SUPREME COURT OF QUEENSLAND

CITATION:	*Whelan v Cigarette & Gift Warehouse P/L* [2017] QSC 17
PARTIES:	**ANDREW WHELAN** (applicant) v **CIGARETTE & GIFT WAREHOUSE PTY LTD** (respondent)
FILE NO/S:	BS12435 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	27 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	1 February 2017
JUDGE:	Brown J
ORDERS:	**1. The application is dismissed.** **2. The applicant pay the respondent's costs of the application proceedings on the standard basis.**
CATCHWORDS:	PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – TRANSFER OF PROCEEDINGS – FROM SUPREME COURT TO DISTRICT COURT – where the applicant applies for proceedings to be transferred from the District Court of Queensland to the Supreme Court of Queensland – where original proceedings were brought in the Supreme Court and an Anton Pillar order was made – where subsequently the proceedings were transferred to the District Court by consent order – where the applicant seeks to have the Anton Pillar order vacated – where the applicant contends that the order having been made by the Supreme Court, must be vacated by the Supreme Court – where the applicant further contends that, because only the Supreme Court has jurisdiction to vacate the order, to avoid overlap between the trial and the vacation application, the entire proceedings should be transferred to the Supreme Court – whether the proceedings should be transferred from the District Court of Queensland to the Supreme Court of Queensland *Civil Proceedings Act* 2011 (Qld), s 25, s 31 *District Court Act* 1967 (Qld), s 69

Rigato Farms Pty Ltd v Ridolfi [2001] 2 Qd R 455, cited

COUNSEL: E White for the applicant
PJ Roney QC, with GW Dietz, for the respondent

SOLICITORS: Adams Wilson for the applicant
Nyst Legal for the respondent

[1] **BROWN J**: By an originating application filed 30 November 2016[1] the applicant, Andrew Whelan, sought an order to transfer proceedings number 3434 of 2016 from the District Court to the Supreme Court of Queensland pursuant to s 25 of the *Civil Proceedings Act* 2011 (Qld).

[2] The present application was filed on 30 November 2016 but the matter was not set down for a hearing until 1 February 2017.

Background

[3] The original proceedings were brought in the Supreme Court of Queensland by an originating application. An Anton Pillar order was applied for and made on 9 September 2015.[2]

[4] After pleadings had been exchanged, the proceedings were transferred from the Supreme Court to the District Court on 25 August 2016 by consent order.

[5] The applicant in the present proceeding is the defendant in the District Court proceedings and the respondent in this proceeding is the plaintiff in those proceedings.

[6] The District Court proceedings relate to the alleged misuse of confidential information that the applicant obtained during his employment with the respondent. In the District Court proceedings the respondent seeks a permanent injunction to restrain the defendant making use of any of the plaintiff's confidential information and for the defendant to deliver up such material or copies thereof. Damages are sought for breach of contract on the basis of legal costs incurred in enforcing the respondent's legal rights and for forensic examinations carried out.

[7] Despite the applicant having signed a certificate of readiness for trial on 19 September 2016, it subsequently opposed the matter being set down for trial due to the fact that it considered it wished to pursue setting the Anton Pillar order aside. According to the affidavit of Mr Wilson it was not appreciated that there was a basis to set aside the order until receipt of the transcript from the Anton Pillar proceedings in October 2016, which was after the certificate had been signed.

[8] The matter was set down in December 2016 for a three day trial commencing on April 2017. Since that time notices to admit facts have been provided and responded to by the applicant.

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1 CF1.
2 Exhibit 2.

[9] The applicant intends to seek to have the Anton Pillar order made on 9 September set aside.[3] This is on the grounds that it was obtained by the provision of incorrect information or by way of material non-disclosure, which have been outlined in the affidavit of Brett Wilson.

Transfer of Proceedings

[10] Section 25 of the *Civil Proceedings Act* 2011 (Qld) provides that:

> "(1) *The Supreme Court may order that a proceeding pending in the District Court … be transferred to the Supreme Court."*

[11] The applicant contends it is appropriate for the Court to transfer the proceedings essentially on two bases:

(a) first that the Anton Pillar order having been made by a superior court needs to be overturned by a superior court. He contends that the District Court would not have jurisdiction to overturn the original Anton Pillar order made by Douglas J in the Supreme Court. In that regard the applicant contends s 31 of the *District Court Proceedings Act* does not provide a clear power to overturn orders of the Supreme Court; and

(b) secondly, the applicant contends that it would be inefficient and impose additional costs for the application to set aside the Anton Pillar to be heard separately in the Supreme Court. It also submitted that there will be an overlap between matters to be addressed in the application to set aside the Anton Pillar order and the District Court proceedings which justify the transfer of the whole of the District Court proceedings to the Supreme Court so that the application may be heard potentially at the same time as any trial.

[12] The respondent contends that the application is misconceived on the basis that the District Court which has now been seized of the matter has by operation of s 31 of the *Civil Proceedings Act* the power to "hear and decide the proceeding as if it had been started in that court."

[13] The District Court has power pursuant to s 69 of the *District Court Act* 1967 (Qld) all the powers and authorities of the Supreme Court, including the powers and authorities conferred on the Supreme Court by an Act. In particular, s 69(3) provides that "to remove any doubt, it is declared that the District Court may grant a mareva injunction or Anton Pillar order in proceedings in which jurisdiction is conferred under this part."

[14] The respondent further contends that even if it is wrong in terms of whether the District Court has the power to set aside the Anton Pillar or vary it, the application to transfer proceedings should not be permitted because the application could be brought on a stand-alone basis in the Supreme Court and does not require that there be a transfer of the whole proceedings.

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[3] Affidavit of Mr Wilson, ex BLW-1.

[15] Evidence was presented by both parties canvassing the merits of an application to set aside the Anton Pillar order. Naturally that is not a matter upon which the Court needs to or should reach any concluded view but it was submitted it had some relevance to the exercise of the Court's discretion. In addition, the respondent raised delay on the part of the applicant which is also a relevant factor in the exercise of the Court's discretion.

[16] In its affidavit evidence, the applicant provides some six examples where it claims that there has been a lack of disclosure or a misrepresentation of facts. In relation to those raised in the affidavit of Mr Wilson, the respondent has indicated that the matters raised are not matters that constitute non-disclosure, were not material and/or which would have been known at the time that the applicant was served with the affidavits and submissions after the hearing of the Anton Pillar application and the order made.

[17] An additional matter was raised by the applicant in support of his application to set aside the Anton Pillar order, namely that it was that it was submitted in the Supreme Court hearing that the applicant had removed documents after his employment had been terminated. In fact it was before that time. That such an error was made appears to be accepted. A letter was written to the Supreme Court of Queensland by the Senior Counsel some twelve months after the Order of 9 September 2015 which explained that there had been an error in its submissions presented to the Court. The original judge who heard the matter indicated he did not wish the respondent to take any further steps. The applicant contends this fact is of little moment given the time that had passed.

[18] In relation to this, the respondent submits however that in terms of any argument as to any appropriate order to be made by the Court in response, it would present evidence to the Court to show that in any event the applicant did not intend to return to his employment when he left taking material with him. Such a matter would be relevant to any relief given. The applicant in response contends that this would be a matter also relevant to the trial in terms of the respondent seeking to address the applicant's defences.

[19] The applicant says that there is an overlap of issues that need to be determined in any application to set aside the Anton Pillar Order and the issues at trial. It also contended that the question of whether the Anton Pillar order should be set aside needs to be determined due to its potential effect on the trial.

[20] The applicant relies on the fact that in terms of material non-disclosure the principle is that the court will be astute to ensure that a plaintiff who obtained information using an Anton Pillar order without making full disclosure is deprived of any advantage that he may have derived from that breach of duty. As the applicant conceded and the respondent contended that is not an absolute rule and any relief granted is in the discretion of the Court and requires weighing up a number of factors. The applicant also contends that if it was successful in varying or setting aside the order then the respondent would be deprived of its costs, which would affect the relief sought by the respondent and to that extent there was significant utility in transferring the whole matter to the Supreme Court. In oral submissions the applicant also raised that if it was successful in relation to its complaint about the Anton Pillar order there was a possibility as part of the relief granted that the

respondent could not rely upon the fact that any documents were found at the applicant's house.

[21] The respondent contends that the issues to be determined at trial are narrow and do not depend upon a determination of any of the grounds sought to be advanced in respect of the application to set aside the Anton Pillar order. The grounds upon which the applicant would apparently seek to challenge the orders made are discrete and separate.

[22] The respondent points out that the applicant has made a number of admissions and pleaded his case in such a way that the issues at trial do not concern in any way whether he was in possession of documents which were obtained in execution of the Anton Pillar order or of the circumstances in which he came to have them. It contends that the issue at trial is principally about whether the applicant was justified in not returning the alleged confidential information, not whether he held the documents or the downloaded information said to be confidential information. The respondent's contention is supported at least by paragraphs 1, 5A, 6 and 6B of the Defence.

[23] The respondent also submits that any variation or setting aside of the Anton Pillar order, would not have the effect of withdrawing admissions made by the applicant, nor could it be assumed that the applicant would be permitted to withdraw the admissions simply on the basis that they made them because of material found in the execution of the Anton Pillar order. That is correct since of itself the variation or setting aside of the Anton Pillar order alone would not raise a matter of real and genuine dispute.[4]

[24] The applicant did not cavil with the proposition that it could bring a separate originating application in the Supreme Court to set aside the Anton Pillar order separate from the transfer of the District Court proceedings. It was however contended by the applicant that it would be inefficient to have the application heard separately from the District Court proceedings and prejudicial for the applicant to bear two sets of costs and have the burden of preparing for two sets of proceedings.

[25] The respondent relies on the fact that the applicant is guilty of significant delay in bringing the present application since the making of the order on 9 September 2015 and the filing of the present application.

[26] In October 2016, following the receipt of the transcript of the proceedings before the Anton Pillar order, the applicant claims it became more aware of the non-disclosure and wrote to the respondent in or about October 2016.[5] No explanation was provided as to why the transcript was not sought earlier. The resondent was not required to serve the transcript at the time it served the material relevant to the making of the Anton Pillar order.

[27] The applicant was however served with the affidavit material and submissions prior to the execution of the order. Mr Cowen, the independent solicitor, engaged to execute the order, explained to the applicant what rights he had to set aside the order

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4 *Rigato Farms Pty Ltd v Ridolfi* [2001] Qd R 455.

5 Affidavit of Brett Wilson (CFI2) at [12], [13].

on 9 September 2015.[6] The applicant engaged his present solicitors at the time who advised him to co-operate.[7]

[28] After the applicant had raised complaint as to non-disclosure, the present application was not filed until 30 November 2016 and was not set down for hearing until 1 February 2017. According to the applicant it may have been able to have the application heard before Christmas, but it was set down for the first available day after Christmas. The application was to transfer the proceedings only and not to set aside or vary the Anton Pillar order. As to the latter the applicant contended it could not have been in a position to have it heard, and needed further time to obtain the relevant evidence.

Consideration

[29] Given the terms of s 31 of the *Civil Proceedings Act* and the powers of the District Court in s 69 of the *District Court Act,* there appears to be no constraint upon the District Court setting aside or varying the Order made by the Supreme Court on 9 September 2015. Such an order is provisional in the sense that it can later be varied or set aside if there are grounds established impugning the basis upon which the order was originally made.

[30] Section 31 states that the proceeding is to be heard and decided "as if it had been started in that court". Section 31 of the *Civil Proceedings Act* does appear on its proper construction to provide that a proceeding is treated as if it was begun in the District Court, once the proceeding transferred to the District Court. This must include the orders made in the original court. If that was not so directions made prior to transfer could not varied by the Court then seized of the matter. It is apparent that the intent of the section is to ensure the court to which the proceedings are transferred can wholly deal with the proceeding provided it has the jurisdiction to do so. To require proceedings to be separately brought in the original court to vary any order made prior to transfer would defeat the evident intention of s 31 of the *Civil Proceedings Act* and would be inconsistent with treating the matter as if begun in the District Court.

[31] In the present case the proceeding was begun by an originating application and ordered to continue as if started by claim by an order of A Lyons J dated 1 October 2015. The effect of transferring the matter to the District Court by operation of s 31 of the *Civil Proceedings Act* is that the proceedings begun by originating application in the Supreme Court are to be treated as if they were commenced by originating application in the District Court and subsequent steps taken are to be treated as if they occurred in the District Court.

[32] In my view the power to vary or set aside the Anton Pillar order originally made by the Supreme Court can be exercised by the District Court.

[33] Even if I am wrong in this regard, I am not otherwise satisfied that the District Court proceedings should in their totality be transferred to the Supreme Court pursuant to s 25 of the *Civil Proceedings Act*. I do not accept the argument by the applicant that there is any significant overlap between any issues to be determined in seeking to have the Anton Pillar order set aside and the issues at trial. The live

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6 Affidavit of Mr Cowen sworn 18 September 2015.

7 Affidavit of Brett Wilson (CF12) at [6].

issues on the pleadings do not indicate that any investigation into the circumstances in which documents or information was obtained on the execution of the Anton Pillar order will be required. In any event, any impact upon the District Court trial, could be dealt with by amendment to the pleadings or objections to evidence. The only real matter identified by the applicant in oral submissions as being a potential matter of overlap of evidence is in relation to the respondent's contention that it would raise additional arguments as to the applicant's intention when leaving the premises in response to the fact that it was incorrectly submitted that the applicant had removed material, before not after, his being terminated. That may be relevant to the relief that may be granted if a ground which could impugn the making of the Anton Pillar order could be established, but does not need to be dealt with at the same time as the trial nor by the same court.

[34] To the extent that setting aside the Anton Pillar order may affect the damages sought that may be dealt with by amendments to the pleadings. Similarly any order obtained consequential upon any setting aside of the Anton Pillar order in terms of use of information or documents obtained could be dealt with in the District Court proceedings by evidential rulings.

[35] Further, given the time that has passed since the making of the order, there is a very real possibility that even if the applicant successfully establishes that there was non-disclosure or that disclosures made were misleading no relief relevant to the conduct of the District Court Trial may be granted. This is particularly so given the admissions that have been made by the Defendant in its defence.

[36] In any event, the applicant has sufficient time to bring an application in the Supreme Court before the hearing of the trial if it acts expeditiously. While there may be an additional cost from two sets of proceedings, the additional costs are unlikely to be significant. The preparation for setting aside the Anton Pillar order will have to be made in any event whether at the same time or separately from the District Court trial. In any event it does not outweigh the other facts discussed below.

[37] A number of other matters militate against the transfer of proceedings. First, notwithstanding it is obviously a serious matter if there has been non-disclosure or misleading disclosure in the making of an Anton Pillar order, the Anton Pillar order was made some 16 months ago and has been fully executed.

[38] The applicant did not obtain a copy of the transcript of the Anton Pillar proceedings until October 2016 and did not file an application until 30 November 2016.

[39] The applicant was provided with all of the affidavit material and submissions that had been relied upon in the Anton Pillar order.[8] An independent solicitor advised the applicant of his rights at the time and the applicant spoke to his solicitors acting at the time of the execution of the Anton Pillar order in September 2015.[9] None of the matters of complaint appear to be only evident from the transcript. In this regard the applicant submitted that it was only with the production of the transcript "that the importance of non-disclosure was fully appreciated". It was not suggested that any disclosures or any matter said to be misleading could not have been identified by the material previously provided.

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8 Affidavit of Mr Wilson (CFI2) at [6], [7].

9 Affidavit of Mr Wilson (CFI 2) at [6].

[40] The present application to transfer the proceedings from the District Court to the Supreme Court was filed on 30 November 2016 but not set down for hearing until 1 February 2017. No proper explanation was provided as to why that did not occur before Christmas particularly given that matter was being called over on 9 December 2016.

[41] Although the applicant opposed the matter being set down for trial, it has been set down for trial and the parties have taken steps towards the matter being prepared for trial. To the extent that date would be vacated, the respondent would suffer some prejudice.

[42] I am not satisfied that there is sufficient overlap of issues to be determined by any application to set aside the Anton Pillar order and the District Court trial such that there is a danger of two courts making conflicting decisions about the same issue. While there may be some impact upon the District Court proceedings in terms of evidence and the relief sought in terms of costs if the Anton Pillar is set aside or varied, that can be dealt with by making a stand-alone application now or at the beginning of the trial.

[43] Accordingly, I dismiss the application.

Costs

[44] The respondent seeks to have the costs of the application on an indemnity basis. The basis of seeking such costs is because the applicant failed to accept an offer which would have permitted the application to be amended to enable his substantive application to proceed in this Court. In that regard there is a letter of 24 January 2017 sent to the solicitors for the applicant which indicated to the respondent that the applicant consented to the applicant being granted leave to amend his originating application to include relief seeking the set aside of the Anton Pillar order and costs reserved. That offer was rejected on 27 January 2017. The applicant in this regard asserted that it would not have been in the position as of 24 January to run the application to set aside the Anton Pillar order. In that regard given the application was filed on 30 November 2017 and the matter was set down for hearing for 1 February 2017 and any application under s 25 of the *Civil Proceedings Act* involves the exercise of discretion. I am not satisfied it was unreasonable for the applicant not to accept the offer in the circumstances.[10] I order that the applicant pay the respondent's costs of the application proceedings on a standard basis.

[45] I order that:

(a) The application filed 30 November 2016 be dismissed;

(b) The applicant pay the respondent's costs of the application on a standard basis.

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[10] as to the relevant factors see *Jean-Claude Best & Ors v Red 5 Limited & Anor* [2017] QSC 8 at [22] – [23] and [31].