**Search orders – introduction, basis and form**

This element introduces search orders and explains the basis on which they are obtained and their common form

**Civil procedure rules**

The main CPR which support the content of this element are:

- CPR 23 and 23A PD (in relation to interim applications generally)

-CPR 25 (in relation to interim remedies including search orders, and note that CPR 25.15 to 25.19 inclusive relate specifically to search orders).

**What is a search order?**

Search orders are orders that are made on an interim basis to protect the evidence necessary for the trial, generally because of **fears that the respondent will destroy that evidence before trial**. They are often considered in the same way as injunctions and they are granted in the court’s discretion in accordance with its equitable jurisdiction.

Two major types of commercial case most likely to attract applications for search orders are:

- Cases involving infringement of rights in intellectual property (such as trademarks, copyright and trade secrets, and passing off); and

- Anti-competition cases brought by ex-employers against ex-employees who are wrongfully competing with their ex-employer.

Another example of where the application is often relevant is in claims concerning fraud and breach of confidence.

**Key word or definition:** Search orders are a type of interim remedy, referred to in CPR 25.1(1)(h), which states that a search order is:

*“An order requiring a party to admit another party to premises for the purpose of preserving evidence etc.”*

**Requirements for grant**

The overriding principle that the court will consider when deciding an application for a search order is that of ‘necessity’; no order ought to be made unless it is necessary in the interests of justice. The application is made without notice (ie without any opportunity for the respondent to be heard). An applicant must generally show:

- an extremely strong prima facie case of a civil cause of action;

- the damage, potential or actual, must be very serious for the applicant. If an order is sought in order to forestall the destruction of evidence, the evidence in question must be of major, if not critical, importance;

- clear evidence of the respondent’s possession of incriminating documents;

- the risk of destruction or removal of evidence must be a good deal more than merely possible / it must be a ‘real’ possibility; and

- the harm likely to be caused to the respondent in its business affairs by the execution of the order must not be excessive or out of proportion to the legitimate object of the order.

These requirements are not set out in the CPR, rather they are established in case law (and, for example, summarised in *Indicii Salus Limited v Chandrasekaran* [2006] EWHC 521 (Ch), para 85).

If any of these pre-conditions is absent, the weight of judicial authority suggests that an application for the grant of a search order should be refused. If each of these preconditions appears to be present, an order will not, however, necessarily be justified: the court will still have to weigh in the balance the applicant’s need for the order as against the injustice to the respondent in making the order without notice. (The ‘without notice’ procedure, sometimes referred to as applying ‘ex parte’, is explained in the element relating to search order procedure.)

A search order is a discretionary and equitable remedy and the usual equitable maxims apply.

**The search order and the search**

To understand the typical nature of this form of interim remedy, you need to consider both the terms of the model search order and the undertakings usually required of the applicant, applicant's solicitor and supervising solicitor (see schedules D, E and F of the model order respectively). Whilst these can be departed from, any departure must be justified.

**Read alongside:** Access CPR Court Form NM01, the model search and imaging order. Read the following summary alongside the model order (including the schedules to the model order).

**Penal notice**

Breach of a search order (by the respondent or by a third party who is aware of it) is contempt of court and may be punished by committal to prison, a fine or sequestration of assets.

The following ‘penal notice’ is found on the front cover of the standard search order:

*“IF YOU [….] DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED”.*

**The nature of the relief**

By paragraph 7, the respondent is ordered that they “must permit” the supervising solicitor, the applicant’s solicitor(s) and any other specified persons in the search party to enter the premises (as listed in Schedule A of the search order) and to take the material or materials specified in the search order(as listed in Schedule B).

This reflects that the search order is not a search warrant - the court has no power to authorise the entry on and search of private premises. A search order is, instead, an ‘*in personam*’ order directed to a named person (the respondent). The court essentially orders the respondent to permit the entry and search. If the respondent refuses to do so, the search party has no authority to enter and the search cannot go ahead, but the respondent risks proceedings for contempt of court (potentially resulting in imprisonment or a fine).

Note that the search is carried out by the people listed, which includes the applicant's solicitor and could include the applicant, as well as the supervising solicitor: it is not the case that the search is carried out only by the supervising solicitor (see also paragraph 33).

**The nature of the relief – supporting provisions**

These paragraphs are supplemented by paragraph 17 which requires the respondent to

- Hand over the listed items to the applicant's solicitors;

And also by paragraph 20 which requires that the respondent

- Immediately gives the Independent IT Expert (who will be a member of the search party) effective access to any electronic data storage devices, which includes all items such as computers, mobile telephones, servers and the like.

In addition, paragraphs 24 and 25 require the respondent to

-Inform the applicant's solicitors where the listed items are, and the details of who supplied the items and to whom the respondent has supplied them; and

- Confirm the information in the previous point by affidavit.

Finally, by paragraphs 26 and 27 the respondent is prevented from telling anyone about the search order or destroying any listed items until 4.30pm on the return date (ie the date of the second hearing, of which the respondent will have been given notice, and by which point in time the court will have had the opportunity to discharge or extend the order).

**Safeguards within the search**

The relief set out above is powerful and potentially draconian. In order to protect the respondent to the extent possible from injustice, there are safeguards and restrictions within this typical form of relief.

Paragraphs 9 to 16 of the model search order broadly give the respondent:

- the right to have the order explained to them;

- a brief opportunity to take legal advice; and

- a brief opportunity to gather privileged documents…

…but in the meantime, the respondent must let the supervising solicitor in to ensure the respondent does not remove /destroy any of the listed items.

**Summary**

- A search order is an order requiring a party to admit another party to premises for the purpose of preserving evidence

- Generally, an applicant must show:

an extremely strong prima facie case of a civil cause of action;

the damage, potential or actual, must be very serious for the applicant.

clear evidence of the respondent’s possession of incriminating documents;

the risk of destruction or removal of evidence must be a good deal more than merely possible

the harm likely to be caused to the respondent in its business affairs by the execution of the order must not be excessive or out of proportion to the legitimate object of the order.

- A typical search order contains substantial safeguards for the respondent.