



Rare Court Orders Can Help Companies Take Legal Action - Part 2

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This is the second of three articles on unusually forceful, difficult-to-obtain court orders that can enable companies fearing they are the victims of such illegal activities as fraud, intellectual-property theft, and trade secret theft to capture evidence before it might be destroyed or to freeze assets that could be used to pay claims they might win.

The [first article](#) in this series, published in the January, 2008 issue of *Commercial Litigation Update*, focused on Norwich orders, which allow a person to obtain information from a third party, in particular a proposed defendant's bank, before moving forward with the claim against the defendant himself.

This article focuses on obtaining information from the target defendant immediately upon making the decision to bring the claim, without having to wait for the normal voluntary discovery of process, which may not take place until months after the lawsuit has already been started. Such orders are called *Anton Piller* orders, named after the famous English decision in which one was first made.

In its most recent pronouncement on *Anton Piller* orders, in its decision on *Celanese Canada v. Murray Demolition Corp.*, The Supreme Court of Canada has actually described an *Anton Piller* order as being a "private search warrant" In his opening paragraph in the *Celanese* decision, Justice Binney states:

"An Anton Piller order bears an uncomfortable resemblance to a private search warrant. No notice is given to the party against whom it is issued. Indeed, defendants usually first learn of them when they are served and executed, without having had an opportunity to challenge them or the evidence on which they were granted. The defendant may have no idea a claim is even pending. The order is not placed in the hands of a public authority for execution, but authorizes a private party to insist on entrance to the premises of its opponent to conduct a surprise search, the purpose of which is to seize and preserve evidence to further its claim in a private dispute. The only justification for such an extraordinary remedy is that the plaintiff has a strong *prima facie* (Latin, meaning on its face) case and can demonstrate that on the facts, absent such an order, there is a real possibility relevant evidence will be destroyed or otherwise made to disappear."

As can be seen, therefore, the *Anton Piller* order can be a very powerful tool to help in the investigation process and to preserve evidence. It is difficult to obtain, however, and there are many pitfalls that can befall a litigant and counsel if not done properly.

As set out by Justice Binney in the *Celanese* decision, there are four central conditions that must be met before the making of an *Anton Piller* order:

- the plaintiff must demonstrate a strong case;
- the damage to the plaintiff as a result of the defendant's alleged misconduct, potential or actual, must be very serious;
- there must be convincing evidence that the defendant has in its possession incriminating documents or things; and
- it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.

In cases where there is fraud, it is usually easier to satisfy these requirements. The more difficult cases are the pure commercial cases involving unfair competition, where the plaintiff alleges the defendant is misusing confidential, proprietary or intellectual property claimed to be owned by the plaintiff. These cases are not on the same level as fraud and therefore the mere fact that a defendant may be using information that is claimed as proprietary by the plaintiff does not amount to the level of fraud such that a court can infer that evidence or documents will be destroyed if an *Anton Piller* order is not granted.

Where an *Anton Piller* order is granted, the plaintiff, through its counsel, is essentially given the right to show up at the defendant's door unannounced and demand that documents and other physical evidence be immediately turned over.

Anton Piller orders are so draconian and involve such a gross and serious violation of a defendant's privacy rights that the Supreme Court sought fit to delineate in *Celanese* a set of guidelines for the preparation and execution of an *Anton Piller* order. The guidelines are as follows:

- the order should appoint a supervising solicitor who is independent of the plaintiff or its solicitors and is to be present at the search to ensure its integrity;
- the plaintiff is required to provide an undertaking and/or security to pay damages in the event that the order turns out to be unwarranted or wrongfully executed;
- the scope of the order should be no wider than necessary and no materials shall be removed from the site unless clearly covered by the terms of the order;
- the terms setting out the procedure for dealing with solicitor/client privilege or other confidential materials should be included in the order with a view to enabling defendants to advance claims of confidentiality over documents before they come into the possession of the plaintiff or its counsel or to deal with disputes that arise;
- the order should specify that items seized may only be used for the purposes of the pending litigation;
- the order should state explicitly that the defendant is entitled to return to court on short notice to discharge or vary the order or vary the amount of security;
- the order should provide that the materials seized be returned to the defendants or their counsel as soon as practicable;
- the order should provide that the search be commenced during normal business hours, when counsel for the party about to be searched is more likely to be available for consultation;

- the premises should not be searched or items removed except in the presence of the defendant;
- the persons who may conduct the search and seize evidence should be specified in the order or be specifically limited in number;
- the order should require that it be served together with the statement of claim and the supporting affidavits used to obtain the order and the plaintiff's counsel or the supervising solicitor should explain to the defendant in plain language the nature and effect of the order;
- the defendant should be given a reasonable time to consult with counsel prior to permitting entry to the premises;
- a detailed list of all evidence seized should be made and the supervising solicitor should provide this list to the defendant for inspection and verification at the end of the search and before materials are removed from the site;
- where this is not practicable, documents seized should be placed in the custody of the independent supervising solicitor and defendant's counsel should be given reasonable opportunity to review them to advance solicitor/client privilege claims prior to the release of the documents to the plaintiff;
- where ownership of material is disputed, it should be provided for safe keeping to the supervising solicitor or to the defendant's solicitors;
- the order should specify that the responsibilities of the supervising solicitor continue beyond the search itself to deal with matters arising out of the search;
- the supervising solicitor should be required to file a report with the court regarding the search and seizure; and, lastly,
- the order may require the plaintiff to bring a further motion to the court for a review of the execution of the search.

In *Celanese*, the defendant sought to have the plaintiff's solicitors removed as solicitors of record because they had reviewed documents that were protected by solicitor/client privilege that had been seized during the execution of the *Anton Piller* order. There had not been proper procedures put in place to deal with privileged documents before they would be reviewed by the plaintiff's solicitors. The plaintiff's solicitors were removed as counsel, undoubtedly resulting in much expense and inconvenience to the plaintiff.

In their initial discussions with counsel, clients should be aware of the possibility of seeking an *Anton Piller* order where there is good reason to believe that the proposed defendant was not acting in good faith and may destroy documents or evidence if put on notice of a claim. Experienced counsel should be engaged when considering whether to seek an *Anton Piller* order, as they are difficult to obtain and even more difficult to properly execute.

The third and final article in this series will focus on *Mareva* injunctions, which involve the freezing of the defendant's assets at the beginning of the case to ensure that there are assets available to satisfy a judgment for the plaintiff which may (or may not ever) be granted at the end of the case. ■