SUPREME COURT OF QUEENSLAND

CITATION:	*Adani Mining Pty Ltd & Anor v Pennings* [2020] QSC 249
PARTIES:	**ADANI MINING PTY LTD ACN 145 455 205** (first applicant) and **CARMICHAEL RAIL NETWORK PTY LTD as trustee for the CARMICHAEL RAIL NETWORK TRUST ACN 601 738 665** (second applicant) **v** **BENJAMIN WILLIAM DEVENISH PENNINGS** (respondent)
FILE NO:	6666 of 2020
DIVISION:	Trial
PROCEEDING:	Ex parte Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 June 2020, ex tempore
DELIVERED AT:	Brisbane
HEARING DATE:	5 June 2020
JUDGE:	Dalton J
ORDER:	**Application dismissed**
COUNSEL:	S Doyle QC with M Doyle and M Eade for the applicants
SOLICITORS:	Dowd & Company for the applicants

HER HONOUR: This is an application filed by leave on a hearing organised at short notice on the afternoon of 5 June 2020. There is a delay in giving my decision on this matter and, even though the hearing was organised at short notice, the matters which are the subject of the application are not urgent, as was conceded by counsel on the hearing.

The case does involve some unusual features, but I mention that one simply because, in assessing the evidence that is put before me on this hearing, I take into account that the subject matter of the hearing has been something which has been continuing for more than three years, that is, the application, although it seeks relief in the nature of an Anton Piller order, was not prepared in haste. The applicant had ample time to prepare it and put whatever material it wanted before the Court.

The application is made by the applicants for a search order in the nature of an Anton Piller order pursuant to chapter 8, part 2, division 3 of the UCPR or the Court's inherent jurisdiction. The applicants seek to have collected and preserved

material which, the evidence indicates, is in the possession of the Respondent Pennings and which they say was induced to be divulged to him in breach of confidence (contractual and equitable) and as a result of tortious action such as intimidation and conspiracy. The applicants undertake to file a claim and statement of claim in terms of CW5 to the affidavit of Christopher Wilson, filed by leave on 5 June 2020.

Mr Pennings, I think it may be well accepted, is a leading force in, and a spokesman for, something which is a loose association called the Galilee Blockade. As I say, the association is probably a fairly loose collection of activists, and the material shows that, from the beginning of 2017, the Galilee Blockade has sought to frustrate, and indeed prevent, the development of the Carmichael Mine by the first applicant and the rail network which supports that mine by the second applicant.

In general terms, the Galilee Blockade has and continues to solicit information from the public. One of its tactics is to obtain information as to the applicants' contractors and put pressure on them by generating negative publicity based on their association with Adani and also by physically protesting at their premises, so that they terminate their contracts with the applicant or, alternatively, withdraw from negotiations for such contracts.

I will outline the case which the applicants wish to make by reference to the statement of claim. Just for clarity, although the statement of claim is not organised this way, I will deal with it in groups which I will call chapters.

Chapter 1

The scheme of the statement of claim is that it defines information as confidential in paragraph 5:

> *5. Adani Mining has, at all material times from about January 2017, possessed information of a confidential and valuable nature relating to the construction and operation of the Carmichael Mine, namely:*
>
> *(a) the detailed scope of works for the construction of the Carmichael Mine, including the location of work sites and a detailed construction program for such work (mine scope of works);*
>
> *(b) the terms of the contracts between Adani Mining and the Adani Mining contractors (mine contracts), including the scope of works to be performed or the nature of the goods to be supplied pursuant to the mine contract;*
>
> *(c) the identity of contractors who are negotiating with Adani Mining for entry into the mine contracts (Adani Mining proposed contractors);*

> *(d) the terms being negotiated for the Adani Mining proposed mine contracts, including the scope of works proposed to be performed or the nature of the goods proposed to be supplied thereunder (proposed mine contracts).*

This information is referred to in the statement of claim collectively as the "Adani Mining confidential information". And there is similar pleading in relation to the second applicant.

It can be seen immediately that the definition of material at paragraph 5(a) of the statement of claim is not specific. It is quite generalised. I am sure that within that general description there would be material which is confidential in its nature, that is, has a necessary quality of confidence. But I am also sure that there would be material which fell within it which is not confidential in terms of the cases. Similarly, I think the terms of contracts and proposed contracts may well be confidential. I find it difficult to see that the identity of contractors who have contracts with Adani Mining is confidential in terms of the cases. It may be, because of tender process, etcetera, that the identity of proposed contractors is confidential, but it is not immediately apparent.

The pleading continues that the applicants keep the confidential information as defined to themselves. See paragraph 6. At paragraphs 7, 8 and 9, it is explained that some of the applicants' employees have access to the confidential information as defined. At paragraph 13 and 14, some of its proposed contractors have access to the confidential information as defined, and, at paragraph 17 and 18 of the pleading, some of its contractors have access to the confidential information as defined. In each case, it is pleaded that the employees, the proposed contractors and the contractors are contractually bound not to disclose the information. Mr Wilson's affidavit, filed with leave, exhibits pro forma clauses from the relevant contracts.

Those pleadings – that is, paragraphs 7, 8, 9, 13, 14, 17 and 18 – really are the foundation for the applicants' pleading that employees, proposed contractors and contractors owe a contractual duty of confidence to the applicants. At paragraphs 10, 15 and 19, there is an alternative case pleaded that employees, proposed contractors and contractors know the information which is defined as confidential information in the pleading is confidential, and that therefore their access to it is subject to an equitable duty of confidence. At paragraphs 21 to 36 of the pleading, almost identical allegations are made in relation to the second applicant as are made in relation to Adani.

Chapter 2 – Pennings

The pleading continues to say that Pennings is a spokesman for the Galilee Blockade who publishes a website on behalf of the Galilee Blockade as well as Facebook and Twitter accounts on behalf of the Galilee Blockade and who operates four email accounts in the name of the Galilee Blockade. See the pleading at paragraphs 36 to 40.

Then it is said, at paragraphs 41 to 43, that, between 21 January 2017 and 11 June 2016, Pennings, for Galilee Blockade, ran something called an infiltration campaign. That is really describing activity on behalf of Galilee Blockade whereby the internet platforms which I have already described were used to ask people to apply for jobs with the applicants. It is pleaded that the point of that was to have those infiltrators send confidential information as defined to Galilee Blockade, and I think it may be accepted that the implication was that that information was to be used to the disadvantage of the applicants in accordance with Galilee Blockade's aims to frustrate and, indeed, prevent the establishment of a mine and a railway.

There are some things to note about this pleading of the infiltration campaign. The first is that it is over, and has been over for more than two years, and there is no pleading that anyone did anything as a result of the infiltration campaign. That is not pleaded in any way that people did apply for jobs; that they did send confidential information as defined, or that it was used adversely to the applicants.

At paragraphs 44 to 45 of the pleading, a second campaign, the Dob In campaign, is described. This campaign, unlike the infiltration campaign, is said to have begun in June 2017 and to be ongoing. It involves use of the internet and social media platforms to make requests, it is alleged, for anyone with confidential information as defined to give it to Galilee Blockade. I think it's well-established that, on the material before me, the implication is that information given to Galilee Blockade will be used to the disadvantage of the applicants.

Chapter 3

In this part of the pleading, it is alleged that Pennings knew, or ought to have known, that the confidential information as defined was confidential to Adani and could not be obtained except from the three classes of people pleaded earlier, that is, employees, proposed contractors and contractors.

The difficulty which I flagged initially with the idea that some of the information which is defined at paragraph 5 of the pleading as confidential information may well be confidential information, but some of it does not, on the face of it, appear to be, in itself, information which has a necessary quality of confidence about it, really resurfaces here at this part of the pleading, in considering whether or not Pennings knew that the confidential information as defined was confidential to Adani.

The pleading involves reliance on Pennings calling this information insider information, which certainly indicates that the persons who knew it, or know it, would be those who worked for Adani in some capacity, or persons employed by such people. But I'm not sure that that, on the face of it, shows that the information is all confidential information in terms of the cases.

Reliance is also placed upon the fact that information given to the Galilee Blockade would be given via encrypted methods and so on. That may be something which the applicants do succeed as showing meant Galilee Blockade knew the information was confidential in terms of the cases. It is also consistent with the idea that it is

providing security for those who provide the information, so that fears of retribution on their part might be overcome.

At paragraph 47 of the pleading, it is alleged that Pennings' intention was to procure breaches of both the contractual and equitable confidential duties owed to the applicants. At paragraph 48 of the pleading, it is said that some of that group of employees, contractors and proposed contractors did disclose confidential information as defined to Pennings in breach of both the contractual and equitable duties. When one looks at the particulars of that allegation, the case is fairly thin. There are 11 particulars, and they all rely upon Pennings or Galilee Blockade's statements. Particulars 10 and 11 just simply are not particulars at all. Particulars 1 and 6 expressly deal with employees of a contractor, so therefore a person who is not within the definitions pleaded earlier of the three types of people who have contractual obligations to the applicant, that is, employees, contractors or proposed contractors. They are another class of people, who do not owe contractual obligations to the applicants.

Then, if I turn to particulars 3(b), 4, 7 and 8, it is not entirely clear, but the likelihood is, I think, when the particulars are read, that they are in the same class – that is, employees of a contractor, not people who themselves owe contractual obligations to Adani. So the particulars are not, in fact, particulars of the pleaded allegations.

Particulars 2, 3(a), 3(c) and 9 are neutral in the sense that it is not clear that the disclosure has been made by an employee, a proposed contractor or a contractor. There is just no indication that it is one of those three types of people who has disclosed.

That leaves particular 5, so one of the particulars, where it seems likely, I think, from what is particularised that the person might be an Adani employee, and that disclosure is pleaded to have been made on the 9th of September 2019, so over nine months ago. So the point that I am making there, is the pleading is very slender, if I could put it that way – that any one of the pleaded people with contractual duties of confidence to the applicants has disclosed information to Pennings. It really just comes down to the one disclosure particularised at paragraph 5 of the particulars.

At paragraph 51(a), it is pleaded that, unless restrained, Pennings will continue, and I think the evidence on the application before me shows that that is likely.

Then, at paragraph 51(b), it is pleaded that Adani will suffer loss because of the breaches of confidence pleaded. There are seven particulars of this. Particulars 1 and 7 are, in fact, not particulars. The remaining particulars at this paragraph are not, in any true sense, particulars of loss. They may be statements that belong in a case to be made that Adani has suffered loss, but they are not, in fact, particulars of any loss suffered.

The relief sought in the statement of claim for breach of confidence is that Pennings take down the publications and that he is permanently restrained from engaging in

the activities which he appears to have engaged in on the material before me, and that he delivers up confidential information he has obtained.

I note that paragraphs 52 to 57 of the pleading really are almost identical to paragraphs 46 to 51, and they make the same or very similar allegations in relation to the second applicant as are made in relation to the first.

Chapter 4.

So, just dealing with the part of the pleading that focuses on breach of confidence, reliance is placed on two campaigns, one of which is finished. Now, allowing for the fact that this application is obviously at an early stage of any litigation and that, naturally, information which I have is limited because of that, it does nonetheless seem that there are difficulties with the case the applicants propose to make.

The first difficulty is I think only a weak case is shown that the confidential information as defined is of the character of information which is regarded as confidential by equity. As I say, there may well be masses of technical detail that fall within the definition at paragraph 5(a) of the pleading, but it is really hard to tell, as that pleading is very general, and I refer to the cases that make it clear that, if a breach of confidential information is alleged, the information has to be specified – with particularity. See, for example, O'Brien v Komesaroff [1982] 150 CLR 310 at pages 326 to 328.

As I say, while, to take paragraph 5(a) as an example, there may well be a whole lot of technical information which falls within that definition which is truly confidential in terms of the cases, such as prices and methods for mining, construction, etcetera, it seems, from the information that is put before me, this is not the information which the Galilee Blockade wants to obtain. The Galilee Blockade wants much more prosaic information as to time and dates that work might be carried out by the applicants so that they can protest at the sites.

I would make the same point about the terms of the contracts and proposed contracts which are particularised at paragraph 5 of the pleading. The terms of the contracts may well be confidential within the meaning of the cases, but again it is not that kind of information which the Galilee Blockade wants. They do not want the terms of the contracts. They just want to know the names of the contractors or proposed contractors. As I said earlier, I see some difficulty in claiming that the identity of people who have contracts with Adani is itself a confidential fact in terms of assessing what is confidential material equity would protect. The situation with proposed contractors may be different, because of a tender process, but again there is nothing before me that really lets me form a view one way or the other as to that.

It is accepted by the applicant in its written submissions that it needs to prove that confidential information possesses "the necessary quality of confidence" in order to succeed on its equitable case at least in relation to confidential information. In that regard, see Saltman Engineering Co Ltd v Campbell Engineering Co Ltd [1963] 3 All ER 413 at 415, Coco v AN Clark (Engineers) Limited [1969] RPC 41 at page 47

to 48 and ABC v Lenah Game Meats Pty Ltd [2001] 185 ALR 1 at paragraphs 25, 36 and 55 per Gleeson CJ.

This case is, in fact, quite like the case of ABC v Lenah Game Meats. The identity of contractors (and proposed contractors) and the times and places where Adani will undertake work is information which people who have particular environmental views might use, or seek to use, to harm the applicants, and its use, in fact, might harm them, but it is hard to see that the information is confidential in the sense that it will be protected by equity.

In that sense, then, it seems that the applicants' strongest case is based on contract, and in that regard I see the pro forma contracts exhibited to Mr Wilson's affidavit. I think the difficulty for me on this application is that that breach of contract case in relation to confidential information is, as I described it earlier, very slender. There is but one particular which definitely relates to somebody breaching a contract, and that one breach occurred in September 2009 and it is not pleaded that anything resulted from it.

So, while I think there is a strong case shown on the material before me that Pennings and Galilee Blockade are getting information from people to use to pursue their objectives of harming the applicants, it seems much less clear that they are getting information which is truly confidential in the sense of the equitable notion to harm those people, and when the focus is therefore thrown back onto the contractual case, it is very slender. If the exhibit bundle to Mr Wilson's affidavit is analysed in terms of the pro forma contracts he exhibits, it does not seem that proposed contractors are bound to keep confidential the fact that they are working with, or hope to work with, the applicants. See exhibit bundle page 45. The situation seems to be different in relation to contractors. See clause 4.7.4 at exhibit bundle pages 51 to 52.

The other thing about the confidential information case is that the pleading does not, as discussed, particularise any loss. Now, it is not necessary that the pleading do so in order to show a complete cause of action, but, on an application like this, where an unusual and extraordinary order is sought, it is something which would be foremost in my mind in deciding whether or not to issue an order. And not only does the pleading not particularise any loss as a result of breach of confidential information, there is no affidavit from anyone at Adani or Carmichael Rail speaking to loss or disruption caused by the breach of confidential information.

Chapter 5 – Intimidation

Paragraphs 58 to 64 of the pleading deal with the tort of intimidation. It is pleaded that Pennings published demands to 14 companies that if they did not stop working for, or proposing to work for, the plaintiffs, they would be the subject of unwanted media attention, that is, negative publicity, along the lines that they were prepared to work for the plaintiffs and that they would be the subject of other protest activities, including physical protest activities at their workplaces aimed at disrupting their

businesses and including acts which might be illegal in the performance of those physical protests.

It is pleaded that these actions were done with the intention to injure the plaintiffs and – and I think on this application both those allegations are made out quite clearly on the material before me.

It is pleaded that nine companies have been targeted, in fact. Paragraph 60 of the pleading particularises this. It particularises 15 occasions on which action was taken against contractors or proposed contractors in 2017, six times in 2018 and nine times in 2019. Lastly, it is said that in 2020 Greyhound withdrew from negotiations with the applicants because of this type of activity on behalf of the Galilee Blockade and that there is loss suffered as a consequence in an amount of around $38,000. Further, in 2020 that AECOM terminated a contract to drill because of this sort of activity and that the loss to the applicants was $49,000.

The material, which is at a pretty low level, it must be said, just in an email, reflects the views of Adani's lawyer that AECOM's termination of contract was unlawful, so I think, in terms of the evidence before me and the pleading of the tort of intimidation, quite a strong case is shown for an action that is worth less than $100,000. That is, well below the jurisdiction of this Court.

Chapter 6, conspiracy

At paragraphs 65 onwards it is pleaded that Pennings, together with unknown other people, procured or acted to procure breaches of confidence, acted to have people withdraw from negotiations for contracts with the applicants, and acted to have people terminate existing contracts with the purpose of injuring the plaintiffs by unlawful means, and the unlawful means are particularised as amounting to trespass and nuisance and breach of contract. Although conspiracy is pleaded as a separate cause of action, it does not add anything of substance, I think, to the earlier causes of action, that is, the cause of action in breach of confidence and the cause of action in intimidation.

I turn now to the principles relevant to the granting of the type of order which is sought on this application. The jurisdiction to make a search order or Anton Piller order has been described in the cases as extraordinary, and that is because it is an intrusive order, and particularly so here where the respondent – I will say works, works on the activities of the Galilee Blockade, it seems, from the material before me, from his home which he shares with his wife and four young children. The type of order sought is likely to be personally very disruptive, therefore, and it is also likely to be very disruptive because it seeks to examine and interfere with the computers and other electronic devices which the respondent keeps at his home.

The purpose of a search order is to preserve evidence because it is feared that a defendant or a respondent, if warned of impeding litigation, would likely conceal or destroy evidence so that it is unavailable to assist a plaintiff or applicant in

establishing their case thus, "defeating the ends of justice," to quote from the case of Anton Piller itself at [1976] Ch 55, paragraph 61.

The applicants set out in their written submissions, paragraph 33, the three requirements which a court must be satisfied of in order to exercise the discretion to make a search order. These requirements come from the case of Anton Piller itself. See paragraph 62 of that case. And I will just note that the rules, no doubt are a good guide, but that they are not there to create substantive law or affect anybody's substantive rights. It is just, in effect, a summary in the rules of Court. But dealing with those three elements outlined in the rules, they are:

(a) That the applicant has a strong prima facie case on an accrued cause of action.
(b) That the potential or actual loss or damage to the applicant will be serious if the search order is not made, and,
(c) That there is sufficient evidence that a respondent possesses important evidentiary materials and that there is a real possibility that the respondent might destroy them so that it became unavailable for use in a court proceeding.

So far as those elements are concerned, I think there is ample material before me to establish the last of them, that is, (c). I think the material before me establishes a good likelihood that there is material relevant to a case which the applicants wish to make and I think because of the nature of the activities which the respondent has conducted on behalf of the Galilee Blockade that he would attempt to frustrate the applicants in any way possible, including by destroying material which might be available or helpful to them to use in a court proceeding, so I think on the material before me the last of the three elements has been well-established; not so the first two.

Turning back to the first one, I do not think the material demonstrates a strong prima facie case in relation to the cause of action, whether based in contract or equity for breach of confidential information. I have explained why. While there is probably a strong prima facie case before me in relation to the tortious actions, as I say, the total amount of loss said to flow from these torts is less than $100,000.

Turning to the second of the two elements, the potential or actual loss or damage the applicant, it must be shown that the potential actual loss or damage to the applicant will be serious if a search order is not made. The loss and damage referred to there is the substantive loss or damage caused by the defendant's alleged misconduct, that is, one looks to the substance of the causes of actions alleged and looks for serious loss or damage that might result and in that respect see the case of Celanese Canada INC v Murray Demolition Corp [2006] SCC 35 which is cited in the book Biscoe, Freezing and Search Orders, second edition, paragraph 7.29.

Here there is not demonstrated on either the proposed pleading, or the affidavit material before me, potential or actual loss if the search order is not made. What is relied upon – see the applicants' written submissions at paragraph 70 – is the detriment in the litigation if the Anton Piller order is not made, that is, in relation to

this second element, the applicants' submissions are put on the basis that their prospects of succeeding in this litigation are substantially damaged if the search order is not made, or, to put it another way, that their prospects of succeeding in the litigation are substantially increased if the order is made because they would hopefully gain a lot of evidence which might otherwise be lost to them.

Thinking about the analysis of the case which the applicants wish to bring in broad terms, the applicants have a lot of evidence, sufficient evidence, to prove that Pennings or Galilee Blockade are trying to obtain information (whether confidential or not is another question) and that they mean to use it to the disadvantage of the applicants, including by targeting their contractors and proposed contractors.

The plaintiffs do not need the information which they might gain by an Anton Piller order to make out that part of their case. The part of their case which the part of the applicants' case which looks weak at the moment is the part showing that this has had any real effect on them, and I refer to my analysis of the particulars above. It is this part of the case that the applicants really should already know. If Pennings' activities or if Galilee Blockade's activities were having a real and substantial effect on the applicants, one would expect that they would know this and be able to present a much more compelling case on this application than they have. This analysis is, as I said, an analysis in broad terms, but really I think it shows that it is likely that were an order granted, the applicants would find things which assisted improving the weaker part of their case, but essentially this would be, I would have thought, in the nature of minor augmentation of something which they should already have.

The part of their case which seems weak on the application is the loss and damage part of the case, so, in effect, the applicants are asking for an extraordinary order to enter and search a home to take all computers and devices, when on analysis of the material before me such a search is likely to add some considerable detail to the part of the case – the pleaded case which is already quite strong and add little to that part of the case which at the moment looks quite weak. In my view, that is not a sufficiently strong case for me to make such an extraordinary order as the applicants seek.

The applicants present their submissions in terms of the two-stage test of serious question to be tried or prima facie case, and balance of convenience. In terms of that analysis, it seems to me that the applicants do raise a serious question or a prima facie case on the three or four – if you count contractual and equitable confidence as separate causes of actions, but while they do that, the case raised in terms of confidence is, as I have said, a slender case and the case raised on tort is a case really about a very small amount of money.

Further, as I have said, while a case of breach of confidence may be technically complete without proof of loss or damage, in terms of an application like this, it really is less than compelling for the applicants to come along essentially showing nothing in terms of that part of the cause of action, and showing very small – two only, very small alleged losses in terms of the tortious cause of action. So then looking at the balance of convenience, I think the applicants probably show a high

likelihood that Pennings has information which would be disclosable in a proceeding and a high likelihood that he might destroy some of that material in an effort to further frustrate the applicants, but that risk has to be weighed in the balance with, as I say, a less than compelling case: the intrusion, disruption and possible distress to the defendant and his family, and the failure to prove serious actual or potential loss to the applicants if the order is not made, so for those reasons I dismiss the application.