

**ANTON PILLER ORDER AS EQUITABLE PRE-EMPTIVE REMEDIES IN PRESERVATION OF SUBJECT MATTER AND RECOVERY OF DEBTS IN NIGERIA\***

**Abstract**

*Litigation is often very expensive and time consuming. Land cases can be in court sometimes for over ten years. Commerce cannot absorb such delay; speed and efficacy are becoming the criteria by which success in commercial litigation most especially debt recovery is to be judged, as legal practice is forced to match the ever increasing vigor of the market place. Many debtors are known to dissipate their assets both movable and immovable when they are threatened with litigations, so that in the event of court judgment, the creditors are left with nothing to fall back on, thereby leaving the court's judgment unenforceable. To prevent a situation like this the courts have developed the law to take care of the interests of creditors. Procedures for the pre-emptive preservation of subject matter and recovery of debts have been developed lately from Anton Piller case (known as Anton Piller order or injunction). The writer will trace the historical development of this order, its applications and effectiveness in meeting with the demand of our modern commercial litigation, the success so far especially on preservation of the subject matter and prompt recovery of debts in Nigeria.*

**Keywords:** Anton Piller Order, Equitable, Pre-emptive, Preservation of Subject Matter, Recovery of Debt, Nigeria

**1. Discussion**

Procedures for the equitable pre-emptive recovery of debts and preservation of subject matter were developed from the case of *Anton Piller K.G v Manufacturers Process Ltd.*<sup>1</sup> This new procedure (Anton Piller Order) was formulated by an ingenious member of the Chancery Bar, Mr. Hugh Laddie. He was consulted by the makers of gramophone records. They had the copyright in all kinds of music and earn their living from royalties on records. Yet these recording could be easily copied and there existed a vast market for piracy. These pirates reproduced the music illicitly on tapes and records. The infringing copies were sold by small shopkeepers in poor surroundings. In the first case in 1974 the owners had a copyright in sound recordings of Indian Music. They found out that a Mr. Pandit in a small shop in Leicester was selling infringing copies at a very low price. They issued a writ against him. He swore to an affidavit in those proceedings. He said, that he had only a few of these records that he bought them from a Mr. Hajisayed of Dubai in the Persian Gulf with no proper address. Only a convenient Post Office Box number, he swore to his own innocence and produced a letter to prove it. The owners of the copyright discovered that the affidavit was a pack of lies and that Mr. Pandit had large quantities of infringing materials on his premise. But, if they went through all the usual legal procedures and served him with process, those infringing copies could disappear. In Mr. Justice Templeman's phrase, 'the horse will rapidly leave the stable's'. So the owners of the copyright made an application *ex parte* for an order enabling them to enter the premises and look for the infringing copies. They realized that it appeared 'at first blush; to be a trespass of property and invasion of privacy'. But he made the order. In a latter case of *Anton Piller*, Lord Denning M.R. said:<sup>2</sup> Brightman J ... refused to order inspection or removal of documents: He said: 'there is a strong Prima Facie evidence that the defendant company is now engaged in seeking to copy the Plaintiff's components for its own financial profit to the great detriment of the Plaintiffs and in breach of the plaintiff's rights.' He realized that the defendants might suppress evidence or misuse documentary material, but he thought that was a risk which must be accepted in Civil matters save in extreme cases; 'Otherwise', he said, if seems to me that an order on the lines sought might become an instrument of oppression, particularly in case where a plaintiff of big standing and deep pocket is ranged against a small man who is alleged on evidence of one side only to have infringed the plaintiff's rights', that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or plaintiff can knock at the door and demand entry so as to inspect papers or documents, the householder can shut the door in his face and say, 'Get out'. That was established in the leading case of *Entick v Carrington*.<sup>3</sup> None of us would wish

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<sup>1</sup> (1976) 6 ALL E. R. 889

<sup>2</sup> (1976) Ch. 55

<sup>3</sup> (1765) 19 ST. Tr. 1030 at 1060

whittle down that principle in the slightest. But the order sought in this case is not a search warrant. It does not authorise the Plaintiff's Solicitors or anyone else to enter the defendant's premises against their will. It does not authorise the breaking down of any doors, or the slipping in a back door, or getting in by open doors or windows.

It only authorizes entry and inspection by the permission of the defendants. The plaintiff must get the defendants permission. It brings pressure on the defendants to give permission with, I suppose, the result that if they do not give permission, they are guilty of contempt of court. This may seem to be a search warrant in disguise. It falls to us to consider it on principle. It seems to me that such an order can be made by a judge *ex parte*, but it should only be made where it is essential that the Plaintiff should have inspection so that justice can be done between the parties: and when, if the defendants were forewarned, there is grave danger that vital evidence will be destroyed that papers will be burnt or lost or hidden or taken beyond the jurisdiction, and so the ends of justice be defeated, and when the inspection would do no real harm to the defendant on his case.

In our exceptional case the court has power to grant the Plaintiff *ex parte* relief, without notice to the defendant, for the detention, custody or preservation of property as to which there is a strong prima facie case that they consist of articles infringing the Plaintiff's copyright, trademark or other rights, and to make an order that such articles be forthwith placed in the custody of a responsible person on behalf of the person on behalf of the Plaintiff who will retain them in safe custody, so held the court in the case of *Universal City Studios v Murtar & Sons*.<sup>4</sup> In granting such relief the court will as far as practicable endeavour to preserve and preserve the rights of the defendants. Such applications should heard in camera and the court must be satisfied that the plaintiffs are good for sums which may be due upon their cross undertaking as to damages.

Anton Piller applications are made *ex parte*, that is without notice to the defendant's, and when such an application is being filed, an application on notice is also filed, and a date for the hearing of the application on notice is inserted after the court has heard the application *ex parte* and has given a date for the hearing of the motion on notice. The Anton Piller order is not restricted to copyright, trademark action alone, it can be granted when 'other rights' are infringed. The right to a debt that is due is covered by an Anton Piller order. A creditor can easily ascertain the debt infringed by the refusal of the debtor to satisfy the debt. When the creditor has fears and believes that the debtor is about to dissipate, dispose of or otherwise deal with his assets, they can be kept in the custody of a responsible person for example a court. A Plaintiff seeking an Anton Piller order in respect of the recovery of debts seek the detention/preservation of defendant's moveable and immovable assets to prevent him from dissipating, disposing or dealing with same to prevent the Plaintiff from having a worthless judgement which cannot be enforced in the event of judgement in his favour. He can sometimes seek the preservation of funds in bank accounts ('Pilling Mareva on Piller'). According to the learned authors, Jain S. Goldrein and K.H.P. Wilkson,<sup>5</sup>

Because of the potentially disastrous consequences to a defendant of an Anton Piller order, accompanied as it is by a Mareva Injunction, there is a very strict duty on the Plaintiff's solicitors to make full and frank disclosure of all relevant matters and not act oppressively or improperly in its execution. Where solicitors did improperly obtain such an order the proper course was not to set aside Anton Piller Order (which will serve no purpose) but to compensate the defendant by damages.

The duty to make full and frank disclosure requires the Plaintiff to makes sufficient enquires before launching his application. A failure to disclose all material facts resulted in the discharge of the order as in the case of *Rogers (Jeffery) Knitwear Productions v Vincola (Knitwear) Manufacturing*.<sup>6</sup> Also in the case of *Digital Equipment Corporation v Darkerest*<sup>7</sup>, it was held that the duty of full and frank disclosure is owed to the court, not to the defendant. For example a Plaintiff applying for an Anton Piller Order should investigate and disclose in clear terms the assets of the defendant he has been able to discover with particularity. The court will not lightly draw inference that there is a risk of disposal, extravagant fears do not generate a real possibility of disposal.

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<sup>4</sup> (1976) 1 WLR. 568, (1976) 2 ALL E. R. 330.

<sup>5</sup> Goldrein I.S. and Wilkson K.H.P, *Commercial litigation-Pre-Emptive Remedies*, 1<sup>st</sup>ed. (London; Butter worths, 1978)(p. 205.

<sup>6</sup> (1985) F.S.R. 184

<sup>7</sup> (1984) 3 Wlr. 617

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Anton Piller Order can be discharged by the courts on application by the defendant even before the hearing of the motion on notice as provided by relevant Nigeria rules of civil procedure. The Nigeria rules of Civil Procedure have incorporated the Anton Piller Order as it relates to the recovery of debts.<sup>8</sup> The Federal High Court Act Cap 134 laws of Federation of Nigeria 190 provides as follows:

1. (a) where the defendant in any suit for an amount or value of five hundred naira or upwards with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of his property or any part thereof, or to remove any such property from Nigeria; or
- (b) where, in any suit founded on contract or detinue or trover in which the cause of action arose in Nigeria.
  - (i) The defendant is absent from Nigeria, or there is probable cause to believe that he is concealing himself to evade service; and
  - (ii) That the defendant is beneficially entitled to any property in Nigeria in the custody or under the control of any other person in Nigeria, or such person is indebted to the defendant.

In either such cases, the plaintiff may apply to the court either at the time of instituting the suit or at any time thereafter before final judgement to order the defendant to furnish sufficient security to fulfil any decree that may be made against him in the suit, and on his failing to give such security, or pending the giving of such security, to direct that any movable property belonging to the defendant shall be attached until the further order of the court.

2. The application shall contain a specification of the property required to be attached and the estimated value thereof as far as is known. The plaintiff shall at the time of making the application declare that to the best of his information and belief, the defendant is about to dispose of or remove his property with the intent as aforesaid.
3. (i) If the court, after making such investigation as it may consider necessary is satisfied that the defendant is about to dispose of or remove his property with intent to obstruct or delay the execution of the decree, it shall be lawful for the court to order the defendant, within a set time, either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the court when required the said property, or the value of same, or such portion thereof as may be sufficient to fulfill the decree, or to appear and show cause why he should not furnish security.
  - (ii) pending the defendant's compliance with the order, the court may direct the attachment until further order of the court, or any portion of the property specified in the application.
4. (i) If the defendant fails to show such cause, or to furnish the required security within the time fixed by the court, the court may direct that the property specified in the application if it is already attached, or such portion thereof as shall be sufficient to fulfill the decree, shall be attached until further order.
  - (ii) If the defendant shows such cause, or furnishes the required security, and the property specified in the application, or any portion of it, which shall have been attached, the court shall order the attachment to be withdrawn.
5. The attachment shall not affect the rights of persons nor parties to the suit and in the event of any claim being preferred to the property attached before judgment, such claim shall be investigated in the manner prescribed for the investigation of claims to property attached in execution of a decree.
6. In all cases of attachment before judgment, the court shall at any time remove the same, on the defendant furnishing security as above required, together with security for the costs of the attachment or upon an order for non-suit or striking out the cause or matter.

The Anton Piller order can be applied to attached the funds in the account of a debtor company in a bank; creditors will in appropriate cases employ the services of a private detective or investigator to investigate the assets, account number of the debtor for purposes of attachment. In the same vein, the Hon. Justice A.G. Karibi-Whyte in his book 'The Federal High Court Law and Practice', at page 238 argues that property, under order 19 of the Federal High Court Rules include money. According to the learned author:-

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<sup>8</sup> Order 19 of the Federal High Rules

‘where the subject matter of litigation is a sum of money, and the defendant is allowed to withdraw it, the object of the litigation is undoubtedly defeated. In our view money can properly constitute property under the rule’. Furthermore, Anton Piller order can be applied also in the infringement of trademarks. In the Nigerian Case of *Ferodo Ltd v Unibros Stores*,<sup>9</sup> the plaintiffs, who were the sole distributors, in Nigeria, of a particular brand of products with certain registered trademarks, sued the defendants in the Federal High Court for the infringement of the trademarks the plaintiffs, in any case, applied *ex parte* for the Anton Piller injunction to enable them recover the infringing products from the defendants, as evidence in the cases. They stated, in their deposition that, if the defendants had notice of the application the offending produced and documents relating to them might disappear from the defendants’ premises. The application was not only heard *ex parte*, but also *in camera*. Anyaegbuna, C.J., granted the injunction restraining the defendants from repeating any infringement on the plaintiffs’ said trademarks; he also ordered the defendants to permit up to six persons, including a police officer to enter upon the premises of the defendants for the detention, preservation and inspection of any moveable property or thing that would constitute a breach of the injunction prayed for in the suit.

## **2. Conclusion**

The Anton Piller order, the local rules equivalent and the enforcement of the same by Nigeria courts lately is like a modern day wonder to commercial litigation lawyers. Debtors who used to hide under the cloak of delay in the judicial system occasioned by court rules are prevailed to pay their debts upon service of an Anton Piller order to attached property usually with Mareva injunction. Many creditors are being saved the embarrassment occasioned by the delay in the settlement of debts by debtors.

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<sup>9</sup> (1980) *Fleet Street Reports*, 489, See *Nwadialo. Op. Cit.*, p.570.