SUPREME COURT OF QUEENSLAND

CITATION:	*Wagners Personnel Pty Ltd & Ors v Shattock* [2008] QSC 293
PARTIES:	**WAGNERS PERSONNEL PTY LTD** **(ACN 105 730 489)** (first applicant) and **WAGNERS QUARRIES PTY LTD** **(ACN 092 751 669)** (second applicant) and **WAGNERS CONCRETE PTY LTD** **(ACN 092 751 696)** (third applicant) and **WAGNERS TRANSPORT PTY LTD** **(ACN 092 751 687)** (fourth applicant) and **WAGNERS CONCRETE PUMPING PTY LTD** **(ACN 108 941 886)** (fifth applicant) **v** **PETER SHATTOCK** (respondent)
FILE NO:	BS 6156 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	17 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2008
JUDGE:	Daubney J
ORDER:	**1. The application for determination of the costs reserved on 27 June 2008, 7 July 2008 and 21 July 2008 be dismissed** **2. The Applicants pay the Respondent's costs of and incidental to that application on the standard basis**
CATCHWORDS:	PROCEDURE – COSTS – INTERLOCUTORY PROCEEDINGS – COSTS RESERVED – where applicant seeks determination of costs reserved in relation to

application for *Anton Piller* orders – where applicant proposes to pursue 'remnant claim' for damages for breach of duty of confidentiality against respondent – where no determination of merits of damages claim – whether reserved costs ought be determined

Uniform Civil Procedure Rules 1999 (Qld)

Austress Freyssinet Pty Ltd v Joseph (2007) NSWSC 24
Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622
Woolworths Ltd v Olsen [2004] NSWSC 896

COUNSEL: R Perry SC for the applicants
P Travis for the respondent

SOLICITORS: Deacons for the applicants
Clewett Lawyers for the respondent

[1] On 27 June 2008, the Applicants applied ex parte to me for Anton Piller orders against the Respondent, a former employee of the Applicants. The order was made, authorising the extreme property inspection and preservation regime which is permitted by such relief. Evidence put before me at the time of the application satisfied me to the requisite standard that the orders ought be made in respect of information, including allegedly commercially confidential information, which the Respondent, while still in the employ of the Applicants, had emailed to his private email address, and the Respondent's work diary, which he had kept when his employment ceased.

[2] The Anton Piller order was executed at the Respondent's home on 1 July 2008. It would appear that the Respondent co-operated fully in respect of the execution of the order, including by volunteering material not expressly covered by the order and obtaining an undertaking from his new employer in favour of the Applicants to permit access to its computers to view material which the Respondent had uploaded to his new work computer and to confirm that it had not been disseminated further through the new employer's network.

[3] The Anton Piller order was extended (with some agreed variations) by consent on 7 July and again on 21 July 2008. The orders on each of 27 June, 7 July and 21 July provided for costs to be reserved.

[4] On 30 June 2008, the Applicants filed an originating application seeking:

1. a mandatory injunction requiring the Respondent to deliver up specified materials;

2. an injunction to restrain the Respondent from disclosing the content of the emails and other allegedly confidential information;

3. equitable damages or equitable compensation;

4. damages for breach of contract;

5. costs.

[5] On 11 September 2008, the Respondent's solicitors wrote to the Applicants' solicitors, saying, amongst other things:

> 'Your client's request [in the Originating Application] is moot given the executed Anton Piller order. Moreover, our client will give any necessary undertaking consistent with the injunctive relief sought in the Originating Application. It appears that the only remaining issues between the parties relate to contractual damages and costs.'

[6] On 17 September 2008, the Applicants' solicitors responded in the following terms:

> 'Our client accepts that the injunctive relief sought by our client in the Originating Application is now moot given the executed Anton Piller order. We are now instructed to set the matter down for further hearing in relation to the issue of costs. As we have previously advised, our client will be seeking costs of the proceeding on an indemnity basis.'

[7] The Applicants then listed the matter before me, seeking a determination in its favour of the costs which had been reserved when I made the Anton Piller order on 27 June 2008 and the costs that had been reserved by the consent orders of 7 and 21 July 2008. The Applicants sought those costs on an indemnity basis. The Applicants' argument was initially advanced to me on the basis that 'save for one issue, namely liability for the expense incurred by the applicants in bringing the proceedings, including the application for the Anton Piller order, all other matters between the parties have now been resolved by the respondent entering into an agreement with the applicants.' The Applicants sought to draw an analogy with *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*") Rule 685, which provides:

> '**685 Costs if further proceedings become unnecessary**
>
> (1) If, for any reason, it becomes unnecessary to continue a proceeding other than for deciding who is to pay the costs of the proceeding, any party to the proceeding may apply to the court for an order for the costs.
>
> (2) The court may make the order the courts considers just.'

[8] It was submitted that, notwithstanding that there had been no determination of issues concerning confidentiality and breach of duty the court was 'nonetheless entitled and ought make an order for costs at this time'.

[9] The Respondent, who had plainly come to the hearing on an assumption that all issues between the parties had been resolved except for the question of costs, urged that I order that each party bear its own costs of the proceedings, relying in particular on observations by McHugh J in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622, at 624-625, concerning the approach which should be adopted on costs where there has been no hearing on the merits.

[10] In the course of the hearing before me, however, it became apparent that the originally stated basis for the Applicants' position, and the Respondent's assumption as to the matters which remained in issue, were incorrect in that, apart from the question of costs, the Applicants have not abandoned their claims for damages against the Respondent, and indeed propose pursuing him in respect of what counsel for the Applicants described as 'the remnant claim' for damages for breach of the duty of confidentiality.

[11] In those circumstances, it would be patently inappropriate for me to make a determination on the reserved costs at this point in the proceeding. The Applicants are entitled to pursue their claims for damages, and the Respondent is entitled to defend those claims. In the normal course, one side or the other will be vindicated after a trial with a judicial determination on the merits of their respective cases at trial.

[12] Rule 698 provides:

> 'If the court reserves costs of an application in a proceeding, the costs reserved follow the event, unless the court orders otherwise.'

[13] Accordingly, the result at trial will determine the question of reserved costs of interlocutory applications.

[14] The cases cited by the Applicant give no assistance in the present case. They concerned cases in which the proceedings had been completely compromised after the Anton Piller order but before a hearing on the merits (such as *Austress Freyssinet Pty Ltd v Joseph* (2007) NSWSC 24) or in which the award of costs on the indemnity basis in connection with the Anton Piller order was considered after a contested hearing on the merits of the particular case (such as *Woolworths Ltd v Olsen* [2004] NSWSC 896).

[15] As the Applicants, as it emerged in the hearing, wish to pursue their claims for damages on the merits, it would be quite inappropriate for me at this juncture to make a pre-emptive determination on the reserved costs. This application will be dismissed.

[16] The Respondent should have his costs of this application. Quite apart from the fact that the Respondent was only disabused of the assumption as to the limit of the matters remaining in issue in the course of the hearing before me, it is clear from what I have said above that I consider that this application was premature, to say the least. The application having been dismissed, there is in my view no reason why the costs of this discrete application should not follow the event.

[17] The orders will be:

1. The application for determination of the costs reserved on 27 June 2008, 7 July 2008 and 21 July 2008 be dismissed;

2. The Applicants pay the Respondent's costs of and incidental to that application on the standard basis.