes before the search has been performed, although very compelling evidence which was not originally before the judge is likely to be required in order to successfully apply to vary or discharge the search order prior to the search having taken place. It goes without saying that that evidence should be compiled urgently. It is certainly arguable that the claimant would suffer very limited prejudice if such steps were undertaken insofar as the Supervising Solicitor should be on hand to ensure that no destruction of any evidence takes place.
15. In reality though, and in the time that is likely to be available, it is only in instances where there are obvious errors or defects in the facts or documents presented by the applicant to the court that it will be realistic for a respondent to make an application to court to vary or discharge the search order prior to the order being fully executed. It is far more likely that a solicitor instructed at short notice to advise the respondent will be more concerned to ensure that any irrelevant or privileged documents do not come into the possession of the applicant and / or his solicitors. It is also worth highlighting the fact that such a solicitor should take care to ensure that a distraught respondent does not make any admissions or statements which he may later come to regret. Indeed, in the overwhelming majority of cases in which a search order is executed, the applicant's solicitors are likely to retain an accurate note of all that was said by the respondent.

### **Excluding Documents from the Search**

16. The standard form of search order makes provision for the situation where the respondent wishes to dispute that a particular document or piece of evidence comes within the terms of the search order or that the relevant item is protected from disclosure. Upon the respondent or his legal representative identifying potentially privileged documents:

“(2) If the Supervising Solicitor decides that the Respondent is entitled to withhold production of any of the documents on the ground that they are privileged or incriminating, he will exclude them from the search, record them in a list for inclusion in his report and return them to the Respondent.

(3) If the Supervising Solicitor believes that the Respondent may be entitled to withhold production of the whole or any part of a document on the ground that it or part of it may be privileged or incriminating, or if the Respondent claims to be entitled to withhold production on those grounds, the Supervising Solicitor will exclude it from the search and retain it in his possession pending further order of the court.” (see at paragraph 11)

17. It will be readily obvious from considering those paragraphs that the Supervising Solicitor thus has the ability to accept provisionally (pending the return date) the respondent's arguments to the effect that a document is privileged or incriminating. Clearly, such a decision by the

Supervising Solicitor would represent a very positive result for the respondent and it follows therefore that it is worth having to hand the relevant authorities to deal with the question of whether a document is privileged or is incriminating.

18. At a minimum, the respondent will need to convince the Supervising Solicitor that certain documents are arguably privileged or incriminating to come within paragraph 11(3), in which case those documents would not be passed to the applicant's solicitors and it ought to be left to the return date of the application for a full argument as to whether the documents can properly be handed to the applicant's solicitors. In the meantime, and so long as the documents are retained by the Supervising Solicitor (who of course is subject to confidentiality undertakings) it is possible that the documents will retain their privileged status despite having been handed to a third party (the Supervising Solicitor) – cf paras. 13 and 41 of *C plc and another v P (Attorney General Intervening)* [2007] EWCA Civ 493 [2007] 3 WLR 437.
19. As mentioned above, it is open to the respondent to argue that certain documents located on his premises although within the scope of the search order are protected by legal professional privilege in which case they can be either excluded from the search or delivered into the custody of the Supervising Solicitor pending further arguments on the return date which arguably ought to preserve any privilege which attaches to them. Reference should be made to a specialist textbook on the issue of legal professional privilege, in this note, the following brief details are supplied. Legal professional privileged divides into two categories:
  - 19.1 Legal Advice Privilege = this category of legal professional privilege protects all communications which have passed between a lawyer and his client which are confidential and which arose for the purposes of seeking or giving legal advice and / or seeking or giving advice as to what steps a client should take in a “relevant legal context”. The most recent and authoritative restatement of the law in relation to legal advice privilege is contained in the House of Lords decision in *Three Rivers District Council v Bank of England (No. 6)* [2005] 1 AC 610
  - 19.2 Litigation Privilege = this category of legal professional privilege embraces and protects all communications made between a lawyer and his client, a lawyer and an agent and a lawyer and another third party which are created for the sole or dominant purpose of litigation, and such litigation has actually commenced or is reasonably in prospect (see e.g. *Donnelly v Weybridge Construction Ltd* [2006] EWHC 721). In this context, litigation includes all proceedings (whether civil or criminal) in a court in England and Wales, arbitral proceedings, some tribunal proceedings and also arguably proceedings which are taking place in a court in a foreign jurisdiction.
20. A search order is subject to general common law principles which include that no individual should be obliged to incriminate himself – this is also known as the privilege against self incrimination. The scope of that privilege in the context of search orders has been substantially cut down by the Court of Appeal's decision in *C plc and another v P (Attorney General Intervening)* [2007] EWCA Civ 493 [2007] 3 WLR 437. Indeed, that case is now authority for the proposition that the privilege against self-incrimination does not extend to documents or things which had an existence which was independent from the person seeking to rely on the privilege. In any event the privilege is subject to a number of restrictions: see section 72 of the Supreme Court Act 1981 in the context of “intellectual property cases” and section 31 of the theft Act 1968 in relation to offences under that act.

## Rights of Third Parties

21. Finally, it is also worth mentioning the case of *R on the application of (1) Benno Hafner (2) Hafner & Hochstrasser v City of Westminster Magistrates Court and the Australian Securities and Investments Commissions* [2008] EWHC 524 (Admin), a decision of the Lord Chief Justice which concerned the compulsory acquisition of documents and the examination of individuals from a London-based corporate services provider at the behest of the Australian Securities and Investments Commissions. A third party Swiss attorney and his law firm intervened in the compulsory acquisition proceedings and sought to rely upon various infringements of his and his firm's human rights as protected by the European Convention on Human Rights.

22. The Lord Chief Justice's findings and reasoning were as follows:

"21. For reasons that we are about to give, there can be no doubt that the compulsory acquisition of documents and information conveyed by the claimants to MPI in confidence, and the communication of that information to a third party, namely ASIC, engages the claimants' Article 8 rights. It is regrettable that District Judge Purdy gave no reasons for his conclusion to the contrary, although he was invited to do so.

22. We endorse the following propositions of law made by Mr Gardner in his skeleton argument:

"(i) The fact that the correspondence is of a business character does not exclude the protection of Article 8 in respect of both 'private life' and 'correspondence': *Funke v France* (1993) 16 EHRR 297 and *Niemietz v Germany* (1992) 16 EHRR 97.

(ii) The fact that the documents are sought in proceedings in which the claimants were not initially concerned does not exclude the protection of Article 8: *Z v Finland* (1997) 25 EHRR 371.

(iii) Public authorities which obtain documents by compulsion engage the right to respect for private life and correspondence in respect of each step of such measures (ie obtaining, storage and subsequent use of the material): *Amann v Switzerland* (2000) 30 EHRR 843."

23. Those findings can be adapted to also arguably apply in favour of a third party who may have Article 8 rights in various documents that are located in the respondent's home or business premises, and that, without proper protection, those third party Article 8 rights would be violated. Indeed, the High Court of England and Wales is clearly a public authority (see section 6(3)(a) of the Human Rights Act 1998) and as such it is unlawful for the High Court of England and Wales to act in a manner which is incompatible with an individual's Human Rights (section 6(1) HRA 1998). The case of *Amman v Switzerland* (2000) 30 EHRR 843 (a decision of the European Court of Human Rights) arguably supports the proposition that by ordering the

search and seizure of documents in which a third party has Article 8 rights, the court is unlawfully interfering with those Article 8 rights. It is therefore arguable that the existence of the search order should be disclosed to the third party, and if so advised, the third party should be in a position to intervene in the application and make representations to the court.

[END]

Ben Daniels  
Partner,  
Beachcroft LLP

Gerard McMeel, Stefan Ramel  
Barristers  
Guildhall Chambers

September 2008



## THIS ORDER

1. This is a Search Order made against [ ] ('the Respondent') on [ ] by Mr Justice [ ] on the application of [ ] ('the Applicant'). The Judge read the Affidavits listed in Schedule F and accepted the undertakings set out in Schedules C, D and E at the end of this order.
2. This order was made at a hearing without notice to the Respondent. The Respondent has a right to apply to the court to vary or discharge the order—see paragraph 27 below.
3. There will be a further hearing in respect of this order on [ ] ('the return date').
4. If there is more than one Respondent—
  - (a) unless otherwise stated, references in this order to 'the Respondent' mean both or all of them; and
  - (b) this order is effective against any Respondent on whom it is served or who is given notice of it.
5. This order must be complied with by—
  - (a) the Respondent;
  - (b) any director, officer, partner or responsible employee of the Respondent; and
  - (c) if the Respondent is an individual, any other person having responsible control of the premises to be searched.

## THE SEARCH

6. The Respondent must permit the following persons—
  - (a) [ ] ('the Supervising Solicitor');
  - (b) [ ], a solicitor in the firm of [ ], the Applicant's solicitors; and
  - (c) up to [ ] other persons being [*their identity or capacity*] accompanying them,  
  
(together 'the search party'), to enter the premises mentioned in Schedule A to this order and any other premises of the Respondent disclosed under paragraph 18 below and any vehicles under the Respondent's control on or around the premises ('the premises') so that they can search for, inspect, photograph or photocopy, and deliver into the safekeeping of the Applicant's solicitors all the documents and articles which are listed in Schedule B to this order ('the listed items').

7. Having permitted the search party to enter the premises, the Respondent must allow the search party to remain on the premises until the search is complete. In the event that it becomes necessary for any of those persons to leave the premises before the search is complete, the Respondent must allow them to re-enter the premises immediately upon their seeking re-entry on the same or the following day in order to complete the search.

## **RESTRICTIONS ON SEARCH**

8. This order may not be carried out at the same time as a police search warrant.
9. Before the Respondent allows anybody onto the premises to carry out this order, he is entitled to have the Supervising Solicitor explain to him what it means in everyday language.
10. The Respondent is entitled to seek legal advice and to ask the court to vary or discharge this order. Whilst doing so, he may ask the Supervising Solicitor to delay starting the search for up to 2 hours or such other longer period as the Supervising Solicitor may permit. However, the Respondent must—
  - (a) comply with the terms of paragraph 27 below;
  - (b) not disturb or remove any listed items; and
  - (c) permit the Supervising Solicitor to enter, but not start to search.
11. (1) Before permitting entry to the premises by any person other than the Supervising Solicitor, the Respondent may, for a short time (not to exceed two hours, unless the Supervising Solicitor agrees to a longer period) –
  - (a) gather together any documents he believes may be incriminating or privileged; and
  - (b) hand them to the Supervising Solicitor for him to assess whether they are incriminating or privileged as claimed.

(2) If the Supervising Solicitor decides that the Respondent is entitled to withhold production of any of the documents on the ground that they are privileged or incriminating, he will exclude them from the search, record them in a list for inclusion in his report and return them to the Respondent.

(3) If the Supervising Solicitor believes that the Respondent may be entitled to withhold production of the whole or any part of a document on the ground that it or part of it may be privileged or incriminating, or if the Respondent claims to be entitled to withhold production on those grounds, the Supervising Solicitor will exclude it from the search and retain it in his possession pending further order of the court.
12. If the Respondent wishes to take legal advice and gather documents as permitted, he must first inform the Supervising Solicitor and keep him informed of the steps being taken.
13. No item may be removed from the premises until a list of the items to be removed has been prepared, and a copy of the list has been supplied to the Respondent, and he has been given a reasonable opportunity to check the list.

14. The premises must not be searched, and items must not be removed from them, except in the presence of the Respondent.
15. If the Supervising Solicitor is satisfied that full compliance with paragraphs 13 or 14 is not practicable, he may permit the search to proceed and items to be removed without fully complying with them.

### **DELIVERY UP OF ARTICLES/DOCUMENTS**

16. The Respondent must immediately hand over to the Applicant's solicitors any of the listed items, which are in his possession or under his control, save for any computer or hard disk integral to any computer. Any items the subject of a dispute as to whether they are listed items must immediately be handed over to the Supervising Solicitor for safe keeping pending resolution of the dispute or further order of the court.
17. The Respondent must immediately give the search party effective access to the computers on the premises, with all necessary passwords, to enable the computers to be searched. If they contain any listed items the Respondent must cause the listed items to be displayed so that they can be read and copied. The Respondent must provide the Applicant's Solicitors with copies of all listed items contained in the computers. All reasonable steps shall be taken by the Applicant and the Applicant's solicitors to ensure that no damage is done to any computer or data. The Applicant and his representatives may not themselves search the Respondent's computers unless they have sufficient expertise to do so without damaging the Respondent's system.

### **PROVISION OF INFORMATION**

18. The Respondent must immediately inform the Applicant's Solicitors (in the presence of the Supervising Solicitor) so far as he is aware—
  - (a) where all the listed items are;
  - (b) the name and address of everyone who has supplied him, or offered to supply him, with listed items;
  - (c) the name and address of everyone to whom he has supplied, or offered to supply, listed items; and
  - (d) full details of the dates and quantities of every such supply and offer.
19. Within [ ] working days after being served with this order the Respondent must swear and serve an affidavit setting out the above information<sup>11</sup>.

### **PROHIBITED ACTS**

20. Except for the purpose of obtaining legal advice, the Respondent must not directly or indirectly inform anyone of these proceedings or of the contents of this order, or warn anyone that proceedings have been or may be brought against him by the Applicant until 4.30 p.m. on the return date or further order of the court.

21. Until 4.30 p.m. on the return date the Respondent must not destroy, tamper with, cancel or part with possession, power, custody or control of the listed items otherwise than in accordance with the terms of this order.
22. [Insert any negative injunctions.]
23. [Insert any further order]

## **COSTS**

24. The costs of this application are reserved to the judge hearing the application on the return date.

## **RESTRICTIONS ON SERVICE**

25. This order may only be served between [ ] a.m./p.m. and [ ] a.m./ p.m. [and on a weekday]<sup>12</sup>.
26. This order must be served by the Supervising Solicitor, and paragraph 6 of the order must be carried out in his presence and under his supervision.

## **VARIATION AND DISCHARGE OF THIS ORDER**

27. Anyone served with or notified of this order may apply to the court at any time to vary or discharge this order (or so much of it as affects that person), but they must first inform the Applicant's solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicant's solicitors in advance.

## **INTERPRETATION OF THIS ORDER**

28. Any requirement that something shall be done to or in the presence of the Respondent means–
  - (a) if there is more than one Respondent, to or in the presence of any one of them; and
  - (b) if a Respondent is not an individual, to or in the presence of a director, officer, partner or responsible employee.
29. A Respondent who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.
30. A Respondent which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

## **COMMUNICATIONS WITH THE COURT**

All communications to the court about this order should be sent to–

*[Insert the address and telephone number of the appropriate Court Office]*

*If the order is made at the Royal Courts of Justice, communications should be addressed as follows–*

*Where the order is made in the Chancery Division*

Room TM 505, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 0207 947 6754.

*Where the order is made in the Queen's Bench Division*

Room WG08, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 020 7947 6010.

*Where the order is made in the Commercial Court*

Room EB09, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 0207 947 6826.

The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday.

## **SCHEDULE A**

THE PREMISES

## **SCHEDULE B**

THE LISTED ITEMS

## **SCHEDULE C**

### **UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT**

- (1) If the court later finds that this order or carrying it out has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make. Further if the carrying out of this order has been in breach of the terms of this order or otherwise in a manner inconsistent with the Applicant's solicitors' duties as officers of the court, the Applicant will comply with any order for damages the court may make.
- [(2) As soon as practicable the Applicant will issue a claim form [in the form of the draft produced to the court] [claiming the appropriate relief].]
- (3) The Applicant will [swear and file an affidavit] [cause an affidavit to be sworn and filed] [substantially in the terms of the draft affidavit produced to the court] [confirming the substance of what was said to the court by the Applicant's counsel/solicitors].
- (4) The Applicant will not, without the permission of the court, use any information or documents obtained as a result of carrying out this order nor inform anyone else of these proceedings except for the purposes of these proceedings (including adding

further Respondents) or commencing civil proceedings in relation to the same or related subject matter to these proceedings until after the return date.

[(5) The Applicant will maintain pending further order the sum of £ [ ] in an account controlled by the Applicant's solicitors.]

[(6) The Applicant will insure the items removed from the premises.]

## **SCHEDULE D**

### **UNDERTAKINGS GIVEN BY THE APPLICANT'S SOLICITORS**

- (1) The Applicant's solicitors will provide to the Supervising Solicitor for service on the Respondent–
  - (i) a service copy of this order;
  - (ii) the claim form (with defendant's response pack) or, if not issued, the draft produced to the court;
  - (iii) an application for hearing on the return date;
  - (iv) copies of the affidavits [*or draft affidavits*] and exhibits capable of being copied containing the evidence relied upon by the applicant;
  - (v) a note of any allegation of fact made orally to the court where such allegation is not contained in the affidavits or draft affidavits read by the judge; and
  - (vi) a copy of the skeleton argument produced to the court by the Applicant's [counsel/solicitors].
- (2) The Applicants' solicitors will answer at once to the best of their ability any question whether a particular item is a listed item.
- (3) Subject as provided below the Applicant's solicitors will retain in their own safe keeping all items obtained as a result of this order until the court directs otherwise.
- (4) The Applicant's solicitors will return the originals of all documents obtained as a result of this order (except original documents which belong to the Applicant) as soon as possible and in any event within [two] working days of their removal.

## **SCHEDULE E**

### **UNDERTAKINGS GIVEN BY THE SUPERVISING SOLICITOR**

- (1) The Supervising Solicitor will use his best endeavours to serve this order upon the Respondent and at the same time to serve upon the Respondent the other documents required to be served and referred to in paragraph (1) of Schedule D.
- (2) The Supervising Solicitor will offer to explain to the person served with the order its meaning and effect fairly and in everyday language, and to inform him of his right to take legal advice (such advice to include an explanation that the Respondent may be entitled to avail himself of [the privilege against self-incrimination or] [legal professional privilege]) and to apply to vary or discharge this order as mentioned in paragraph 27 above.

- (3) The Supervising Solicitor will retain in the safe keeping of his firm all items retained by him as a result of this order until the court directs otherwise.
- (4) Within [48] hours of completion of the search the Supervising Solicitor will make and provide to the Applicant's solicitors, the Respondent or his solicitors and to the judge who made this order (for the purposes of the court file) a written report on the carrying out of the order.
- (5) Within [48] hours of completion of the search the Supervising Solicitor will make and provide to the Applicant's solicitors, the Respondent or his solicitors and to the judge who made this order (for the purposes of the court file) a written report on the carrying out of the order.

## **SCHEDULE F**

### **AFFIDAVITS**

The Applicant relied on the following affidavits–

[name]      [number of affidavit]      [date sworn]      [filed on behalf of]

(1)

(2)

### **NAME AND ADDRESS OF APPLICANT'S SOLICITORS**

The Applicant's solicitors are–

[Name, address, reference, fax and telephone numbers both in and out of office hours.]

[END]