

Urgent Remedies in Uncertain Times: A Guide To Injunctive Relief During The Coronavirus Lockdown

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17 April 2020

Introduction

1. Our offices are closed, we clap for our carers, and we cross our fingers that today – just maybe – we won't be number 147,000 in the virtual Tesco queue. But though normal life seems so far away, fraud and other nefarious dealings will always be with us.
2. As of mid-April 2020, Action Fraud reports receiving almost 50 daily reports of Covid-19-linked fraud, including via scams, phishing, smishing and hacking. As still more of our daily and business activity is forced online, perhaps forever, losses to fraud more generally can only increase. And as businesses continue to struggle, we anticipate an increase in wrongdoing, and in desperate measures being taken to survive. Now, more than ever, commercial counterparties are likely to require the urgent assistance of the Courts.
3. But how is that to be achieved during the lockdown? We set out below our practical guide to remote bundling, arranging the hearing, and interacting with the Court – together with a reminder of the main remedies, their principal requirements, and how they are likely to be affected by the virus. In particular, we think that particular care is required when obtaining Anton Piller orders, as a result of social distancing requirements.

The Main Remedies

Freezing Orders

4. An applicant for a freezing order must show:
 - » a substantive cause of action against the respondent;
 - » a good arguable case on that cause of action; and
 - » A “real risk” that the respondent will dissipate their assets if relief is not granted. This means the applicant must have evidence that, absent such relief, the respondent will deal with his assets so as to frustrate the claimant's ability to enforce an eventual judgment.
5. As with any discretionary remedy, the Court must be satisfied that it is just and convenient to grant the order, bearing in mind the prejudice that would be caused to the applicant if refused, and that which would be caused to the respondent if relief were granted.
6. The applicant's duty of full and frank disclosure also requires them to draw the Court's attention to any factors which may undermine their case, or cause the Court to refuse relief.

Search and seizure (“Anton Piller”) orders.

7. The remedy is discretionary; the requirements for relief are stringent. An applicant must show:
 - » an extremely strong prima facie case;
 - » the actual or potential damage to the applicant - if the relief is not granted - will be “very serious”;
 - » “Clear evidence” that the defendants have in their possession incriminating documents or things, and a “real possibility” that the defendants may destroy such materials;
 - » the harm likely to be caused to the respondent and his business affairs by the execution of the search order is not excessive or out of proportion to the legitimate object of the order.

8. How to search and seize in a climate of ‘stay at home’? We think that carrying out such an order would be permissible under the current regime, with certain caveats.
9. The Health Protection (Coronavirus, Restrictions) Regulations 2020 (the “Coronavirus Regulations”) recognise that a “reasonable excuse” for leaving the home includes “travel for the purposes of work ... where it is not reasonably possible for that person to work ... from the place where they are living” (Regulation 6(2)(f)), and, “to fulfil a legal obligation ... or to participate in legal proceedings” (Regulation 6(2)(h)). We therefore doubt that these Regulations would render it unlawful to carry out such an order.
10. Pausing there, it is recognised that those attending the respondent’s property are not “obliged” to carry out the search; nor that such a search constitutes “legal proceedings”. However, the “reasonable excuses” are not exhaustive, and it seems that the nature of this exception, and the fact that the work entailed in carrying out the order is not work which is reasonably possible to be carried out at home, means that the carrying out of a search order is likely to be permitted by one and/or both
11. However, applications for search orders are made without notice, and an applicant has a duty of full and frank disclosure. The duty to draw to the Court’s attention any factors which militate against the grant of an order (including any harm which may be caused to the respondent), is likely to encompass a duty to inform the Court of factors which are relevant from a public health perspective.
12. Amongst those factors are likely to be elements of the search which require gatherings of more than two people. For example, a normal case will usually necessitate a ‘gathering’ of, at least (1) the respondent (who will be asked to permit entry to the named premises); (2) a representative of the applicant (a solicitor), who must serve the search order on the respondent; and (3) the supervising solicitor. Moreover, if the supervising solicitor is a man, it may be necessary for him to be accompanied by a woman (CPR PD25A, para 7.4(5)).
13. Further:
 - » the respondent must be informed of his right to obtain legal advice; and the respondent’s solicitor may wish to attend the premises to be searched in order to do so;
 - » given that documents are often stored electronically, a forensic computer expert is often enlisted to assist with the search, and to take forensic copies (“clones”) of documents stored;
 - » given the Coronavirus Regulations, it is very likely that the respondent’s family will already be at their home with them.
14. The public health / policy reasons behind the Coronavirus legislation, and the government response to the pandemic, means that the following factors are also likely to be relevant to the Court’s discretion:
 - » relevant health history of those called upon to attend (including details of their recent travel history);
 - » the number of persons expected to already be at the property to be searched, and their health and travel history;
 - » whether any of the above are classified as “vulnerable persons” for the purposes of the Coronavirus legislation;
 - » details of the layout of the relevant property, insofar as is relevant to the consideration of the practicability of employing social distancing measures when carrying out the order;
 - » the protective measures which may be employed to mitigate any health risks (for example, the availability of personal protective equipment – for both those carrying out the search, and those already at the searched property).
15. Whilst the applicant may not know all of the above information, it would be prudent to take reasonable steps to find out as much as possible prior to making the application.

16. A further question arises as to the legitimacy of the respondent denying a request for entry on the grounds that they are displaying Covid-19 symptoms, and are therefore isolating. The very nature of such relief means that its purpose would likely be defeated if the respondent were to be informed of the order, but its execution delayed for the relevant isolation period.

Norwich Pharmacal Orders (third-party disclosure orders)

17. These orders are granted where the Court is persuaded that it is necessary for a third-party respondent to provide disclosure to the applicant. Such orders are typically made where the applicant knows that wrongdoing has occurred, is not sure of the identity of the wrongdoer, but can identify a third party with relevant information. Such an order, requiring the third-party to disclose the relevant information, can be made at any stage of proceedings: from pre-commencement to post-judgment.
18. In order to obtain such relief, the applicant must show (see *Golden Eye (International) Ltd et ors v Telefonica* [2012] EWCA Civ 1740 para 7):
 - » a good arguable case that there was a wrong committed against them;
 - » the respondent's involvement in the wrongdoing;
 - » that the applicant intends to seek redress;
 - » that the disclosure sought is necessary for the applicant to pursue this redress; and
 - » that it is necessary and proportionate to grant the relief.

What Documents are Required?

19. The following will generally be needed when making an application for urgent interim relief:
 - » Application Notice;
 - » Draft Order;
 - » Evidence in support (CPR 25.3(2)) – this must be in a sworn affidavit when applying for a freezing injunction or search order (PD25A, paragraph 3.1), unless the application is extremely urgent in which case the Court may be prepared to accept an unsworn document accompanied by an undertaking that it be sworn at the earliest opportunity;
 - » Exhibit to evidence;
 - » Skeleton Argument.
20. In most pre-action applications, the Court will want to see a Claim Form and will require an undertaking that proceedings be issued in short order. Particulars of Claim can be served after the issue of the Claim Form and therefore need not be available at the initial hearing for interim relief.

Remote Bundling

21. Given that the hearing will – during the Coronavirus lockdown - likely proceed remotely, care will be needed when preparing any e-bundle.
22. In the first instance, we anticipate that the Court will require the relevant documents (set out above) to be CE-filed and may, following a review of those documents, proceed in the absence of a separate e-bundle. However, we expect that operating from a well-prepared e-bundle at the hearing itself will result in a smoother hearing.

23. Useful guidance can be found in the e-bundles protocol published by the Interim Applications Court (Court 37) of the Queen's Bench Division: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879158/Ops_Update_-_QB_Interim_Applications_Court.pdf
24. The protocol notes that urgent applications should be CE-filed by professional court users. Where the application cannot be sent via CE-file, an electronic bundle accompanying the application should be compiled in accordance with the protocol. The following key points should be noted, which seem to us to represent general good practice for compiling e-bundles more generally (noting that the guidance issued in respect of Court 37 does not automatically apply to applications in the Chancery Division and Commercial Court):
 - » the bundle should be in a single PDF format, not exceeding 20mb in size;
 - » the bundle should be paginated in ascending order (we suggest that the pagination be computer-generated, rather than hand-written);
 - » the text within the bundle should be selectable (we suggest that it should also be searchable);
 - » bookmarks within the bundle must be labelled (we suggest that each section of the bundle, and each individual document referenced in the index, should be separately bookmarked);
 - » the index page must be hyperlinked to the documents it refers to;
 - » the resolution of the bundle should be between 200 – 300 dpi.
25. A PDF bundle can be compiled using programs such as Adobe Acrobat Pro. In the first instance, all documents to be included in the bundle will need to be converted to PDFs. Acrobat will then allow the individual documents to be combined to produce a single e-bundle. Page numbers may also be added electronically, and the document can (and should) be made word-searchable.
26. In the case of applications for urgent interim relief, the appropriate method of delivery of any e-bundle should be discussed with the relevant listing office and the Judge's clerk. This is further addressed below.
27. For further detail on using Adobe Acrobat Pro to create e-bundles, please see the helpful guide produced by Quadrant's James M. Turner QC: <https://www.quadrantchambers.com/sites/default/files/2020-04/Ebundling%20Guide%20-%20James%20M%20Turner%20QC.pdf>

Arranging the Hearing, and Other Interactions with the Court

28. Each of Court 37 in the Queen's Bench Division, the Commercial Court, and the Interim Applications List (Chancery) is continuing to hear applications for urgent injunctive relief throughout the Covid-19 lockdown.
29. As always with prospective applications for interim relief, applicants should contact the relevant Listings Office – with as much notice as possible – to warn Listings of the imminent application and to check that a Judge is available. That is particularly important during lockdown: bundles for hearings in each division must be emailed directly to the Judge's clerk (copied to the relevant Listings Office), as well as being CE-filed. So, the sooner one knows the identity of the Judge, the sooner one can make arrangements with his or her clerk in respect of the bundle and the hearing.
30. The Listings Officers have advised that none of the divisions is currently accepting hearing bundles in paper form, notwithstanding the guidance on the website for the Interim Applications List (Ch) that paper bundles should be lodged. However, it appears that individual Judges may request a hard copy bundle, in addition to an e-bundle.
31. The way in which the hearing will be conducted will depend upon the individual Judge. Hearings for urgent injunctive relief are currently being heard by telephone or via Skype for Business. We are aware that at least one hearing for a freezing order in the Commercial Court has been conducted through Zoom.

32. The Chancery Listings Office says that in extreme circumstances, they would consider a hearing in person, but they are discouraged from taking this course.
33. The process for getting orders sealed has not changed: draft agreed minutes of the order should be sent to the Judge's clerk and CE-filed.
34. Details of the relevant email addresses and telephone numbers for contacting the listings officers, as well as the current addresses, telephone numbers and opening hours that must be included in the "Communications with the Court" section of the standard-form freezing orders, search orders and any other orders providing for injunctive relief, are set out in the table below.

	QBD Court 37	Commercial Court (QBD)	Business List (Ch)
Who to contact to arrange a hearing?	Email only (telephone contact is not available): qbjudgeslistingoffice@justice.gov.uk Senior Listing Officer: James Tipp	Email: comct.listing@Justice.gov.uk Telephone: 020 7974 6826 Senior Listing Officer: Michael Tame Listing Officer: Daniel Hull	Email: ChanceryJudgesListing@Justice.gov.uk Telephone: 020 7947 6690 Senior Listing Officer: Joe Quinn Listing Officer: Charlotte Brice
Details for "Communications with the Court" part of the order	Royal Courts of Justice The Strand WC2A 2LL Tel: 020 7947 7772 The offices are open between 10am and 4.30pm Monday to Friday.	Commercial Court Listing Office, 7 Rolls Building, Fetter lane, London, EC4A 1NL Tel: 020 7947 6826 The offices are open between 10am and 4.30 pm Monday to Friday.	Chancery Judge's Listing Office, 7 Rolls Building, Fetter lane, London, EC4A 1NL Tel: 020 7947 6690 The offices are open between 10 am and 4.30 pm Monday to Friday.

35. Further information may be found on the websites for the daily cause lists of the Queen's Bench Division (<https://www.justice.gov.uk/courts/court-lists/list-queens-bench>) and the Business and Property Courts (Ch) (<https://www.justice.gov.uk/courts/court-lists/list-cause-rolls2/interim-applications-list-chd>).
36. Counsel's clerks are used to liaising with the Courts; they remain the first and best port of call when it comes to arranging a hearing. The contact details for Quadrant Chambers' clerks are set out below.

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Nicola Allsop



"A decisive and thorough advocate who often has the ear of the court." (Legal 500, 2019)

Nicola specialises in civil fraud, insolvency, company law (particularly shareholder disputes) and banking litigation. Nicola's practice has a strong international element; she was called to the Bar of the BVI in 2012, in the Cayman Islands in 2016 (limited admission) and many of her cases raise cross-border and jurisdictional issues. Nicola has a wealth of trial experience both as sole counsel and as part of a team. Notable cases include the Weaving litigation which occupied her throughout most of 2016 and concerned a claim against the Fund's Cayman auditors arising out of a large-scale fraud perpetrated by the Fund's founder Magnus Peterson; a 10-week fraud trial *Sita v Serruys*; a series of matters arising out of the collapse of the Arch Cru Fund; and a long-running shareholder dispute involving the Barclay Brothers and the affairs of Coroin Limited, the owner of Claridges, the Berkeley and the Connaught.

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Emily Saunderson



"An accomplished and confident advocate, her ability to effectively communicate the finer points of the case to the court is invaluable." (Legal 500, 2020)

Emily is a commercial litigator with a particular specialism in commercial fraud, and banking and finance. She has broad experience in obtaining urgent injunctive relief including freezing orders, search orders, asset preservation orders and delivery up orders. Emily's banking and finance practice has an emphasis on financial derivatives instruments, and standard form contracts including the ISDA Master Agreement.

Emily is ranked in the latest edition of Chambers & Partners in commercial dispute resolution and she is recommended as a leading junior in banking and finance and financial services by the Legal 500. Latest comments include: "Has a razor-sharp mind and a prodigious work ethic. Her ability to review, analyse and interrogate vast quantities of information is remarkable."

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Claudia Wilmot-Smith



Claudia has a broad and international commercial practice, covering banking and finance, international trade, professional negligence, cross-border insolvency, shipping, and insurance and reinsurance.

She has appeared as sole and junior counsel in the Court of Appeal, High Court (primarily in the Commercial Court and Chancery Division), and before arbitral tribunals under the rules of a range of international organization rules. Many of her cases raise conflict of laws issues, and she is experienced in obtaining, and resisting applications for, anti-suit and anti-enforcement injunctions.

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Liisa Lahti



"A rising star who is extremely well liked and gets heavily involved in cases."
(Chambers UK, 2020)

Liisa Lahti has a broad commercial practice covering banking & finance, civil fraud, international trade, shipping and insurance.

Before coming to the Bar Liisa qualified as a solicitor at Freshfields Bruckhaus Deringer. Liisa has also been seconded in-house at an international group P&I Club, the General Counsel's Division of the (then) Financial Services Authority and a leading international law firm.

Liisa is ranked as an 'Leading Junior' in Banking & Finance and Commercial Dispute Resolution in Chambers UK 2020 and as a 'Leading Junior' in Banking & Finance in Legal 500 2020.

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Simon Oakes



"An effective and valuable junior counsel, who is a very competent young barrister with the ability to think quickly" (Legal 500, 2020)

Simon practises in commercial law, with a particular focus on banking & financial services, and complex commercial fraud cases.

Simon has a wealth of experience in some of the most significant banking and financial services cases of recent years, from major interest rate hedging product litigation to regulatory investigations against individuals. He has a deep knowledge of the allegations of LIBOR misconduct against several major banks, a great deal of experience in misselling cases, and a wealth of experience of developing legal and tactical arguments in major commercial litigation.

Simon is recommended as a leading junior in the Legal 500.

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