
SCOTTISH STATUTORY INSTRUMENTS

2000 No. 319

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session
Amendment No. 4) (Applications under s. 1 of the
Administration of Justice (Scotland) Act 1972) 2000**

Made - - - - *7th September 2000*

Coming into force - - *2nd October 2000*

The Lords of Council and Session, under and by virtue of the powers conferred upon them by section 1 of the Administration of Justice (Scotland) Act 1972(1), section 5 of the Court of Session Act 1988(2) and of all other powers enabling them in that behalf, do hereby enact and declare:

Citation and commencement

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No. 4) (Applications under s.1 of the Administration of Justice (Scotland) Act 1972) 2000 and shall come into force on 2nd October 2000.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

Amendment of Rules of the Court of Session 1994: applications under section 1 of the Administration of Justice (Scotland) Act 1972

2.—(1) For Chapter 64 of the Rules of the Court of Session 1994(3) there is substituted Chapter 64 as set out in Schedule 1 to this Act of Sederunt.

(2) After Form 62.65 there are inserted Form 64—A and Form 64—B as set out in Schedule 2 to this Act of Sederunt.

Edinburgh
7th September 2000

Rodger of Earlsferry
Lord President, I.P.D.

(1) 1972 c. 59.
(2) 1988 c. 36 as amended.
(3) S.I.1994/1443.

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SCHEDULE 1

RULES OF THE COURT OF SESSION 1994

CHAPTER 64

APPLICATIONS UNDER SECTION 1 OF THE ADMINISTRATION OF JUSTICE (SCOTLAND) ACT 1972

Application of this Chapter

64.1. This Chapter applies to an application for an order under section 1 of the Administration of Justice (Scotland) Act 1972 made where a cause is not depending before the court in which the application may be made.

Form and content of application

64.2.—(1) An application to which this Chapter applies shall be made by petition.

(2) The statement of facts shall set out—

- (a) a list of documents and other property (in this Chapter and in Form 64—A referred to as the “listed items”) which the petitioner wishes to be made the subject of the order;
- (b) the address of the premises within which the petitioner believes the listed items are to be found;
- (c) the facts which give rise to the petitioner’s belief that were the order not to be granted the listed items or any of them would cease to be available for the purposes of the said section 1.

Accompanying documents

64.3. The petitioner shall lodge with the application—

- (a) an affidavit supporting the averments in the petition;
- (b) an undertaking by the petitioner that he—
 - (i) will comply with any order of the court as to payment of compensation if it is subsequently discovered that the order, or the implementation of the order, has caused loss to the respondent or, where the haver is not the respondent, to the haver; and
 - (ii) will bring within a reasonable time of the execution of the order any proceedings which he decides to bring; and
 - (iii) will not, without leave of the court, use any information, documents or other property obtained as a result of the order, except for the purpose of any proceedings which he decides to bring and to which the order relates.

Modification of undertakings

64.4. The court may, on cause shown, modify, by addition, deletion or substitution, the undertaking mentioned in rule 64.3(b).

Intimation and service of application

64.5.—(1) Before granting the application, the court may order such intimation and service of the petition to be given or executed, as the case may be, as it thinks fit.

(2) Any person receiving intimation or service of the petition by virtue of an order under paragraph (1) may appear and oppose the application.

Form of order

64.6. An order made under this Chapter shall be in Form 64—A.

Caution and other security

64.7. On granting, in whole or in part, the application the court may order the petitioner to find such caution or other security as it thinks fit.

Execution of order

64.8. The order of the court shall be served by the Commissioner in person and it shall be accompanied by the affidavit referred to in rule 64.3(a).

Duties of commissioner

64.9. The Commissioner appointed by the court shall, on executing the order—

- (a) give to the haver a copy of the notice in Form 64—B;
- (b) explain to the haver—
 - (i) the meaning and effect of the order;
 - (ii) that he may be entitled to claim that some or all of the listed items are confidential or privileged;
- (c) inform the haver of his right to seek legal advice;
- (d) enter the premises and take all reasonable steps to fulfil the terms of the order;
- (e) where the order has authorised the recovery of any of the listed items, prepare an inventory of all the listed items to be recovered before recovering them;
- (f) send any recovered listed items to the Deputy Principal Clerk of Session to await the further order of the court.

Confidentiality

64.10.—(1) Where confidentiality is claimed for any listed item, that listed item shall, where practicable, be enclosed in a sealed envelope.

(2) A motion to have such a sealed envelope opened may be made by the party who obtained the order and he shall intimate the terms of the motion, by registered post or first class delivery, to the person claiming confidentiality.

(3) A person claiming confidentiality may oppose a motion made under paragraph (2).

Restrictions on service

64.11.—(1) Except on cause shown, the order may be served on Monday to Friday only, between the hours of 9am and 5pm only.

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(2) The order shall not be served at the same time as a search warrant granted in the course of a criminal investigation.

(3) The Commissioner may be accompanied only by—

(a) any person whom he considers necessary to assist him to execute the order;

(b) such representatives of the petitioner as are named in the order,

and if it is likely that the premises will be occupied by an unaccompanied female and the Commissioner is not herself female, one of the people accompanying the Commissioner shall be female.

(4) If it appears to the Commissioner when he comes to serve the order that the premises are occupied by an unaccompanied female and the Commissioner is neither female nor accompanied by a female, the Commissioner shall not enter the premises.

Right of haver to consult

64.12. The haver may seek legal or other professional advice of his choice and where the purpose of seeking this advice is to help him to decide whether to ask the court to vary the order the Commissioner shall not commence to search for or to take any other steps to take possession of or preserve the listed items.

Return of documents etc. to haver

64.13. The Deputy Principal Clerk of Session shall return the recovered listed items to the haver if the petitioner has taken no further action within 8 weeks of the date on which they are sent to him under rule 64.9(f).

SCHEDULE II

RULES OF THE COURT OF SESSION 1994

FORM 64—A Form of order of court in procedure for recovery of documents under Chapter 64

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ORDER BY THE COURT OF SESSION

In the Petition

of

[A.B.] (*designation and address*)

Petitioner

against

[C.D.] (*designation and address*)

Respondent

Date: (*date of interlocutor*)

To: (*name and address of party or parties or named third party haver, from whom the documents and other property are sought to be recovered*)

THE COURT having heard Counsel and being satisfied that it is appropriate to make an order under section 1 of the Administration of Justice (Scotland) Act 1972;

APPOINTS the Petition to be intimated on the walls of the court in common form and to be served upon the person(s) named and designed in the Petition;

APPOINTS (*name and designation of Commissioner*) to be Commissioner of the court;

GRANTS commission and diligence;

ORDERS the Commissioner to explain to the haver on executing the order—

- (1) the meaning and effect of the order;
 - (2) that the haver may be entitled to claim that certain of the documents and other property are confidential or privileged;
 - (3) that the haver has a right to seek legal or other professional advice of his choice;
- and to give the haver a copy of the Notice in Form 64—B of the Rules of Court.

GRANTS warrant to and authorises the said Commissioner, whether the haver has allowed entry or not—

- (1) to enter, between the hours of 9am and 5pm on Monday to Friday, (*or, where the court has found cause shown under rule 64.11(1), otherwise specify the time*) the premises at (*address of premises*) and any other place in Scotland owned or occupied by the haver at which it appears to the Commissioner that any of the items set out in the statement of facts in the application to the court (the “listed items”) may be located;

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(2) unless the haver is taking legal or other professional advice on the question of having the order varied—

- (a) to search for and take all other steps which he considers necessary to take possession of or preserve (*specify the listed items*); and
- (b) to take possession of and to preserve all or any of the listed items and to consign them with the Deputy Principal Clerk of Session to be held by him pending the further orders of the court;

and for that purpose,

ORDERS the haver or his servants or agents to allow the Commissioner, any person whom the Commissioner considers necessary to assist him, and the Petitioner's representatives to enter the premises named in the order and, unless the haver has sought legal or other professional advice on the question of having the order varied, to allow them—

(1) to search for the listed items and take such other steps as the Commissioner considers it is reasonable to take to execute the order;

(2) to provide access to information stored on any computer owned or used by him by supplying or providing the means to overcome any and all security mechanisms inhibiting access thereto;

(3) to allow the Commissioner, any person whom the Commissioner considers necessary to assist him, and the Petitioner's representatives to remain in the premises until such time as the search is complete, including allowing them to continue the search on subsequent days if necessary;

(4) to inform the Commissioner immediately of the whereabouts of the listed items;

(5) to provide the Commissioner with a list of the names and addresses of everyone who has supplied him with any of the listed items and of the names and addresses of everyone to whom he has given any of the listed items;

and not to destroy, conceal or tamper with any of the listed items except in accordance with the terms of this order;

FURTHER AUTHORISES (*specify the representatives*) to be the sole representatives of the Petitioner to accompany the Commissioner for the purpose of identification of the said documents and other property.

SCHEDULE TO THE ORDER OF THE COURT

Undertakings given by Petitioner

The Petitioner has given the following undertakings—

1. That he will comply with any order of the court as to payment of compensation if it is subsequently discovered that the order, or the implementation of the order, has caused loss to the respondent or, where the respondent is not the haver, to the haver.
2. That he will bring within a reasonable time of the execution of the order any proceedings which he decides to bring.
3. That he will not, without leave of the court, use any information, documents or other property obtained as a result of the order, except for the purpose of any proceedings which he decides to bring and to which the order relates.

(*or as modified under rule 64.4*)

IMPORTANT

NOTICE TO PERSON ON WHOM THIS ORDER IS SERVED

1. This order orders you to allow the person appointed and named in the order as Commissioner to enter your premises to search for, examine and remove or copy the items mentioned in the order.
2. It also allows entry to the premises to any person appointed and named in the order as a representative of the person who has been granted the order and to any person accompanying the Commissioner to assist him.
3. No-one else is given authority to enter the premises.
4. You should read the order immediately.
5. You have the right to seek legal or other professional advice of your choice and you are advised to do so as soon as possible.
6. Consultation under paragraph 5 will not prevent the Commissioner from entering your premises for the purposes mentioned in paragraph 1 but if the purpose of your seeking advice is to help you to decide if you should ask the court to vary the order he will not be able to search the premises.
7. The Commissioner is obliged to explain the meaning and effect of the order to you.
8. He is also obliged to explain to you that you are entitled to claim that the items, or some of them, are protected as confidential or privileged.
9. You are entitled to ask the court to vary the order provided that—
you take steps to do so at once; and
you allow the Commissioner, any person appointed as a representative of the person who has been granted the order and any person accompanying the Commissioner to assist him, to enter the premises – but not to start the search – meantime.
10. The Commissioner and the people mentioned as representatives or assistants have a right to enter the premises even if you refuse to allow them to do so, unless—
you are female and alone in the premises and there is no female with the Commissioner (where the Commissioner is not herself female), in which case they have no right to enter the premises;
the Commissioner serves the order before 9am or after 5pm on a weekday or at any time on a Saturday or Sunday (except where the court has specifically allowed this, which will be stated in the order);
in which cases you should refuse to allow entry.
11. You are entitled to insist that there is no-one (*or* no-one other than X) present who could gain commercially from anything which might be read or seen on your premises.
12. You are required to hand over to the Commissioner any of the items mentioned in the order which are in your possession.
13. You may be found liable for contempt of court if you refuse to comply with the order.

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EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt replaces Chapter 64 of the Rules of the Court of Session with a new Chapter 64 which makes more detailed provision for the granting of orders under section 1 of the Administration of Justice (Scotland) Act 1972.

In particular, it regulates the manner in which an order may be implemented and provides more protection for the haver.

Rule 64.2 provides that, as at present, an application for such an order shall be by way of petition and provides what facts are to be set out in the statement of facts; rule 64.3 details the documents which are to accompany the petition.

Rule 64.4 allows the court to modify the undertakings which the petitioner is to give under rule 64.3 and rules 64.5, 64.7 and 64.8 deal respectively with intimation, caution and execution.

Rule 64.9 sets out the duties of the Commissioner, rule 64.10 deals with the question of confidentiality and rule 64.11 lays down restrictions on service.

The haver is given a right to consult by rule 64.12 and rule 64.13 provides for the return of any items seized if an action is not raised within a certain period.

Form 64—A is the form of order which the court will grant; a Schedule attached to it will set out the undertakings given by the petitioner.

Form 64—B is the form of Notice which will be given to the haver at the time the order is served, setting out clearly his rights and obligations.