

RUDE AWAKENINGS: DAWN RAIDS ON THE TCHENGUIZ BROTHERS – UNDERSTANDING THE COURTS' POWER TO AUTHORISE SEARCH ORDERS

As part of the SFO's investigations into the 2008 collapse of Kaupthing Bank, over 130 police officers and investigators were involved in the recent dawn raids on the homes and business premises of Vincent and Robert Tchenguiz. Eight homes and two London businesses were searched, including the Mayfair offices of Rotch Property, the investment vehicle that controls the Tchenguiz brothers' property portfolio.

These high-profile raids have brought the power of the court to authorise search orders and the use of raids, into the media spotlight. In this article we explain the circumstances in which the court can order a raid, and contrast the differing approach between the civil and criminal law in its application to search orders.

Search Orders

Raids are authorised by order of the court, known as a 'search order' or a 'search and seizure order' (formerly also known as an Anton Piller order), and are made without notice to the defendant. The element of surprise is a key characteristic of these raids and means that a defendant may not know he is even being investigated until the claimant's solicitor/the prosecutor arrives at his door armed with such an order.

Civil claim

In civil matters, the court has the statutory power to make a search order to order a defendant to allow the claimant to enter premises for the purpose of: (i) inspecting

documents or other articles; and/or (ii) taking custody of documents or other articles, pending trial or enforcement of a judgment.

A search order does not allow the claimant to force entry, but would make the defendant liable for contempt proceedings if he did not obey the order. Its effect is therefore dramatic and consequently the pre-conditions to making a search order are onerous and strictly applied.

In a civil context, to make a search order the court must be satisfied that the applicant has shown that there is:

- (i) an "extremely strong *prima facie* case" against the defendant;
- (ii) risk of very serious damage, potential or actual, for the applicant; and
- (iii) clear evidence that the defendants have in their possession incriminating documents or material and that there is a real possibility that they may destroy such

material before any application can be made.

Criminal claim

In comparison, where an application for a search order is made under Section 8 of the Police and Criminal Evidence Act 1984 (PACE) (as amended), if the court is satisfied that there are 'reasonable grounds' for believing that an indictable offence, for example fraud, has been committed, the pre-conditions for a search order are far less onerous than in civil proceedings. The prosecutor must satisfy the court that:

- (i) there are reasonable grounds for believing that there is material on the premises which is likely to be of substantial value to the investigation of the offence; and
- (ii) the material is likely to be relevant evidence.

Unlike the requirement in relation to search orders for civil claims, under PACE the prosecutor does not need to show that the

purpose of a search may be defeated if the defendant is put on notice of the search. It is sufficient for the prosecutor to show that it is not practicable to communicate with a person entitled to grant access to the premises, or if there are reasonable grounds to believe that entry to the premises will not be granted unless a warrant is produced.

Safeguards

A search order is one of the most draconian orders a court can make. Consequently, in the context of civil matters at least, case law and the Civil Procedure Rules have introduced a number of safeguards for defendants who are the subject of these orders. In addition to the hurdle the claimant has to clear to even obtain a search order, once it has been obtained, only the material listed in the order can be the subject of a search; the order cannot include a catch-all provision to include material which is discovered in the search; and certain items cannot be seized, for example, a search order cannot cover legally privileged material.

There is also a very strict procedure required by the Civil Procedure Rules to be followed when serving and executing the order. Failure to follow the correct procedure could constitute contempt of court by the claimant itself. The claimant must be accompanied at the defendant's premises by a 'supervising solicitor' who is an independent officer of the court. The supervising solicitor must serve the search order on the defendant, explain its terms and advise him of his legal rights and allow him sufficient time (usually up to two hours) to obtain legal advice. No items may be removed from the defendant's premises until a list of those items has been made and then checked by the defendant.

There is the possibility that the defendant can refuse immediate compliance with the order and instead make an urgent application to have the order set aside but, if this fails, he renders himself liable for proceedings for contempt. The proper course for a defendant seeking to challenge the order is to apply to the judge who made the order or to another High Court judge to discharge or vary it.

In a criminal context, under PACE there are fewer safeguards available to the defendant. The officer executing the search order must do so in the presence of another officer, and supply the defendant with a copy of the warrant. Again, privileged material is a significant exclusion to the scope of the material which may be covered by the order.

Conclusion

In civil claims, the high threshold criteria for obtaining search orders means that their use may remain relatively rare. However, the Tchenguiz raids clearly demonstrate that the criminal authorities are perfectly prepared to ask the court to make these draconian orders and to use them to their full advantage when they can.

Where there are claims in fraud, they can be brought in both the civil court, (by the person claiming to have been subject of the fraud), or by the criminal authorities. Where there is a need to seek to secure evidence, search orders will always be considered as an option.

If that knock on the door comes, it is essential that urgent advice is sought, where possible, before agreeing that the search can proceed (ie in a civil claim), or during the process of the search (ie in a criminal claim).

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