**Workshop 5**

**Prepare**

This document provides two summaries of instances of search orders in practice. The summaries themselves are not examinable (you will not be assessed on what happened in these specific cases). The cases do illustrate matters set out elsewhere which are examinable, such as in Adapt material relating to search orders.

The first summary illustrates the purpose and nature of a search order.

The second summary illustrates the discharge of a search order.

**Purpose and nature of a search order**

**Ferrari v McLaren**

A good example of use a search order is the one undertaken in 2007 by Ferrari against Mr Mike Coughlan (the then chief designer at McLaren’s Formula 1 (‘F1’) racing team) and his wife.

In this case, a director at Ferrari in Italy was contacted by an employee of a photocopying shop near Woking (England).  The copy shop employee was suspicious after a woman visited the shop asking for a large number of Ferrari designs and documents (totalling almost 800 pages) to be scanned on to a CD for her husband. They included technical drawings. The employee – an F1 fan - asked whether the woman’s husband worked for Ferrari. The woman replied: “He used to”. In the circumstances – and especially given the nature and volume of material being copied – the copy shop employee had concerns. He therefore undertook some research into the woman’s last name, ‘Coughlan’. It transpired that this surname matched that of the chief designer at one of Ferrari’s principal F1 rivals, McLaren. The copy shop employee accordingly contacted Ferrari, stating that he believed that a McLaren employee, Mike Coughlan, was in possession of Ferrari designs and other confidential information. Without this tip-off, Ferrari would have had no idea that one of its rivals had the information.

On 28 June 2007, Ferrari contacted its English solicitors for advice.  From 28 June to 1 July those solicitors obtained witness evidence (eg from the copy shop employee and the technical director at Ferrari). In accordance with the CPR, witness evidence in search order applications must take the form of affidavits. Such evidence must demonstrate facts which substantiate the criteria for obtaining a search order ie the legal principles which the court will consider when deciding whether or not to grant a search order.

Whilst seeking and preparing this witness evidence, the solicitors also instructed counsel, computer specialists and sourced a ‘supervising solicitor’ (ie an independent solicitor who would oversee the execution of any search order being effected at Mr Coughlan’s home). This was quite an exceptional case, so Ferrari also instructed ‘independent’ solicitors to undertake the search itself, in conjunction with the supervising solicitor: Ferrari’s own solicitors, who in many cases would be expected to be part of the search party, did not want to expose themselves to any confidential information about McLaren which might have an impact upon any subsequent legal proceedings between the two parties.

A search order cannot exist ‘in a vacuum’ - it has to be applied for in the context of actual or proposed court proceedings. If proceedings have not yet been issued when a search order is applied for, the court will require – as a precondition for granting any search order – that proceedings are issued as soon as practicable. Ferrari’s solicitors therefore had to draft a claim form and get ready to issue proceedings (in this case, for breach of confidence) in the normal way. However, given the secrecy and urgency of the search order application (ie details of the underlying claim and/or the accompanying search order could not be notified to the Coughlans until the search order was carried out), the claim form was not actually served on the respondent until the search was actually effected.

On 2 July 2007, Ferrari’s solicitors made a ‘without notice’ application to the High Court in London, requesting an order allowing the search of the Coughlan’s home to locate (and seize) any confidential information owned by Ferrari.  As mentioned above, the application was made ‘without notice’. This is standard with search order applications, since notification of the application might have resulted in Mr Coughlan hiding or destroying the relevant information.

The initial ‘without notice’ hearing was held in private. Otherwise, the whole purpose of the search might be frustrated. Given (i) the onerous nature of search orders and (ii) the fact that the respondents were not present at (not even notified about) the hearing, Ferrari had to give various undertakings to the court. These included an undertaking that Ferrari would pay damages to the respondents if it turned out that the search order should not have been granted. Ferrari also had to give an undertaking to keep the matter confidential and not to use any information found as a result of the search for any purpose other than those proceedings.

In addition to Ferrari giving undertakings, the supervising solicitor equally had to give certain undertakings to the court. He accordingly undertook to explain the order to the defendants in everyday language and to inform them of their rights to legal advice. The supervising solicitor also undertook to provide the court with a report, detailing what happened at the search, within 48 hours of the search being effected.

As mentioned above, this case was quite exceptional and Ferrari accordingly instructed independent solicitors to undertake the search itself, under the watchful eye of the supervising solicitor. These independent solicitors, who were named in the search order, were also required to provide undertakings to the court (eg to retain any items recovered during the search in safekeeping).

In addition to the supervising solicitor and the independent search team, there were also computer experts named in the search order. It was known that Ferrari’s documents had been copied on to CDs and there was accordingly a risk that they had also been transferred or saved on to PCs or laptops.

The computer experts gave undertakings to return any computer equipment to the defendants within two days of the search and to retain any ‘images’ taken of the computers until the court directed otherwise.

Ferrari’s ‘without notice’ application was successful.

The next day, on 3 July 2007, the search took place at the Coughlans’ home.  A claim form was also served on the defendants, Mr and Mrs Coughlan, at that same time.  As a result of the search, Ferrari seized two CDs containing Ferrari’s documentation.

From 4 July until 9 July both parties gathered evidence and prepared further affidavits in preparation for the subsequent ‘with notice’ hearing.  On 10 July, the week after the search order was effected, a ‘with notice’ hearing took place in court 59 of the Royal Courts of Justice in London. Such a ‘with notice’ hearing essentially constitutes a ‘full’ hearing of the application for the search order. In contrast to the ‘without notice’ hearing, however, the court now has the benefit of (i) the respondents being in attendance and presenting evidence (ii) the supervising solicitor’s report and (iii) the results of the search order itself. Having heard both sides, it was held that the granting of the search had been justified in this case. The court accordingly ordered that the material seized – and which had been held by the independent solicitors pending the outcome of the ‘with notice’ hearing – should be transferred to Ferrari.

As you can see from this case the whole process, of receiving the instructions from the client, collating evidence, drafting affidavits and applying to court to actually carry out the search, took only a few days.

During the course of the proceedings, it transpired that one of Ferrari’s employees had contacted Mr Coughlan as a ‘whistle blower’ - the Ferrari employee considered that certain aspects of Ferrari’s car design breached the governing rules of the FIA (the motorsport governing body). The Ferrari whistle blower had provided a dossier of documents to Mr Coughlan in April 2007, during a meeting in Barcelona. Having organised for the dossier to be copied onto two CDs, the originals had been shredded (using a home shredding machine) and burnt in the Coughlan’s back garden. Ferrari’s claim against Mr Coughlan was subsequently settled out of court.

**Please note that this case settled and as a result there is no case citation for it – the above summary is all that students require.**

**The second summary starts on the next page**

**Discharge of a search order**

**The Gadget Shop Ltd v Bug.Com Limited**

**Please note that the CPR citations in the summary below relate to the pre April 2025 rules. The substance of the relevant provisions remains the same post April 2025.**

Search orders are particularly onerous. On this basis, the court will not grant such an order lightly. The legal requirements for obtaining a search order are, therefore, stringent. An applicant must, in addition, provide affidavit evidence in support of the application (as opposed to a ‘mere’ witness statement, as required for most other interim applications). The standard draft search order also includes a number of safeguards which protect the respondent. In light of this, the court will look very unfavourably on an applicant which abuses a search order. In this judgment, the respondent applied for the discharge of a search order for four principal reasons:

* the applicant had failed to make full and frank disclosure to the court;
* there were breaches of Part 25 of the CPR and its associated Practice Direction;
* the form of order was (in material respects) not in the standard form and the departures from the standard form were not drawn to the judge’s attention at the without notice hearing; and
* there were defects in the manner in which the search order was executed.

With regards to the first point, it was held that there had been “inexcusable non-disclosure” in this case. For example, the case concerned alleged misuse of confidential information by the respondents, and the applicant had failed to disclose that (at least arguably) some of the allegedly confidential information was publicly available.

With regards to the second point, the judge noted that 25A PD 7.4(5) indicated that “where the Supervising Solicitor is a man and the respondent is likely to be an unaccompanied woman, at least one other person named in the order must be a woman and must accompany the Supervising Solicitor”. The judge accepted that the circumstances of the case were not such that the judge would inevitably have required a woman to be a member of the search teams. There was no certainty that the respondent would be an unaccompanied woman. However, due to the possibility of this, the issue should have been brought to the judge’s attention; “the circumstances were not so clear that [applicant]'s lawyers could safely decide the matter themselves. If the point had been drawn to the judge's attention ... [it was] quite possible that he would have required a woman to be part of the search teams.”

In addition, 25A PD 7.3(1) states:

*“The affidavit [in support of the search order] must state the name, firm and its address, and experience of the Supervising Solicitor, also the address of the premises and whether it is a private or business address …”*

In breach of these requirements, at the time of the ‘without notice’ hearing the CVs of the proposed supervising solicitors in this case were not produced to the court and the affidavits said nothing about their experience. It later became clear that the supervising solicitors had no relevant experience of search orders. It was not suggested by the court that either of the supervising solicitors was other than an experienced solicitor. What counted, however, was their experience of search orders. It was held that the applicant's solicitors ought to have ascertained that the supervising solicitors had material (and recent) experience of the execution of search orders, even if conducted under the supervision of another supervising solicitor (otherwise no-one could ever get their first appointment as a supervising solicitor!). Had the judge been told about the experience of the proposed supervising solicitors in this case, it was highly likely he would have declined to appoint them - the judge would have doubtless required steps to be taken to obtain the services of solicitors with better and more recent experience. It was ultimately for the judge to be satisfied as to whether the proposed supervisors were sufficiently qualified, after having been informed of the relevant facts.

With regard to the third point, it was held that “there were certain material departures from the standard form of order about which the judge was given no opportunity to form or express a view”. In particular, the applicant: (a) failed to provide for a partner from the applicant’s solicitors to be in the search teams (the standard order at the time required a partner to be included) and (b) did not include an undertaking not to inform third parties of the order except for the purposes of the proceedings. It transpired that the applicant’s solicitor had used an old version of the standard order. In relation to the requirement to include a partner, the court held that whilst “...this requirement in the standard form of order is not set in stone, and in many cases a judge may well be satisfied that a supervising solicitor need not be accompanied by a partner in the claimant's solicitors ... it will be sufficient if a particular, and adequately experienced, assistant solicitor is in attendance. But [this] is a matter to which the judge's attention needs to be drawn so that he can be satisfied that a departure from the standard requirement is justified.”

With regard to the execution of the search order, the applicant removed documents which were not even listed in the search order. The judge agreed that “[t]he search and removal of items from the [respondent’s] store does not appear to have been carried out with the care it should have been.”

Individually, many of the above irregularities might not have been sufficient to warrant a discharge of the search order. When considered collectively, however, the court decided that a discharge would be appropriate in this particular case.