

ROYAL COURT OF JERSEY
RC15/05
Search Orders

Introduction

This practice direction is issued to give guidance in relation to the granting of search orders previously referred to as Anton Piller Injunctions, and their execution.

With effect from the date of this practice direction, such orders shall be referred to as search orders

Unless otherwise indicated in this practice direction, the general guidance applicable to the granting of freezing orders contained in Royal Court practice direction RC15/04- also applies to the granting of search orders. This guidance is therefore in addition to the general guidance applicable to the granting of a freezing order.

General principles

The granting of a search order is a matter for the discretion of the Bailiff or the Deputy Bailiff. Such a search order is a draconian power only to be used in exceptional cases since it represents one of the most severe forms of restriction a civil court can impose. This is especially so as search orders are almost invariably granted after only hearing the plaintiff's case on an *ex parte* application.

The evidence filed in support of the application for a search order firstly must be persuasive and must show an extremely strong *prima facie* case. Secondly it must show that the damage, potential or actual, would be very serious for the plaintiff. Thirdly there must be clear evidence that the defendant or defendants possesses incriminating documents items or material and that there is a real possibility that such documents items or material may be destroyed before any application *inter partes* can be made.

The application should also justify the extent of the relief sought. There must be proportionality between the perceived threat to the plaintiff's rights and the relief granted. The more draconian the proposed search order, the more there must be a careful balancing between the plaintiff's right to recover his property or to preserve important evidence against the violation of the privacy of a defendant who has had no opportunity to put his side of the case. The granting of a search order *ex parte* can only occur when there is a paramount need to prevent a denial of justice to the plaintiff.

The harm likely to be caused by execution of a search order to a defendant and his business affairs must not be excessive or out of proportion to the legitimate object of the search order. If the effect of a search order might be to prevent a defendant from carrying on its business at all, this should expressly be drawn to the attention of the Court on the application being made.

If the relief sought includes a search of the defendant's dwelling house, such an application is at the absolute extremity of the Court's powers and may cause significant embarrassment or distress for a defendant or a defendant's family. Such a search order must be specifically justified.

Standard Wording for a Search Order

Attached as a schedule to this practice direction, is the proposed standard wording for a search order. Any variation to the standard wording should be drawn specifically to the attention of the Bailiff or Deputy Bailiff when the application is made.

The Supervising Advocate

As a search order is a draconian remedy, it must only be executed in the presence of a supervising advocate. The application for a search order must state the name, firm and address and experience of the supervising advocate.

The supervising advocate must be a Jersey qualified advocate with at least ten years' post qualification experience in commercial litigation whether as a Jersey advocate or in other common law jurisdictions.

The supervising advocate must be independent and must not be an employee or member of the plaintiff's firm of legal advisers. The supervising advocate's obligations must be set out in the search order.

When making the application, the Court must be provided with evidence of the supervising advocate's agreement to act and the undertaking he is required to provide.

Service

The order of justice containing the search order and the evidence in support must be served personally by the Viscount but only in the presence of the supervising advocate, unless the search order provides otherwise. If it is intended not to serve a defendant personally this should be raised expressly with the Bailiff or Deputy Bailiff.

Confidential exhibits need not be served but they must be made available for inspection by the defendant in the presence of the plaintiff's Jersey legal adviser. While the search order is carried out, and afterwards, such exhibits may be retained by the defendant's Jersey legal adviser on the latter undertaking only to allow inspection of such exhibits by the defendant in the presence of the defendant's Jersey legal adviser and not to allow the defendant to make or take away any copy, note or record of them.

Only those persons expressly mentioned in the search order may accompany the supervising advocate.

If the supervising advocate is male and the defendant is likely to be an unaccompanied female at least one other person named in the search order must be female and must accompany the supervising advocate.

Explaining the effect of the search order

Before any steps are taken to execute the search order the supervising advocate must explain the terms and effect of the search order to the defendant in everyday language and advise him: -

- a. of his right to take legal advice, and to apply to vary or discharge the search order; and

- b. that he may be entitled to avail himself of legal professional privilege and the privilege against self-incrimination.

The search order may permit the supervising advocate to delay execution of the search order to enable the Defendant to take legal advice on execution of the search order or on questions of privilege. Ordinarily such delay will not exceed 2 hours.

When the search order may be executed

The search order may only be served and executed between 9:00 a.m. and 5:00 p.m. Monday to Friday unless the Court orders otherwise.

Guidance relating to the manner of execution

No premises may be searched and no items removed except in the presence of the defendant or a person who appears to be a responsible employee of the defendant.

The search order must not be executed at the same time as a police search warrant.

The defendant or his representative must immediately identify materials, items or documents falling within the scope of the search order and their location within the premises being searched.

The defendant or his representative must also all give those executing the search order effective access to all parts of the premises to be searched where there may be materials, items or documents falling within the scope of the search order.

No material shall be removed unless clearly covered by the terms of the search order.

The supervising advocate must make and retain a list of all material to be removed from any premises pursuant to the search order.

A copy of the list must be given to the defendant and the defendant's Jersey legal adviser. No material shall be removed from the premises until the defendant has had reasonable time to check the list.

Where copies of original documents are sought, the original document should be retained for no more than two days before being returned to the owner.

If the search order provides that material or items in dispute are to be removed from the defendant until trial, the plaintiff's Jersey legal advisers shall place such material or items in the custody of the defendant's Jersey legal advisers on their undertaking to retain it in safe keeping and to produce it to the Court when required. Alternatively, if the Royal Court so orders, such material may be placed with the Judicial Greffe.

Where the supervising advocate is satisfied that full compliance with the terms of the search order is unachievable, he may permit the search to proceed and items to be removed without compliance with the unachievable requirements. The remaining requests should immediately be referred back to the Royal Court.

In appropriate cases the plaintiff shall take out insurance in respect of the material or items retained by the defendant's Jersey legal adviser or by the Judicial Greffe.

Computers, laptops and other electronic devices

If any of the listed items exist only in computer readable form, the defendant must immediately give effective access to computers, laptops, phones or other similar devices by providing all necessary passwords or security codes to enable them to be searched and the listed items printed out.

The plaintiff and his representatives may only search the defendant's computer, laptops, phones or where they are expressly authorized by the search order. Such a search, if so authorized, may only be carried out by individuals who are independent of the plaintiff and who possess sufficient expertise not to damage the defendant's systems or devices.

The plaintiff and those assisting in the execution of the search order must take all reasonable steps to ensure that no damage is done to any computer, laptop, phone or other similar device or any data stored on such device.

The supervising advocate's report

The supervising advocate shall provide a report on the execution of the search order to the plaintiff's Jersey legal advisers as soon as possible after execution of the search order is completed and no later than two working days after execution is completed.

The supervising advocate shall also at the same time serve a copy of his report on the defendant, the defendant's Jersey legal adviser and also file a copy with the Court.

Parties Cited

Where a party cited is served with a search order such service shall only occur in the presence of a supervising advocate and the above guidance shall apply to execution of the search order at the premises of the party cited in the same manner as execution of the search order at the premises of a defendant.

Standard Wording for a Search Order

After the main body of the Order of Justice insert:-

WHEREFORE UPON

(A) The plaintiff by his advocate undertaking:

1. To comply with any order that the Court may make as to damages if the Court later finds that this search order or any part of it has caused loss to the defendant or a party cited and decides that the defendant or a party cited should be compensated for that loss by the plaintiff.
2. To pay the reasonable costs of the party cited incurred as a result of this search order including the costs of ascertaining whether the party cited holds any materials the subject matter of this search order.
3. [Optional] To fortify the undertakings contained in the foregoing paragraphs 1 and 2 by paying the sum of £ to his advocate on or before the day of and shall forthwith upon such payment notify the defendant/party cited of the same] OR
[By causing a written guarantee in the sum of £ to be issued from a bank having a place of business in Jersey and shall forthwith upon such issue provide a copy of the guarantee to the defendant/party cited].
4. That other than with leave of the Court, any information obtained pursuant to this search order or any other related order of the Court in this action shall only be used for the purposes of this action;] OR [if wider use anticipated, inserted details of intended purpose and foreign jurisdiction concerned].
5. To serve this Order of Justice and the Affidavit evidence in support upon the defendant or any party cited as soon as practicable.
6. [to insure any property or other documents removed in accordance with the terms of the search orders granted].
7. [If relevant] To cause an affidavit to be sworn and filed with the Court [substantially in the terms of the draft Affidavit produced to the Court].

OR

[confirming the substance of what was said to the Court by the plaintiff's Advocate].

8. To notify forthwith in writing any party served with this search order should all or any part of it cease to have effect for any reason or should it be varied.

(B) And upon the plaintiff's Advocate personally undertaking:-

1. to immediately provide to the supervising advocate being the individual appointed by paragraph A2 (b) of this search order with
 - 1) a copy of this order of justice;
 - 2) a copy of the affidavits and exhibits capable of being copied containing the evidence relied upon by the plaintiff;
 - 3) any note of any hearing before the Royal Court;
 - 4) a copy of any skeleton argument produced to the Court.
2. to the best of his ability, to answer any question whether a particular item is an item falling within the scope of the search order.
3. to retain in safe keeping all items obtained as a result of the search order until the Court directs otherwise; and
4. to return all originals of all documents obtained as a result of the search order [except original documents which belong to the plaintiff] as soon as possible and in any event within [two] working days of their removal .

(C) And upon the supervising advocate undertaking:-

1. to use his best endeavours to attend with the Viscount on service of the order of justice upon the defendant and any party cited;
2. to explain to persons served with the search order its meaning and effect, fairly and in everyday language,
3. to inform persons served with the search order of their right to take legal advice, including an explanation that the defendant or a party cited may be entitled to avail himself of the privilege against self-incrimination or legal professional privilege and to apply to vary or discharge this search order as mentioned in paragraph 1 of this search order;
4. to obtain and keep safe all disputed items or documents required to be retained by him pursuant to paragraph B6 of this search order until the Court orders otherwise;
5. not to disclose to any person any information relating to any disputed or privileged items unless or until the Court otherwise orders;
6. to keep any list of items or documents prepared by him pursuant to this search order confidential unless or until the Court otherwise orders; and
7. within 48 hours of completion of the search to make and provide to the plaintiff's Jersey legal advisers, the defendant, any party cited, the defendant's or any party cited's Jersey legal advisers, if any, and to the Court a written report on the execution of the search order.

IT IS HEREBY ORDERED THAT:-

A Access

- 1 This search order may only be served and executed between 9:00 a.m. and 5:00 p.m. on a weekday. This search order must be served in the presence of a supervising advocate and must be carried out in his presence and under his supervision.
- 2 The defendant must permit access to [description of premises] and any other premises of the defendant disclosed pursuant to paragraph [] of this search order and any vehicles under the defendant's control on or around any premises within the scope of this search order to the following persons:-
 - (a) The Viscount or a representative of the Viscount's department;
 - (b) [] ["the supervising advocate"]; and
 - (c) [.....] an advocate or solicitor [in the firm of [blank]], being the plaintiff's Jersey legal advisers accompanied by up toother persons being [state their identity or capacity] accompanying them [together "the search party"].
3. The defendant must allow the search party to remain on any premises within the scope of the search order to allow the search to be completed within the time periods permitted by the terms of the search order granted. In the event it is necessary for any or all members of the search party to leave any premises before the search is complete, the defendant must allow them to re-enter all premises immediately upon their seeking re-entry on the same or on the following day in order to complete the search.
4. Execution of this search order may not be carried out at the same time as a police search warrant.

B. Explaining the search order and privilege

1. Before the defendant allows anybody from the search party onto premises to execute this search order, he is entitled to have the supervising advocate explain what the search order means in everyday language. The defendant must permit the supervising advocate to enter the premises.
2. The defendant is entitled to seek legal advice and to ask the Court to vary or to discharge the search order. Whilst doing so he may ask the supervising advocate to delay starting the search for up to two hours or for such longer period as the supervising advocate may permit. However, the defendant must inform the supervising advocate of the information referred to in paragraph C (3) of this search order. The defendant also must not disturb or remove any listed [items or] documents.

3. Before permitting entry to the premises by any person other than the supervising advocate, the defendant may, as quickly as possible but for no longer than two hours, [unless the supervising advocate agrees to a longer period] gather together any documents he believes are legally privileged or which may not have to be disclosed because the defendant believes he is entitled to assert a privilege against self-incrimination. Such documents must be handed over to the supervising advocate for the supervising advocate to assess to whether or not they are legally privileged or self-incriminating.
4. If the defendant wishes to take legal advice and/or gather potentially privileged documents as permitted, he must first inform the supervising advocate and keep him informed of the steps being taken to obtain such advice and/or gather such documents. The defendant shall further ensure that no steps are taken pending receipt of such advice to deal in any way with any of the listed items or listed documents.
5. If the supervising advocate decides that the defendant is entitled to withhold production of a document on the grounds that it is privileged or self-incriminating, the supervising advocate shall exclude the document from the search and record it in a list for inclusion in his report and return the document to the defendant.
6. If the supervising advocate believes that the defendant may be entitled to withhold production of all or part of a document, on the basis that all or part of it may be privileged or self-incriminating on grounds that are reasonably arguable and require determination by the Royal Court, the supervising advocate will exclude it from the search. The relevant document or relevant part will be retained by the supervising advocate until further order of the Court.
7. If the supervising advocate decides that the defendant is not entitled to withhold production of the document on the grounds that it is privileged or self-incriminating, the supervising advocate shall inform the defendant of his decision and the reasons why and shall record such a decision in his report.

C. Materials, items or documents to be produced

1. [Following compliance with Part B of this search order, the search party may search for inspect, and deliver into the safe keeping of the [plaintiff's Jersey legal advisers] the following materials or items [the "listed items"].

The listed items:

[List categories of materials or items to be produced]

[Delete if not relevant]

2. Following compliance with Part B of this search order, the search party may [also] search for and inspect the following documents or categories of documents to photograph or photocopy the same.

The listed documents

[list of categories of documents to be produced]

3. Following compliance with Part B of this search order, the defendant must immediately inform the plaintiff's Jersey legal advisers so far as he is aware of – [a] where all the [listed items and] the listed documents are, [[b] the name and addresses of all those that supplied or offered to supply him with listed items, [c] the name and address of everyone to whom the defendant supplied or offered to supply the listed items, [d] full details of dates and quantities of any such supply and offer.][*delete reference to listed items as appropriate*]
4. Within [] working days after being served with this search order the defendant must swear and serve an affidavit setting out the above information.
5. Subject to paragraphs 3 to 5 of part B of this search order, the defendant must not destroy, tamper with, cancel or part with possession, power, custody or control of any of the listed [items or] documents for so long as the terms of this search order remain in force.

D. The Search

1. The premises must not be searched and [items or] documents must not be removed except in the presence of the defendant or a duly authorised representative of the defendant.
2. No [items or] documents may be removed from any premises until a list of the [items or] documents to be removed has been prepared, and a copy of the list has been supplied to the defendant and he has been given a reasonable opportunity to check the list.

E. Electronic Devices

1. Where any of the listed documents, which are in the defendant's possession or control, are contained in or stored on a computer, hard drive, laptop or any other electronic device, (the "electronic device") the defendant must immediately give the search party all necessary passwords to allow access to the relevant electronic device.
2. If any electronic device contains any listed document the defendant must cause the listed document to be displayed so it can be read by the search party, photographed and a copy printed wherever possible.
3. Where there is a dispute as to whether any electronic device contains a listed document or where a copy of a listed document cannot immediately be read printed or photographed, unless:-
 - (a) it is impracticable to do so; or
 - (b) the device is essential in the opinion of the supervising advocate to the defendant's livelihood or immediate wellbeing,

the electronic device must immediately be handed over to the supervising advocate for safe keeping, pending resolution of the dispute or further order of the Court.

4. All reasonable steps are to be taken by the plaintiff, the search party and the plaintiff's Jersey legal advisers to ensure no damage is done to any electronic device or to any data contained on any such device.
5. The plaintiff and his representatives may only read or be provided with a copy of a listed document on any electronic device. Access to an electronic device may only be carried out by a suitably qualified individual independent of the plaintiff.

F. [Gagging Order]

1. Except for the purposes of obtaining legal advice the defendant must not directly interact with or inform anyone of these proceedings or the contents of this search order or warn anyone that proceedings have been or may be brought by the plaintiff until [insert time period] or a further order of the Court.][*any gagging order must be specifically justified*]

G. Interpretation

1. An order requiring "the defendant" to do or not to do anything requires each defendant to do or not to do it
2. A defendant who is ordered not to do something must not do it himself or in any other way. He must not do it though others acting on his behalf or on his instructions or with his encouragement.
3. A defendant which is a corporation and which is ordered not to do something must not do it itself or by its directors, officers, employees, or agents or in any other way.
4. In this Order "he" includes "his", "him", "she", "her", "it", or "its".
5. Where there are two or more defendants then (unless otherwise stated) a reference to "the defendant" means both or all of them respectively.

H. Service out of the Jurisdiction and Substituted Service

1. Leave is given to the plaintiff to serve this Order of Justice personally on the defendant outside the jurisdiction at _____ requiring his attendance before the Royal Court on _____;OR

[amend to deal with multiple defendants]

2. [Leave is given to the plaintiff to effect substituted service on the defendant by way of service of the Order of Justice on _____ (with a request that it be transmitted to the defendant _____) requiring the defendant's attendance before the Royal Court on[____]].

I Variation or Discharge of this Order

1. The defendant or anyone notified of this search order) may apply to the Court at any time to vary or discharge this search order (or so much of it as affects that person), but anyone wishing to do so must first inform the plaintiff's Advocate.

J. Application of the search order to a party cited

1. Parts A to I of this search order shall also apply to [] being the party cited as if any reference to a defendant shall be read as a reference to the party cited unless varied by this part.
2. The premises of the party cited covered by this order are at [].
3. The [listed items] and listed documents covered by the search order [are the same as those the defendant is required to produce] [are as follows: - *[insert description]*].
4. [Leave is given to serve to serve this Order of Justice personally on the party cited outside the jurisdiction at requiring his attendance before the Royal Court on []].

AND IT IS HEREBY FURTHER ORDERED THAT:-

- (1) The defendant [and the party cited] shall be convened before the Royal Court so that in its [their] presence and after proof of the facts hereinbefore alleged the Court may:-
 - (a) confirm the said interim search orders;
 - (b) etc.

SAVING ALL JUST EXCEPTIONS

Given at St. Helier this day of .