

Date: 20050903

Docket: T-346-05

Ottawa, Ontario, September 2, 2005

PRESENT: THE HONOURABLE MR. JUSTICE SHORE

BETWEEN:

**NEW ERA CAP COMPANY, INC.
and NEW ERA CAP COMPANY**

Plaintiffs

and

**JANE DOE and JOHN DOE and OTHER PERSONS,
NAMES UNKNOWN, WHO DEAL IN UNAUTHORIZED OR COUNTERFEIT
ROCAWEAR MERCHANDISE, AND THOSE PERSONS LISTED
IN SCHEDULE "A" TO THE STATEMENT OF CLAIM**

Defendants

AMENDED DIRECTION

This Direction is issued to ensure that each party in this matter is made aware and given the opportunity to participate in each proceeding with respect to the Plaintiff's request to extend an interim preservation order and that the order only be granted upon such assurance as specified. (This Direction is further to oral directions in regard to the said proceeding).

The following excerpts from *Ridgewood Electric Limited (1990) v. Robbie et al.*, 74 O.R. (3d) 514, Superior Court of Justice, Corbett J. February 18, 2005 reflect simply a few of the reasons for greater scrutiny with regard to Anton Piller Orders and any matter of renewal linked thereto :

... the jurisdiction for an Anton Piller order is found in the court's inherent jurisdiction to protect its own process. But the source of the jurisdiction for the order and its substance are two different things. The substance of the order is entry, search and seizure of private property. Since the substance of an Anton Piller order is entry, search and seizure, the distinction between Anton Piller orders and search warrants is "subtle to say the least" (Sharpe, *Injunctions and Specific Performance*, 2nd ed. (Aurora, Ont: Canada Law Book, 1992), para. 1.1280), with one court going so far as to call it "hypocrisy" (see *Bhimji v. Chatwani*, [1991] 1 W.L.R. 989, at p. 1001 W.L.R., per Scott J.).

The reason for this distinction is said to hearken back to the ancient and revered authority of *Entick v. Carrington* (1765), 2 Wils. 275, [1558-1774] All E.R. Rep. 41, 95 E.R. 807, in which the court stated the following fundamental principle: a person's home is her "castle", her own private domain. Even officers of the state may not invade that sanctum without the permission of the householder. To honour this principle, the courts have described an Anton Piller order as something other than a search warrant. But the description and analysis does not change the fact that, in substance, an Anton Piller order is a search warrant. And it is time that the theoretical distinction between Anton Piller orders and search warrants be abandoned, not to denude privacy and property rights, but to protect them.

Safeguards for Anton Pillar as a minimum should include:

Careful judicial scrutiny of execution of Anton Piller orders to balance the interests of both sides to ensure a fair disposition of the substantive issues in the case in a process that is fair to both sides.

The test for an Anton Piller order is as follows:

- (a) the applicant must show a "strong" or "extremely strong" prima facie case for the substantive relief grounding the request for the order;
- (b) the applicant must show that very serious potential harm could occur if the order is not granted;
- (c) the applicant must show that the respondent has in its possession ...items to be seized; and
- (d) the applicant must show that there is good reason to believe that the respondent will destroy or secret the items to be seized if given notice of the motion.

See: *Anton Piller K.G. v. Manufacturing Process Ltd.*, [1976] Ch. 55, [1976] 1 All E.R. 779 (C.A.); *Adobe Systems Inc. v. KLJ Computer Solutions Inc.*, [1999] F.C.J. No. 649, 1 C.P.R. (4th) 177 (T.D.); *Robert Half Canada Ltd. v. Jeewan*, supra.

These principles, summarized, stand for the proposition that there must be prior judicial authorization for an Anton Piller order, which may be obtained only upon satisfying the court that there is a proper basis for this extraordinary remedy.

Lawyers have duties [as] "officers of the court". However, that is a role in which they are perceived by judges and other lawyers, and not by members of the public. In their traditional roles, lawyers are partisans whose conduct is circumscribed by ethical and professional standards of conduct. They are not accountable to the courts or to the Law Society for their partisanship, but for adherence to minimum standards of conduct, principally in respect to competence, honesty and integrity. When a lawyer is acting for a client, she is not, and she is not seen to be, independent, impartial, or even necessarily fair. A lawyer acting as an independent "officer of the court" during the execution of a search warrant is not perceived as independent and impartial by virtue of his position as an "officer of the court".

Safe Retention of Seized Materials

"Safe retention" issues in Anton Piller cases will vary among cases. The following issues, however, arise routinely:

(a) some or all of the materials seized may be required urgently by the subject of the search, in order to continue operating a ... business or for some other legitimate purpose. ...Sometimes there may be good reason to deprive the subject of the search of the seized materials for a longer period.

According to the Court however, that must be demonstrated to the Court adequately.

(b) In some cases the subject of the search has privilege claims in respect to some of the materials seized. The ability to assert those claims needs to be preserved until a process for assessing those claims has been completed. It is important that materials over which privilege is claimed not be reviewed by the opposing party or its counsel before the privilege claim is determined.

(c) It will be necessary to prepare an inventory of seized materials, and returned materials, for use by all parties.

[T]he defendant must have the right to consult counsel before being required to permit entry to his or her premises; the defendant must be advised of that right." These rights are both "firstly" and "most importantly" in the eyes of some courts: *Grenzservice Spedition Ges.m.b.H. v. Jans, supra*. See also *Columbia Pictures Industries Inc. v. Robinson*, [1986] 3 All E.R. 38 (Ch.); *Anton Piller K.J. v. Manufacturing Process Ltd.*

Therefore, the Court directs that non *ex parte* parties should not be excluded from the process of obtaining such an order or any renewal thereto.

“Michel M.J. Shore”

JUDGE