FEDERAL COURT OF AUSTRALIA

Rauland Australia Pty Ltd v Johnson (No 2) [2019] FCA 1175

|  |  |
| --- | --- |
| File number: | NSD 480 of 2019 |
|  |  |
| Judge: | **STEWART J** |
|  |  |
| Date of judgment: | 1 August 2019 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE** – search order – access to seized documents in subsequent proceeding – access to documents should follow discovery – application dismissed  |
|  |  |
| Legislation: | *Federal Court Rules 2001* (Cth) rr 7.42, 7.43, 20.23*Federal Court of Australia Act 1976* (Cth) ss 37M, 37P  |
|  |  |
| Cases cited: | *Findex Group Ltd v iiNet Ltd* [2018] NSWSC 1567*Findex Group Ltd v McKay* [2019] NSWCA 93*Lamond (No 4)* [2017] FCA 820*Metso Minerals (Australia) Ltd v Kalra (No 3)* [2008] FCA 1201*Metso Minerals (Australia) Ltd v Kalra* [2009] FCAFC 57*Microsoft Corporation v Goodview Electronics Pty Ltd* [1999] FCA 754; 46 IPR 159*Rauland Pty Ltd v Johnson (No 1)* [2019] FCA 1174 |
|  |  |
| Date of hearing: | 26 June 2019 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Intellectual Property |
|  |  |
| Sub-area: | Copyright and Industrial Designs |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 63 |
|  |  |
| Counsel for the Applicant: | S Prince SC with T Wong |
|  |  |
| Solicitor for the Applicant: | Workplace Law Pty Ltd |
|  |  |
| Counsel for the First Respondent: | C Harris SC |
|  |  |
| Solicitor for the First Respondent: | Kennedys (Australasia) |
|  |  |
| Counsel for the Second Respondent: | T Brennan with S McIntosh |
|  |  |
| Solicitor for the Second Respondent: | Norton White Lawyers |

ORDERS

|  |  |
| --- | --- |
|  | NSD 480 of 2019 |
|   |
| BETWEEN: | RAULAND AUSTRALIA PTY LTD (ACN 056 360 653)Applicant |
| AND: | MS FIONA JOHNSONFirst RespondentHILLS LIMITED T/AS HILLS HEALTH SOLUTIONS (ACN 007 573 417)Second Respondent |

|  |  |
| --- | --- |
| JUDGE: | STEWART J |
| DATE OF ORDER: | 1 AUGUST 2019 |

THE COURT ORDERS THAT:

1. The applicant’s interlocutory application filed on 1 May 2019 is dismissed.
2. Costs are reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STEWART J:

## Introduction

1. This judgment concerns an interlocutory application brought by the applicant in the principal proceedings (**Rauland** Australia Pty Ltd) against the first and second respondents, **Ms Johnson** and **Hills** Ltd, respectively. The nature of the claims made in the principal proceedings by the applicant against the respondents is set out in my reasons for judgment in another interlocutory application, by the second respondent against the applicant, which are delivered at the same time as these reasons for judgment: *Rauland Pty Ltd v Johnson (No 1)* [2019] FCA 1174. These reasons for judgment assume familiarity with the other reasons for judgment.
2. In the present interlocutory application Rauland seeks orders directed at an independent computer expert appointed by it (Mr Khoury) being given access to a number of forensic images that were made of devices that were seized from Ms Johnson, and an email account of Ms Johnson that was accessed, pursuant to search orders that were made late last year and before the present proceeding was commenced. The orders envisage the expert being able to search the images of the devices and the email account for documents (or information in the form of metadata) that relate to the pleaded issues in the principal case and to disclose what he finds to the applicant but not to disclose anything else that he finds to the applicant.
3. The terms of the orders that are sought in the interlocutory application are as follows:

1. The independent computer expert (Martin Sisk of PricewaterhouseCoopers) make available to Michael Khoury at Ferrier Hodgson the forensic images, and any associated evidentiary forensic imaging notes, of the following:

a) First Respondent's email account -'fionaj9@gmail.com';

b) Transcend StoreJet External HDD 1TB;

c) Dell Latitude 5280 (SN: 8C52QN2);

d) Sandisk Cruzer Glide 16GB USB (SN: BL 1808255818);

e) Seagate External Slim hard drive 500GB (SN: 2J000G97);

f) HP Simplesave 1TB USB 2.0 External Desktop hard drive (SN: WCAZA0518431);

g) Sandisk Cruzer 32GB USB (SN: BM1204WZOB);

h) Medion Desktop Computer MD8356 SN: NI0100502 containing:

i. WD Green 1.5TB Internal hard drive (SN: WCAZA5108813);

ii. Canon 16MB SD Card (SN: BP3FC006061); and

i) Asus Transformer Tablet Computer (SN: E2N-BC-3234710512M).

2. The Applicant file and serve an undertaking(s) from:

a) Mr Khoury; and

b) any person under Mr Khoury's direction or control who is assisting Mr Khoury in this matter;

to the Court that they will not, without the consent of the First Respondent, or leave of the Court, discuss, disclose, use or otherwise make available the copy of the forensic images taken or their contents to any person other than if the discussion, disclosure, use or making available is:

1. in relation to the Listed Things (including any associated metadata) as defined in the Order of Justice Rares dated 7 November 2018 in matter no. NSD1913/2018; and

ii. in relation to the Employment Information (including any associated metadata) as defined at paragraph 10 of the Statement of Claim.

3. The First and Second Respondents pay the Applicant's costs arising from, and incidental to, this interlocutory application forthwith.

1. During the course of the hearing on the application Mr Prince of senior counsel, who appeared with Ms Wong of counsel for Rauland, accepted that the orders would be better structured as requiring the consent of both respondents, or the leave of the Court, before Mr Khoury disclosed anything to the applicant.
2. Of the devices identified in the proposed Order 1, the Dell Latitude 5280 laptop computer listed in paragraph (c) belongs to Hills. It is the Hills laptop that was personal to Ms Johnson on which she did her work for Hills and which would be expected to have on it a substantial amount of material that is irrelevant to the present proceedings and commercially confidential to Hills. Indeed, it was for that reason that Rauland sought orders allowing an independent expert to search the forensic image of the laptop for relevant material and be prohibited from disclosing any irrelevant material to Rauland, and why it later accepted that no material from the laptop should be disclosed to it without the consent of the respondents or the leave of the Court.
3. The other devices identified in proposed Order 1 belonged, at the time that forensic images of them were made, to Ms Johnson.
4. The “Listed Things” referred to in the proposed orders are, as will be seen, a “.pst” file that had been created on 21 September 2018 and which is referred to in more detail at [18] below, and any document or thing that is derived from or re-created using the “.pst” file including four identified PDF (portable document format) files and any related metadata. The “Employment Information” is the contents of the “.pst” file.

## Background

1. On 15 October 2018, Rauland sought urgent *ex parte* search orders against Ms Johnson in a proceeding under a different case number, namely NSD1913/2018.
2. The search orders were sought on the basis of an affidavit deposed by Mr Gomes which, relevantly, included the following allegations.
3. Mr Gomes is the managing director of Rauland. Rauland provides integrated communication solutions to various healthcare organisations in Australia and New Zealand. Its business is to provide the design, product development, manufacture, supply, installation, servicing and support of technological communication solutions to those healthcare organisations.
4. The services provided by Rauland are in large part subject to tender processes instigated by corporate clients. Such tender processes can take up to 3-4 years depending on the scope of the work needed. Hills is one of Rauland’s key competitors in one of its lines of business.
5. Ms Johnson was employed by Rauland as its manager of corporate accounts from 22 February 2015 to 4 October 2017. Her primary duties and responsibilities included selling Rauland’s products and services, building long-term relationships with customers and partners, developing strategic high level influencing relationships with prospective and existing clients and building and maintaining an engaged workforce.
6. On 3 October 2017, Ms Johnson resigned from her employment with Rauland with effect from the following day, 4 October 2017. At that time she advised that she intended to take a holiday and would not be commencing new employment in the immediate future. In about mid-March 2018, Mr Gomes learnt that Ms Johnson had commenced employment with Hills.
7. Mr Gomes said that Ms Johnson’s employment agreement contained a number of post-employment restraints and obligations, including that until 12 months after the termination of her employment she was not to carry on, or be engaged in, or own an interest in, an entity engaged in or involved in any business or undertaking of a like or similar kind to Rauland’s, or any business or undertaking which competes with any aspect of Rauland’s business.
8. During Ms Johnson’s employment with Rauland, she had direct and immediate access to a significant amount of its confidential information. Moreover, she was directly involved in the creation of a significant amount of Rauland’s commercially sensitive information, such as tender proposals. At the time of her resignation, she was critically involved in two identified tender proposals that were in progress.
9. In July 2018, Mr Gomes learnt that Hills had won one of those tenders. He was immediately concerned that Ms Johnson had become involved during the tender process and used her intimate knowledge of Rauland’s business proposals to undercut its prices and secure the tender on behalf of Hills. Mr Gomes subsequently received information that Ms Johnson had become involved in the tender at the final stages to help Hills to secure the tender.
10. As a result, Rauland’s lawyers were instructed to engage a forensic expert (Ferrier Hodgson) to conduct a forensic examination of the electronic devices that Ms Johnson used during her employment with Rauland. These included a Dell laptop computer and an Apple iPad tablet device.
11. On or about 28 August 2018, Mr Gomes was informed of Ferrier Hodgson’s preliminary findings arising from its review of the devices. It appeared that a “.pst” (personal storage table) file had been created and copied onto a removable USB (universal serial bus) storage device on 21 September 2017 shortly before Ms Johnson’s departure. A “.pst” file is a copy of the whole Microsoft Outlook email account at a particular point in time, being when it is created. It would include email folders, calendar/diary and contacts.
12. Further enquiry established that an information technology support engineer at Rauland had, in accordance with usual practice, created a “.pst” file of Ms Johnson’s Microsoft Outlook account on the last day of her employment, being 4 October 2017. Ferrier Hodgson was thus instructed to review that “.pst” file – understanding that it is different from the “.pst” file that was apparently created on 21 September 2017 and copied onto a removable USB storage device.
13. Ferrier Hodgson’s report, relevantly, revealed the following:
	1. on 16 August 2017, a Microsoft PowerPoint file titled “Rauland Australia FY 18 strategy.pptx” that was located on a USB device had been accessed;
	2. on 21 September 2017, a Microsoft Outlook “.pst” file located on a removable USB storage device, titled “Backup 21092017.pst”, which was 13.8 GB in size, had been accessed;
	3. on 29 September 2017, a file titled “20170929 FJ Figures FY 17.xlsx” had been accessed from a USB storage device;
	4. on 4 October 2017, being the date of Ms Johnson’s last day of employment by Rauland, the following files were created: “contacts.csv”, “FJ contacts.csv” and “contacts.vcf”; and
	5. on an unidentified date, “Maccontacts.csv” was created.
14. Mr Gomes was concerned that that activity had been performed by Ms Johnson as it was done in her user profile.

## The first set of orders

1. On 15 October 2018, Burley J made standard search orders under Division 7.5 of the *Federal Court Rules 2011* (Cth) (**FCR**) and the Court’s Search Orders Practice Note (GPN-SRCH). For present purposes, the search orders had the following pertinent features:
	1. The “premises” that were identified as the place where the search would take place, which were described as including any vehicle or vehicles under Ms Johnson’s control on or about those premises, were believed to be Ms Johnson’s home address.
	2. The “Listed Things” for which the search order permitted a search at the premises were the computer files and related information referred to at [7] above.
	3. The independent computer expert to conduct any search of a computer was identified as Martin Sisk of PricewaterhouseCoopers Australia.
	4. The independent computer expert was authorised to make a copy or digital copy of a computer hard drive and remove that copy or digital copy from the premises.
	5. The independent computer expert was ordered, as soon as possible and, in any event prior to the hearing on the return date, to deliver the copy or digital copy of the computer hard drive and all electronic and hard copies of listed things to the independent lawyer, together with a report of what the independent computer expert had done, including a list of such electronic and hard copies.
	6. The independent lawyer, who was identified as Tim Frost, a partner of PricewaterhouseCoopers Australia, was ordered to deliver to the Court all things received from the independent computer expert and to serve a copy of the latter’s report on the parties.
2. Undertakings were required to be given to the Court by Rauland as the applicant, Rauland’s lawyers, the independent lawyer and the independent computer expert.
3. Rauland, its lawyers, the independent lawyer and the independent computer expert undertook that they would not, without leave of the Court, use any information, document or thing obtained as a result of the execution of the order for the purpose of any civil or criminal proceeding, either within or outside Australia, “other than this proceeding”.
4. Rauland’s lawyers also undertook not to disclose to the applicant any information which they acquired during or as a result of execution of the search order, without leave of the Court.

## The second set of orders

1. The matter came back to Court, on this occasion before Rares J, on 7 November 2018. It was explained to his Honour by senior counsel on behalf of Rauland that there had been a difficulty with the execution of the orders because the “premises” had turned out not to be the home address of Ms Johnson and that there had been difficulty in finding such an address for her. Thus, new orders were sought identifying the “premises” for the purpose of the search as being “the usual space occupied or controlled by [Ms Johnson] (including any storage facility)” at Hills’ premises at Lidcombe, New South Wales. The “premises” went on to include “the usual place of residence of [Ms Johnson] within New South Wales”.
2. The listed things remained the same, as did the terms of the undertakings given to the Court.
3. In seeking the amended order from Rares J, by way of an email to his Honour’s associate which asked for the matter to be listed and by senior counsel on behalf of Rauland in open court it was said that the only changes to the orders that had previously been made by Burley J were the identity of the premises and the time for execution of the orders. A close comparison of the orders on the two occasions reveals those representations to be accurate.
4. In the circumstances, and something as an aside as it plays little role in what follows, I reject the submission made on behalf of Hills that senior counsel misrepresented to Rares J the amendments that were sought in saying that “the device in question, in this case, is a USB device”. First, the orders were in the standard form and, as per that form, permitted the search of “any computer” for the “listed things”; and Rares J must be taken to have read the orders before making them. Secondly, as I have said, the orders were in precisely the same terms as the previous orders save as to the premises and the timing, and Rares J was accurately told that. Thirdly, the origin of the problem was Ms Johnson apparently having copied the “.pst” file to a USB storage device. It is that that lead to the justification for the further search that was ordered by Burley J and which Rares J was being asked to amend. In the circumstances, I do not consider that a fuller explanation of the orders could have made any difference to whether or not Rares J would have made the amendments that were sought.

## The searches

1. Mr Sisk produced three reports. In accordance with the orders (see [22.6] above), the reports were served on Ms Johnson but they were not at that time served on Hills as Hills was not a party to that proceeding.
2. The three reports of Mr Sisk were served on Hills in the lead-up to the interlocutory application and they were tendered before me. Hills objected to their tender on the basis that that constituted the “use [of] information, document or thing obtained as a result of the execution of [the search] order for the purpose of any civil … proceeding … other than this proceeding” in contravention of the undertakings given to the Court by Rauland and its lawyers in the search order proceeding. Hills also submitted that I should not exercise any discretion to release Rauland and its lawyers from that undertaking.
3. The reports of Mr Sisk were accepted by me into evidence on a provisional basis pending the determination by me of the objection to their tender. Hills did not oppose that course.
4. Rauland sought to rely on the reports to show that there are a considerable number of documents on several of the images of the devices, including the image of the Hills laptop computer, which may be relevant to the issues in the proceedings. Hills disputed that the reports demonstrated that. For reasons that will become apparent, I do not need to resolve those issues, at least at this stage.
5. Having said that, and with a mind to guidance in the further conduct of the case, it does appear to me, at least on a preliminary view, that some parts of Mr Sisk’s reports fall foul of the prohibition on use of information etc. in any subsequent proceeding. Clearly Mr Sisk’s report of what searches were conducted, what was seized and copied, what was returned to Ms Johnson, and so on, i.e. his factual report of what he did pursuant to the orders – all of which appears in his written reports – is not “information, document or thing obtained as a result of the execution of [the search] order”. However, the contents of the files and documents that were copied, and possibly also “information” such as the identity of such documents and files, seem to fall within the prohibited class.
6. Although the search order proceeding, by its nature, is a precursor to an envisaged further proceeding – being the very proceeding for which evidence is sought to be preserved by the search orders – the limitation on the use of the prohibited class of information etc. to “this proceeding” is, it seems to me, a reference to the search order proceeding and does not include the subsequent proceeding. I consider that that conclusion flows from the language used, as well as from the consideration that the restriction is aimed at giving the Court control over exercise of the extraordinary and invasive search order power in order to avoid abuse. Thus, the information etc. that is derived from the execution of the search orders can only thereafter be used in another proceeding, including the anticipated proceeding for which the search orders were made, with the leave of the Court.
7. As will be seen from the discussion below about access to information etc. that is obtained under search orders, when the information is not otherwise available for use in evidence in the subsequent proceeding a Court may grant leave to access it.
8. Returning now to the facts of what occurred, the search at the premises of Hills took place on 20 November 2018 and a search at the home of Ms Johnson took place on 21 November 2018.
9. Mr Frost, the independent lawyer, provided to Mr Sisk, the independent computer expert, 13 devices that were seized under the search orders. Forensic images were made of those devices (excluding an Apple iPhone 4S to which access was blocked).
10. The matter was again before the Court on 27 November 2018 when Jagot J made orders requiring Ms Johnson to provide an external hard drive containing the “.pst” file to Mr Sisk. Ms Johnson then did that and Mr Sisk made a forensic image of it.

## The basis for the application

1. Rauland’s original basis for the application to access the relevant information on the devices was to enable it to provide further particulars to Hills which had insisted on such particularity before filing a defence. However, Hills subsequently filed a defence without the further particulars having been furnished.
2. Rauland identified r 20.23 of the FCR and the power under s 37P of the *Federal Court of Australia* ***Act*** *1976* (Cth) as the sources of power for the orders that it seeks. Rule 20.23 provides that if a party believes that a person who is not a party has or is likely to have in the person’s control documents that are directly relevant to an issue raised in the pleadings or affidavits, the party may apply to the Court for an order that the person make discovery of documents to the party. That is to say, it is a third-party discovery provision. To that end, the interlocutory application was also served on Mr Sisk but he did not enter an appearance.
3. Section 37P of the Act gives the Court a general power to give directions about the practice and procedure to be followed in relation to any civil proceedings before the Court. Rauland also referenced s 37M of the Act, submitting that the overarching purpose of the civil practice and procedure provisions would be best served by allowing it to have access to the material preserved as a result of the search orders in order to allow Rauland to expeditiously prosecute its claim.

## Opposition to the application

1. The respondents raised a number of grounds of opposition to the orders sought by Rauland. Some have more merit than others. To my mind, the most pertinent relate to the timing of the application and the purpose of search orders.
2. With regard to the timing, it was submitted that access to the relevant documents should be sought, first, as part of the process of discovery which has not yet taken place. Insofar as the purpose of search orders is concerned, it was emphasised that the search order power is extraordinary and should only be exercised where evidence may be destroyed, and that it should not be exercised merely for a discovery purpose, or as an investigative tool.

## Consideration

1. There can be little doubt that the purpose of a search order is to secure or preserve evidence. In that regard, r 7.42 of the FCR provides as follows:

The Court may make an order (a ***search order***), in any proceeding or in anticipation of any proceeding in the Court, with or without notice to the respondent, 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 that is, or may be, relevant to an issue in the proceeding or anticipated proceeding.

1. Rule 7.43(c)(ii) provides that one of the matters on which the Court must be satisfied in making a search order is that “there is a real possibility that the respondent might destroy such material, or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the Court”. That requirement also reveals that the principal purpose of a search order is to preserve the evidence, and it implies that that which is preserved may only be made available for use in evidence in the event that the respondent does not otherwise make it available.
2. In *Microsoft Corporation v Goodview Electronics Pty Ltd* [1999] FCA 754; 46 IPR 159, Branson J (at [26]) said that the Court “must … be careful to avoid the extraordinary jurisdiction of the Court to make [a search] order from being subverted to a mere investigative tool for applicants or indeed, from being used for any purpose other than the preservation of vital evidence pending the hearing and determination of a proceeding”. That was said in the context of whether or not the Court should make search orders, which is materially different to the context of a party seeking access to seized material after the execution of search orders that were properly made. It is nevertheless an authoritative statement as to the purpose of search orders and is serves as a caution against allowing search orders to be abused.
3. The fact that a search order preserves evidence for use in a proceeding in due course bears with it the unavoidable implication that there are circumstances in which the preserved evidence will be made available to a party requiring it in order to then make it available in the proceeding; were it otherwise, there would be no purpose to making search orders. It is therefore not the case that a search order will only serve the purpose of preserving evidence, always insulating that evidence from use in the subsequent proceeding. If the evidence is not otherwise produced in the proceeding, there will be a need to access that which was preserved so that it can be adduced in the proceeding. There may also be a need to access what was preserved in order to ascertain whether what has been produced pursuant to, say, discovery procedures is all that had to be produced. But none of that means that access will necessarily be granted at a stage prior to discovery.
4. In ***Metso*** *Minerals (Australia) Ltd v Kalra* ***(No 3)*** [2008] FCA 1201, Flick J dealt with a circumstance in which a party sought access to documents that had been preserved under a search order. After analysing the authorities, his Honour stated as follows:

28 In that context, it is considered that the discretion to allow an applicant to inspect seized documents may be exercised to permit:

(a) an assessment to be made as to whether or not there has been compliance with the order as made and (possibly) whether any further order pursuant to O 25B may be warranted;

(b) the identification and separation from the entirety of those documents that were in fact seized, those documents which do or may provide evidence pending the hearing and determination of a proceeding; and

(c) the identification and separation from the entirety of those documents that were in fact seized, those documents which do not provide such evidence so that those documents may be returned.

And, in identifying those documents which should be preserved pending the final hearing and determination of a proceeding:

(d) the search is not limited to those documents directly related to the precise cause of action then known: cf *Aristocrat Technologies Australia Pty Ltd v Global Gaming Pty Ltd* [2006] FCA 862 at [6]–[7] per Allsop J*; Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd* [2006] FCA 1707 at [4] per Jacobson J.

There may well be other reasons for granting leave to an applicant to inspect seized documents. All of the purposes identified, however, have one thing in common — they allow the documents which have been seized to be inspected in order to ensure that the search order has been complied with and to ensure that only evidence which should be preserved is in fact preserved pending the final determination of a proceeding.

1. His Honour (at [36]) also held that in the absence of consent, to permit access to seized materials for the purposes of facilitating discovery or the provision of particulars as opposed to preserving the continued existence of evidence, goes beyond the authority conferred by the relevant rule of court. His Honour (at [49]) rejected the proposition that the Court’s discovery powers can be used to “permit [a] party to ‘rummage through’ the material seized, in order to make an assessment as to those documents which that party considers would be or should be discoverable”.
2. Those dicta were subsequently adopted by Besanko J in *Lamond (No 4)* [2017] FCA 820 at [20] in rejecting access in that case “as substitute for discovery or in tandem with, or as an adjunct to, the discovery process”. They have also more recently been adopted in *Findex Group Ltd v iiNet Ltd* [2018] NSWSC 1567 per Ward CJ in Eq at [120]-[122]. An application to appeal against the latter judgment was refused by the Court of Appeal: see *Findex Group Ltd v McKay* [2019] NSWCA 93, particularly at [26].
3. The reasons of Flick J in *Metso (No 3)* were to some extent reconsidered by the Full Court in *Metso Minerals (Australia) Ltd v Kalra* [2009] FCAFC 57. The latter was not an appeal from the former. Rather, it was an application for leave to appeal against a subsequent judgment of Flick J in which his Honour said that he again dismissed the applicant’s application for access to seized documents for the same reasons as he had given in *Metso (No 3)*. The subsequent application for access to the previously seized documents was made after discovery had taken place on the basis that discovery had been inadequate.
4. Emmett J, with whom Jacobson and Perram JJ agreed, held (at [16]) that if there was material that cast doubt on the adequacy of discovery that has actually been given by the respondents, it would be appropriate to grant access to some or all of the seized documents and that a court would have the power to do so. His Honour (at [17]) identified s 23 of the Act as a source of power to grant access to seized documents if that was considered appropriate for the purpose of ensuring that the proceedings were adequately and properly prepared and for the purpose, if need be, of testing whether proper discovery had been given and whether discovery that had been given was adequate.
5. Of some importance for the present case in view of submissions made on behalf of Hills to the effect, or at least implying, that any access to the seized documents would in any event be limited to the issues in the proceeding as defined by the current pleadings, his Honour (at [19]) identified that one possibility that arises from the execution of search orders is the gaining of access to material that would show a further cause of action beyond that which is pleaded. His Honour held (at [20]) that once a *prima facie* case has been made out for seizure of documents, there may be a basis for permitting access to the material seized in order to formulate the claims that may be made in respect of that *prima facie* case.
6. It is apparent from the above authorities that the Court has a discretion to order access to documents that have been preserved under a seizure order. In the case of access to the seized material for the purpose of formulating a claim, or as an aid to discovery, or to particularise a claim, that discretion may be exercised only in narrow circumstances. However, where parties have already furnished discovery and questions arise as to the adequacy of discovery or discovery has not produced the seized material (which is otherwise assumed to be relevant and not subject to a valid objection to production such as privilege), the discretion might be more readily exercised.
7. In my view, this is not a proper case for the exercise of the discretion in favour of Rauland, at least not at this stage. The pleadings have only recently closed. No party has yet made application for discovery from other parties to the proceeding. That is the obvious next step. It is only after the discovery process that it would be appropriate to reconsider whether there is a need for Rauland to have access to the material that is in the meantime being preserved under the seizure orders.
8. The considerations against exercising the discretion in Rauland’s favour at this stage are particularly weighty in the case of Hills. That is because Hills was not a party to the proceeding in which the seizure orders were sought and granted, its laptop was seized from its premises and the forensic image that was then made is expected to contain documents which go well beyond what might be relevant to the current proceedings and which are commercially sensitive to it. It should have the opportunity to ‘rummage through’ its own documents to satisfy any orders for discovery before any need arises to consider whether an independent expert should be given powers to do that.
9. I consider that it would be particularly intrusive to empower an independent computer expert appointed by Rauland to, at this stage, search through all of the material copied from the seized devices in order to find documents or information that may be relevant to the issues in the case. That level of intrusion weighs against the exercise of the discretion in Rauland’s favour.
10. The position in relation to the “.pst” file that Ms Johnson created of her Microsoft Outlook account on her Rauland work computer may be thought to be different. On the face of it, that file and its contents are the property of Rauland, they are not expected to contain any of Hills’ proprietary information (indeed Hills did not object to their immediate production), and they will be relevant and thus subject to an obligation on Ms Johnson to produce them under any anticipated discovery regime. But it is the last point that counts against production being ordered in this application. They should be sought first from Ms Johnson, whether by notice to produce or discovery orders. This is not a proper case – at least not at this stage – to order their production by way of third party discovery orders against Mr Sisk.
11. It was submitted on behalf of Rauland that the specific point in time ‘snapshot’ of the “.pst” file is what Mr Sisk has, but that Ms Johnson will not have that as any subsequent activity on the relevant Microsoft Outlook account will have written-over, or amended, the ‘snapshot’. But that does not appear to me to be correct because, as indicated at [39] above, Ms Johnson produced the relevant device and Mr Sisk made an image of it. It may be that Ms Johnson still has the “.pst” file on that device, or elsewhere, and will produce it to Rauland in due course. If for some reason that is not possible, then that would constitute a weighty consideration in favour of exercising the discretion in Rauland’s favour at that time.
12. It follows that in my view Rauland’s application should be dismissed.
13. The conclusion that I have reached makes it unnecessary to consider a number of other points that were raised during the hearing by the respondents during the course of argument. Since they may be raised in answer to any future revived application for access to the seized documents, it is better that I say nothing about them at this stage.
14. Since I have not heard any submissions on costs, I will reserve the question of costs.

|  |
| --- |
| I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stewart. |

Associate:

Dated: 1 August 2019