

What to do if you are served with a Freezing Injunction, Search Order or other “Without Notice” Injunction



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A freezing injunction is a court order restraining you from removing your assets in England and Wales out of the reach of the court or dissipating them. A search order is a court order requiring you to admit another party’s solicitors to your premises and allow them to search for and copy your documents or other evidence so that it can be used in a law suit against you. Such orders are sought in secret and without your knowledge and they are served “without notice.” There are other types of “without notice” orders such as orders to deliver up documents that are known as “delivery up orders”. As a fundamental principle of natural justice is that both sides should be heard, these orders stand at the very extremities of the court’s jurisdiction. They are made only where the court believes that you will try to frustrate its process by putting out of its reach assets that could satisfy a judgment or by hiding or destroying evidence.

How will you know that a “Without Notice” Order has been made against you?

Your first inkling that a without notice has been made against you will be when it is served on you. If a search order has been made, a gentleman (or indeed a lady) in a business suit will introduce him or herself to you as “the supervising solicitor” and will hand a large bundle of documents to you. These will consist of the order which the supervising solicitor will offer to explain to you in everyday language and the evidence that persuaded the court to make the order. The supervising solicitor will tell you that the court has ordered you to admit him and a team of solicitors and experts representing the party that applied for the order (“**the applicant**”) to your premises and allow them to search for, and copy, the documents and other evidence specified in the order. He or she will warn you that if you fail to comply you will be in contempt of court for which you may be fined or even sent to prison. He or she will allow you some time to contact your solicitors or other legal advisors but will warn you not to talk to anyone else until after a date referred to in the order known as “the return day”. The supervising solicitor will emphasize that he or she does not represent the applicant and has been appointed by the court to see fair play. You will also receive a large bundle of documents if you are served with a freezing injunction, delivery up order

or other type of “without notice” order but you will not be required to admit anyone to your premises.

What you should do next

Even if you intend to settle your dispute with the applicant at the earliest opportunity you need to take legal advice immediately. If you have a solicitor you must call him or her immediately. If you do not have a solicitor you can try one of the law firms on the Intellectual Property Lawyers Association website.¹ You should also be aware that many barristers (including some intellectual property specialists²) have the right to accept instructions directly from members of the public under the Public Access Rules and several have the right to conduct litigation. So, too, do many patent or trade mark attorneys. If you do not have a name to contact, you may call us on

020 7404 5252.

Our members live in all parts of the UK. Several of us specialize in IP. Some of us accept instructions under the Public Access Rules. A few of us have the right to conduct litigation. If we cannot help you ourselves we can put you in touch with a specialist solicitor or patent or trade mark attorney litigator near you who can.

Can you challenge the Order?

Yes. You have the right to apply to the court to discharge or vary a without notice order from the moment it is served on you but you have to take care not to do so in a way that puts you in contempt of court. You have three options. You can ask for a hearing immediately, on the return day or after judgment if you win your case. The factors to consider are that you must present evidence and argument if you are to persuade the court to discharge or vary its order. That will take time and cost money. In most circumstances, the longer you take in gathering that evidence and developing your arguments, the more likely you are to succeed. Thus, it is unusual for an order to be discharged or varied before the return day and not very common for it to be discharged even on the return day though it may well be varied at that stage. In order to get the injunction the applicant will have promised the court that it will compensate you for any loss or damage you may sustain by reason of the order if the court decides that the order should never have been made. If you can live with the order until trial your best bet may be to wait until judgment when can claim considerable damages from the other side if you win.

Complying with the Order

The order will require you to take certain steps and provide certain information to the applicant’s

¹ <http://www.ipla.org.uk/>

²² Most IP specialists are members of the Intellectual Property Bar Association (<http://www.ipba.co.uk/>)

solicitors. If you take legal advice your legal advisor can advise and assist you in complying with the order. If you do not take legal advice you must read the terms of the order very carefully and comply with them to the letter. Failure to do so could result in an application for your committal to prison for contempt which, at the very least, will be expensive to resist. If you are not legally represented take a full note of everything that is said to you and done as well as everything that you say or do. Make sure that you have copies and receipts for everything that is removed from your possession. Your lawyers will need to see those notes and records and you may also need to show them to the court.

Reacting to the Order

In the days following the service of the order you are likely to experience a welter of emotions including shock and indignation. Try to put those emotions to one side as quickly as possible. You need to make some important decisions quickly and need to think clearly and objectively. If you have no real prospect of successfully defending the claim this is probably the least disadvantageous time to settle. Your costs and the other side's will only increase the longer the litigation continues. If you think you can resist, seek an objective opinion on your prospects of success from your lawyers as soon as possible. If you are advised that you have a reasonable chance you should identify the witnesses you can call and the documents you can produce. You should also consider how the litigation is to be funded. If you do not have before-the-event insurance your funding options include after-the-event insurance or other third party finance. If the action has been brought anywhere but the Intellectual Property Enterprise Court ("IPEC"), consider whether the litigation can be transferred to that court. Damages are limited to £500,000, trials have to be completed within 2 days, but recoverable costs are capped at £50,000.³

Preparing for the Return Date

The court fixes a hearing on the return day at the time it makes the order to consider any further orders that it must make or directions that it must give following the execution of the order. The court allows all parties to be heard and considers any additional evidence that any may wish to file. In the case of the search order the court considers the report of the Supervising Solicitor. At the earliest opportunity you or your lawyer should approach the other side to explore what, if anything, can be agreed. If you and your opponent can settle the whole dispute, the hearing on the return day will be treated as the trial of the action. Any agreement that you may reach will be implemented by an order that the lawyers will draw up. If you cannot settle the whole dispute you may still be able to agree case management directions that may include the

variation of the injunction. Any issue upon which you cannot agree will have to be decided by the court. If you want to support your argument with evidence you should prepare and file a witness statement as soon as possible.

There are only a handful of grounds on which a court will discharge a "without notice" order but one that nearly always works is failure by the applicant to make full and frank disclosure. In order to get a "without notice" injunction, the applicant has to anticipate and lay before the court all the evidence and any arguments upon which you might be expected to rely if you were present at the hearing of the application. If the applicant fails to do so the court has to discharge the injunction in the interests of justice unless there is a compelling reason not to do so. One of the reasons for serving all the evidence that was presented to the court on the hearing of the without notice" injunction application is that it allows you to see whether the applicant has discharged his obligation. Usually you will be provided with the applicant's skeleton argument and a note or transcript of its counsel's submissions as well. You must read those materials very carefully. If you find anything, you or your legal advisor must construct and document your argument very carefully.

Things you can do now

The best way to avoid this hassle and expense is to keep out of trouble in the first place. You can anticipate and avoid any disputes before they arise by carrying out regular intellectual property audits. These are carried out by your patent or trade mark attorneys or lawyers. They identify not only your own intellectual assets and whether they are protected adequately but also your use of other peoples' assets and whether you are licensed properly. If you are not licensed your attorney or lawyer will advise you how to obtain a licence or how else to avoid infringing another's intellectual property. You should also obtain insurance before a dispute arises which will cover third parties' claims against you for infringement of their intellectual property rights as well as any claims you may wish to make against infringers of yours. Before-the-event insurance is only a fraction of the cost of after-the-event cover.

Further Information

If you want to discuss any of the matters contained in this short guide please do not hesitate to contact me during normal office hours at the address or on the number set out below.

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³ See Jane Lambert "New Patent County Court Rules" 31 Oct 2010 *NIPC Law*
<http://nipclaw.blogspot.co.uk/2010/10/new-patent-county-court-rules.html>