To Our Clients and Friends

Memorandum

March 26, 2020

COVID-19 - Temporary Suspension of English Search Orders

The English Courts are both popular and world-famous for the commercial and practical manner in which they resolve disputes. Equally famous are the various forms of interim relief available to the English Courts to allow them to resolve cases justly. Two of the most well-known forms of relief are the Search Order (also known as an Anton Piller Order) and the Freezing Injunction (also known as a Mareva Injunction), once famously described by Sir John Donaldson MR as "*the law's two "nuclear" weapons*"[1].

The potency of these 'weapons' available to the English judge arises from their ability, backed up by the threat of contempt proceedings, to prohibit a respondent from dissipating his assets prior to the determination of proceedings in which he is a defendant (the Freezing Injunction) and to mandate that such respondent allow the applicant into his home or place of business to confiscate evidence that the applicant fears the respondent will destroy (the Search Order). As one may well expect, these 'weapons' are particularly popular (and particularly useful) in claims involving allegations of fraud or dishonesty.

In the current COVID-19 climate, however, one may well ask how - or even whether - the Search Order in particular is to operate. Although the English Courts remain open for business, having adopted a remote working protocol, where the U.K. Government's most recent response to the pandemic has been to stop "*all public gatherings of more than two people*", a question arises as to whether the Search Order, which will typically involve at least three people (the applicant's solicitor, an independent supervising solicitor and the respondent), will be considered to fall within the Government's exception for gatherings essential for work purposes. This article explores this issue and, in particular, the balance between public health on the one hand, and the administration of justice on the other.

Search Orders: the requirements

Any applicant who wishes for the Court to exercise the Search Order jurisdiction must convince the English Court of four principal matters. These are as follows:

1. That the applicant has an extremely strong prima facie case on the merits.
2. That there is clear evidence that the respondent holds incriminating documents or materials.
3. That there is a real possibility that such items may be destroyed before any application on notice can be made.

[1] Bank Mellat v Nikpour [1985] FSR 87

4. That the respondent's activities (i.e. the destruction of evidence) would result in very serious potential or actual harm to the claimant's interests.

As is evident from the above, an application for a Search Order is, by its nature, urgent and made ex parte (i.e. without notice to the respondent). Following on from this, one of the principal purposes of a Search Order is "*to prevent a defendant, when warned of impending litigation, from destroying all documentary evidence in his possession which might, were it available, support the plaintiff's cause of action*"[2]. In the Anton Piller case itself, this was described as the requirement for the applicant to show that "*if the defendant were forewarned [of the application], there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated…*"[3]. As the jurisdiction has developed, it has become clear that the applicant must establish that there is a "*real possibility*" of this risk occurring - something more than the "*extravagant fears*" experienced by every claimant that evidence will be destroyed[4].

In establishing this requirement, one of the most important (and often relied upon) pieces of evidence is the respondent's past behaviour. In cases of fraud in particular, where there is "*solid evidence of serious wrongdoing which is analogous to international fraud*", this can provide "*at least a starting point for serious concerns as to the risk of destruction of documents*"[5]. Similarly, evidence that the respondent would disobey even a lesser Order of the Court (for example, to deliver up a computer device containing vital evidence) can provide the evidentiary basis for a risk of destruction[6]. This is common sense. Where there is strong evidence that a respondent has engaged in fraudulent conduct or has evidenced that he is willing to flout the English Court's Orders, it is unsurprising that the English Court is willing to find that the respondent is precisely the type of person who would destroy evidence in breach of his disclosure obligations.

Search Orders and COVID-19

In the current era of COVID-19, the U.K. Government has made clear that gatherings of more than two people are to be prohibited. Although the reference in the Government's guidance is to "*public*" gatherings, it is clear both from the Government's various pronouncements and, indeed, the new Coronavirus Act 2020, that what is prohibited is a 'gathering' of more than two people - and it is unclear what, if anything, the word 'public' adds.

In the case of a Search Order, the nature of the relief in and of itself will necessitate a 'gathering', typically in the respondent's office or home, of more than two people. The following people will be required to attend the execution of a Search Order, at a minimum:

1. The respondent himself, who will be asked to permit entry to the premises named in the Search Order.

---

2 Columbia Picture Industries Inc. and Others v Robinson and Others [1987] Ch. 38, at p. 71

3 Anton Piller KG v Manufacturing Processes Ltd. and Others [1976] Ch. 55, at p. 61 (per Lord Denning MR)

4 Booker McConnell plc v. Plascow [1985] RPC 425, at p. 441 (per Dillon LJ)

5 ArcelorMittal USA LLC v Essar Steel Ltd [2019] 2 All E.R. (Comm) 414, at [106].

6 Indicii Salus Ltd. (In Receivership) v Garu Paran Chandrasekaran & Ors [2007] EWHC 406 (Ch) at [14]

2. A representative of the applicant (a solicitor), who will be tasked with serving the Search Order on the respondent.

3. The supervising solicitor - a solicitor independent of the applicant and the respondent - who will be tasked with explaining the contents of the Search Order to the respondent and for ensuring that the Search Order is effected fairly and appropriately.

In many cases, however, there are likely to be a number of other individuals involved. By way of example only, as soon as the Search Order is served on the respondent, he will be advised that he has the opportunity to seek legal advice. This may result in a representative of the respondent (also a solicitor) being asked to attend the respondent's home or office, in order to provide a further safeguard against any impropriety on the part of the applicant and, indeed, to advise as to whether the Search Order can be discharged.

In addition to this, in the modern era, many documents are stored on electronic devices, such as mobile telephones, computers and tablets. This may require a forensic computing expert to attend in order to extract and therefore preserve the documentary evidence that is the subject of the Search Order.

Finally, if the Search Order names the respondent's home as the place to be searched, it is entirely possible that other members of the family will be present. It is quite possible to imagine a scenario where the number of people either present at or involved in effecting the Search Order slides into the double digits.

On the basis of the U.K. Government's guidance, it is permissible for more than two people to gather where this is "*essential for work purposes*". Although not entirely clear, one may well imagine that effecting a Search Order (which cannot, for obvious reasons, be effected without a gathering) would be "*essential*", particularly as the applicant will already have convinced the English Court both (a) that there is a risk that the respondent will destroy documents; and (b) that such documents are vital to his case.

However, what of the position of the respondent? Can he resist the Search Order by refusing to permit entry to his premises on the basis that he has real and genuine concerns over the impact on his health of bringing a number of strangers into his home (or place of work - if it is even possible to access such a place in the current climate)? Or can he prevent or deny entry to the applicant on the basis that he - or a member of his family - displays one of the two symptoms by which COVID-19 has become known? In circumstances where the U.K. Government's guidance is clear that a person must self-isolate if they have either a cough or a fever, yet the consequences of refusing entry in order to allow the applicant to execute the Search Order are potentially very severe (possibly constituting a contempt of the English Court), what is a respondent to do? Indeed, what is an applicant to do when faced with such a suggestion, particularly as testing for COVID-19 is not widely available? More specifically for a respondent's solicitor, what is the advice that they should give if asked whether their client can refuse entry over COVID-19 concerns? This is a very real possibility, given that a Search Order will invariably contain a provision permitting the respondent to seek legal advice[7].

As to the potential consequences of a failure to permit entry, the position was summed up most viscerally by Lord Denning MR in the Anton Piller case itself, in which his Lordship said as follows:

---

[7] Universal Thermosensors Limited v Hibben & Others [1992] FSR 361

> *You might think that with all these safeguards against abuse, it would be of little use to make such an order. But it can be effective in this way: It serves to tell the defendants that, on the evidence put before it, the court is of opinion that they ought to permit inspection - nay, it orders them to permit - and that they refuse at their peril. It puts them in peril not only of proceedings for contempt, but also of adverse inferences being drawn against them; so much so that their own solicitor may often advise them to comply. We are told that in two at least of the cases such an order has been effective. We are prepared, therefore, to sanction its continuance, but only in an extreme case where there is grave danger of property being smuggled away or of vital evidence being destroyed.*

Thus, a respondent who fails to comply with a Search Order faces the very real risk of being committed to prison, or doing irreparable harm to his own case (typically, his defence). Indeed, in a more recent case, it was said that "*the entire efficacy of [a Search Order] hinges upon the fact that it is, when executed, respected strictly according to its letter and according to its terms*", with the result that obstructing the execution of the Search Order in that case constituted an actionable contempt[8].

Nevertheless, the respondent to a Search Order does retain a discretion as to whether to permit the applicant to enter his premises - thus distinguishing a Search Order from a (criminal) search warrant. Ormrod LJ explained this important element of the Search Order in Anton Piller as follows:

> *The form of the order makes it plain that the court is not ordering or granting anything equivalent to a search warrant. The order is an order on the defendant in personam to permit inspection. It is therefore open to him to refuse to comply with such an order, but at his peril either of further proceedings for contempt of court - in which case, of course, the court will have the widest discretion as to how to deal with it, and if it turns out that the order was made improperly in the first place, the contempt will be dealt with accordingly - but more important, of course, the refusal to comply may be the most damning evidence against the defendant at the subsequent trial. Great responsibility clearly rests on the solicitors for the applicant to ensure that the carrying out of such an order is meticulously carefully done with the fullest respect for the defendant's rights, as Lord Denning M.R. has said, of applying to the court, should he feel it necessary to do so, before permitting the inspection.*

In a case where contempt proceedings are brought against a respondent for refusing to permit entry on the basis of COVID-19 concerns (or where the respondent seeks to resist an application to draw adverse inferences), the respondent may well wish to say that he would, in ordinary circumstances, have done everything to comply with an Order of the English Court. However, given the exceptional (and unprecedented) circumstances pertaining during the COVID-19 crisis, the respondent may, understandably, wish to put his health (and potentially that of his family) first. This is a very difficult issue to resolve, given the extremely severe consequences to the respondent of a failure to comply with the Search Order.

It may well be said that health should come first, and that if a respondent refuses to comply with a Search Order, a contempt application is not an appropriate way to proceed. After all, if the applicant has satisfied

---

8 Universal Business Team PTY Ltd v Moffitt [2017] EWHC 3251 (Ch), at [33]

the English Court that there is documentary evidence that runs the risk of being destroyed by the respondent, everything should come out in the wash when disclosure is ordered and the evidence, if it has been destroyed, fails to materialise. However, this is unlikely to be satisfactory in every case. In certain cases (most notably copyright infringement cases), the value of the evidence held by the respondent does not derive solely from what it says about his conduct: there is also the monetary value that arises from the quantification of loss. In these circumstances, an applicant may not be happy with a contempt finding if the victory on the merits is merely pyrrhic.

One option may be to require the respondent to undertake to deliver up to the applicant certain specific devices or items, without permitting entry into the home or place of business. By way of example, if the applicant knows or is aware of a particular device on which information is stored, the provision of this device, maintaining social distancing, to the applicant to take away and, subsequently, to return, could be one way of maintaining the efficacy or underlying purpose of the Search Order, while at the same time addressing a respondent's concerns. Clearly, a failure to deliver the device could have the same contempt or evidentiary consequences as a failure to permit a search. This is not a perfect solution and, indeed, it may not work in every case. In some instances, the potency of a Search Order is derived from the fact that it applies to specific categories of documents or communications, as opposed to specific devices. Moreover, in cases of fraud in particular, any solution that relies upon the 'good will' of the respondent is likely to be met with concern by the applicant.

A further option is to rely on careful drafting within the terms of the Search Order itself. One may well imagine a situation where a 'COVID-19 protocol' is adopted in the Search Order, making it clear that concerns over health and safety do not outweigh the need to preserve evidence, and specifying measures that everyone must follow during the execution of such an Order. Such measures by now will be familiar to a great number of people, comprising of a mixture of maintaining social distance and the frequent disinfection of surfaces.

In reality, however, it is likely that there is no perfect solution to the particular difficulties caused by COVID-19 and the effect that the virus is likely to have on the execution of the very personal Search Order remedy. In the end, one party (applicant or respondent) is likely to lose out.

What seems clear, however, is that where an applicant intends to apply for a Search Order to preserve evidence, he must think carefully of the practical realities of applying for this relief in the current climate, as well as the obstacles (in addition to the typically heavy burden imposed on an applicant in any event) raised by COVID-19. A respondent, on the other hand, will almost certainly be left with tough choices to make as to refusing entry to preserve his health with the consequent possibility of being faced either with contempt proceedings or an application to draw adverse inferences against him. In any event, now more than ever there is a need to seek legal advice before applying for or resisting one of the common law's "*nuclear weapons*", as an ill-thought-out strategy could have dire consequences.

* * *

Authors:

Justin Michaelson

James Kitching

James Barratt

Simon Camilleri

Daria Sakhno

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

Fried Frank Authors, Contacts and COVID-19 Task Force Co-Heads:

Justin Michaelson	+44.20.7972.6270	justin.michaelson@friedfrank.com
James Kitching	+44.20.7972.6295	james.kitching@friedfrank.com
James Barratt	+44.20.7972.9215	james.barratt@friedfrank.com
Gail Weinstein (Co-Head)	+1.212.859.8031	gail.weinstein@friedfrank.com
Steven M. Witzel (Co-Head)	+1.212.859.8592	steven.witzel@friedfrank.com
Jennifer A. Yashar (Co-Head)	+1.212.859.8410	jennifer.yashar@friedfrank.com
Joshua D. Roth (Co-Head)	+1.212.859.8035	joshua.roth@friedfrank.com