

# Imaging orders in UK employment disputes

PROTECTING HIGH-VALUE CONFIDENTIAL  
INFORMATION AND INTELLECTUAL PROPERTY

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Employers whose competitive advantage depends on proprietary technology, engineering know-how, trade secrets or sensitive commercial data are among the most exposed when a key employee departs for a competitor. The risk is not limited to senior management: any employee with access to that material may hold information whose misappropriation could cause serious harm.

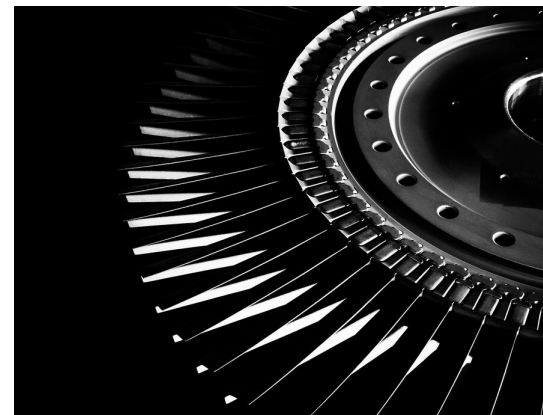
With business-critical data now routinely held across laptops, phones, email accounts, messaging apps and cloud storage, the potential repositories for confidential information on departure are vast. Where there are concerns about misappropriation, employers are increasingly asking the courts for imaging orders to preserve critical evidence that might otherwise be lost. But, as the recent case of *Vertical Aerospace Group Ltd v Ngoma* shows, these orders must be deployed with precision.

*Vertical Aerospace* concerned an imaging order obtained against the claimant's Head of Systems Engineering, who had resigned and accepted a role with a direct competitor. The employer – a business described by the court as “*properly to be regarded as ‘cutting edge’*” in the aerospace industry – discovered that confidential technical documents appeared to have been printed, uploaded to a personal cloud account, and copied by the defendant in the days and weeks before her resignation.

Imaging is solely a preservation measure, and questions of access and disclosure must be addressed separately, but its tactical value should not be underestimated: by capturing a snapshot of the employee's devices and accounts at a fixed point in time, an imaging order secures not just the documents themselves, but metadata showing when files were accessed, copied, uploaded or shared. That evidence may later support claims for injunctive relief, delivery up, deletion or damages – and its very existence may deter further misuse.

*Vertical Aerospace* also underscores that even a successful imaging order has its limits. The employer obtained the order, yet was refused permission to inspect the imaged material – the court holding that disclosure should proceed in the ordinary way through the defendant's solicitors.

In this article, we examine the legal test for obtaining an imaging order, the duty of full and frank disclosure on without-notice applications, why the court drew the line at inspection, and the practical steps employers should take both before and after a key departure to protect their position.



# Why employers with high-value IP are most at risk

For businesses in sectors such as aerospace, defence, technology, pharmaceuticals, financial services and advanced manufacturing, the potential damage from the loss and misuse of even a single document can be enormous. The judge who granted the imaging order in *Vertical Aerospace* was alive to this, observing that the claimant was competing in a field where participants are racing to bring a new type of aircraft to market first, and that once the contents of the propulsion document were known by a competitor, they could not be “unknown”. That captures the urgency of these sorts of orders: without prompt action, the opportunity to preserve the evidence may be lost for good.



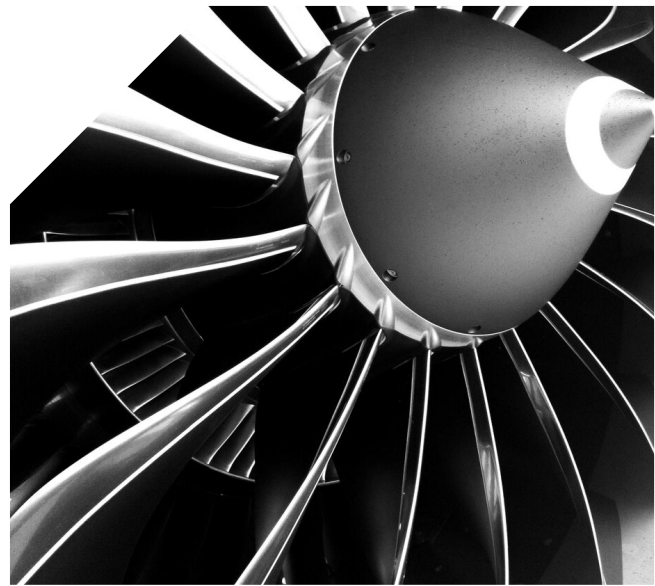
# The test for an imaging order: what the court requires

Imaging orders are an exceptional form of relief – and a highly intrusive one. There is currently no way, when imaging someone’s devices and accounts, to automatically separate potentially relevant business information from personal photographs, banking details, health-related correspondence or privileged communications, for example.

Applications for imaging orders are also typically made without notice, to avoid tipping off the respondent in a way that would defeat the preservative purpose of the order. The threshold for obtaining one is therefore particularly high. Applicants must demonstrate a strong prima facie case on the merits, that the actual or potential damage to the applicant is very serious, that there is clear evidence the respondent holds incriminating material and a real possibility it will be destroyed if the application is made on notice, and that the order would not be disproportionate. Suspicion alone will not be enough. What is needed is evidence of conduct that, taken as a whole, indicates a real risk of destruction or concealment.

The judgment in *Vertical Aerospace* is a helpful reminder that the test will not necessarily be met on any single factor alone. It will often be satisfied only by the combined weight of several considerations. In this case, those included: evidence that multiple confidential documents had been taken or copied around the time of the defendant’s resignation, ostensibly without any work-related justification; the nature and sensitivity of those documents; the imminent prospect of the defendant joining a direct rival; and her failure to inform the claimant about her possession of the most significant documents when asked, despite having referred to others.

Pending trial, at which the claimant’s allegations and the defendant’s explanations would be tested, the court concluded that an imaging order preserving evidence was appropriate. It also included a requirement, adopted from the model order, for the defendant to swear and serve an affidavit setting out information such as the location of listed items, details of relevant devices and online accounts, and any transfers of listed items to or from third parties – although at the return date, the court reduced the scope of that affidavit to ensure the terms were not unduly onerous.



# Full and frank disclosure

Because applications for an imaging order are typically made without notice, the applicant has a duty to give full and frank disclosure when making the application – including any points that may tell against urgency or proportionality. A failure to do so may lead to discharge of the order or adverse costs consequences. That was one of the grounds on which the defendant in *Vertical Aerospace* sought to discharge the imaging order made against her.

In a useful reminder on tactics when challenging an imaging order on this basis (or, indeed, any order made without notice), the court referred to a number of key authorities on the duty. These included the decision in *Mex Group Worldwide Ltd v Ford*, in which it was observed that “a defendant’s case that the claimant failed to make full and frank disclosure at the *ex parte* hearing will stand or fall on no more than a handful of alleged failures” and “Quality not quantity should be the watchword”.

The court in *Vertical Aerospace* found that there had been certain failures to give full and frank disclosure, but these fell away once the imaging order was varied. A total discharge was therefore not necessary.



# Fruits of the imaging order

The primary purpose of an imaging order is preservation, not inspection; a successful applicant does not have a free hand to review the captured material.

The courts have made clear that the inspection of imaged materials must be considered separately, with a starting presumption that disclosure should follow the usual litigation processes – in part because the imaging process cannot currently discriminate between relevant and irrelevant information, as noted above.

Departure from that presumption may be warranted, for example, where a defendant cannot be trusted to carry out disclosure properly, or where relevant documents are liable to be honestly missed by a defendant's solicitor. The court in *Vertical Aerospace*, however, was not satisfied that there were sufficient reasons to rebut the presumption of disclosure being given in due course in the ordinary way. The claimant's application for an order permitting inspection of materials on the images was therefore refused.



# Takeaways for employers

Despite the increasing frequency with which we see employers in commercial employment disputes seeking imaging orders, that step will not always be appropriate. Before seeking an imaging order, employers should secure and analyse their own systems, identify precisely what information is at risk, preserve evidence of any suspicious activity, and consider whether a less intrusive step would suffice.

Even if an application for an imaging order is considered necessary and appropriate, the right strategy may involve a combination of remedies. Seeking undertakings, imaging, delivery up, deletion, affidavit evidence or steps directed at a new employer should all be considered as part of a broader strategy to protect an employer's trade secrets, confidential information and IP.

Acting without delay and paying careful attention to the drafting of the order itself – including the definition of listed items and the scope of any affidavit – is also essential. As *Vertical Aerospace* demonstrates, an order that is too broadly drawn is vulnerable to being narrowed or challenged at the return date.

The strongest protection, however, is usually built before the crisis – whether to head off efforts by outgoing employees to take confidential information or put employers in the best possible position to make an application for an imaging order where it has been impossible to prevent them from doing so. Clear confidentiality obligations, well-drafted restrictive covenants, robust leaver processes, device and account controls, and prompt internal escalation can make the difference between a focused, unassailable application and one that is vulnerable to challenge.

For advice on this area, or support in taking both pre-emptive and reactive steps to protect your business, please get in touch.

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