SUPREME COURT OF QUEENSLAND

CITATION:	*Adani Mining Pty Ltd & Anor v Pennings* [2020] QCA 169
PARTIES:	**ADANI MINING PTY LTD** **ACN 145 455 205** **(first appellant)** **CARMICHAEL RAIL NETWORK PTY LTD AS TRUSTEE FOR THE CARMICHAEL RAIL NETWORK TRUST** **ACN 601 738 685** (second appellant) **v** **EX PARTE BENJAMIN WILLIAM DEVENISH PENNINGS** (respondent)
FILE NO/S:	Appeal No 6931 of 2020 SC No 6666 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 22 June 2020 (Dalton J)
DELIVERED ON:	17 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 2020
JUDGES:	Sofronoff P and Philippides JA and Davis J
ORDER:	**The application is refused.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DETENTION, INSPECTION AND PRESERVATION – SEARCH ORDERS – OTHER CASES – where the first appellant is the developer of a coal mine in the Galilee Basin in Queensland – where the second appellant is the developer of an associated railway line that is intended to be used to transport coal from the mine to a port – where the respondent is the "principal" of a group of political activists, called the "Galilee Blockade", whose object is to prevent the development of the mine and the railway – where the appellants applied for an *ex parte* Anton Piller order against the respondent – where the learned primary judge dismissed the application – where the appellants appeal against that dismissal – where the appeal was heard *de novo* – whether the Anton Piller order ought to be granted *Uniform Civil Procedure Rules* 1999 (Qld), r 261A, r 261B,

r 763

Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55; [1975] EWCA Civ 12, distinguished
Lock International Plc v Beswick [1989] 1 WLR 1268, considered

COUNSEL: S L Doyle QC, with D J Pyle and M J Doyle, for the first and second appellants
No appearance for the respondent

SOLICITORS: Dowd & Co for the first and second appellants
No appearance for the respondent

[1] **SOFRONOFF P:** The first appellant, Adani Mining Pty Ltd, is the developer of a coal mine in the Galilee Basin in Queensland. The second appellant, Carmichael Rail Network Pty Ltd, is the developer of an associated railway line that is intended to be used to transport coal from the mine to a port. The respondent, Mr Benjamin Pennings, has been described in the evidence as the "principal" of a group of political activists, called the "Galilee Blockade", whose object is to prevent the development of the mine and the railway on the ground that their development and operation will be harmful to the environment.

[2] On 5 June 2020 the appellants filed an application seeking a search order pursuant to r 261A of the *Uniform Civil Procedure Rules* 1999 (Qld). Dalton J heard the application *ex parte* on the same day and dismissed it on 22 June 2020. The appellants appealed against that dismissal on 25 June 2020. Like the application itself, the appeal was heard *ex parte*.[1]

[3] The proceeding arises out of the following facts.

[4] Adani has developed a "Mine Plan" for its development. This Mine Plan is kept on a computer, apart from some large drawings that mine planners used in Adani's Brisbane office, and it contains "a detailed description of the works", the location of work sites and a "detailed construction programme containing (*inter alia*) the proposed commencement dates for such Mine Works". This part of the Mine Plan is described as the "Mine Technical Scope". The document contains information about the work that contractors will perform, the sites where that work will be done and the timing of the work. The Mine Technical Scope changes over time as Adani enters into new contracts. In addition to the Mine Plan, Adani keeps confidential the contents of the contracts into which it enters with contractors. This kind of information would be of use to Adani's competitors and its disclosure to them would be likely to harm Adani's business.

[5] The Mine Plan is therefore kept as a confidential document. Adani limits access to the document to certain senior executives, Adani's in-house lawyers, as well as others such as engineers and geotechnical staff who require access to the Plan in order to perform their tasks. All of Adani's employees are bound by contractual obligations not to disclose Adani's confidential information. Existing contractors and intending contractors who tender for work may be given access to some parts of the Mine Plan but such contractors and tenderers are also bound by written

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1 This appeal has been brought pursuant to *UCPR* r 763 as a "renewed" application. It has been heard upon the footing that this is an application to be heard *de novo*.

undertakings to keep the information confidential. The terms of the confidentiality undertakings given by third parties are in evidence but it is not necessary to refer to them. It is clear that the information referred to is confidential.

[6] Carmichael has a similar written plan for its proposed railway with similar characteristics to the Mine Plan and is, likewise, kept confidential.

[7] Evidence has been tendered from a private investigator, Ms Julia Del Rosso, who specialises in investigating activities carried out on the internet. She has deposed as follows. Galilee Blockade represents itself on the internet as a group of people whose aim is to protest against any form of mining in the Galilee Basin. Mr Pennings has been represented in the group's publications as its strategist, convenor and spokesperson. As early as January 2015, the group identified Adani as one of "Our Current Targets". According to Ms Del Rosso, the group published the following about Adani in January 2015:

> "Adani have an absolutely appalling record of eco-terrorism and human rights abuses, particularly in India. They own the lease to the biggest mine in the Galilee Basin, Carmichael. They also own the shipping terminal facilitie [*sic*] in Abot [*sic*] Point. Adani are the biggest and most advanced player in the sick race to mine the Galilee Basin. They are threatening ecocide. They must be stopped."

[8] Also in January 2015, Galilee Blockade published its plan of campaign as follows:

> "Galilee Blockade will entail:
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> - Grassroots groups undertaking direct action against these ecocidal companies. Anywhere in the world they operate. These groups will be offered strategic, legal and other advice by campaign advisors and activist networks.
> - Professional operations and logistics planning for the possibility of entrenched and mobile blockades in the Galilee Basin, and any other places these companies operate.
> - Building the capacity of the environment movement to undertake direct actions and be involved in blockades.
> - Building a base of human, logistical and financial resources to quickly initiate blockade actions if needed.
>
> The campaign has detailed information on all the potential mining projects, and locations of the companies involved. Projects closest to financial closure and legal approval will be targeted as a matter of priority. This starts with the biggest proposed coal mining project in Australia, the huge Carmichael Mine."

[9] One of Adani's contractors was identified as follows:

> "Downer EDI are a huge supporter of eco-terrorism. They have recently signed a huge $2 billion worth of contracts with Adani 'for the provision of mining services and the construction of mine infrastructure at the Carmichael Coal Mine'. Downer EDI are a vital piece of the eco-terrorist network that must be broken down'."

[10] Ms Del Rosso's investigations demonstrate that Galilee Blockade continued its campaign on the internet from January 2015 until at least 22 June 2019 when the following was published:

> "DOB IN ADANI AND THEIR CONTRACTORS. Do you have information about companies working with #Adani, or even thinking about it? Have you got inside info about Adani, including their events? Help us sharpen our #StopAdani strategy by sharing what you know – galileeblockade.net/dob-in/."

[11] The "Dob In" campaign was supported by inviting people to submit a web-based form which asked for the disclosure of the identity of a contractor or proposed contractor as well as the scope, timing and location of the works.

[12] This campaign may have been successful in persuading at least one person to cooperate because, according to an ABC news story, a "worker at a company bidding for an Adani contract has told the ABC she is leaking inside information to environmental activists so they can target her employer".

[13] Another part of the campaign involved protests at the premises of contractors. Thus, on 19 April 2020, Galilee Blockade published a tweet stating that its protests against a business called FKG, that had contracted with Adani, had been successful. Another such publication stated the group's intention to protest at the offices of Lloyds of London in order to pressure it to decline insurance to the appellants.

[14] According to the evidence there have been "blockades" at the premises of Downer Group in Brisbane, on the Sunshine Coast and in Melbourne. Apparently, in Downer's case the campaign has been successful because according to the appellants' evidence:

> "In November 2017 Mr Vora received a telephone call from Downer's Mining CEO wanting to urgently meet. A meeting then took place within a day or two at Adani Mining's Brisbane Office whereby Downer's Mining CEO and Group CEO advised Mr Vora and Mr Jeyakumar Janakaraj, the CEO of Adani Australia, that Downer was withdrawing from negotiations and would not enter into a mining services agreement with Adani Mining. The reason given was the impact to the Downer business as a consequence of continuous protestor action directed to Downer's business and offices."

[15] There is also evidence that Greyhound Australia decided not to continue negotiations for a contract with one of Adani's sub-contractors pursuant to which it was to convey workers to a worksite. Another company, AECOM, is said to have withdrawn from a contract with Adani. The evidence about this includes two emails exchanged within Adani relating the author's view that AECOM has signified that "they are not going to proceed with the work". The author of the email concluded that "[f]rom a work delivery point of view Adani will not be disadvantaged" if another named company were to take over the same work.

[16] The appellants have tendered a draft statement of claim. Upon the basis of the conduct of Galilee Blockade referred to above, the appellants intend to proceed against Mr Pennings, to whom it attributes the group's conduct, for breach of

confidence, inducing breaches of contract, intimidation and conspiracy to injure. In this application the appellants seek a search order in aid of those proceedings.

[17] Rule 261A of the *UCPR* provides for the purposes of such an order:

> "The court may make an order (a ***search order***), in any proceeding or in anticipation of any proceeding in the court, for the purpose of securing or preserving evidence and requiring a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence which is, or may be, relevant to an issue in the proceeding or anticipated proceeding."

[18] Rule 261B provides:

> "The court may make a search order if the court is satisfied that–
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> (a) the applicant has a strong prima facie case on an accrued cause of action; and
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> (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and
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> (c) there is sufficient evidence in relation to a respondent that–
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> (i) the respondent possesses important evidentiary material; and
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> (ii) there is a real possibility that the respondent might destroy the material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court."

[19] Rule 261B reflects the principles laid down in *Anton Piller KG v Manufacturing Processes Ltd*.[2] In *Lock International Plc v Beswick*[3] a further principle was put forward, namely that the harm likely to be caused to the respondent by the execution of the order must not be excessive or out of proportion to the legitimate objects of the order. The order lies at the limits of the court's jurisdiction because of its conflict with the long established common law principle that every unauthorized entry upon private property is a trespass, the right of a person in possession, or entitled to possession of premises, to exclude others from those premises being a fundamental common law right.[4]

[20] For this reason the court must be careful to avoid this extraordinary jurisdiction being subverted to a mere investigatory tool and must be astute to prevent its use for any purpose other than the preservation of vital evidence.[5] There must, therefore, be convincing evidence that the defendant has possession of incriminating documents or things.[6] The grave danger of causing unintended and unforeseen harm by granting such orders and the need to guard against such harm has been repeatedly emphasised in the cases decided since *Anton Piller*. It has been said that the making of a search order, a highly intrusive order made *ex parte*, is contrary to

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2 [1976] Ch 55 per Ormrod LJ at 62.
3 [1989] 1 WLR 1268 at 1281.
4 *Coco v The Queen* (1994) 179 CLR 427 at 436 per Mason CJ, Brennan, Gaudron and McHugh JJ.
5 *Microsoft Corporation v Goodview Electronics Pty Ltd* (1999) 46 IPR 159 at [13] per Branson J.
6 *Celanese Canada Inc v Murray Demolition Corp* (2006) SCC 36 at [35].

the normal principles of justice and can only be justified when there is a paramount need to prevent a denial of justice to the plaintiff.[7]

[21] In *Anton Piller* Lord Denning credited Mr Hugh Laddie of counsel, who appeared before the Court of Appeal in that case, with actually inventing the order.[8] Fifteen years later, in an article published in the Law Quarterly Review, the same Mr Laddie wrote:[9]

> "Anton Piller orders are offensive weapons. They have the ability to harm their victims in many ways. Service of an *ex parte* order coupled with a demand for immediate entry into premises is likely to produce strong emotional reactions; shock, anger, confusion, a sense of violation and powerlessness are common recollections, even when orders are served by sensitive and tactful solicitors. The execution of an order may cause severe, sometimes irreparable, physical disruption to a defendant's business or daily life: the process may take hours to complete." (footnote omitted)

[22] The evidence in this case is wholly inadequate to justify the order sought.

[23] It is true, as the appellants submit in their written argument, that they have identified with adequate specificity the information that they claim to be confidential. However, perusal of the appellants' written argument and close attention to the oral argument has disclosed no evidence that Mr Pennings has obtained any of it. It is true that activists associated with Mr Pennings have appeared at the premises of several of the appellants' contractors or intending contractors. However, as Mr Doyle QC, who appeared for the appellants, candidly admitted, the appellants cannot exclude the possibility that the names of these contractors were obtained from sources other than the confidential information. That puts paid to the whole case based upon the confidentiality of the identity of contractors.

[24] There is a single instance proven in which protesters appeared at a work site that is said to be in an "extremely remote" location which could not have been known except by reference to the confidential information. On 25 September 2019 protesters appeared at a particular place along the intended 200 kilometre railway and disrupted the work being done there. It is not said that Mr Pennings was one of them.

[25] Put at its highest, it may be inferred that at least these activists who appeared at the site found out this confidential information about work being done at this location. It says nothing about Mr Pennings's involvement in accessing the Mine Plan. It is still further from proving, to any standard of proof, that Mr Pennings holds confidential information on a computer at his home.

[26] When the appellants argued their application before Dalton J, her Honour observed that the draft pleading did not raise a substantial case that any meaningful loss had been suffered by the appellants. Losses are now alleged to have been caused by publications to particular contractors or potential contractors of threats that unless

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7 *Lock International Plc v Beswick*, *supra*.

8 "On appeal to us, Mr. Laddie appears for the plaintiffs. He has appeared in most of these cases, and can claim the credit – or the responsibility – for them.": *supra*, at 58. Mr Laddie was appointed to the High Court in 1995 and sat in the Chancery Division.

9 *Piller Problems*, M Dockray and H Laddie, (1990) 106 LQR 601 at 603.

they cease to work for the appellants or cease negotiations with the appellants they would be "subject to Direct Action by persons associated with Galilee Blockade".[10] These contractors are "Targeted Contractors", an expression that is defined in the pleading to include contractors engaged by the appellants, contractors who are negotiating with the appellants and those who have subcontracted to contractors engaged by the appellants.[11] Sixteen such persons have been identified in the pleading.[12]

[27] The current form of the draft pleading alleges that Downer Group and Greyhound Australia have withdrawn from negotiations and that AECOM has "purportedly terminated its services contract". The loss incurred by the withdrawal of Greyhound Australia from negotiations (with a contractor, not with the appellants) is pleaded as $37,579.30. The loss attributable to AECOM's actions is pleaded as $49,000, a sum at odds with the email evidence in which it was stated that no loss would be incurred. Otherwise, it is pleaded that the appellants will have to "modify its mine plans and to negotiate and contract with other contractors, at an increase in its forecast operational expenses".[13]

[28] It can be accepted, as the evidence states, that "the budgeted spend on security for both the Carmichael Mine and Rail Network has increased from $1million to $5million". However, expenditure on "security", whatever may be encompassed by that word, cannot be equated to expenditure that has been necessitated by the obtaining of confidential information and no attempt was made to make such a causal link. For the purposes of establishing one or more of their causes of action it may not be necessary for the appellants to make that connection. For the purposes of this application they have to do so because the order is said to be justified by the loss that will be suffered if the order is not made.

[29] The appellants also led evidence to show that the withdrawal of Downer Group from negotiations has had the consequence that:

> "… the scope of the Carmichael Mine was required to be scaled down from 30 million tonnes per annum mine to a 10 million tonnes per annum mine. The consequence of that downscaling has resulted in an increase to the capital cost per ton of coal of at least 15%".[14]

[30] Downer Group is said to have withdrawn from negotiations as a result of being subjected to "continuous protestor action directed to Downer's business and offices".[15]

[31] It is unnecessary to consider whether and to what extent this constitutes evidence of loss. It is evidence that is expressed in the broadest and most impenetrable terms and nothing is known about projected profits. It is true that this is an interlocutory application. But it is an *ex parte* interlocutory application and, as a result, the Court has to depend upon the utmost comprehensive candour in an applicant's explication of the basis for the claim for relief. These mere assertions fall short of what is required on an application seeking the extraordinary relief claimed.

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10 Draft Statement of Claim, paragraph 58.
11 Draft Statement of Claim, paragraph 41(b).
12 Draft Statement of Claim, paragraph 58(g)(i) – (xvi).
13 Draft Statement of Claim, paragraphs 63 and 64.
14 Affidavit of Mr Christopher Wilson, affirmed 10 July 2020, paragraph 38.
15 *Ibid*, paragraph 29.

[32] In any case, this was no more than evidence of loss caused by persons fomenting protests at premises belonging to contractors whose identities were not necessarily secret.

[33] In short, the appellants have failed to establish the likelihood that Mr Pennings has any confidential information or that he has any confidential information stored at his home. They have failed to establish the likelihood that the use of any confidential information has resulted in any loss.

[34] The inadequacy of the evidence can be seen when this case is contrasted with *Anton Piller*, in which the evidence satisfied the required criteria. The plaintiffs manufactured devices using technology that was confidential. The defendants were the plaintiffs' agents in the United Kingdom for the sale of the devices and, as such, they received many examples of such devices as well as confidential information about the technology used to make them. The plaintiffs tendered direct evidence from two employees of the defendants that proved that the defendants had agreed with a competitor of the plaintiffs to divulge the confidential information so that, together, they might manufacture the same devices. These two informants furnished documentary evidence to prove the existence of this plan, including written communications between the two wrongdoers. Thus, the prima facie case was very strong, the potential damage to the plaintiffs was going to be serious if the misconduct was not checked and there was ample proof that the defendants held documentary proof of wrong doing and, being proved malefactors, would be likely to destroy the evidence if alerted. The premises to be searched were, of course, business premises.

[35] There is nothing like that in the present case.

[36] Something must be said about the delay in seeking relief. On 13 February 2017 Herbert Smith Freehills, solicitors who were then acting for the first appellant, wrote to Galilee Blockade to place the members of that organisation on notice that the first appellant would seek relief from the Court if the appellant's confidential information was obtained and misused. The letter made specific reference to a public invitation to employees of the appellant issued by Galilee Blockade to disclose "inside information" for use against the appellant. On behalf of their client, the solicitors threatened to seek an injunction to restrain the misuse of the appellant's confidential information. No such injunction, or any other relief less intrusive than a search order, was ever sought until the present application for extraordinary relief. That failure is unexplained. It leaves open the inference that the appellants have not regarded the danger of misuse of confidential information as a serious danger. It may be accepted from the evidence led in this case that the protests themselves have had a serious effect on business and it might be thought that those effects were not fully felt until recently; but that is, on the evidence, the result of protests at the premises of contractors, the identity of whom might have been obtained from non-confidential sources.

[37] The appellants seek orders that would require Mr Pennings to "permit members of the search party to enter the premises so that they can carry out the search and other activities referred to in this order" and permit them also "to leave and re-enter the premises on the same day and the following day until the search and other activities referred to in this order are complete". The "search party" would comprise four persons; two solicitors instructed by the appellants, an independent solicitor and an independent computer expert. Mr Pennings would be required to permit "the

independent computer expert to search any electronic device and make a copy or digital copy of any electronic device and permit the independent computer expert to remove any electronic device from the premises …". If Mr Pennings were to object, then the independent solicitor would take the electronic devices.

[38] The "premises" are Mr Pennings's home and the home of his partner and children. The evidence of a private investigator, Mr Garry Sweet, identifies Mr Pennings as "an owner" of the premises in which he and his family live. The appellants tendered a CITEC search that reveals him to be *an* owner but the search is qualified as follows:

> "Only one registered Owner Name for each address is displayed below. Each title may contain additional registered owners. Order the title to see all registered owners for that address."

[39] The appellants did not "order the title" and so the Court has not been told whether or not Mr Pennings's partner is a co-owner of the property. In any event, she and the children are certainly lawful occupants of the whole of the premises. Nothing has been said about the right of the appellants to require this other adult who lives in that house to give them permission for entry and search or, indeed, the rights of the children to be protected. Nothing has been addressed about the possibility or likelihood that some "electronic devices" that might be taken under the order might belong to Mr Pennings's partner or the children and not to Mr Pennings.

[40] When search orders are granted, the relevant premises are usually business premises.[16] Surely, to permit a search of a defendant's house, with the humiliation and family distress which that might involve, lies at the outer boundary of the discretion.[17] This is because, for reasons that anyone can understand, the "shock, anger, confusion" and the "sense of violation and powerlessness"[18] will be much greater in such a case and may be suffered not only by someone who is proved in due course to be a wrongdoer, but by entirely innocent parties as well.

[41] The application should be refused.

[42] **PHILIPPIDES JA:** I agree with the reasons of Sofronoff P and the order proposed by his Honour.

[43] **DAVIS J:** I agree with Sofronoff P.

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16 See eg. *Anton Piller*, *supra*; *Microsoft v Goodview Electronics*, *supra*; *Television Broadcasts Ltd v Nguyen* (1988) 21 FCR 34 at [7]; *Bugaj v Bates* [2004] FCA 1260 at [7].

17 *Lock International Plc v Beswick*, *supra*.

18 *Piller Problems*, *supra*, 603.