

PRACTICE DIRECTION

APPLICATION FOR A WARRANT UNDER THE ENTERPRISE ACT 2002

Interpretation

- 1.1** In this practice direction –
- (1) ‘the Act’ means the Enterprise Act 2002;
 - (2) ‘the OFT’ means the Office of Fair Trading;
 - (3) ‘officer’ means an officer of the OFT;
 - (4) ‘named officer’ means the person identified in a warrant as the principal officer or person in charge of executing that warrant;
 - (5) ‘Notice’ means the Notice of the powers to search premises and the rights of occupiers; and
 - (6) ‘warrant’ means a warrant under section 194 of the Act.

Application for a warrant

- 2.1** An application by the OFT for a warrant must be made to a High Court judge using the Part 8 procedure as modified by this practice direction.
- 2.2** The application must be made to a judge of the Chancery Division at the Royal Courts of Justice.
- 2.3** The application is made without notice and the claim form may be issued without naming a defendant. Rules 8.1(3), 8.3, 8.4, 8.5(2)–(6), 8.6(1), 8.7 and 8.8 do not apply.

Confidentiality of court documents

- 3.1** The court will not serve any claim form, warrant, or other document filed or issued in an application to which this practice direction applies, except in accordance with an order of the judge hearing the application.
- 3.2** CPR rules 5.4(2), 5.4B and 5.4C do not apply, and paragraphs 3.3 and 3.4 have effect in their place.
- 3.3** When a claim form is issued the court file will be marked ‘Not for disclosure’ and, unless a High Court judge grants permission, the court records relating to the application (including the claim form and documents filed in support and any warrant or order that is issued) will not be made available by the court for any person to inspect or copy, either before or after the hearing of the application.
- 3.4** An application for permission under paragraph 3.3 must be made on notice to the OFT in accordance with Part 23.

(Rule 23.7(1) requires a copy of the application notice to be served as soon as practicable after it is filed, and in any event at least 3 days before the court is to deal with the application.)

Contents of claim form, affidavit and documents in support

- 4.1** The claim form must state –
- (1) that the OFT is applying for a warrant under section 194 of the Act;

- (2) the address or other identification of the premises to be subject to the warrant; and
- (3) the anticipated date or dates for the execution of the warrant.

4.2 The application must be supported by affidavit evidence, which must be filed with the claim form.

4.3 The evidence must set out all the matters on which the OFT relies in support of the application, including all material facts of which the court should be made aware. In particular it must state –

- (1) the subject matter (i.e. the nature of the suspected offence under section 188 of the Act) and purpose of the investigation to which the application relates;
- (2) the identity of the person or persons suspected to have committed the offence;
- (3) the grounds for applying for the issue of the warrant and the facts relied upon in support;
- (4) details of the premises to be subject to the warrant and of the possible occupier or occupiers of those premises;
- (5) the connection between the premises and the person or persons suspected to have committed the offence;
- (6) the name and position of the officer who it is intended will be the named officer;
- (7) the name and position of the officer or officers who it is intended will accompany the named officer;
- (8) if it is intended that the named officer is to be a person who is not an officer and who has been authorised by the OFT pursuant to section 195(1) of the Act to exercise on its behalf all or any of the powers conferred by section 194 of the Act and to act as the named officer, the name and job title of such person and the reason why it is intended that he may act as the named officer and exercise the relevant powers conferred by section 194 of the Act;
- (9) if it is intended that the warrant may pursuant to section 194(4) of the Act authorise any person (other than an officer) to accompany the named officer in executing the warrant, the name and job title of each such person and the reason why it is intended that he may accompany the named officer; and
- (10) if it is intended that any competent person who is not an officer will be authorised by the OFT pursuant to section 195(1) to exercise on its behalf all or any of the powers conferred by section 194, the name and job title of each such person and the reason why it is intended that he may exercise such powers.

4.4 There must be exhibited to an affidavit in support of the application the written authorisation of the OFT containing the names of all persons falling within the categories described at subparagraphs (6) to (10) of paragraph 4.3 above.

4.5 There must also be filed with the claim form –

- (1) a draft of the warrant;
- (2) the Notice to be produced and served with it; and
- (3) the written undertaking by the named officer required by paragraph 6.2 of this practice direction.

(An example of the form of a warrant under section 194 of the Act, and the Notice to be produced and served with it, are annexed to this practice direction).

4.6 If possible the draft warrant and the Notice should also be supplied to the court on disk or electronically in a form compatible with the word processing software used by the court.

Listing

5. The application will be listed by the court on any published list of cases as 'An application by [D]'.

Hearing of the application

- 6.1 An application for a warrant will be heard and determined in private, unless the judge hearing it directs otherwise.
- 6.2 The court will not issue a warrant unless there has been filed a written undertaking, signed by the named officer, to comply with paragraph 8.1 of this practice direction.

The warrant

- 7.1 The warrant must –
 - (1) state the address or other identification of the premises to be subject to the warrant;
 - (2) state the names of –
 - (a) the named officer; and
 - (b) any other officers or other persons who may accompany him in executing the warrant;
 - (3) set out the action which the warrant authorises the persons executing it to take under section 194 of the Act;
 - (4) give the date on which the warrant is issued; and
 - (5) state that the named officer has given the undertaking required by paragraph 6.2.
- 7.2 Rule 40.2 applies to a warrant.

(Rule 40.2 requires every judgment or order to state the name and judicial title of the person making it, to bear the date on which it is given or made, and to be sealed by the court.)
- 7.3 Upon the issue of a warrant the court will provide to the OFT –
 - (1) the sealed warrant and the Notice; and
 - (2) a copy of the sealed warrant and the Notice for service on the occupier or person in charge of the premises subject to the warrant.

Execution of warrant

- 8.1 A named officer attending premises to execute a warrant must, if the premises are occupied –
 - (1) produce the warrant and Notice immediately upon arrival at the premises to the occupier or any other person entitled to grant access to the premises, explaining the authority under which entry is sought; and
 - (2) as soon as possible after his arrival at the premises, personally serve a copy of the warrant and Notice on the occupier or person appearing to him to be in charge of the premises.

The named officer is not required to serve the warrant and Notice personally if he reasonably believes this would frustrate the object of the search or endanger officers or other people.
- 8.2 If the occupier is not present, the named officer shall leave copies of the warrant and Notice of the powers to search premises and of the rights of occupiers in a prominent place on the premises or appropriate part of the premises, recording the name of the named officer in charge of the search and the date and time of the search, unless the named officer reasonably believes recording or disclosing his name might put him in danger.

- 8.3** The named officer must also comply with any order which the court may make for service of any other documents relating to the application.
- 8.4** Unless the court otherwise orders –
- (1) the initial production of a warrant and entry to premises under the authority of the warrant must take place at a reasonable hour, unless this might frustrate the purpose of the search; but
 - (2) once persons named in the warrant have entered premises under the authority of a warrant, they may, whilst the warrant remains in force –
 - (a) remain on the premises; or
 - (b) re-enter the premises to continue executing the warrant.
- 8.5** If the persons executing a warrant propose to remove any items from the premises pursuant to the warrant they must, unless it is impracticable –
- (1) make a list of all the items to be removed;
 - (2) supply a copy of the list to the occupier or person appearing to be in charge of the premises; and
 - (3) give that person a reasonable opportunity to check the list before removing any of the items.

Application to vary or discharge warrant

- 9.1** The occupier or person in charge of premises in relation to which a warrant has been issued may apply to vary or discharge the warrant.
- 9.2** An application under paragraph 9.1 to stop a warrant from being executed must be made immediately upon the warrant being served.
- 9.3** A person applying to vary or discharge a warrant must first inform the named officer that he is making the application.
- 9.4** The application should be made to the judge who issued the warrant, or, if he is not available, to another judge of the Chancery Division.

Expiry of the Warrant

- 10.** The warrant will expire one month after the date on which it is issued.

Application under section 59 Criminal Justice and Police Act 2001

- 11.** Attention is drawn to section 59 of the Criminal Justice and Police Act 2001, which makes provision about applications relating to property seized in the exercise of the powers conferred by (among other provisions) section 194(2) of the Act.

Warrant

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

CLAIM No. of 20

CLAIMANT:

OFFICE OF FAIR TRADING

[insert address]

PREMISES TO WHICH THIS WARRANT RELATES:

[insert address]

**WARRANT TO ENTER PREMISES AND EXERCISE POWERS
UNDER SECTION 194 ENTERPRISE ACT 2002**

To the occupier of the premises described above (“the premises”) and to any person in charge of, or operating at or from, the premises:

You should read the terms of this Warrant and the accompanying Notice of the powers to search premises and of the rights of occupiers (“the Notice”) very carefully. If you intentionally obstruct an officer or fail to comply with any requirement of the officers or other persons exercising their powers under the Warrant, you may be committing a criminal offence under section 201 of the Enterprise Act 2002, the relevant terms of which are set out in Schedule C to this Warrant.

An application was made on *[insert date]* by Counsel for the Office of Fair Trading (“the OFT”) to The Honourable Mr Justice *[insert name]* (“the Judge”), for a warrant under section 194(1)(a) and (b)*[insert the relevant sub-paragraph (i), (ii) or (iii)]* of the Enterprise Act 2002 (“the Act”) on the basis that there are reasonable grounds for believing:

- (a) that there are on the premises documents which the OFT has power under section 193 of the Act to require to be produced for the purposes of an investigation under section 192(1) of the Act; and
- (b) that *[insert the text of the relevant sub-paragraph (i), (ii) or (iii)]*.

[In the remainder of this Warrant, references to an officer or officers of the OFT shall be taken to include any competent persons authorised by the OFT under section 195(1) of the Act to exercise on its behalf all or any of the powers conferred by section 194.] The Judge read the evidence in support of the application and was satisfied that the grounds in section 194(1)(a) and (b)*[insert the relevant sub-paragraph (i), (ii) or (iii)]* of the Act have been met and accepted the undertakings by *[insert name]*, an officer of the OFT authorised to act as the “named officer”, set out in Schedule A to this Warrant. The named officer is the principal officer of the OFT in charge of executing this Warrant.

As a result of the application, this Warrant in relation to the premises was issued by the Judge on *[insert date]*.

1. This Warrant is issued in respect of an investigation under section 192(1) of the Act by the OFT on the basis that there are reasonable grounds for suspecting that an offence under section 188 (cartel offence) of the Act has been committed and, under section 192(2) of the Act, it appears to the OFT that there is good reason to exercise the powers under section 194 of the Act for the purpose of investigating the affairs, or any aspect of the affairs, of any person (“the person under investigation”).
2. *[Set out the subject matter and purpose of the investigation]*.
3. By this Warrant the named officer and the other officers [and person(s)] *[The words in brackets shall be included if the Judge so orders pursuant to section 194(4).]* named in Schedule B and authorised in writing by the OFT to accompany the named officer, are authorised to produce the Warrant at any reasonable time *[unless the Judge has ordered otherwise]* and on producing the Warrant:

- (a) to enter the premises, using such force as is reasonably necessary for the purpose;
 - (b) to search the premises and -
 - (i) take possession of any documents appearing to be of a kind in respect of which the application referred to in this Warrant was granted ("the relevant kind"), or
 - (ii) take, in relation to any documents appearing to be of the relevant kind, any other steps which may appear to be necessary for preserving them or preventing interference with them;
 - (c) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found;
 - (d) to require any information which is stored in any electronic form and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form -
 - (i) in which it can be taken away, and
 - (ii) in which it is visible and legible or from which it can readily be produced in a visible and legible form.
4. The Warrant will expire one month after the date on which it is issued.
5. Pursuant to section 50 of the Criminal Justice and Police Act 2001, the powers set out in paragraph 3(b)(i) of this Warrant include the powers-
- (a) to take possession of any document in order to determine later and elsewhere whether (or the extent to which) the document is of the relevant kind, where in all the circumstances it is not reasonably practicable to determine this on the premises; and
 - (b) to take possession of any document comprised in something else where in all the circumstances it is not reasonably practicable to separate, on the premises, the document which is of the relevant kind from a document which is not but in which it is comprised.

6. Terms used in this Warrant have the following meanings in accordance with the Act:

“documents” include information recorded in any form and, in relation to information recorded otherwise than in a form in which it is visible and legible, references to its production include references to producing it in a form in which it is visible and legible or from which it can readily be produced in a visible and legible form.

SCHEDULE A

UNDERTAKINGS GIVEN TO THE COURT BY THE NAMED OFFICER

If the premises are occupied when the Warrant is to be executed -

1. To produce the Warrant and the Notice on arrival at the premises; and
2. As soon as possible thereafter to serve personally a copy of the Warrant and the Notice on the occupier or person appearing to him to be in charge of the premises.

The Notice was produced to the Court with the application for the Warrant.

SCHEDULE B

NAMES OF PERSONS AUTHORISED TO EXECUTE THE WARRANT

[insert name of the named officer] who is the OFT's officer authorised in writing by the OFT to be the named officer.

[insert name of each of the other officers] who are the OFT's other officers authorised in writing by the OFT to accompany the named officer.

[insert name of each of the other person(s)] who is *[insert job title of each person]* and who *[is/are]* authorised in writing by the OFT to accompany the

named officer. *[This paragraph shall be included if the Judge so orders pursuant to section 194(4).]*

[insert name of each of the other person(s)] who is *[insert job title of each person]* and who *[is/are]* authorised in writing by the OFT pursuant to section 195 to exercise on its behalf all or any of the powers conferred by section 194. *[This paragraph shall be included if the Judge so orders pursuant to section 194(4).]*

SCHEDULE C

OFFENCES CREATED BY SECTION 201 OF THE ACT

The offences created by section 201 of the Act in connection with the execution of a warrant under section 194 are set out below. Text marked as [...] denotes the omission of provisions that are not relevant for section 194 purposes.

201.-

- (1) Any person who without reasonable excuse fails to comply with a requirement imposed on him under section [...] 194 is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.
- (2) A person who, in purported compliance with a requirement under section [...] 194—
 - (a) makes a statement which he knows to be false or misleading in a material particular; or
 - (b) recklessly makes a statement which is false or misleading in a material particular,is guilty of an offence.
- (3) A person guilty of an offence under subsection (2) is liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both; and
- (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

(4) Where any person –

- (a) knows or suspects that an investigation by the Serious Fraud Office or the OFT into an offence under section 188 is being or is likely to be carried out; and
- (b) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of documents which he knows or suspects or would be relevant to such an investigation,

he is guilty of an offence unless he proves that he had no intention of concealing the facts disclosed by the documents from the persons carrying out such an investigation.

(5) A person guilty of an offence under subsection (4) is liable–

- (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both; and
- (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

(6) A person who intentionally obstructs a person in the exercise of his powers under a warrant issued under section 194 is guilty of an offence and liable –

- (a) on conviction on indictment, to

- imprisonment for a term not exceeding 2 years or to a fine or to both; and
- (b) on summary conviction, to a fine not exceeding the statutory maximum.

The statutory maximum fine on summary conviction is currently £5,000 and the fine at level 5 is currently also £5,000. The fine on conviction on indictment is unlimited.

DATED this [] day of [] 20
THE HONOURABLE MR JUSTICE []

Notice of the Powers to search premises and of the rights of occupiers under section 194 of the Enterprise Act 2002 ('the Act')

Subject matter and powers

[In this notice, references to an officer or officers of the OFT¹ shall be taken to include any competent person authorised by the OFT under section 195(1) of the Act to exercise on its behalf all or any of the powers conferred by section 194 of the Act.] Officers of the Office of Fair Trading ('the OFT') have been authorised under Warrant to enter and search the premises identified in the Warrant in connection with an investigation under the Act. OFT officers can be accompanied by one or more named individuals authorised to assist them to execute the warrant under section 194(4) of the Act. The subject matter of this investigation is set out in paragraph 2 of the Warrant. The officers and any accompanying persons will not elaborate on this.

Paragraph 3 of the Warrant sets out the powers of the named officer¹ and other officers and any accompanying persons under section 194 of the Act for the purposes of the present investigation. On entering the premises, the named officer will, as a matter of practice, produce evidence of his identity when producing the Warrant, and identify and introduce all other officers and any accompanying persons, unless he has reasonable grounds for believing that alerting the occupier or any other person entitled to grant access would frustrate the object of the search or endanger any officers or accompanying persons.

Officers of the OFT and any accompanying persons shall have regard to the provisions of Code B of the Code of Practice under the Police and Criminal Evidence Act 1984, including in Scotland. A copy of Code B of the Codes of Practice will be made available on request.

Reasonable and proportionate force may be used to enter premises if the named officer in charge of the search is satisfied that premises are those specified in the warrant and the occupier or any other person entitled to grant access has refused entry or it is impossible to communicate with the occupier or any other person entitled to grant access. If the occupier is not present, a copy of the warrant and of the notice of the powers to search premises and the rights of occupiers shall be left in a prominent place on the premises, recording the date and time of the search and the name of the named officer.

If premises have been entered by force, before leaving the named officer must make sure that they are secure either by arranging for the occupier or the occupier's representative to be present or by any other appropriate means.

Unless the Court has ordered otherwise, the initial production of the Warrant and entry to premises must take place at a reasonable hour unless this might frustrate the purpose of the search; and, once officers and any accompanying persons have entered premises under the authority of the Warrant, they may remain on the premises or re-enter the premises to continue executing the Warrant.

The named officer shall also provide the occupier with this Notice of the powers to search premises and the rights of occupiers.

OFT officers also have the power in accordance with section 50 of the Criminal Justice and Police Act 2001 to seize material where it is not reasonably practicable, while on the premises, to determine the extent to which it may be seized, if at all, or for the seizable material to be separated from the non-seizable material in which it is comprised. Where this power is to be exercised, the occupier will be given a Notice which sets out the grounds for the exercise of the

¹ The named officer is the principal officer of the OFT who, together with other officers and accompanying persons, is authorised by the Warrant to exercise the powers under section 194 of the Act. His name and the names of the other officers and accompanying persons are set out in Schedule B to the Warrant.

power and the rights of persons who have an interest in the property to be seized pursuant to the power.

Access to legal advice

When executing a warrant OFT officers are not required to wait for an occupier or other person's legal adviser to be present before commencing the search.

However, generally the OFT officers will wait for a legal adviser before commencing a search provided the search is not unreasonably delayed. Where the OFT officers do wait for the legal adviser's arrival, they will wait on the premises and all persons on the premises will be required to adhere to appropriate instructions to ensure that material on the premises, or on other premises, which may be relevant to the investigation, is not interfered or tampered with. Furthermore, in cases where the OFT has commenced the search without waiting for a legal adviser to arrive, the OFT would avoid removing any material from the premises until the person's legal adviser has arrived and had the opportunity to make representations. This is provided that the conclusion of the search is not unreasonably delayed.

Witness to the search

A friend, neighbour or other person will be allowed to witness the search if the occupier wishes unless the named officer in charge of the search has reasonable grounds for believing that the presence of such person would unreasonably delay the investigation or endanger officers or other people.

A record of the action taken, including the grounds for refusing a request from the occupier to have a witness to the search, will be made on the premises search record.

Protection against self-incrimination

The OFT has the power to require any person at the premises to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his or her knowledge and belief, where it may be found. This power is used to enable the OFT to direct its search efficiently and effectively.

It should be noted that, any statement made by a person in response to any such requirement imposed by the named officer or other officers or accompanying persons in exercise of their powers under paragraph 3(c) of the Warrant (the 'earlier statement'), may only be used in evidence against that person in the following circumstances.

On a prosecution for an offence under section 201(2) of the Act

Where that person has knowingly or recklessly made a statement that is false or misleading in a material particular in response to that requirement.

On a prosecution for some other offence

Where he makes a statement inconsistent with the earlier statement provided evidence relating to the earlier statement is adduced or a question relating to it is asked by him or on his behalf in that prosecution¹.

¹ See section 197 of the Enterprise Act 2002.

Privileged communications

The powers under section 194 of the Act in relation to documents and information (set out in paragraph 3(b) onwards in the Warrant) do not apply to communications benefiting from legal professional privilege ('privilege'). A person may not be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of privilege in proceedings in the High Court. However, a lawyer may be required to provide the name and address of his client as part of an investigation being conducted under the powers in the Act. Privilege does not apply to communications made with the intention of furthering a criminal purpose (whether the lawyer is acting unwittingly or culpably).

The Act also provides a safeguard in respect of confidential banking information. A person may not be required to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business, unless the person to whom the obligation of confidence is owed consents to the disclosure or production or the OFT has authorised the making of the requirement.

If you consider that a document or information is subject to privilege, you should provide the named officer or other officer or accompanying person with a sufficient explanation such as to demonstrate to his satisfaction that the document or information, or parts of it, for which privilege is claimed, fulfil the conditions for it being privileged.

If no agreement is reached during the search as to whether the conditions for privilege have been made out in relation to particular documents or information, the named officer will request that the documents or information are placed in a sealed opaque bag in his presence. The named officer will then discuss with you appropriate arrangements for the safe-keeping of the documents or information by the OFT pending resolution of the issue of privilege.

Listing of items

Unless it is impracticable in all the circumstances, items will not be removed from the premises by the named officer or other officers or accompanying persons until a list has been prepared by the named officer (or other officers or accompanying persons) of all the items to be removed, a copy of the list has been supplied to you, and you have been given a reasonable opportunity to check that the list relates to all the items concerned, and only to those items.

Retention and copying of items

Items seized during the search will be retained by the OFT only for as long as is necessary in all the circumstances. For example, material seized may be retained if it will be needed –

- (1) for use in evidence in a criminal trial;
- (2) to satisfy the OFT's criminal disclosure obligations; or
- (3) so that it may be subjected to forensic examination.

Material may also be retained under the provisions of the Criminal Justice and Police Act 2001. On request, the OFT will, where practicable, provide a copy of such material to the person from whom the material was seized as soon as reasonably practicable.

Confidentiality

You should note that, subject to the safeguards in relation to self-incrimination and communications subject to privilege, you are **not** entitled to withhold a document or information by claiming that it is confidential.

However, section 237 of the Act imposes limits on the disclosure of information that relates to the affairs of any individual or any business which has been obtained by the OFT as a result of using its powers of investigation under the Act, subject to certain exceptions. Those exceptions

include the right of the OFT to disclose information for the purpose of facilitating the exercise by the OFT of its statutory function and the investigation of any criminal offence in any part of the UK. The relevant provisions are in Part 9 of the Act.

Application to vary or discharge the Warrant

You are entitled to apply to the Court to vary or discharge the Warrant. If you intend to make such an application, you must first inform the named officer. An application to stop the Warrant from being executed must be made immediately upon it being served.

The application must be made to the judge who issued the Warrant, or if he is not available, to another judge of the Chancery Division.

If you are making an immediate application to stop the Warrant from being executed, the named officer will delay starting or continuing a search of the premises for a reasonable period (not exceeding two hours) while you make your application, provided that you –

- (1) permit the named officer and other officers [and other accompanying persons] to enter and remain on the premises;
- (2) keep the named officer informed of the steps you are taking in relation to the application;
- (3) provide the named officer with contact details of the solicitor, if any, who is in receipt of your formal instructions in relation to an application to stop the Warrant being executed; and
- (4) comply with any other conditions that the named officer imposes.

Examples of conditions that the named officer may impose pursuant to (4) above include –

- (1) that you do not disturb or move any document or information that is the subject of the Warrant; and/or
- (2) you do not tell anyone other than your legal adviser about the Warrant or the investigation.

Application under section 59 Criminal Justice and Police Act 2001

Your attention is drawn to section 59 of the Criminal Justice and Police Act 2001, which makes provision about applications relating to property seized in the exercise of the powers conferred by (among other provisions) section 194(2) of the Act.

An application under section 59 should be made to a judge of the Crown Court.

