**Search orders - procedure**

This element explains procedural aspects of obtaining and executing a search order.

**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).

**Without notice procedure**

Now that the nature of the relief has been addressed, this element will address procedural aspects of obtaining and executing a search order.

An application may be made without notice where the overriding objective is best furthered by doing so (23A PD 3(2)).

A search order is invariably made ‘without notice’: a ‘with notice’ application would defeat its object (which is to prevent the respondent from destroying the relevant evidence). The ‘without notice’ hearing will, however, be followed by a ‘with notice’ second hearing which takes place on the return date (if the search order is granted).

You should familiarise yourself with the 'safeguards' that apply in the case of without notice applications, set out in the elements 'interim applications’ and ‘interim injunctions’ as these apply equally to search orders.

The next page sets out a short flowchart demonstrating the ‘usual’ procedure for applying for a search order. The details are then explained in the following pages.

**Summary of procedure**

**Preparation of documentation**

- [Draft / issued] Claim Form

- N244 Application Notice

- Affidavit in support

- Draft Order

- Court fee

- Skeleton argument

**‘Without notice’ hearing (applicant only)**

**Order executed**

The order is served with:

- Claim Form

- Details of ‘return date’ for second hearing (with notice hearing)

- Copy of any affidavit in support of application

- Note of without notice hearing

- Skeleton argument from without notice hearing

**Supervising solicitor’s report re execution**

**‘With notice’ hearing (applicant and respondent)**

Order…

- maintained?

- varied?

- discharged?

Damages?

**Before the hearing – applicant’s solicitors**

As well as investigating and amassing the evidence in support of the application, the applicant's solicitor and applicant must prepare to ensure the applicant makes full and frank disclosure at the without notice hearing.

The applicant's solicitor must also arrange for a supervising solicitor to be available for the search (if the application is successful). The supervising solicitor must be independent of the parties. They must be experienced practitioners who are familiar with the procedural requirements.

The court will expect the proposed supervising solicitor to have experience in the operation of search orders (CPR 25.16).

Also, the applicant's solicitor must ensure that the premises and listed items (as contained in the draft order) are sufficient and appropriate. Finally, the applicant's solicitors must also consider people and resources (eg would police presence be desirable? Gender of the team? Briefing the team? Video of the search? Storage of items? Bulk copying?).

**Before the hearing – documentation**

As well as the usual documentation needed for an interim application (application notice, evidence, draft order), the application should note the following:

- The application must be supported by affidavit evidence (ie a sworn statement of evidence) (25.17(1)).

- The affidavit in support of the application must include the following information:

- the name and experience of the supervising solicitor (see later in this presentation);

- the name and address of the firm at which the supervising solicitor practises;

- the address of the premises to be searched and whether it is a private or business address.

- The affidavit evidence must “fully” disclose the reason why the order is sought, including evidence establishing “the probability that relevant material would disappear if the order were not made” (CPR 25.17(2)).

- The draft order should be in the form of the model search and imaging order (CPR 25.18(1)) subject to any modifications to account for the circumstances of any particular case. Any such modifications should be brought to the judge’s attention at the without notice hearing.

**At the without notice hearing**

The applicant will need to be careful to comply with the duty to give full and frank disclosure.

The applicant's solicitors will also need to take a careful note of the hearing – as explained later, this will need to be served on the respondent with the search order.

The applicant must give an undertaking to pay damages to the respondent, typically in the following form (Schedule D, paras. 1 and 2 of model order):

*“(1) If the court later finds that this order or carrying it out has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make.*

*(2) If the court later finds that the carrying out of this order has been in breach of the terms of this order or otherwise in a manner inconsistent with the Applicant’s Solicitors’ duties as officers of the court, the Applicant will comply with any order for damages the court may make”.*

This undertaking will be recorded in the order.

**Service of the search order**

The search order is served at the time it is executed, not in advance. In accordance with the supervising solicitor's undertaking (Schedule F(1)), the supervising solicitor will serve on the respondent:

- The search order.

- The application documents, including the affidavit evidence.

- A copy of the skeleton argument produced to the court by the applicant’s counsel/solicitors.

- A note of any allegation of fact made orally to the court where such allegation is not contained in the affidavits or draft affidavits read by the judge.

- A transcript (if available), failing which a note of the without notice hearing.

- The claim form if issued (otherwise the draft produced to the court).

- An application for hearing on the return date (the ‘with notice’ hearing)

**Execution of the search order**

All parties must be scrupulous to comply with the terms of the search order and the undertakings given to the court (including the supervising solicitor and applicant's solicitor).

**The applicant's solicitor**

Of particular note for the applicant's solicitor is to only take listed items and to undertake to keep those in safe custody.

**The supervising solicitor**

The supervising solicitor, as referred to in Schedule F(5) of the model search order, will be obliged to provide a written report on the carrying out of the order.

**The respondent’s solicitor**

When the search team arrives on the premises this is the first the respondent (or its solicitors) know about the application for a search order. A respondent will generally call its solicitor as soon as a search team arrives. The respondent’s solicitor might:

- request a delay so they can attend the search and advise their client;

- apply to discharge the search order prior to the search (because, for example, the criteria for the search are not fulfilled); or

- advise their client to allow the search to proceed.

If the search goes ahead, the respondent’s solicitor must also:

- advise their client that they risk being in contempt of court if they do not co-operate;

- advise their client that it is no defence that the order was wrongly made; and

- examine the documents to be seized (if present) - some may be privileged.

Clearly there are severe practical difficulties in doing all of this in the ‘without notice’ circumstances of a search order.

**The ‘with notice’ hearing (variation, discharge, or maintaining of the search order)**

Once an applicant has effected service of the search order and/or undertaken the search itself, a respondent might apply to vary or discharge the order. A respondent might also apply for damages. This might be done at various points, but most commonly at the 'with notice' hearing fixed at the time the search order was originally granted.

**Prior to any with notice hearing**

Within days of completion of the search (typically within 48 hours- see Schedule F(5)) the supervising solicitor must make and provide to the applicant's solicitors, the respondent or their solicitors and to the judge who made the order a written report on the carrying out of the order.

**At the with notice hearing – the respondent**

The respondent might make an application for variation or discharge at the with notice hearing itself.

Grounds for **discharge** include:

- The order should not have been made (there was no basis for granting it);

- The applicant is guilty of non-disclosure. The court may discharge the search order even if, after a full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure;

- Procedural irregularity (in the application or in the execution of the order itself); see *The Gadget Shop Ltd v Bug.Com Limited* [2001] F.S.R. 26; and/or

- Disclosure of the material covered by the search order would amount to breach of the privilege against self-incrimination.

By the time of the with notice hearing, the search order will almost always have been executed, so it may seem pointless to seek that the order be discharged. However, such an application is commonly a pre-cursor to an application for damages or is made to try to prevent the applicant seeking any further documents / search order on a similar basis.

Grounds for **variation** include:

- The order is drawn too widely; or

- There are insufficient safeguards, for example no female being present when one is required.

If a search order has actually been executed, it could be argued that its discharge or variation before trial would be an unnecessary waste of the court’s time and the parties’ costs, and/or that it is impossible to resolve questions of material non-disclosure other than at trial, save in exceptional cases. For these reasons, the court might consider that it is not appropriate to consider discharge of the search order on the grounds of material non-disclosure in an interlocutory hearing, save in exceptional circumstances – the court might defer the matter to a later hearing / trial: see *Dormeuil Freres SA v Nicolian International (Textiles) Limited* [1988] 1 WLR 1362. Nonetheless, depending upon the circumstances of the individual case, this might still be argued.

In addition to the application for variation or discharge, the respondent might also apply for **damages**. Such damages might arise as a consequence of the search order having been effected (ie any consequential losses) or as a result of some form of procedural irregularity arising from the way in which the order was effected by the applicant. The ‘undertaking in damages’ provided at the time of the with notice hearing provides a basis for an award of damages.

**At the with notice hearing – the applicant**

In reply to any of the respondent’s applications, the applicant is itself likely to apply to the court for the search order to be maintained. An applicant might also apply for the search order to be varied if (for example) the search gave rise to additional documents which had not been included within the scope of the order as originally granted.

**Summary**

- A search order is almost always sought using the without notice procedure.

- There will be a without notice hearing, and then (usually after execution) a with notice hearing.

- The applicant will be required to give an undertaking to pay damages to the respondent if the court later finds that the order / carrying it out has caused the respondent loss.

- The execution of the order is supervised by a supervising solicitor.

- Only items listed in the order can be seized.

- At the with notice hearing, the respondent may ask for the order to be varied or discharged and might also seek damages.