IN THE SUPREME COURT OF NEW ZEALAND SC 25/2014

[2014] NZSC Trans 18

BETWEEN **KIM DOTCOM**
First Appellant

FINN BATATO
Second Appellant

MATHIAS ORTMANN
Third Appellant

BRAM VAN DER KOLK
Fourth Appellant

AND **HER MAJESTY'S ATTORNEY-GENERAL**
Respondent

Hearing: 25-26 August 2014

Coram: Elias CJ
McGrath J
William Young J
Glazebrook J
Arnold J

Appearances: P J Davison QC, W Akel and H D L Steele for the First Appellant
F Pilditch for the Second Appellant
G J S R Foley and L F Stringer for the Third and Fourth Appellants
D J Boldt, F R J Sinclair and M H Cooke for the Respondent

CIVIL APPEAL

MR DAVISON QC:
May it please the Court, I appear for the first named appellant Mr Kim Dotcom with my learned friends Mr William Akel and Mr Henry Steele.

ELIAS CJ:
Thank you Mr Davison.

MR PILDITCH:
May it please the Court, counsel's name is Pilditch. I appear for the second named appellant Mr Batato.

ELIAS CJ:
Thank you Mr Pilditch.

MR FOLEY:
May it please the Court, counsel's name is Foley. I appear for the third and fourth named appellants.

ELIAS CJ:
With?

MR FOLEY:
With Ms Stringer.

ELIAS CJ:
Yes, thank you Mr Foley.

MR BOLDT:
May it please Your Honours, Boldt for the Crown, together with my learned friends Mr Sinclair and Ms Cooke.

MR DAVISON QC:

Your Honours, the intention of the US and the New Zealand Police from the outset, was the New Zealand Police were to seize a very wide range of items that were thought to be potentially items that would contain evidence relevant to the FBI prosecution and investigation, that had led to charges being laid against Mr Dotcom and his business associates. And that seizure was to take place in circumstances where the New Zealand Police would undertake sifting or sorting of items beyond a very broad level of selection of items such as electronically capable data storage devices. The actual physical items were to be handed over to the United States officials pretty much straight away to be transported back to the United States and there to be examined an FBI investigators and a sifting examination to take place there to determine which of the items were in fact relevant to the prosecution case against the appellants, and what particular documents within those items would be relevant to the prosecution case.

So as I say, there was to be no sorting of items here in New Zealand undertaken by either the New Zealand Police or the FBI or a combination of them. There was no provision in the warrant of any process by which anything found to be irrelevant through that process I've described was to be returned to the proper or rightful owners of those items. There was no provision or process for copies of any items were they documents or electronic data to be provided to the owners in relation to the items which were to be taken away or retained. There was no provision or process for any sifting of the items which were to be retained so that only those relevant to the US offences would in fact be retained.

The New Zealand Police had not been briefed to a degree or level that would enable them, themselves, to determine what was relevant to the FBI investigation and prosecution, and their role was to do no more than seize all and everything that could possibly be relevant and then hold it to await a direction that it be handed to the Americans. Nowhere in any of the materials subsequently provided to or obtained by the appellants is there any specific process by which one can see a recognition of or consideration of the rights of the appellants in this process.

ELIAS CJ:

Sorry I don't understand what that means, so what do you mean?

MR DAVISON QC:

What I'm saying is that section 3 of the New Zealand Bill of Rights Act 1990 applies to all Government agents, including the police in this instance who are carrying out functions. At no point in any of the papers put before the Court, be they the application for the warrant, or the memorandum of counsel presenting the application and supporting it the time the warrant was sought and obtained, is there any indication that the rights of, that are protected under section 21, were addressed in any tangible manner, or any observable manner, at no point does anyone say anywhere the interests of those affected need to be addressed the people who are directly the occupants of the house, the people who are in the house who are not subject of prosecution et cetera, there is nothing either specific or inferential which would suggest and nothing in –

ELIAS CJ:

You're not suggesting that that would – that that's a deficiency in itself –

MR DAVISON QC:

No.

ELIAS CJ:

– we're concerned with the substance of effect, yes.

MR DAVISON QC:

What I'm simply trying to do at this stage is to set a context –

ELIAS CJ:

Yes.

MR DAVISON QC:

– and the manifestation of that lack of attention to that topic becomes apparent in the documents which were going to be under close examination.

So this was despite the fact that the police knew that living in the household with Mr Dotcom was his wife, his five children, three of theirs, some young teenage boys who were Mrs Dotcom's brother's and a number of domestic staff, and others who were not at all were subject of an indictment and/or prosecution in the United States. As this Court has observed in earlier judgments a residence of this kind is a place where

there is objectively a high expectation of privacy, particularly in circumstances such as this where families reside, or a family resided.

ARNOLD J:
It's not disputed though is it that Mr Dotcom ran his business from the house?

MR DAVISON QC:
In the – Your Honour it's not disputed that there was a mixture of activity no question about that.

ARNOLD J:
Right.

MR DAVISON QC:
It ran the business is much like saying, "Does a professional run his practice from home?", when there's such an overlap of activity that in the modern era, but in terms of what was put to the Court in the application as to whether there were large servers in the house which were processing the data, no, it wasn't run in that sense, all of the servers and the nuts and bolts of the business were located elsewhere, but in terms of leadership administration, communication, yes, it was an indivisible activity.

ELIAS CJ:
But all that's necessary for your argument is that there would be a clear expectation that there would be irrelevant material because of the circumstances that it was both a home and a place where business was accessed?

MR DAVISON QC:
Yes. Your Honour, it's an appropriate time for me to just introduce the other feature, but it is very important in this case, and that is obviously the seizure was directed at data storage devices, computers, telephones, anything that had the capacity to store data, and in the authorities which I'll come to take you to in more detail later. It's clear in the modern era that an item as simple as a cellphone is a misnomer as a phone, it's not a phone, it's actually a computer, it's a library, it's all sorts of things, and it contains a wealth of information and of course the same goes for personal computers and other items of that kind, so one is not just talking about the expectation of privacy in relation to a residence, one is also talking about an expectation of privacy in relation to the collection of information that individuals

assemble around their lives relating to all manner and aspects of their lives, which are conveniently for them, and I suppose this makes them vulnerable, all assembled in these electronic data storage devices that then are amenable to seizure. Your Honours had it not been for the judicial review proceedings commenced, it's clear that these items would have been promptly handed over to the US authorities, which is the physical items, and that's it.

In a letter written to me by Crown Law on the 24th of February 2004, which is Mr Dotcom's affidavit in the case volume 3, his affidavit is tab 19, the page is 445, Crown Law advised that the position taken was under MACMA there was no obligation to make arrangements for access to physical items or clones, and said this in the context of the domestic criminal case, the defence may be provided the opportunity to inspect items seized under warrant where it's reasonable, arrangements will often be made for copies of relevant or specific material to be provided. There is however, no duty on the police to clone a computer for a respondent to a domestic restraining order, where we are aware of no authority that would require that material to be cloned for the purposes of an extradition hearing. So the position was that the appellant was to receive nothing.

ELIAS CJ:
That's not before us though is it? I'm just trying to understand the relevance of that point. I understand what you're saying. This is directed at the conditions is it?

MR DAVISON QC:
Absolutely.

ELIAS CJ:
Yes, I'm sorry.

MR DAVISON QC:
So that situation, if it pertains, would result in a deprivation of access to the physical item obviously, a deprivation of access to the information on those items, be it relevant or irrelevant to the US charges in circumstances where Mr Dotcom had been arrested on charges and initially held in custody to face an extradition request and now two and a half years later we're pretty much in the same position. Progress has been made and it looks like we are shortly to reach a position where Mr Dotcom will be able to receive the data, a copy of the data contained on his data storage devices,

but I just raise that by way of again context, to indicate just where this is at. In the meantime the US has, through its legal representatives the Crown Law Office, and the District Court resisted every application and measure taken by Mr Dotcom to defer his extradition application, defer the extradition application because he wishes to be in a position of having his information available to him.

So the appellants, Mr Dotcom submit to this Court that the search warrant pursuant to which this seizure was authorised, was itself illegal and invalid, it was a nullity at law, and not a lawful authorisation for the wholesale seizure and continued retention of the appellant's property and information and the question posed by this appeal, is to whether the Court of Appeal was correct to allow the appeal from the High Court on the basis that the search warrant issued by the District Court were valid. In my submission the correct answer to that question is, "No the Court of Appeal was not correct in its decision in relation to that."

Now I know that a lot has been said in general terms about privacy and search warrants. We have comparatively recently had a Law Commission review of the whole issue of privacy, search warrants and the review of that has lead to the enactment of the Search and Surveillance Act 2012. But the foundation of it all is the fundamental human right to privacy. Privacy that exists in relation to one's home. Privacy that exists in relation to one's person, and privacy that exists in relation to one's information and communications.

ELIAS CJ:
Is the argument you base on privacy a freestanding one, or is it the principle you say underlies section 21?

MR DAVISON QC:
Your Honour, It's an independent common law right, but it is, in my submission, it finds recognition in section 21 and the route of section 21 is this right, and if there was no section 21 the right would of course still exist, so the two co-exist and to the extent that one wants to intellectualise on the basis that one could put section 21 aside, I would say, "Yes it is independent" but in my submission it's not necessary to address it in that way, because section 21 is a legislative recognition of it and can be dealt with in that way.

But the fundamental principles are so fundamental to a free and democratic society that although they can be expressed in fairly brief terms the recognition of them and the protection of them is something for which, in my submission, the law must be forever vigilant because it is the gradual encroachment or gradual erosion of a right such as that that is under threat and is a process that is apparent in this very day and age where people's data is so readily seizable and obtainable by reference to these data storage devices that I've been referring to. Never more than in this day and age is it necessary for these principles to be clearly articulated and applied.

Your Honours and Chief Justice, you describe it as the right to be left alone. It's been described in a range of ways but in the end there's a certain sanctity about it, whether it be the person or the house or the information that defines the limits or the features of civilisation if you like. It defines the very essence of what society really is. A society is a compendium of individuals who agree to work together under a legal framework or live together under a social framework but who, as part of that agreement, recognise the sanctity of each of them unless there is a social imperative, a general social imperative for the invasion of that privacy in the interests of the greater societal interest.

So the next point I wish to make just relates to section 21 itself and that is that, in my submission, section 21 isn't a bottom of the cliff measure. It's a preventative, protective measure. A measure that's guaranteeing a right to be secure from unreasonable.

ELIAS CJ:
Is this a response to the suggestions in the - I can't remember if it was this case or one of the other cases in the Court of Appeal that all these things are downstream concerns?

MR DAVISON QC:
Yes.

ELIAS CJ:
Yes.

MR DAVISON QC:

And I emphasise this because to be secure is to be in a state where the occurrence of such a breach is avoided by all appropriate legal means and it is a very much second-rate way of being secure to be told that there has been a breach after it's occurred and to have a vindication of the right by virtue of a court judgment that the objective is to ensure that these events don't occur and legal processes are in place that are directed at achieving that as well as when there's a breach doing the remedial work to determine whether the breach is one which requires a remedy.

ELIAS CJ:

What I was going to ask you at some stage – what's the purpose of the declaration of invalidity? Is that what you're touching on here?

MR DAVISON QC:

Your Honour, could I just enquire of your question, whether you're talking about in this case or in general?

ELIAS CJ:

In this case.

MR DAVISON QC:

The – initially when the judicial review proceedings were commenced they arose in circumstances where there had been an inability to secure access to Mr Dotcom's own data and what was being sought at that point was an order that he get access and part of that process was a declaration of invalidity that would grant the Court jurisdiction to perform discretionary relief by way of an order for a term.

ELIAS CJ:

For a term, I see.

MR DAVISON QC:

I need to make one thing clear about that. At the outset Mr Dotcom, through counsel, had contemplated in negotiations with the Crown, that the hardware would go to the US and had accepted an inevitability of that but needed, and said, "I need my data to defend myself," so that was the position that he had taken and the data would meet his concern as to the breach. His position has changed and even though I have put in my submissions that what he is seeking is restoration of the orders of Her Honour

Justice Winkelmann that would provide him with access to his data and return of those things which are not relevant, as you'll hear. Quite a lot of things, an enormous amount of data, has returned to him now following the sifting that was done pursuant to Her Honour's direction.

ELIAS CJ:

Has that been quite a recent –

MR DAVISON QC:

Comparatively, Your Honour –

ELIAS CJ:

Because that – some of the stuff that was seized was returned pretty promptly but has there now been –

MR DAVISON QC:

Yes.

ELIAS CJ:

– further return of data? Or…

MR DAVISON QC:

Well, of hardware.

ELIAS CJ:

Hardware, sorry. Yes.

MR DAVISON QC:

Yes, hardware. Your Honour, the best way of dealing with this might be just to hand the Court the document by which this came back that the section 49 where there's a schedule which has very conveniently set out the whole range of things because ultimately this is a fact in the case which is relevant to this whole notion of the ambit of the initial seizure. Just to put this in context…

McGRATH J:

This is the Solicitor-General's section 49 direction?

MR DAVISON QC:

Yes.

ELIAS CJ:

Is this a later one or?

MR DAVISON QC:

This was December 2012.

ELIAS CJ:

I see.

MR DAVISON QC:

2013.

McGRATH J:

Thanks.

MR DAVISON QC:

Your Honours, you'll recall that Your Honour Justice Winkelmann had directed that there be a sorting exercise.

ELIAS CJ:

Yes.

MR DAVISON QC:

And this was reflected in what's set out in this section 49 direction of 11 December 2013 and in the attached schedule is a list of all of the items that were, had been – the hardware items, I should say, that had been examined and found to contain nothing of any relevance to the US prosecution and there are, in this list, I think something in the order of 140-odd items although the numbers just go up to 127. You'll see that in a number of instances there are two items assigned to a particular number. So for example…

ELIAS CJ:

These are – sorry, these are only the electronic hardware –

MR DAVISON QC:

Devices.

ELIAS CJ:

Devices. And if there are 140 not of interest, how many were retained as being of interest?

MR DAVISON QC:

The answer to that is the balance of I think, a total of 247 I think it was.

ELIAS CJ:

Right.

MR DAVISON QC:

I'll just check the –

ELIAS CJ:

So it's about half were not of interest?

MR DAVISON QC:

I'm sorry Your Honours, I just need to check this.

ELIAS CJ:

I don't think –

MR DAVISON QC:

Yes Your Honour in total on the 20th of January 2012, during the post-raid seizure, a total of 278 items were seized, but a review of this list for you, just indicates the sort of things, memory sticks, thumb drives and the like are on page 1. There's a – there are external hard drives which the Court will know contain vast storage capacity, at 26 there's an Apple iPhone, there's a –

ELIAS CJ:

What's the difference between the pink and the blue? Is there any difference?

MR DAVISON QC:

I'm not able to answer that just at the moment. There are other hard-drives and other laptops. At 60 there's a computer tower, et cetera, et cetera, so the storage capacity in the aggregate of these items is literally in the millions of documents.

McGRATH J:

Sorry, what was that, at 60 you were referring to, I'm just trying to – I see, it's the first item, is that a computer tower and four hard-drives, is that what you're referring to?

MR DAVISON QC:

I was just highlighting the fact that amongst these items that were returned, there's some major data storage kind of items, as well as the personal things such as iPhones and laptops.

ELIAS CJ:

Just looking at this scale of things, there's the amount of terabytes that are referred to in the Court of Appeal decision, is there any indication of what proportion of the terabytes available are embraced by this schedule. They may not be, I was just feeling for it.

MR DAVISON QC:

I'll just give you a very broad approach to it, because that's all I'm able to do from the information I've got. But if you pro rata-ed just for want for a better, across the whole number, back into your, against your 150 terabytes you would end up with the returned items being about 60, I think 60-odd terabytes –

ELIAS CJ:

I'm not sure that that technique would be justified though.

MR DAVISON QC:

Well I can't think of any other way that –

ELIAS CJ:

No, it may be that the exercise hasn't been done, but the 150 terabytes was certainly information that was given, I just wondered if there is up to date information of what has been retained. I may be that the Crown can assist us with that. It's probably of very marginal relevance.

MR DAVISON QC:

I could tell you in terms of numbers, about 40 per cent of the seized items by number were returned.

ELIAS CJ:

Yes.

MR DAVISON QC:

Now it's my submission that in this area of the issue of search warrants and the applications for search warrants, the role of the judiciary is vital in that in a very real sense the Judge who considers, or the judicial officer who considers if it's a registrar of a Court, an application must independently stand between the applicant's state and the individual citizen and evaluate the necessity of the intrusion against the recognition of the right and in doing so, and in circumstances where an intrusion is going to occur, endeavour to ensure that the intrusion is limited to that necessary and reasonably necessary for the law enforcement function to be properly performed, but limited beyond that so that the right to the extent that it can be preserved or protected is so preserved or protected.

Again there have been many statements of this principle in language that is worth perhaps reflecting on. Your Honour Justice Glazebrook, in your decision in *Hammond* – in *R v Williams* [2007] 3 NZLR 207 (CA), I think was referring to some of the words of Justice Burchett in the Federal Court of Australia where he said that the judicial officer in standing between the state and individual just balance this and made the observations in these words, "It's no quaint ritual of law requiring a perfunctory scanning, right formal phrases perceived but not considered and followed by an inevitable signature." And I simply draw the Court's attention to that, and indeed the words of our Law Commission in dealing with applicants – applications for warrants, in which the Law Commission said, I'll give a reference, it's not in our materials, but it's a Law Commission's report at para 2.55, where it is said, "It is an essential component of the cheques and balances that should exist in the system operating according to the rule of law. While the State through it's agents may be expected to act in good faith when exercising coercive powers against individual citizens, that cannot be guaranteed, and should not be assumed, its fundamental to the protection of individual liberty that the need for the exercise of the power should be demonstrated to the satisfaction of an independent officer and authorised by that

officer before the exercise of the power, rather than justified afterwards with the benefit of hindsight."

I quote that passage because of the way in which it underscores an aspect of, in my submission, the correct approach of the Courts to these matters, and that is that the protection of the right is something which must be vigilantly addressed and even though the Crown has an obligation to act in good faith, even though police officers are required to act in accordance with the law, even though there is an assumption that they will do so in good faith, and it were an expectation that they will, it cannot be assumed that it will always be undertaken like that, hence the need for the independent examination before the issue of the warrant. So that leads me to Mutual Assistance in Criminal Matters Act 1992.

ELIAS CJ:
Is this a response to something – is this submission directed at, I think the Court of Appeal said something about, "You can rely on the police" yes I see thank you.

MR DAVISON QC:
So that brings me to the Mutual Assistance in Criminal Matters Act, and –

ELIAS CJ:
Is it your position that that makes any difference, the fact that it's under that legislation? That there is a difference with the domestic regime? I wasn't sure on –

Yes.

MR DAVISON QC:
It is just that when the judicial officer and the Courts come to look at a MACMA matter there is a context there is a context around that that gives – that leads to particular circumstances that require particular consideration as to whether the protection of a right requires something more.

ARNOLD J:
I'm just wondering about that point about the context and the MACMA not being raising any different considerations. I mean in this case there had been an application under the Extradition Act 1999 for issue and arrest warrant, so the issuing

officer had the information that an indictment had been preferred in the United States. So all of that material is context that does affect the judicial officer's analysis isn't it?

MR DAVISON QC:
Your Honour I may not have made myself clear, so I'll just try and do that.

ARNOLD J:
Right.

MR DAVISON QC:
In terms of the broad principles that I've been addressing, they apply at all times to all applications in my submission. I was just about to say that the MACMA context adds another layer if you like, of refinement or context, that clearly does need to be addressed, that's exactly what my next point is.

ARNOLD J:
I see.

ELIAS CJ:
Although in answer to, perhaps to Justice Arnold it's, the issue here is not concerned with whether there was justification for a search warrant.

MR DAVISON QC:
Correct, Your Honour, it's not in relation to justification –

ELIAS CJ:
On which one can readily see that the material behind the application that's been made under the MACMA is going to be relevant. It's rather concerned with the manner in which the warrant is expressed.

MR DAVISON QC:
Yes, with great respect I don't see any consistency between –

ELIAS CJ:
No. But do you see that there's any difference in that second question, between the domestic context and the MACMA context?

MR DAVISON QC:
Yes.

ELIAS CJ:
Yes.

MR DAVISON QC:
Because when we get to a MACMA situation, the consequences of seizure are far-reaching and involve a whole range of interference with rights that are not being interfered with in a domestic circumstance.

ELIAS CJ:
Well you'll need to probably enlarge on that and after all the Act does have additional safeguards in the control exercised by the Attorney-General, which might address that additional dimension.

MR DAVISON QC:
Well it will only address it. The Attorney-General is going to be involved in two key moments, one before the application is made by considering whether an authorisation should issue, so there's a gatekeeper role there obviously. And then assuming that there is an authorisation issue and there is a seizure, the Attorney-General a responsibility for the disposition of the items seized under section 49 and so that role of the Attorney-General is one where there are compendium I suppose of factors and relationships that are being addressed by the Attorney, one is the very pure and simple MACMA request, one is the International Committee issue that the Attorney is directly involved with, with the requesting State, and it's my submission that because of all of that, come back to the fundamental role of the Court in determining and adjusting for the individual circumstances, so to come back I think to the point Your Honour has made with me, is the general approach to judicial scrutiny if you like, applies to all warrant applications, that can never change. The expectation of privacy is the same for everybody if you like, so there should be no difference in the way in which the Courts approach it.

In a MACMA context, which may have led to the issue of the search warrant, which I think His Honour Justice Arnold made in his mind in asking his question, it's been necessarily relevant there, and it becomes very relevant to how the Court frames or authorises a search warrant the terms of the search warrant if you like, that authorise

the intrusion, and in my submission both the legislation which I'll take the Court to, and the context, both indicate the necessity of strict compliance to ensure that the right is addressed and it's obviously really with respect, you're going to take something from someone and send it to a foreign jurisdiction, in circumstances where they're either being investigated or they have been prosecuted, the items taken are therefore obviously going to be, or sought to be those which are relevant to the prosecution and the person from whom they're taken may wish to inevitably will want to access them in his or her own interests for all manner of reasons which are fundamental to a free and democratic society.

ELIAS CJ:

Well does that go further than saying there must be some heightened concern about inaccessibility and loss – well and the process of establishing relevance, is that what you're saying?

MR DAVISON QC:

Well, one relevance is always the – it's the key justification for the intrusion, the possession of relevant information, so that's the starting point. The necessary sifting or determining of that which is relevant and that which is not, whether are mixed sources, mixed containers of information, is the next issue, and that becomes the privacy issue, and thirdly, there is at the access to the information in the MACMA context particularly, to ensure that legal process can be undertaken in a fair and proper manner, section 27, New Zealand Bill of Rights Act, that wouldn't be as prominent in a domestic situation because we have a Criminal Procedure Act 2011 if it was a New Zealand prosecution and access to information would flow through that process. So it is bespoke if you like, it's particular, it's unique, there is no other warrant I am aware of, that would involve the seizure and removal from this jurisdiction of property or information.

GLAZEBROOK J:

Can I just check with you as to why – I can understand that access to information for the purposes of the extradition hearing in New Zealand is a concern as the New Zealand Government, and the New Zealand State generally, and the judiciary, I can understand that the fairness of the process which can include matters such as discovery will be relevant at the extradition hearing and also relevant to the final decision as to extradition, why is it relevant at the search warrant stage? I understand everything that happens in New Zealand could be relevant but this – your

last submission seemed to go further than that and suggests that you're looking at it in a wider context?

MR DAVISON QC:

Your Honour the reason is, the moment of seizure is not the beginning and end of the interference with the right. It's – the seizure continues throughout whatever period it might be, the item is held and the person who owns it is deprived from access to it. So that the reason why it's relevant and important in this instance, is that the warrant which authorises this seizure, is just step one. Step 2 is the passing of the item overseas and the Court with the power of ability to impose conditions, in my submission has an obligation of ensuring that the citizens' rights or the individuals' rights are met in that period of post-seizure and prior to transfer to the foreign state. So that the New Zealand processes that are going to follow, can be undertaken in a properly, in a manner consistent with natural justice.

GLAZEBROOK J:

I understand the New Zealand. So you are not going further and saying that the New Zealand courts should have ensured access at an earlier time, as I understand from the US processes because I understand from the previous that the US discovery process has happened further down the track.

MR DAVISON QC:

Correct Your Honour, yes, that's right.

GLAZEBROOK J:

So you are not suggesting that the New Zealand processes would have to bring that forward. You are just concerned about the New Zealand processes, is that right?

MR DAVISON QC:

Yes, correct Your Honour but that is an interesting issue in itself in this sense in that just leaving the American process to take its course for the purposes of this argument. From the moment a person has their items seized, and they are arrested, that person necessarily is going to be turning their mind to preparing for extradition and opposition of that and addressing what if the extradition order is made and I am extradited and they are entitled in my submission to access to their information for preparation of extradition but also for whatever legitimate purposes they may have and quite obviously in this case, the fact that an indictment has been issued by the

grand jury in the United States with charges that they have been arrested on engages that process straight away.

GLAZEBROOK J:

Is that a back door discovery argument because if the warrant has seized relevant material and I understand the argument on irrelevant material as well. Let us say that we have only got relevant material there, isn't this a back door discovery argument again?

MR DAVISON QC:

Well Your Honour I would say no because it is not a way of circumventing the US legislative and procedural rules around discovery that would delay the provision of criminal disclosure until someone was within the US jurisdiction and certain steps had been reached. That is why I say it is not a way of circumventing it. The right to information exists independently of any entitlement to get it via the United States disclosure process. The right exists from the moment it is seized from the person in New Zealand to be used for whatever purposes they like. I mean for example let's say it is a photograph album of the family. They have a right to that and to be able to use that for whatever purpose they like. If it is their business files, they have a right to that, to continue their business if they can undertake that lawfully. And if they want to use that to start engaging their counsel and instructing experts around the need for things that may be relevant to a US prosecution, then they have a right to do so and until they have been extradited, there is no matter in the US. They, the US first of all has to get them, secure them by way of an extradition.

GLAZEBROOK J:

So, can I just check the right then exists independently because it is their property or under their control.

MR DAVISON QC:

Yes.

GLAZEBROOK J:

So does that mean if that items are seized in New Zealand, that there has to be some process for ensuring that you could continue business, if they are needed for a Court process, or you could continue putting the baby in the pram that is evidence, or an exhibit in a case.

MR DAVISON QC:

Well Your Honour –

GLAZEBROOK J:

But obviously you do not take it to extremes like that I understand.

MR DAVISON QC:

Can I perhaps bring it into these terms. Suppose it was something physical like something relevant to a crime, let's make it easy. A gun. Obviously the gun goes and access to it, one would never expect in a domestic situation or in a situation such as a MACMA request. But where it is something that is readily reproducible, and which doesn't have that characteristic of being the single item but is a reproducible item such as a data set in a computer, then the law in my submission tailors itself around those circumstances with a view to preserving the right meantime of the owner of the property and there are ways of doing it, simple ways of doing it which are being done all the time now. Domestic setting, that is the provision of a clone of data and a return of that so that even where the computer hardware is regarded is of evidential circumstances, the content can be continued to be used and enjoyed.

WILLIAM YOUNG J:

But is the only reason that has not been handed back, the issue over passwords or are there other issues?

MR DAVISON QC:

The password issue has been the impediment Sir and if I can just take a minute. Your Honour will know that her Honour Justice Winkelmann in granting that relief in the High Court made it subject to the provision of the inscription password and since that, we are still struggling to try and get over that and the idea that there is a nice neat password such as the name of the dog of Mr Dotcom, he could have given it, it is nothing like that at all. It has been very difficult.

WILLIAM YOUNG J:

Well it is no good to him if he does not have a password.

MR DAVISON QC:

You know it is all about, in fact Your Honour, it is an encrypted alphanumeric code itself, the password that one gets in Mr Dotcom's case, by going into a particular file and getting a hint out that enables you to reproduce the alphanumeric sequence and so if you do not have access to the computer, you do not have access to your encryption code. We have finally got a way round that but it relates to the backups of Mr Dotcom.

ELIAS CJ:

Is that word in the evidence beginning with R, in the hard drive, some sort of?

MR DAVISON QC:

RAID.

ELIAS CJ:

Yes RAID, yes.

MR DAVISON QC:

That is the random access information something.

ELIAS CJ:

Is that what that is?

MR DAVISON QC:

No.

ELIAS CJ:

Okay then, well do not tell me.

MR DAVISON QC:

That just simply means that you have a whole bunch of computers that talk to one another and if I save something it might put it here, here and there and you need all of those things to bring it back to here.

So to come to the issue of MACMA. As I say, the items will be going offshore. The second feature of a MACMA warrant is that the police, New Zealand Police typically will not have the sort of detailed knowledge of New Zealand Police investigators that

were executing a warrant that they had sought, so they will be short on information and need therefore some clear guidance in the warrant as to what is within the scope of the warrant and what is not seizable under it.

GLAZEBROOK J:

Could that be done by way of briefing? Because it would be relatively unusual to clutter a warrant with the sort of detailed information that you would actually want the police to have I would've thought when exercising the warrant, that applies to domestic warrants as well.

MR DAVISON QC:

Well Your Honour, yes, it should be done by both. The briefing of course is a much more diverse and rich source of information, but that doesn't, and I'm not suggesting that effectively a briefing is somehow or other converted into a memorandum attached to a warrant, what I'm suggesting is that the warrant should have upon its face, details such as, define its limits such as dates, names, particulars of the offences charged, et cetera, et cetera, so that a police officer presenting it to someone and says, "That's the authority", isn't asked, "Well what can you take?" And have to say, "I've been told in my briefing I can take such and such." But that's not the process, the process should be that the person receiving it should be able to see some definition of the limits and if required go and get legal advice and a legal advisor look at it on its face and see what the limits are and endeavour to rationalise from there that which can be seizure and that which cannot, because axiomatically, the warrant has to have limits. If it doesn't it is a general warrant and it is illegal on my submission, on that account.

McGRATH J:

Do you accept that in the case of digital devices, computers in particular, that presents general difficulties?

MR DAVISON QC:

Yes, Sir.

McGRATH J:

And the overseas authorities, particularly in Canada, appear to have looked at that and do not seem to think that the answer lies in specifying the detail but that's something you will come to I suppose.

MR DAVISON QC:

Well in the US in the *Riley v California* 134 S.Ct. 999 (2014) case which we have got and I will hand up to you, where they were dealing with the seizure, incidental seizure of a cellphone.

ELIAS CJ:

Has that decision come out?

McGRATH J:

Very recently.

ELIAS CJ:

I did not realise that, I knew it had been argued.

MR DAVISON QC:

Yes and Your Honour perhaps I could just hand that up to you.

McGRATH J:

Well I am not expecting you to go into the detail and I do not want to distract you and no doubt you will be looking at the Canadian's decision of *R v Vu* [2013] SCC 60 as well.

MR DAVISON QC:

But it is a good time to just make the point with respect Your Honour, that in my submission the correct approach when data devices are being seized, is to recognise you are getting the library. You are not – you are getting this huge volume of material in this nice convenient device and the correct approach is to get a warrant for the examination of the contents that is specific. So you might get a warrant to look for and seize the receptacles, the data storage devices and having received them, then following *Riley v California* apply for a warrant which is specific as to the content rather than being able to roam through a private data storage device without restraint and *Riley v California* contains some graphic language really around this sort of statement from His Honour Chief Justice Roberts comparing the search of the contents of a physical item such as a packet of cigarettes which I think was the *United States v Robinson* 414 US 218 case saying that comparing the search of the physical item such as a packet of cigarettes or a wallet or a purse, to the search of a

cellphone, is like saying a ride on horseback is materially indistinguishable from a flight to the moon.

McGRATH J:
Whereabouts are you at?

MR DAVISON QC:
At page 16 I think. Bottom of page 16, top of 17. "United States asserts that a search of all data stored on a cellphone is 'materially indistinguishable' from searches of these sorts of physical items in referring to brief of evidence as read by consent above." That's like saying, "A ride on a horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cellphones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette packet, a wallet, or a purse. In conclusion inspecting the contents of an arrestee's pocket works no substantial additional intrusion of privacy beyond the arrest itself, may make sense as applying to physical items, but any extension of that reasoning to digital data has to rest on its own bottom."

Then they go on to, His Honour Chief Justice Roberts goes on at the next paragraph to just start talking about cellphone. The term "cellphone" is misleading shorthand, a point I was making earlier.

ARNOLD J:
Does this really help though, I mean in the context of the case that the US is bringing against Mr Dotcom alleges this huge conspiracy that is basically operated through the internet and servers all over the world and so on, and does Mr Dotcom says in his evidence, you know, business is web based and he uses his personal computer both for business and private use. So we're dealing with a situation where everything is electronic. I mean this is an example of a cellphone that somebody had, it's not the sort of situation we're addressing is, and the problem it seems to me, is that because of the sort of capacity that all of these electronic devices have they all could be, not necessarily were, but could be used in the operation of the business and that, don't you have to address that. What process do you say should have been established to deal with that?

MR DAVISON QC:

Well Your Honour with respect, the point I'm making is particular germane to this case because –

ELIAS CJ:

It's a process, rather than what process that you're asking for isn't it?

MR DAVISON QC:

The process that I'm contending is required, is a recognition that the data storage device is being as broad scope as they are, and quite obviously Your Honour as you quite rightly say, so there will be a range of possibilities as to where things might be. But are of a type that store private information as well as say business related or information relevant to the prosecution and exculpatory information, and my point is that a search warrant is to be issued in terms that recognise that the intrusion into the privacy or privacy of the individual is to be limited and what *Riley* is talking about and what *R v Vu* is talking about we now live in a different era where so much of an individual's private material is on these devices and the Courts and the law has to tailor the interaction between the societal interest of law enforcement and the privacy interest in a way which recognises that this breadth of data and the mixture of data is present.

Now in a case like this where as Your Honour has said, Mr Dotcom, there's no dispute about the fact that it's a data-based business. Before the warrant was applied for, an investigation had been under way for a year or two, an indictment had been sought, so a case had been created, 14 million emails had been examined. So one has to put all of this into context, it's not as if this is an investigation coming along sort of cold if you like, trying to – all of that information was put before the Court in the application, and in my submission this is a more surgical approach based on the recognition of privacy than a sort of a broad brush, broad sweeping up of data that might be relevant, and when you say, "Something might be relevant", it's a bit like going to a library and saying, "I might find a book in there". That's the sort of volume that you're talking about, and so do you justify a search warrant to take the whole library, or should the search warrant to take the whole library, or should the search warrant be limited in some way to by reference to dates and parties involved in the investigation, and as I'll come to address you on, there was a wealth of detail that could have been employed in this case to define the scope of the search in a

way which would have made it clear both for the searchers and the subjects of the search.

GLAZEBROOK J:

But they wouldn't have had access realistically if you have a little hard-drive which now – I bought one that was two terabytes the other day and it's this big and this thin, and you don't have access to that to, and in any event if you start accessing it you destroy the data in any event and destroy the times and all of those, and dates that might be of particular relevance in any event, or at least make them more difficult to trace. So realistically you could have had all of that detail in there and the people would still, the searchers would still have been – maybe there was a stack of these things, they were still going to have to seize that physical item weren't they?

MR DAVISON QC:

Your Honour I don't –

ELIAS CJ:

You're not resisting that.

MR DAVISON QC:

I'm not suggesting the seizures –

GLAZEBROOK J:

But what do – all right so then they do that, and then what do they do? Couldn't they apply for the two together, they seize those items and at the same time say that the conditions are that when they do the cloning that they exclude material or whatever it might be.

MR DAVISON QC:

Precisely. That's where it's –

GLAZEBROOK J:

It's conditions that are put on, but they can't define the search itself because the search itself will be picking up these little, passport like photos.

MR DAVISON QC:

Yes Your Honour, I think your description of this and mine, might be different in terms of our terminology, is that I'm – I think one has to distinguish between the physical act of uplifting at the time of search, and the seizure that occurs, and the time the thing starts to run and my submission is that the warrant, it's one thing to define the item that can be seized, but it must in MACMA as I will endeavour to develop, also address access as well.

ELIAS CJ:

Well you're saying that they have to be conditions –

MR DAVISON QC:

Correct.

ELIAS CJ:

– on which the warrant is granted because of the whole world that is opened up through these devices, the response, I'm not sure that the response I think to Justice Arnold is that it's simplistic to say that because in a case like *Riley* they didn't have any legitimate interest in picking up the device, that the reasoning that is developed in that case is not applicable to limiting access once the physical device is properly obtained, and you don't resist –

MR DAVISON QC:

I don't resist that.

ELIAS CJ:

– that the seizing of the physical device?

MR DAVISON QC:

Yes, Your Honour for all the reasons which, you know, have forensic integrity behind them, there is a freezing of the information at the moment of seizure is very much part of the process.

ELIAS CJ:

Yes.

MR DAVISON QC:

And one has to accept that the law enforcement offices want to freeze it and then be able to see what it contains at that moment and not let that be corrupted by any subsequent use or have you. That is accepted but that can be done and it is done all the time with the cloning process. As the Court will know, that in many instances the cloning is done on site but where the volume is such as is the case here and it can't be conveniently done on site, I accept as the authorities have indicated, that a removal to a more convenient location where it can be done efficiently is not inconsistent with the right but that doesn't mean that the right of access is somehow or rather to be lost sight of and that's what I say ought to have been addressed.

WILLIAM YOUNG J:

So that means that the seizures which took place were inevitable, however a warrant was drafted?

MR DAVISON QC:

No, Your Honour, because when you look at the information that should have been on the warrant to restrict it in terms of the sort of things which could have been added.

WILLIAM YOUNG J:

Well what was taken that would not have been taken?

ELIAS CJ:

Of the electronic devices, because there was an awful lot of other stuff.

WILLIAM YOUNG J:

The physical things, the things which were physically -

MR DAVISON QC:

Well Your Honour, let me pick some of the easier ones for example. In the house was household staff, who had separate living accommodation, they had their own devices and computers and things. Now as is explained by the police, they say they wouldn't know what role staff played, that things like that were taken.

WILLIAM YOUNG J:

But would they not have been taken anyway?

MR DAVISON QC:

Well Your Honour if one has a search warrant that says, the people involved in the alleged conspiracy are A, B, C and D and A, B and C are at this house and it's alleged that between certain dates they committed the conspiracy in relation to such and such, then probably you wouldn't be taking the household video library or the household album of family excursions and events. In a case where who is where and who communicated to who was richly evident from a distillation of 14,000,000 emails. One has to bring this back to reality in my submission and I will make the submission right now. That this was a general warrant and it was a fishing expedition and it was no more or less.

WILLIAM YOUNG J:

So was the video library seized?

MR DAVISON QC:

Yes. What was seized – one other thing was seized. They had installed in the house a system called the Kaleidescape system of home entertainment and uniquely it cannot be used other than by reference to licensed Blu-Ray products, you just can't put a bogus thing in it, it's protected in some way, and that was taken. But it was taken from the house and not taken from The Prom just up the road. They had it installed in both locations. In one case they took it; in the other they didn't. It was a huge storage device in terms of movies and the like. Your Honours if I could perhaps focus on MACMA. And in my submission the MACMA provisions in relation to search warrants read and should be interpreted as a code. Self-evidently the meaning of the enactment is to be ascertained from its text and in the light of its purpose to use the words of section 5 of the New Zealand Bill of Rights Act and as this Court has said, in the *Stiassny v Commissioner of Inland Revenue* [2013] 1 NZLR 453 decision, "The safest method is to read the words, memos, natural sense, look for the real intention of the legislature" and in my submission MACMA and its purpose can be seen from its long title. From a recognition that it is part of New Zealand's international –

ELIAS CJ:

We do not have the whole Act, of course, do we?

MR DAVISON QC:

No I am sorry it is not there.

ELIAS CJ:

If it is a code, it might have been helpful to provide it.

MR DAVISON QC:

My submission was that 43 in relation to search warrants was the code and I accept that we should have provide it. But the long title is an act to facilitate the provision and obtaining of international assistance in criminal matters and there is of course the treaty with the US that New Zealand has entered into, contained in the 1970 order which requires reciprocal assistance.

McGRATH J:

That does not, I take it. address searches specifically.

MR DAVISON QC:

No Your Honour but what it does say at article 9 of the order is that, "The determination that extradition based upon the request, should it not be granted shall be made in accordance with the laws of the requested party and the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law." So an applicant under MACMA comes on the basis that the person affected will have their rights and remedies determined in Court.

ELIAS CJ:

Sorry is that a provision, I missed that. In that provision in the Mutual Assistance in Criminal Matters Act.

MR DAVISON QC:

No, Your Honour, it is a provision in the treaty.

ELIAS CJ:

You are talking about the treaty?

MR DAVISON QC:

Yes.

ELIAS CJ:

But surely that bites only on the extradition legislation. Why does it bite on this?

MR DAVISON QC:

Because if one has the right to use such remedies and recourses as are provided by such law, and the extradition request is accompanied by a warrant of arrest which is a necessary incident and a search warrant which is indivisibly connected to the same extradition process, in my submission it would be artificial to say that the right which is being spoken of, remedies and recourses, would be limited to the Extradition Act 1999 and for example not have effect in relation to natural justice.

ELIAS CJ:

But those all come in anyway because this is a local Act.

MR DAVISON QC:

Yes I am not saying we have to get it in through there. I am not suggesting that at all. I am just – the point I was endeavouring to make is when the Court approaches an interpretation of MACMA, one of the recognition is it is a comity treaty if you like, a quality act, it is an act which is intended to facilitate co-operation. "The provision and obtaining of international assistance in criminal matters." And in my submission when that is happening under our domestic law and New Zealand Bill of Rights Act section 21, section 27 are all engaged and so when approaching MACMA with a purpose of intent or looking for purpose of intent it's my submission that one can readily see that whilst affording co-operation to the requesting state, one is required to do so and I'm not saying we rely upon the Treaty for this, we rely upon our domestic law to do so in accordance with the New Zealand rights.

If I could invite the Court's attention to the provisions of MACMA which are in the bundle of authorities at tab 3 and I note of course section 6 of the New Zealand Bill of Rights Act and an interpretation consistent with the Bill of Rights is to be preferred and if one looks at section 43 it can be seen that the initial stage whereby the Attorney-General receives a request and considers it and makes a decision to authorise a constable, all functions expressed in the enabling use of the word "may", "Foreign country may et cetera," "The Attorney-General if satisfied may authorise," and then moving to 44 dealing with search warrants. "A District Court Judge upon application in writing made on oath is satisfied that there are reasonable grounds for believing there is on any," is on any place or thing the three categories that the Court will be familiar with, "May issue a search warrant." And then moving to 45 the language changes and significantly as to what the search warrant must contain. 44(1), it's to be in the prescribed form and the use of the word "shall" in my

submission, is of real significance. And as we will see in this instance the correct form wasn't used but as you will see for some reason which is difficult to discern, that the Summary of Proceedings Act form was used and yet the Court was told and assured in a memorandum that the correct form had been used and when one compares the two that are such material differences that they have some significance here. So 45(2), "Every warrant issued under section 44 shall be directed to any constable." 45(3), "Shall be subject to such special conditions, if any, as a District Court Judge may specify," and then 45(4), "Shall contain the following particulars." "And place or thing that may be searched, the offence or offences," a description of the articles or things that may be authorised, the period during which the warrant may be executed and the conditions, if any, specified by the Court."

The powers conferred by the warrant under section 46 are also expressed in, what I would for shorthand term the mandatory terms of the use of, by the use of "shall", shall authorise the constable executing the warrant to do those things. And then 46(2), "The constable shall have the powers." And then across at 46(a) is not relevant to present purposes. 47, "A person executing the warrant to produce evidence of authority, every constable executing the warrant under section 44 shall have it with them and shall produce it on initial entry and if requested at any subsequent time." "Shall if requested at the time of the execution provide a copy with it, et cetera within seven days." Then 48, "Within seven days a constable shall provide a list of those things seized to the person from whom it's been seized or any party that is believed to have an interest in it." And I just pause to say that that wasn't undertaken in this case, there was no such notice provided, to my knowledge. And then 49 is also in mandatory terms, "The items seized shall be delivered into the custody of the Commissioner of Police." "They shall be kept for a period," under 49(2) and there until the Attorney-General gives a direction in 49(3), which they shall be dealt with." "And if no direction, 49(4), shall be returned." And then the Attorney-General's certificate under 50.

So in my submission and turning then to –

ELIAS CJ:

Is that a – are you turning to something else?

MR DAVISON QC:

Yes I was going to turn to the forms, so is that a time to stop?

ELIAS CJ:

We'll take the adjournment now.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.49 AM

MR DAVISON QC:

Your Honours, just before I resume by dealing with the form, I just wanted to make one matter clearer, I hope, in relation to the question that His Honour Justice Young asked me about encryption codes and what I didn't make clear was that there are a number of items that have been held up in relation to the encryption codes, but they are not all of the items. There are quite a large number of items. There was something in the order of 90 items that have been determined to contain relevant material. Some of them, and I can't put a number on it, because there hasn't been information provided, maybe affected by encryption codes, but the vast majority of those are not but they have not been provided. So what hasn't come back is not just the stuff which has been inhibited by the encryption codes, but the other stuff determined to contain relevant material as well.

WILLIAM YOUNG J:

Why hasn't that come back, do you know?

MR DAVISON QC:

No. Well in part, I can say that we have – went to the Court of Appeal a week or two – a week, 10 days or so ago, seeking some directions in relation to that course, reservation of leave in relation to this same proceeding, and we're seeking to resolve matters around that which might provide us with possession of that information. Part – one of the issues raised is that this Court's determination may have an impact as well, so –

WILLIAM YOUNG J:

Do you mean in relation to this case?

MR DAVISON QC:

Whether this Court rules that the warrant is valid or invalid may, it's said, have a bearing upon whether we, whether Mr Dotcom gets access to his information. But, with respect, my proposition is that that entitlement subsists irrespective of whether

the warrant is valid or invalid but I'm trying to explain to you that there have been a range of issues debated around the – as to reasons why the material is coming back, and it's not just limited to the encryption codes.

Your Honours, section 65 of MACMA provides for the creation or provision of the making of regulations and section 65(1)(b) specifically authorises the Governor-General by Order in Council to make regulations, "(b) prescribing the forms of applications, notices, certificates and other documents for the purposes of this Act, and requiring the use of such forms." So that's the legislative –

ELIAS CJ:
Sorry, where's that?

MR DAVISON QC:
It's section 65 of MACMA.

GLAZEBROOK J:
We don't seem to have that.

MR DAVISON QC:
No, I'm sorry, we're getting copies of the full Act for the Court and that should be available shortly. So coming to the regulations made, which are in the materials before you under volume 1 of the bundles of authorities at tab 4, and relevantly under regulation 3, "The forms set out in the schedule are the forms to be used in respect of the proceedings or matters under the Act to which those forms relate. Such variations may be made in any prescribed form as the circumstances of any particular case may require. Strict compliance with the prescribed forms is not necessary, and substantial compliance, or such compliance as the particular circumstances of the case allow, is sufficient."

Now I just interpolate there to respond to the suggestion that what was used was sufficient. As I will explain shortly this Summary Proceedings Act form was used so if one doesn't use the form, one cannot use, or apply, reg 3 to justify any departure by way of need to meet the circumstances of a case. Reg 3 is no answer to a use of the entire entirely wrong form. It's an answer where there is a need for some variation to meet a situation that doesn't comply with the form. The form is over the page and I –

ELIAS CJ:

If the information, though, was substantively the same but the layout was different –

MR DAVISON QC:

Yes. Well –

ELIAS CJ:

– would you say, well, it's the wrong form?

MR DAVISON QC:

No I –

ELIAS CJ:

Doesn't it fit within regulation 3?

MR DAVISON QC:

If the lay – well layout I would, I think, layout I'd put to one side altogether, I mean how it looks in the end is pretty much subservient to what it says, but the form is not a form of layout, it's a form of substance, and it is the legislative way of including a level of detail in the warrant to comply with the requirements of section 45. And if I could invite your attention to –

ELIAS CJ:

Do we have here the regulation setting out the form under the Summary Proceedings Act 1957 to compare it with?

MR DAVISON QC:

I have got –

ELIAS CJ:

It doesn't matter –

MR DAVISON QC:

I've got copies of section 198 invokes form 50, five O, and I've got copies of form 50 to be handed to the Court.

ELIAS CJ:

I'd quite like to compare the two as you're going through this, if that's all right.

McGRATH J:

We actually have the warrants of course that were issued.

ELIAS CJ:

And they are accepted to be in form 50 are they?

MR DAVISON QC:

Well I understand so because when we can trust them, one can see that it is a form 50 document, which we're going to look at, the document itself –

McGRATH J:

Although it refers to the MACMA Act, it's nevertheless the document a form 50 as you say.

MR DAVISON QC:

The actual warrant of course is in the case on appeal, volume 1, tab 3.

ELIAS CJ:

Thank you.

MR DAVISON QC:

Volume 1 tab 3 so that if one wishes to start quickly by looking at the form I've just handed up, form 50, and comparing that with the search warrant as the case at tab 3, one can quickly see the corresponding –

ELIAS CJ:

It's not entirely equivalent, but –

MR DAVISON QC:

But where it is – the heading has been changed, so the words, "Section 198, Summary Proceedings Act" have been removed, and substituted with the typed words, "Section 43 and 44 of the Mutual Assistance in Criminal Matters Act 1992", so that's been changed, otherwise the form is as per 50.

ELIAS CJ:
Okay.

MR DAVISON QC:
So comparing that then with the requisite form, form 5, which has as its title, some more information than the actual – than the one employed in the search warrant, "Warrant to search and seize article or thing relevant to foreign offence." So all of a sudden one reads the title and one can see that it's something relating to a foreign matter. And then in the first paragraph, it's – the words, "Satisfied on application made both by specific person, a constable authorised by the Attorney-General under section 43 of the Mutual Assistance in Criminal Matters Act 1992 to make that application." That's all omitted from the actual, now it's a recital –

GLAZEBROOK J:
But does that matter to the person who's receiving it?

MR DAVISON QC:
Not as much as when taken on its own, as other matters, but what it does convey to the Court that's being asked to issue this warrant, is it's an affirmation or a confirmation that authorisation has been provided and it's focusing the Court's attention on this particular process, which is required to be adopted and followed in a MACMA context so, that's why I've described it as a recital Your Honour, it's – and it does help to inform the person receiving it to know that this is a process which has already received the attention of the Attorney-General. And then a reasonable grounds for believing that there is on – describe the, describe the place or thing that maybe search pursuant to the warrant, contrast that to the language of form 50 which is here described, building aircraft, ship et cetera.

The following article insert, "Description of the article or thing to be searched for and seized", and compare that with 50, "Here insert description of things to be searched for". And then the next paragraph, "Upon or in respect of which the offence of" and in 50, "State offence being an offence punishable by imprisonment" and the words, "Specify offence, being an offence under the law of country, and being an offence punishable by imprisonment for a term of two years or more, has been or is suspected of being committed." Now that information is not replicated in form 50. And the word, "specify" as I will comment shortly in my submission has significance.

And then the alternative, and there are three options in such situations as to what types of – so the next paragraph, "Or which there are reasonable grounds for believing will be evidence of the Commission of Offence of," again the offence is to be specific, so the second time, "being an offence under the law of again the country, being an offence punishable by imprisonment for a term of two years or more." So the information is repeated. In our case the third option intended to be used for the committing of an offence wasn't relevant but the form does require again the specification of the offence and the country.

And then the warrant authorises you at any time day or night, within specified the period, and form 50 by comparison refers to a month, perhaps nothing too significant in that on its own. And then in my submission very significantly, the paragraph, "This warrant is subject to the following conditions specify." And finally, "If you seize any article or thing you are required to comply with section 48." And that's the section requiring in mandatory terms, the provision of a notice of to the owners of the items within seven days, detailing the things seized.

Now the significance of this with respect, is that if one uses the right form, not only is the information provided to the recipient of notice more fulsome in terms of explaining what the warrant is all about, it contains information regarding the offence and country, such as will inform those persons responsible for executing it and those affected by it, to know what the focus is, what the limits are, and it informs the judicial officer to whom it's placed before, that the issue of conditions is possible. Now as the Court well knows, the issue of conditions doesn't arise on the form, form 50, and generally speaking as the *Television New Zealand Limited v Attorney*-General [1995] 2 NZLR 641 (CA) case, is authority for conditions are not regarded as normally required or to be encouraged in warrants. But here the situation is quite different. Here warrants are specifically provided for in the form and in section 45(3).

McGRATH J:
As so far as the judicial officer's concerned, Judge McNaughton had, in fact, substantial information at the application didn't he?

MR DAVISON QC:
Yes, Sir, he did.

McGRATH J:

So we're more, so does that really mean we're more concerned with the person who's affected by the warrant?

MR DAVISON QC:

We are. I am vitally concerned about the person who is affected by the warrant –

McGRATH J:

Yes.

MR DAVISON QC:

– but as you will see, I hope, when I take you through the process of the provision of information to the Court including what I think Your Honour's referring to about what was before His Honour Judge McNaughton, if the right form had been used, for example, and he hadn't been told by counsel in a written memorandum that the right form had been used but –

McGRATH J:

Yes I appreciate that.

MR DAVISON QC:

– then one's attention may not have been deflected, or whatever might have been the case, away from the issue of conditions, I'm not here seeking to attribute sort of responsibility if you like, what I'm seeking to highlight is that the Act requires the use of a form, the Act provides for the possibility of conditions. If the form is used and the Act is followed the coincidence of that process is much more likely to bring conditions to front of mind; it wasn't unfortunately the case here and what we ended up with was a Summary Proceedings Act warrant.

McGRATH J:

I understand what you say, it's just that you did bring the Judge into this and it just does seem to me having read the application and of course which specifies paragraph 77 relevant United States offences that were committed, that the Judge was fully informed on those matters. I accept that's not the case where the person is the subject of a warrant in light of – I accept you've made your submissions on the information in the deficiencies there?

MR DAVISON QC:

Yes there is one refinement I think that I would make. Her Honour Justice Winkelmann noted that in the application Detective Sergeant McMorran made no reference to the intention of sending the items overseas. If one goes right back and trawls through it which I'm just going to pick it up for you in due course, but there was an indication in the materials that items would be –

McGRATH J:

I'm not, certainly not saying that I think it's a complete document –

MR DAVISON QC:

No, no.

McGRATH J:

– in any respect, I'm just trying to see what it was that the District Court Judge had before him –

MR DAVISON QC:

Yes.

McGRATH J:

– that he might, that might not have been had because the wrong form was used in relation to the warrant.

MR DAVISON QC:

Well Your Honour I suppose all I can say in response to that because I will take you to the information that ought to have provided the, the data as if you use the wrong form and you tell the Court you're using the right form then the potential for the issue to, the issue of conditions to escape the attention of the Court is greater than if you use the right form and told the Judge et cetera. I mean it's really what it comes to.

McGRATH J:

I understand that submission yes.

ELIAS CJ:

I don't, certainly don't want to hold you up and I am getting a little anxious about time –

MR DAVISON QC:
I'm trying to move on –

ELIAS CJ:
Yes. But I should flag that I'm not myself convinced that some of the statements in the cases emphasising the impact on the recipient of a warrant are sufficient for our purposes. I'm concerned about what the warrant on its face authorises and this warrant is deficient under form 50 as well as under the MACMA because it doesn't specify the effects and I'd certainly like some attention on what it authorised.

MR DAVISON QC:
Yes. Thank you Your Honour, well I'll just try and move on then. It's been submitted by my learned friend that the language in MACMA 45, the mandatory language there is replicated in other statutes such as the War Crimes Tribunals Act 1995 and the Films, Videos, Publications Classification Act 1993 and others, it being said that, "Reflects a drafting style for new warrant provisions in vogue in the early 1990s," and in my submission, whether it was in vogue or not it needed to be in those terms because the Bill of Rights Act had been passed in 1990 and that what was following in legislation after 1990 was legislation that was much more focused on rights and the recognition of them and this is an example of it and it's no way diminished by the use of the same language in other enactments and in any event, in my submission, it falls to be interpreted in its own context having regard to its purpose and this language and in my submission when one does that, one can – the correct conclusion is that these requirements are mandatory and that is the means by which the legislature is seeking to protect the rights of that person or person affected.

Now in terms of legal principles and I'll try and be as quick as I can. As is trite and is expressed by the Courts in *Tranz Rail Limited v Wellington District Court* [2002] 3 NZLR 780 (CA) included, general warrants are not accepted by the Courts and are held invalid as a consequence. Your Honour Justice Glazebrook in *R v Williams* summarised, principles applicable to warrants in a convenient compendium but first and foremost and this at the heart of my submission; a warrant must be as specific as the circumstances allow. And as is recognised there will be instances where circumstances don't enable much specificity because someone is – whether it's the state of an investigation or someone is deliberately concealing or dispersing their information in various ways, so being specific is difficult, so the – but the requirement

is as specific as the circumstances allow and it's my submission that as Justice Tipping observed in *Tranz Rail* anything less would be inconsistent with the privacy considerations inherent in section 21. And the sufficient particularity is the means by which the executing officer and the recipient are able to observe, recognise and act on what the limits are. His Honour Justice McMullin talking about the metes and bounds phrase that's been picked up in subsequent decisions. And where an offence is not sufficiently specifically described, that deficiency is fundamental, it's no longer a matter of simply a choice of description or expression, it's a legal defect of a kind which renders the warrant invalid and it's my submission that that is the case here.

I'll deal with section 204 in due course but in this instance the deficiencies are such that there is much more than a defect of expression or a misnomer of an offence; it's a wholesale failure to describe the offence in sufficiently specific terms and as I will also develop, the recourse to extraneous information is not permissible in my submission.

GLAZEBROOK J:
How do you say – as I understand it you say it's not sufficient to say the offence is an offence against – well using a document or something of that nature, that you have to give particulars as well. Is that the submission?

MR DAVISON QC:
No, not that far, and if I could invite the Court's attention to the *R v Sanders* [1994] 3 NZLR 450 (CA) case, which is at the bundle at tab 4 I think, volume 4, tab 27, where His Honour Justice Fisher in the Court of Appeal at 466/467, under tab 27, in dealing, of course, with the Summary Proceedings Act, in the first paragraph on 466 referred to, "Certain irreducible elements, must be expressed or implied in the warrant. These are that the warrant be addressed to a constable, recite the foundation and purpose of the warrant," this is at lines 10 to 15, "confer authority to enter a defined location for the purpose of searching for, and seizing, defined things."

Then it goes on to talk about the recitals, which is why I chose that word earlier, which he says that are intended, this is at line 30, "Seems to have been intended that the warrant will give the owner some rudimentary background so that he or she can better understand the warrant and, if necessary, take legal advice about it… If the

warrant contains nothing intelligible as to the basis upon which it had been issued that apparent aim would be at least partially frustrated."

Then he goes on to deal with things to be seized, "Something more than simply a verbatim repetition of paras (a), (b) or (c) of 198(1), the bald statutory formula is adopted when it comes to the operative part of the form. For a warrant issued to gain evidence, the actual authority," et cetera, and he says at the foot of the page, "Since the scope of things to be taken is largely determined by reference to that offence, it is important that the latter be defined in the warrant. But the warrant need not contain the detail appropriate for a charge sheet, particularly since warrants are normally executed when the police are still at an investigatory stage in the case. The degree of particularly required will differ from one crime to another… but the warrant must convey that it was issued in respect of a particular instance or instances of the crime in question, as distinct from a general warrant to search for any crimes, known or unknown and merely suspected… In the end the question must be whether, looking at the document as a whole, it is likely that anyone would be misled as to its scope and purpose."

In the present case there was an indictment issued by the grand jury in the US which specified the charges, of course, and the instances, if you like. So this wasn't an investigatory stage warrant. This was one where matters had moved on considerably.

ELIAS CJ:
Do we have that? I don't want you to take us there.

MR DAVISON QC:
Sorry?

ELIAS CJ:
Do we have the grand jury…

MR DAVISON QC:
No, no.

ELIAS CJ:
I mean were dates involved and so on?

MR DAVISON QC:

Yes, there's a, it's a fulsome document, I just forget how many pages, but it's getting on towards a hundred. It's compared with a New Zealand indictment. It's a very substantial document which contains matters of –

ELIAS CJ:

Because even accepting that this is a wide-ranging, continuing criminal offence that's – one would have thought that there would be some specification of the period of time and so on.

MR DAVISON QC:

Yes. Yes well the dates and details are evidence on the indictment and from the other material which was presented to the Court in any event.

GLAZEBROOK J:

Whereabouts are the arrest warrants?

MR DAVISON QC:

In the case –

ELIAS CJ:

Is that at tab 5 is it? Are these the provisional ones.

MR DAVISON QC:

Yes, that's it there Your Honour. It's volume 1 of the case of tab 5 is the arrest warrant for Mr Dotcom, and for Mr Van der Kolk over at tab 6.

GLAZEBROOK J:

What exactly should have been said then in relation to the offence?

MR DAVISON QC:

Well, in relation to the offence says, Your Honour, "Each of the offences that the warrant was seeking authorisation to search for relevant material for ought to have been specified with as much specificity as was possible", and in this instance that would have enabled a reference to the actual charge without going to any trouble or

unnecessary detail at all. There were charges in the indictment which ought to have been –

GLAZEBROOK J:
Well for instance, do you say that they should've said, "Criminal copyright infringement by distributing a work on a computer network", so should they have just taken the relevant counts?

MR DAVISON QC:
If they took that and put some dates around it, and involving certain people, all of a sudden you've got a focus of, or a framework for relevance.

GLAZEBROOK J:
Did they mean that by specifying the offence?

MR DAVISON QC:
You're referring to the form of the words in the form?

GLAZEBROOK J:
Yes.

MR DAVISON QC:
Your Honour, "Specify the offence" in my submission is a phrase which will take its requirements from the context of the requirement for as much specificity as the circumstances allow. If it's an investigation into an offence of conspiracy to defraud, then it may not be possible to provide the sort of particulars. Once the investigation has reached the stage where charges have been issued by a Grand Jury, the situation is changed and more detail is required that the specified of the offence will be met by meeting the requirement of as specific as the circumstances allow.

It's my submission and I just adopt what Her Honour Justice Winkelmann cited I think at para 28 of her second judgment and which she drew from His Honour Justice Fisher in *Sanders* –

ELIAS CJ:
Sorry, what para?

MR DAVISON QC:

It was para 28 of His Honour Justice Winkelmann's second judgment. And is a passage which she quoted from Justice Fisher in *Sanders* which I'm asking you to look at which is in our bundle at tab 27, at page 461, where His Honour drew the distinction between, this is at line 40 on page 461, at tab 27 –

ELIAS CJ:

The bundle?

MR DAVISON QC:

Bundle authorities number 4, form, at tab 27.

ELIAS CJ:

Yes, oh sorry, that's *Sanders* case, yes.

MR DAVISON QC:

His Honour at line 40 on page 461, spoke of drawing a distinction between legal defects and mere defects of expression. The latter will be of consequence if they are so profound the meaning of the document cannot be ascertained, but –

ELIAS CJ:

I must say I find this distinction quite elusive and it may not be important for your argument, but if it is, I'd like more help on it.

MR DAVISON QC:

Well –

ELIAS CJ:

Because we must only be concerned with legal defects and if there are legal defects then the statutory word is form really, or other words around it, but it looks as if it's directed at formalism, I'm not sure what mere defects of expression add to that, and it may be confusing, because expressions sometimes are very important.

MR DAVISON QC:

Well Your Honour can I respond to that in two ways as promptly as I can. Firstly, the point I wish to make from this passage, is that His Honour Justice Fisher having characterised defects of expression or legal defects, goes on to say that, "A legal

defect is so fundamental that it is beyond the curative powers of section 204." And it's lines 49 and following, which is the passage –

ELIAS CJ:
But that's to bring back 204 into the assessment of the legality.

MR DAVISON QC:
Exactly Your Honour and the proposition that I'm wishing to advance is that firstly, one should not telescope the two concepts into one decision. There is a sequential decision-making process which is the proper one. That is, one, is the warrant valid? Yes or no. Is there a defect, a legal defect of it, which renders it invalid? If it is, it's invalid, it's beyond section 204. If there is a defect of a different kind that isn't as radical to use Justice Cooke's, President Cooke's word, then consideration of section 204 can take place on the issue of whether there's been a miscarriage of justice or determine whether or not 204 will be available to cure the defect.

The second quick point I wish to make in relation to *Sanders* and with great respect His Honour Justice Cooke and His Honour Justice Casey, in their comparatively brief judgment which precedes that of Justice Fisher in this report, were much more cautious around this whole business and the description that Justice Fisher gave to the process, and the formula that he employed, and they said this at line 45 on page 454, "Fisher J has provided a valuable general discussion of sections 198 and 204, we have no doubt that it will be helpful in the resolution of cases arising under those sections. Shortcomings and procedure and documentation is so various however, that we have reservations as to how far any formula could be evolved that would provide anything in the nature of an automatic analytical answer to questions under the two sections, in the end it's always a question of the relative seriousness or otherwise of an error, if the error is so serious as to attract a description nullity section 204 would not assist inevitably questions of degree and judgment that arise." And in my submission that's with respect, a broader but clearer description of the process if the defect is of a kind that is serious, then it is a – it is to the – determined that the warrant is a nullity and perhaps just to respond to my learned friend's overarching submission that one should look at aspects of substance and see whether any harm has been done to inform that. In my submission, no, the correct approach is the top of the cliff approach, the preventative approach the keeping the secure, it's keeping secure the right approach, is the warrant, did it meet the requirements, yes or no. No? Invalid.

Now I'll try and move on pretty quickly. I want to speak pretty briefly but I need to address –

WILLIAM YOUNG J:
Can I just – he did refer to the earlier sections in the Justices of the Peace Act 1927, which was expressed to apply to defects of substance.

MR DAVISON QC:
Sorry, Sir, I'm not –

WILLIAM YOUNG J:
This is at page 19 of Mr Boldt's submission.

MR DAVISON QC:
Of my learned friend's submission.

WILLIAM YOUNG J:
Now this was a warrant provision, it wasn't a – sorry, this looks to me, this was addressed to the compelling the attendance of someone at Court rather than a search warrant but, "No objection shall be taken or allowed," in relation, "to any information, summons or warrant… for any alleged defect therein in substance or form."

MR DAVISON QC:
Yes and in, you say, *R v Kestle* [1973] 2 NZLR 606 were you referring to Sir?

WILLIAM YOUNG J:
Sorry?

MR DAVISON QC:
It's on page 19 Your Honour?

WILLIAM YOUNG J:
Yes, it's in the footnotes, 69.

MR DAVISON QC:
Yes.

WILLIAM YOUNG J:
Now section 204 in a sense is to the same effect but the language is different and its scope broader.

MR DAVISON QC:
Yes, except 204 does have the word "full" in its title as well.

WILLIAM YOUNG J:
Yes.

MR DAVISON QC:
Which in my submission does tend to colour, or inform the type of irregularity that's being contemplated as remedial.

ELIAS CJ:
It also applies to proceedings more generally including convictions and –

MR DAVISON QC:
All sorts.

ELIAS CJ:
– other sort of things. It would be rather odd to see defects in those areas measured too nicely suggesting that 204 is really a slip rule, a matter of form, rather than substance and that miscarriage attends any defect in substance.

MR DAVISON QC:
Your Honour, I, with respect, agree that 204 is, I would characterise it as a slip section, as a –

WILLIAM YOUNG J:
How would a slip ever give rise to a miscarriage of justice, a mere slip ever give rise to a miscarriage –

ELIAS CJ:

Well it's not a miscarriage it's – the miscarriage is assessed in the context. It's not the downstream miscarriage, the forensic prejudice, it's the fact that there is an illegality perhaps.

MR DAVISON QC:

Well, Your Honour, I would submit that as Justice McCarthy said in the *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 case, the prejudice, or the, if you like – sorry, I'll take away that word. The injustice – the consequence of the invalidity occurs at the time that the illegal warrant has been issued. It is that which is the injustice that – if you need to look at those terms, in my submission, it's unnecessary to point to a particular type of, or manifestation of injustice or prejudice in the context of an analysis of whether the law was followed or not, because the following of the law is something which society as a whole requires compliance with, and that is the means by which society as a whole is seeking to promote the recognition of the rights.

ELIAS CJ:

Justice has miscarried if the law is not observed. That's the sense in which it may well be being used, and indeed is the sense in which it's used in other provisions. Anyway.

MR DAVISON QC:

Your Honour, could I just quickly – just take you, and it will be quickly, just to some of these background documents which took the matter through to the District Court Judge. This is in the affidavit – excuse me, it's in the case on appeal at volume 4, and under tab 33, and this is an affidavit of Ms Hannah Stallard, who was – who had direct knowledge of, Assistant Crown Counsel at Crown Law Office, and –

ELIAS CJ:

Sorry, what page is it?

MR DAVISON QC:

It's tab 33 of case 4 and it's where the affidavit starts, and at 618 is the request, the US request to the Attorney-General and this document is exhibit B to the affidavit filed in the District Court by Detective Sergeant McMorran, which starts at page 581, and the point is simply that this request, which was set out in some detail, the whole

background. It referred on page 1, page 618, to what was described by the authorities as the Mega conspiracy, where it was said the officers and employees, including Mr Dotcom, herein referred to as Dotcom, Mr Van der Kolk, and the affiliated company Megastuff Ltd, among others, "For violating US criminal laws by administering several Internet websites that reproduce and distribute infringing copies of copyrighted television programs," so that detail is set out. In the third paragraph, three lines from the bottom, "In addition, the US prosecutors seek assistance in the… seizure of evidence located in New Zealand."

The next page, second paragraph, all this information about who is involved, "The information contained in this request includes a description of the offending criminal conduct, and the roles of the following individuals," and the names are all there. "The offending criminal conduct includes conspiracy to commit racketeering, conspiracy to commit money laundering, conspiracy to commit criminal copyright infringement, and actual criminal copyright infringement. Under the racketeering legislation in the United States, 'racketeering' involves," so all of that information is there.

Then over at 620, a section entitled "The Facts" and, "An Overview of the Mega Conspiracy's Unlawful Activities," and again reference to those names and the suggestion that they were involved in and engaged and facilitated criminal copyright infringement and money laundering.

Then in the following paragraphs there's a detailed description of various allegations, and this continues for several pages which I won't take you to, but it contains a wealth of detail as to what is being alleged and contended. There was then, at page 625/626 a contention that the premises were being used, the Coatesville premises were being used to further purposes of Mega and that at 626 a proxy server is – was set up there. And in para 1 but from the bottom, about half way through, "In addition the emails show the Mega conspiracy maintains high powered computer web servers at the Dotcom Mansion for the purpose of furthering its activities. FBI expects these servers to contain records of communication." In fact that wasn't correct, but that was the information provided.

The over at 630, there's a section entitled, "The Offences" and the offences concerned are all identified, "Aiding and abetting, conspiracy, criminal copyright infringement –

ELIAS CJ:

What page are you at?

MR DAVISON QC:

630, six three zero Your Honour.

ELIAS CJ:

Thank you.

MR DAVISON QC:

Page 13 of this document. So all the offences are there. So at 631, "Criminal copyright infringement." 632, "Criminal infringement of copyright." "Money laundering". 634, another example of money laundering. 635, "Racketeer influenced and corrupter organisations," et cetera. And then at 637 "People involved," and then there's a list of people, "25 people and companies." Then at 643, "Bank records were sought," and that was a separate process, but not subject to the search warrant request. And then over at 648, and this is the passage which then finds its way into the search warrant under a heading entitled, "Search and seizure of evidence," this is page 31 of the request document, and page 648 of the case volume, "Police asked New Zealand Law Enforcement Agencies to search the following properties and seize the items listed below." And that's, "Please seize all evidence instrumentalities of the crimes being investigated." All the crimes being investigated is ascertainable if you look at the rest of this document but otherwise means nothing. And then that's the A to F and in the appendix A, F has been broken down into bullet points. So over at 653, page 36 of the document, "Seized evidence" last paragraph, "Please have the seizing official complete the attached certificate with respect to seized items and forward the seized items with the certificate to the appropriate authorities for transmittal to the United States." Now so far as I'm able to discern that is the only reference in the material which went before the District Court Judge indicating to him that the items were to be sent off short and there's no timing around that, as is obvious.

Then at exhibit A of this affidavit, so going back to page 615 is the Deputy Solicitor-General's authorisation and it's a three page document that responds to what is contained in the request, and he refers to, in the first paragraph, "Business records," and so the names of the people are set out, and it's noted that they are suspected of money laundering and significant copyright infringement. Well we're not dealing with

the business records here but that's how he dealt with that first section of documents they wanted, business records, and then under, "Search and seizure of evidence, searching the following property," and he just replicated the passage I've drawn your attention to from page 648.

ELIAS CJ:
Sorry can I just ask you again, this – you say that the document you took us to before was before the Judge –

MR DAVISON QC:
Yes.

ELIAS CJ:
– and was this before the Judge?

MR DAVISON QC:
Yes Your Honour, if I can just take you back to page –

ELIAS CJ:
This is a, this is attached to an affidavit in opposition –

MR DAVISON QC:
Yes, if we just go back to page 581 –

ELIAS CJ:
Right, thank you.

MR DAVISON QC:
If I can just take you back to 581 briefly, I'm sorry I am rushing. But 581 is the –

ELIAS CJ:
I see.

MR DAVISON QC:
– the detective's affidavit and he's appended the request and the authorisation.

McGRATH J:

And that includes a summary of the material from the official request of the United States' Government to the Attorney-General doesn't it?

MR DAVISON QC:

The authorisation?

McGRATH J:

Yes, well the –

MR DAVISON QC:

Of the affidavit?

McGRATH J:

The affirmation of Detective Greenwall was it?

MR DAVISON QC:

I'll take you to the affidavit in a moment, if I could just – I'm trying to sort of sequentially move through the US request first, then the next is the authorisation which, which the Deputy Solicitor-General created.

McGRATH J:

Yes, that's –

MR DAVISON QC:

So that's at 615. And interestingly enough this is an authorisation pursuant to section 43 of the Act, as one can see from its heading, and form 4 of the regulations, the MACMA Regulations set out the form of the authorisation and the Deputy Solicitor-General has used the form so he's used the right form in his authorisation as contrasted to what I have said before that the warrant itself wasn't used. So at the foot of page 615 is the reference to search and seizure evidence and his – the Deputy Solicitor-General's repetition of the passage that appears in the US request at page 648 and it is just reproduced at paragraph 4 on page 616. "Seizing from those properties all evidence for instrumentalities of the crimes being investigated." What crimes being investigated, question mark in my submission. And then he goes onto say, and this is significant –

GLAZEBROOK J:

Well in the warrant itself it does say, "Breach of copyright and money laundering," doesn't it?

MR DAVISON QC:

It says, "Breach of copyright," yes it does. Those are the two –

GLAZEBROOK J:

So, so it's clear what the crimes are isn't it, but just not the specifics of how they're operating or dates?

MR DAVISON QC:

Well Your Honour there isn't offence in breach of copyright with respect.

GLAZEBROOK J:

Well no but there is an offence of criminal copyright infringement isn't there, apparently, according to the arrest warrant – there's conspiracy to commit money laundering and conspiracy to commit copyright infringement. Well breach and infringement do mean the same thing don't they?

MR DAVISON QC:

I would say with respect, when one's talking about breach of copyright one is immediately looking at a much more likely scenario of civil liability for breaching a copyright than criminal but if I could just –

GLAZEBROOK J:

Well, and you certainly wouldn't be looking at a criminal offence in New Zealand so the fact it doesn't mention the United States might actually be a substantive defect.

MR DAVISON QC:

Yes Your Honour. If I could just invite your attention briefly back to this authorisation document, because in my submission this is important, at 616 the Deputy Solicitor-General then goes onto say that he is satisfied in relation to this that the request relates to the following matters and he sets out in A and B a list of offences, his A is copyright infringement and money laundering, which is this phrase which finds its way in part into the search warrant but his B doesn't and in B he's talking about conspiracy to commit racketeering, conspiracy to commit copyright infringement –

GLAZEBROOK J:

Sorry if I am now in the wrong place again.

MR DAVISON QC:

Could I just invite you –

GLAZEBROOK J:

I'm sorry I'm still at the warrant, so 616 is it?

MR DAVISON QC:

Six one, yes Your Honour, can I just – it starts at 615. 615 is the document where the authorisation commences and I'm just referring to a passage on 616.

GLAZEBROOK J:

That's right, I've found it now.

McGRATH J:

At 617?

MR DAVISON QC:

And it goes over to 617, yes there's another two charges mentioned over there.

McGRATH J:

Including criminal copyright infringement?

MR DAVISON QC:

Yes, times two. By distributing or by electronic means are two species of it. So –

ARNOLD J:

Can I – sorry to interrupt. Can I just check one thing – I had the impression from reading the Court of Appeal judgment that you had accepted in the course of argument there, that if the search warrant had contained the specificity that arrest warrant did then the search warrant would have been fine but as I understood what you told us a little earlier, you say more of specificity is needed in particular in relation to time and what?

MR DAVISON QC:

Your Honour I want to make my position very clear in relation to the acknowledgement which was what the Court of Appeal termed my acceptance, that the information in the arrest warrants read together with the content of the search warrants would have informed the reader of the offences charged and that's what I understood I was accepting.

ARNOLD J:

Right.

MR DAVISON QC:

But I, if I was taken to accept that that was a process, that a reasonable reader could be expected to undertake, I withdraw that because I certainly didn't intend to do that.

ARNOLD J:

No, I'm sorry. I wasn't trying to commit you to that at all but I was just trying to understand if the search warrant had identified the offences in the way that the arrest warrant did –

MR DAVISON QC:

Done.

ARNOLD J:

– do you say that would have been sufficient? I thought you had said earlier that more is required and I'm just trying to find –

MR DAVISON QC:

Your Honour in my submission more, more, more is required. It just demonstrates that there wasn't even the listing of the, of the charges in the way that the arrest warrant had them but more... My submission is that as particular as the circumstances allow would require more than, more than simply listing the charges in order to –

ARNOLD J:

So dates?

MR DAVISON QC:

Some dates.

ARNOLD J:

Names?

MR DAVISON QC:

Names.

ELIAS CJ:

Well if – yes. If there's a conspiracy there would have to be some sort of indication even if it's "and persons unknown" or something like that.

MR DAVISON QC:

Yes Your Honour but the reality is that the names were all specified –

ELIAS CJ:

Yes.

MR DAVISON QC:

– they're all there. No one has to speculate as to what – there may have been some – and others – but there's 20-odd names there.

GLAZEBROOK J:

But so are defects are it didn't say it was the US and so you didn't know where the offences were supposedly committed which could well be substantial. It didn't say the names of the people although would you accept that if you have a conspiracy with the man who was the employer, one might also reasonably expect to search the employees?

MR DAVISON QC:

Well Your Honour –

GLAZEBROOK J:

But if it's a business premises it's the man himself who's the head is not necessarily going to be performing everything him or herself?

MR DAVISON QC:

I, look I accept that logically. If there was one person named running a business that there's likely to be others involved in a conspiracy if that's the allegation but a conspiracy between how many people, who were they, what's the scope of it –

GLAZEBROOK J:

Sorry I was, I was – in terms of the names if there are also electronic devices belonging to staff that one could assume that there could be information on those as well if they are business staff members, couldn't one?

MR DAVISON QC:

Yes, if they were business staff members, employees of the business. If they were employed as domestic household staff then no.

GLAZEBROOK J:

And how would they know they were employed as domestic household staff when they –

MR DAVISON QC:

Because they woke them up in their bedrooms and put a gun to their nose.

ELIAS CJ:

It doesn't necessarily make the point.

GLAZEBROOK J:

No, I –

MR DAVISON QC:

They were in a separate part of the house, away from the family –

GLAZEBROOK J:

Well, one would expect, if people sleep on business premises, you wouldn't normally expect them to sleep with the family.

MR DAVISON QC:

No but –

GLAZEBROOK J:

If they were staff.

MR DAVISON QC:

Well, again if I could just employ some contextual reality to this. There had been an extensive investigation underway. The US knew who was in the household. The New Zealand Police had been undertaking surveillance of the household. The New Zealand Police have actually been to the household and visited on two occasions that have been identified. One in relation to an alleged complaint – complaint of an alleged offence. One in relation to getting along with the police social visit. This wasn't in the material before the Court the detective inspector responsible for the off cams operation deposes to the fact that the police knew there were domestic staff in the household. So it wasn't a matter of turning up and just having to make a snap decision on the spot. There was a lot of information that had been gathered about this group of people in this household before the search warrant was executed.

McGRATH J:

Mr Davison, before we leave pages 615 and 616, the authorisation to apply for a search warrant, can you just sort of sum up. Are you critical of this document which is, of course, really an authorisation for an application to a Judge for a search warrant?

MR DAVISON QC:

Your Honour, the document itself, the significance of the document, in my submission, is that it is an illustration of, together with the request itself, and then the affidavit of Detective Sergeant McMorran which starts at 581, is an – demonstrates the extent of the available information that would have enabled the application – sorry, the search warrant to be as particular as the circumstances allow, and I'm just drawing on the request –

ELIAS CJ:

You're not criticising this document?

MR DAVISON QC:

No.

ELIAS CJ:

Which is the answer to –

MR DAVISON QC:

No, I'm not criticising it.

McGRATH J:

That's fine, that's all I need then, thanks.

MR DAVISON QC:

I suppose if any, if there is any criticism of it, it's the wholesale adoption of the things to be searched for in the American documents terms, including the fruits and instrumentalities of the crime –

ELIAS CJ:

But what else could you do under a Mutual Assistance regime. That is exactly what one would have expected would be adopted. Your point is rather that there was much more specificity here and instead we get something a bit like the Auckland Hospital Board, whatever it is –

MR DAVISON QC:

Auckland Medical Aid Trust.

ELIAS CJ:

Yes, abortion.

MR DAVISON QC:

Well, look, I'm not going to take that much further. I do – I'm not going to develop my submissions in relation to the authorisation. But simply just wish to make a point finally in relation to two further documents I will quickly refer you to. One is the McMorran affidavit itself, which starts at 581, and this is interesting, with respect, because in this affidavit the detective sergeant refers to the authorisation and refers to the request and annexes them in his paragraphs 5 and 9 respectively, and then goes on to, in a section entitled, "Overview of the Mega Media Group's unlawful activities" and he uses this phrase, "Mega Media Group's unlawful activities," and wherever you go back and compare request, where the term Mega conspiracy was

used, in almost every case, the detective sergeant uses his choice of language, Mega Media Group, MMG and we can see that all the way through the document.

ELIAS CJ:
Sorry, what is the significance of that?

MR DAVISON QC:
Well the significance is that when we get to the search warrant itself, and the appendix which is annexed to it, which is at page 21 of the case. One of the criticisms that I advance in relation to its specificity is at paragraph, third bullet point, "All records and things in whatever form, including communications relating to the activities of the Mega conspiracy," and Her Honour Justice Winkelmann observed well, how does one know what the Mega conspiracy is. It is described in the request document but it's nowhere described anywhere else. Here the police, in this affidavit have chosen to use a less pejorative term if you like, or a less conclusive term and instead of calling this, enterprise, the Mega conspiracy whenever it is said to have done something that used the more neutral term of Mega media group.

McGRATH J:
But they also use the term Mega conspiracy.

MR DAVISON QC:
Well in the affidavit?

McGRATH J:
Yes.

MR DAVISON QC:
In the affidavit, yes there are a couple of instances of it.

McGRATH J:
Just looking at page 586 over the page.

MR DAVISON QC:
Yes Your Honour, so there are a couple of instances where having apparently assiduously avoided it, it seems to slip back in. My point is simply this. That it comes back in, in the document, despite the fact that it is the search warrant, despite

the fact that the police were expressing it in this way. Could I just also point out that at paragraph 77 on page 590, there's a list of the relevant US offences. At paragraph 78 is a list of the people involved; this follows through on page 591, 592, the names of all the individuals. There's some redacted information, the point being is that the detective sergeant has employed a lot of the information that he has drawn from the previous documents and other information that the New Zealand Police had gathered. And so that brings me to the Crown memorandum which is at page 657. And here at 659, the memorandum of counsel sets out the item sought for seizure, the evidence of the Commission of Criminal Copyright, criminal infringement of the copyright, money laundering and racketeering. So there are four distinct –

GLAZEBROOK J:
Sorry, what page was that?

MR DAVISON QC:
Page 659 Your Honour.

McGRATH J:
Whereabouts in that page are you?

MR DAVISON QC:
Paragraph 7 at the foot, "Grounds. The items sought for seizure will be evidence that the Commissioner of the Criminal Copyright, criminal infringement of the copyright, money laundering and racketeering." And then over on 660, on (a) and (c), is counsel are now referring to the Media conspiracy under paragraph 8, they have used the term twice. And then over, I won't take you to the other instances of it, and then over at paragraph 12, "Form and content of warrant." The form and content of the warrant is set out in sections 45 and 46 MACMA, the form of the warrant provided to the Court complies with these sections. And section 45 is set out for the Judge.

McGRATH J:
Well obviously, that is where the legal error occurred isn't it. But can I just, I would like you to help. What is the complaint you make about the term, Mega conspiracy, which it seems to me to have been picked up by the detective sergeant who has described a whole lot of things that is the employees of Dotcom did and then he sought of has grouped those together and called them Mega conspiracy. But are you saying that's a pejorative term or are you –

ELIAS CJ:

It is not defined, that is your point, isn't it?

MR DAVISON QC:

My point is, how does one search for or define whether something is relevant to –

McGRATH J:

It is too imprecise.

MR DAVISON QC:

It is so imprecise as to be meaningless. Especially when contrasted against the available information which would enable somebody to set it out.

ELIAS CJ:

Especially when they had it all.

MR DAVISON QC:

That's the point.

ELIAS CJ:

Mr Davison, over lunch could you give some thought to time and perhaps you could start off by giving us a road map of where you are going in your oral argument so that we do not trip you up with, by anticipating things that you are going to get on to.

MR DAVISON QC:

Yours Honours I will certainly be as economic after lunch as I possibly can too.

COURT ADJOURNS: 1.07 PM

COURT RESUMES: 2.14 PM

ELIAS CJ:

Mr Davison, do we get more material?

MR DAVISON QC:

That is just a copy of the MACMA.

ELIAS CJ:

Thank you , yes.

MR DAVISON QC:

And the relevant regulations. Your Honours just before I just give you a quick outline of where I am going, you requested it. I just have a couple of comments to make, one comment to make about SP50, then I want to deal with some aspects of the execution of the search warrant very briefly. I will then talk about the conditions, again very briefly, commenting on the Court of Appeal's treatment. I then wish to deal with the Court of Appeal's analysis and the reliance upon the *Rural Timber Limited v Hughes* [1989] 3 NZLR 178 decision to distinguish it. I will deal briefly with the issue of the use of extraneous sources of information beyond the warrants themselves and other jurisdictions. I want to draw a conclusion then about the consequence of the defects in this case. I will just speak briefly about the High Court's judgment and why it was, with respect, the correct conclusion reached. And I will speak about s 204. In the context of dealing with *Rural Timber,* I will deal with the issue of the arrest warrant and its general relevance to the case. Just a couple of quick matters. Firstly I was talking before the luncheon about the form of the search warrant being form 50 of Summary Proceedings Act and I overlooked bringing to the Court's attention, that in the top right-hand corner of the document, which is in volume 1 of the case at tab 3, is the detail POL SP50 11/08 so not that there was much doubt about it, of course, but that looks like the use of a police pre-formatted but modified form.

GLAZEBROOK J:

Sorry, where were we again?

MR DAVISON QC:

Your Honour, it is the case volume 1. Tab 3, in the top, right at the top right-hand corner there, POL SP50, so Police Summary Proceedings Act form 50 is the shorthand in my submission.

McGRATH J:

So you think that is police fingerprints, not Crown Law fingerprints?

MR DAVISON QC

I am not even going there Sir. All one can say is it is surprising that one person within Crown Law is using form 4 and issuing the authorisation and another is not and what the explanation is, I can't say. I hope this is acceptable to you but the issue of the indictment has come up and in the application for the issue of the provisional arrest warrants, it was supported by the same Detective Sergeant McMorran by way of an affidavit and I have a copy of it, I can hand up to you. That affidavit to which was appended as an exhibit marked H, a copy of the whole indictment. So it is 72 pages long, it is a pretty significant document. The point simply being that the District Court Judge was being asked to do certain things at the same time and the other parallel application was for the issue of provisional arrest warrants and so this material was before him in that context. I am not suggesting that he needed to necessarily cross-refer it, but I am just making the point it was there before him. Can I hand that through to you?

ELIAS CJ:

Yes, thank you. So this is what? I had hoped Justice McGrath would -

MR DAVISON QC:

Your Honour you asked about the indictment.

ELIAS CJ:

Yes I see.

MR DAVISON QC:

When the same Detective Sergeant McMorran filed his affidavit in support of the provisional arrest warrants, he appended the indictment, which is exhibit H to that document.

ELIAS CJ:

Yes. If I cannot get to sleep -

MR DAVISON QC:

I am sure Your Honour will go to that as the first port of call. Again just pretty quickly. Just in terms of the information that I have just provided to you, that was before, available to inform the content or the detail of the warrant as particular as possible. My learned junior has identified for me that these numbers – there were 22

individuals named in those documents. There were 30 companies, there were 18 Mega websites named, there were 10 linking sites, there were seven third parties, there were 32 number plates or vehicle VIN numbers. There were 15 bank account details or account numbers and seven specific instances of copyright infringement.

ELIAS CJ:
Seven?

MR DAVISON QC:
Seven, derived from the material there.

ELIAS CJ:
Are those in the indictment, the seven?

MR DAVISON QC:
From the materials which were before the Court in relation to the search warrant, the materials I have just taken you through.

ELIAS CJ:
Oh yes, I see.

MR DAVISON QC:
So of the 22 individuals named in the material, none appear in the search warrant. And of the 30 companies, three. Megastuff, Megaupload, Megavideo but only those three. Of the 18 websites, two. Of the linking sites, none. Of the third parties, none. Of the number plates, none. Of the bank accounts, none. Of the specific instances of copyright infringement, none. So if that is a score card, in my submission, it just illustrates the way of the extent to which the available information wasn't converted or applied and used to particularise the warrant. I want to say something and I will be as brief as I can, regarding the execution of the warrant. And I said in introduction that the police had, in discussion with the US authorities, resolved that their role was limited to the seizure and I ask the Court to note the affidavit of Detective Inspector Wormald which is at the case on appeal volume 5 at tab 43. I won't ask you to go to it but simply to note it where Detective Inspector Wormald explains at paragraph 10 and following, that it had been established that the police wouldn't be required to undertake any examination of the exhibits in New Zealand and that although it would be possible for the New Zealand Police Electronic Crime Unit to have examined the

seized items, the doing so would impact upon their other work and their other commitments.

ELIAS CJ:
And the resources.

MR DAVISON QC:
So it was a resource issue.

ELIAS CJ:
He says money as well.

MR DAVISON QC:
And money. At paragraph 12 and I won't read it now, but he explains that there was no request for the police to analyse any evidence or to clone or image any computer device and so far as the operational police were concerned, they were to be reliant upon the electronic crime laboratory staff to determine what was to be selected.

ELIAS CJ:
There is no real alternative to that, of course, is there.

MR DAVISON QC:
There is no alternative to –

ELIAS CJ:
It would have to be examined.

MR DAVISON QC:
No there is no alternative to relying upon, they were going to rely upon them at the scene to make the selections, the electronic crime unit staff because no one else was going to be in a position to even make that primary selection. Detective Inspector Wormald also refers to the knowledge of other people staying at the residence, and that's in his affidavit at case on appeal for it, at tab 32, it's another affidavit sworn somewhat earlier. And he said in this affidavit sworn in April 2012, that no provision was made for the appellants to have access to the content of their data, storage devices or computer hardware because he said he was unaware of any requirement to set out conditions for disclosure and a search warrant and he said that

New Zealand Police are not in a position to assess any of the items for relevance and would be, nor would they be a position to do so, given their limited knowledge of the US investigation. So documents were to be seized on the basis that they may contain relevant information, that's in this affidavit, and that seizures would take place on the basis of potential relevance, and this is important in my submission, he said it in this affidavit, this is his affidavit at case 4, tab 37, this is his affidavit of May 2012, so he swore three affidavits, this is third of them. He said, "It was always my understanding and instruction in planning the operation that once seized the Attorney-General would direct that the items seized pursuant to the warrants, would immediately be sent to the United States to be forensically processed and examined there."

The evidence of Mr Allan Langille of the Police electronic crime laboratory, was subject to cross-examination at the remedies hearing and at case on appeal volume 6, tab 47, his evidence appears at pages 980, 981 is the passage I'm referring to.

ELIAS CJ:
Is that the affidavit or the cross-examination?

MR DAVISON QC:
This is the cross-examination.

ELIAS CJ:
All right.

MR DAVISON QC:
It's volume 6 of the case, page 980, 981. Probably starts best at 980, if I could invite your attention back to the very foot of page 980. He says that, about half way down that page, in answer to a question he says, "I suppose the lack of my detailed knowledge about the investigation or what they would be particular looking for in the evidence, it's hard even today for me to make a determination on what would've been purely systems controlling household monitoring music or video, even today I don't have enough detailed knowledge of the investigation or what evidence has been looked for to make that determination." And just a bit further on he was asked, at the foot of the page, "Would it be fair to say that you were hampered by the fact that you didn't have any detailed knowledge of the issues arising in the investigation, so that as a result you were driven to take a broad and inclusive approach to the

selection of what items should be removed, would that be fair?" And then he sort of clarification, of questions asked again, and he then answered, questions asked at line 12. "I ask you again, would it be fair et cetera", and he replies, "Right, in answer to your question, the amount of detailed information I had relating to the investigation was a small amount, it's hard to answer the second part of your question, but if it were an investigation that I had a detailed knowledge of what was being looked for then I probably would've been in a better position to risk out seizing certain items." I think that maybe a mishearing of the stenographer to risk out, it might be rule out.

GLAZEBROOK J:
It's, "not" I assume, it would be "not".

MR DAVISON QC:
Rule out position to, something with an – rule out certain items, but it's very hypothetical in nature, because without knowing that information and being told that the impression I had going in was there was potentially evidence on anything that had digital storage capability and he then goes on to say, at the foot of the page, "That there's a wealth of information on all of those sorts of things, computer, digital cameras, cellphones" and then he's asked. "And so am I right that you adopted an approach to the selection of items to be removed which was broad an inclusive because of the possibility that it might contain something of evidential significance?" Answer, "Yes."

And then over at the page 219 and 220, at lines 20 and following, "So as a result you were by adopting that broad approach you were inevitably going to be seizing a lot of items that didn't have any evidential value in due course once examined carefully, would that be fair?" "I'd say that given what I knew at the time that I didn't know what evidence they were looking for and you know, you talk with something like a computer, perhaps a computer that's connected to a television, until a person looks at it, you're not going to be able to eliminate it." And question, "You included for removal anything that was capable of storing digital data, is that right?" Answer, "Essentially, anything that had the capacity to store digital information was selected." And he just confirmed that he did that without any involvement of the FBI who were not there.

So my proposition is simply that that demonstrates both in terms of the search warrant itself and how it was executed, the consequences of a broadly drawn

warrant being executed by people who don't know what the relevance of the information is, and you end up with all and everything being selected simply on the basis that it has the potential. Well it's like saying the filing cabinet might contain something so we'll take it. But much more egregious context.

I just want to speak now briefly about the issue of the conditions, and I've already addressed these, and so I won't say more than to submit that this was a case which fairly called for the imposition of conditions to balance the rights of the individuals to be effected. An example of conditions in appropriate terms appears in the firm of solicitors case which sets out a process to enable the computer items themselves to be searched for relevant evidence, and being treated as to be the subject of examination rather than simply the evidence. That's in a bundle at –

GLAZEBROOK J:
It was a slightly different case where they were looking at a specific transaction effectively?

MR DAVISON QC:
Yes. Yes, and there was – correct Your Honour, I'm sorry.

GLAZEBROOK J:
No that was all I was – I just wanted your comment on that at some stage in the course of your discussion.

MR DAVISON QC:
Yes, well I'll just address it by saying that in that case there was some specific information and also some general information but the ultimately the specific governed the ability to focus on the general and in my submission one looks at these cases on their facts, but that's an instance of where there was a process, and there was sufficient reference to particular detail that enabled the focused search to be undertaken, even though the computer was to be seized thereafter, the manner in which it was searched was to be constrained by protocol and that process. Here there's no constraint, or restraint.

I just want to say in relation to the conditions that the Court of Appeal concluded in this case, in our case, that it wasn't necessary to impose conditions for three reasons. Firstly, that the legislation doesn't – is not mandatory insofar as the use of

the power. Secondly, the Attorney-General could direct under section 49 the disposition of the items, and that was a measure that would meet the needs of the situation, and thirdly, that the District Court Judge could reasonably assume that the police would execute the warrant lawfully and responsibly and make an appropriate level of selection, informed selection. As to the first, the fact that there's a discretionary power, doesn't in any way in my submission absolve the Court of the responsibility of imposing conditions where doing so is a necessary feature to achieve the requisite balance and a failure to do so, in my submission, would render a warrant invalid where the rights are not met or addressed. Secondly, as regards to the Attorney-General's role under section 49, it's a matter for the Court to assume the role and to deal with it and not to rely on the Attorney-General. It's a matter that the Court has the responsibility and jurisdiction to deal with and in my submission section 49 is no answer and in fact what we have seen illustrates just what sort of difficulties one can get in to – when there are no guidelines or directions or in this case the conditions that stipulate who should do what and what was expected of those with responsibility for the retention of the items and any obligation to provided copies. Insofar as the police being relied upon to act lawfully, one doesn't quibble with the expectation that they will act lawfully but for the reasons I alluded to and drawn from the Law Commission's observations, it's not an assumption that one ought to make, it's the responsibility of the Court to perform that role and if the Court doesn't do it, relying upon the police is a very second choice and not one that effectively administers the law as is required.

So far as the Court of Appeal's reasoning is concerned it is my submission, the Court of Appeal made a significant error in its reasoning in its conclusion that the warrant was valid by reference to information that could be derived from the arrest warrants which could and should be read together with the search warrants and when that was done a reasonable reader would be informed of sufficient information to meet the minimum standard or the requisite standard of information to be contained in a search warrant. And the Court placed reliance upon the *Rural Timber* decision of the Court of Appeal and the statements of Justice Cooke in relation to it. And I just repeat what I said in answer to His Honour Justice Arnold about the acknowledgement which was noted in the Court of Appeal's judgment and that what counsel understood had been acknowledged was that the information, the arrest warrants, as regards the list of charges with information that ought to have been in the search warrants to meet the requirement of an adequate description of the offences but that wasn't an acknowledgement intended to be an acceptance that the

practice of reading both meant that what was a practice that could be expected to be undertaken or that doing so would be a process which would remedy the defects.

It's my respectful submission that the *Rural Timber* judgment is not authority or support for the reading of an extraneous document such as the arrest warrants, no matter how connected they might have been in terms of being a parallel process and their presence at the same time as the search warrants were provided. Just in sequence you will have seen on the search warrant the endorsement "0645 hours executed 20:01:12" so the search warrant has been signed by a police officer and noted that it was executed at 0645. Sometime about an hour or so later the search, the arrest warrant was provided to Mr Dotcom and – the arrest warrant was first provided and then the search warrant and I'll just address that in a moment.

In *Rural Timber* the police had, as the Court will know, applied for a number of search warrants, 15 I think in relation to business premises and vehicles. The charge was very broadly stated as conspiring to defraud the public pursuant to section 257 of the Crimes Act 1961. The application itself set out in detail the purpose of the application and the whole nature of the investigation in relation to the hubodometer fraud and the, and there was a schedule containing a list of 15 items or categories of items which was actually annexed to the, to the search warrant and the fact that it's attached is recorded, I think, at page 181, line 30 of the judgment. So the Court in those circumstances expressed the view that the inadequately described offence was not fatal to the warrant because the defects of it could not be regarded as so radical as to require a treatment, to be treated as a nullity and His Honour the learned President Cooke noted that in the, in a examination of the requirements against their statutory background it was a matter of referring to the particular facts of the case to rationalise the conclusion reached. But was, that was a reasonable reader reading the warrant together with the attached schedule would be able to gather the hubodometer's instruments were tampering therewith in relation to road user charges and distances were involved and a reasonable reader would have little difficulty in gathering that the alleged conspiracy must involve misrepresentations in relation to those topics. And there was –

ARNOLD J:

This would justify the seizure of all of those items within the categories –

MR DAVISON QC:
Yes.

ARNOLD J:
– even though it wouldn't be apparent until you'd done quite a lot of investigative work, that some of them were relevant to the charge and some were not?

MR DAVISON QC:
Well yes Your Honour, my submission is the, the very crucial – although in this case it is – the Court will know, there was also an oral explanation or briefing given both to the police and traffic officers who participated in the execution of a warrant and to the company personnel and some reference was made to that as well. The key features of the case were that the, the appendix or schedule was annexed, physically attached, to the warrant and so one could read the two as a collective of information knowing that the, that the appendix detail informed the, any lack of information on the face of the warrant. Here in our case the Court of Appeal concluded that Mr Dotcom ought to have first been, having first been given the arrest warrant, should then have read it together with the search warrant and decided for himself that there's some shortcomings in the arrest, in the search warrant so I better fill in that gap of information by reference to the arrest and in my submission as I – the *Rural Timber* authority just doesn't go so far as to support that proposition and on its facts and in the context of it, quite different from the instant case.

When one just pauses to think it through for a moment, what it would require is this. For – Mr Dotcom is, is just one person who's the subject of this search warrant so just leaving aside everything else, if he's one person who gets an arrest warrant because he's arrested and there are other people out there who are equally affected by the search warrant who don't get arrested and don't get the arrest warrant but somehow or other the search warrant is valid for Mr Dotcom because he's got an arrest warrant and valid for others who don't have the arrest warrant, it doesn't make any sense to me. In my submission what must be the case is the warrant is either valid for everyone affected by it or it's not. It can't take its validity by the happenstance or coincidence of a document turning up in the hands of one or other people affected by it, that's the first proposition. The second proposition is that in order to engage in the process of rationalisation that I need to look at the shortcomings of the search warrant and fill in the gaps by reference to the arrest warrant, one has to conclude that wasn't a deliberate choice of language in the

search warrant to limit the search to those things and not the others and there's nothing to suggest that one would necessarily do that when all of these officials and experts are all over the household with the police executing this warrant with a lot of officialdom behind the documents. Moreover the process by which one go about associating the two wasn't one which even the police were familiar with. They didn't refer him to the search warrant and suggest he should read it along, together with the arrest warrant. Some of the police had no search, had no copies of the arrest warrant because they weren't involved in that process. And finally there was no reference from one document to the other suggesting that they be read together.

So in my submission it's quite artificial to suggest that the two should have been read together and in my submission that is a sort of a post factor rationalisation of events that is the very sort of assessment of validity that has been criticised, certainly in the Supreme Court of Canada in the *Hunter et al. v. Southam Inc*. [1984] 2 S.C.R. 145 that this Court has previously cited that there Justice Dickson has spoken against this notion of ex-post factor reasoning and this in my submission a glaring example of it.

So in summary it's my submission that the defects of the search warrant here were radical and were sufficient to require the warrant to be, concluded to be a nullity or invalid and the reference to other material doesn't save it.

Just very quickly about some of the other jurisdictions. The UK in the case of *R (Van der Pilj & Anor) v Crown Court at Kingston* [2013] 1 WLR 2706 which is in our bundle of authorities at volume 4, tab 29 –

ELIAS CJ:
Mr Davison I want to – because this deals with this question of taking material off site for sorting doesn't it?

MR DAVISON QC:
Yes.

ELIAS CJ:
Van der Pilj. And there's conflicting authority I think in the UK on the point. The practice has grown up in New Zealand and it may be that there's no alternative but it does all seem to be pretty – there's no, in other jurisdictions is there any statutory basis for it, provided?

MR DAVISON QC:

For taking it offshore, off site?

ELIAS CJ:

Yes. Here it seems to have just been something the Courts have acquiesced in for sound practical reasons no doubt –

MR DAVISON QC:

Yes.

ELIAS CJ:

– but in any of the other statutes, jurisdictions, is there a statutory regime?

MR DAVISON QC:

Not that I'm aware of Your Honour.

ELIAS CJ:

No. So they've done the same sort of thing?

MR DAVISON QC:

They have approved the removal for the necessary practical reasons of volume and the like.

ELIAS CJ:

Yes. Thank you.

MR DAVISON QC:

The Court in *Van der Pijl* included the citation of Justice Kennedy's remarks and the *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court (Practice Note)* [2006] 1 WLR 1316 case, and I can hand a copy of that to you, it's not in our materials and I will ask that it be passed up to you, but they're all – the legislation in the UK requires compliance with the contents of the warrants, and in this – in the financing case, Energy Financing Team case, Justice Crane made the observation to which it set out that a warrant is to be judged by reference to its own terms exclusively and not by reference to any other material source.

ELIAS CJ:

Where's the reference to this case in *Van der Pijl*?

MR DAVISON QC:

I'll just get my copy of that. The case is at bundle of authorities 4, tab 29, and the passage that I'm –

ELIAS CJ:

I see it's in paragraph 53. Well there is one reference there any way.

MR DAVISON QC:

It's headed up the *Energy Financing Team* case.

ELIAS CJ:

So what happened in this case?

MR DAVISON QC:

I'll just turn to my copy of it. The issue is I think quite succinctly dealt with over on page 1327, 1328.

ELIAS CJ:

And does Lord Justice Kennedy not have anything to say on the point?

MR DAVISON QC:

No, he speaks more generally about the issue, but not about the use of extraneous information.

ELIAS CJ:

I see. Thank you.

MR DAVISON QC:

Lord Justice Kennedy at page 1325, makes his – makes an observation about at D, capital D in the margin, where he says, "Nevertheless the warrant needs to be drafted with sufficient precision to enable both those who execute it and those whose property is affected," et cetera.

McGRATH J:
What letter's that at?

MR DAVISON QC:
That's at letter D Your Honour.

McGRATH J:
Thank you.

MR DAVISON QC:
On page 1325. And then over at 1327, His Honour Lord Justice Kennedy, this is at C, refers to Lord Justice Woolf's observations in Kent Pharmaceuticals in relation to the words "include" and "including" and makes the comment, "A warrant does have to be read as a whole, that also meets Mr Down's criticisms of the schedule." And then coming to Justice Crane's observations, which is, his judgment is just at page, starting at the foot of 1327 and over at 1328. What happened there, was that there was as one can see at paragraph 33, "The warrant authorised a search for documents which appeared to relate to any matter relevant to the investigation of the affairs of EPRS between some dates, which include the documents referred to in and between the persons and entities described in the schedule, or any of them including information recorded in any form." And there was information that was provided that was detailed, and it's set out in para 34, where His Honour notes, "The scope of the investigation will be described" as apparently it was in this case, "in the information, may be clarified as it was here by the terms of the request to the director, however, the information and the request will not necessarily have been seen by all those executing the search, and certainly not by the person whose premises are being searched. How then are they to understand whether a particular document was relevant to the investigation?" And then he goes on to address the issues of – in relation to the language of including and concludes at G, "Also of the opinion that the request what we know of the information would have justified the seizure of any documents relating to EPRS", and so he says, "While for these reasons I would not quash the warrant in the present case, a warrant should be capable of being understood by those carrying out the search and by those whose premises are being searched without reference to any other document."

And Your Honours that's really – underlines the point that it's the document, the search warrant which authorises the otherwise unlawful intrusion and renders it lawful and it's that document which should describe the extent of the search.

Also in the submissions is a reference to the decision of *R (an application of Anand) v Revenue and Customs* [2012] EWHC 2989, which is at tab 23 of the bundle of authorities, a decision of Lord Justice Pitchford in the High Court, and in this case in his judgment Lord Justice Pitchford cites the *Energy Financing Team* case just sited to you, and he says, by reference to, this is at paragraph 16 he's referring to Lord Justice Stanley Burnton in a decision of *Power-Hynes*, he says, "Mr Clemens –

ELIAS CJ:
I'm sorry I've lost the place, where is it?

MR DAVISON QC:
This is at – I'll take you back to bundle 3, tab 23.

ELIAS CJ:
Yes, thank you.

MR DAVISON QC:
16 I think is where the passage I've just – the case I've just been referring to has referred to Lord Justice Kennedy's remarks, 16 have reproduced there.

McGRATH J:
Not Stanley Burnton.

MR DAVISON QC:
And then across the page Your Honour, I'm just coming to the Stanley Burnton part. Lord Justice Crane's remarks as set out –

ELIAS CJ:
Para 21.

MR DAVISON QC:
At 24 there's a reference to the Stanley Burnton comments and I'm just trying to pick up my other one, it's 24, but this related to –

ELIAS CJ:

So what was the crucial omission?

MR DAVISON QC:

Here the issue was whether or not one could have reference to extraneous information and at 24 of this judgment and where he cites from Stanley Burnton at 22, it's on – it's in the judgment at 24, he refers to the warrant in that case he says at 22, "Contained an express limitation that it was open to a person to who it was presented to inquire of the police officers effecting the search as to what was the stated defence. There is no such limitation or reference in the present case here. Mr Clemens' submission," and this is the part I wish to cite to you, "ignores the express wording in section 15(6)(b), which requires that, so far as is practicable, the articles to be sought must be specified in the warrant itself. The reason for this is obvious. It is necessary that the persons who are in the premises searched can ascertain from the warrant itself, when it is presented to them, to what material it relates. It is as necessary that they can see, so far as practicable, what is the scope of the warrant as can the police officers effecting the search. Both the statute and principle require the warrant to be a self-contained statement of the articles for which the search is authorised." And so in my submission it's not just a statute, it is clear principle that is being relied upon, that would dictate that outcome or that inclusion for those reasons.

At para 26 reference is made to counsel having valiantly argued that the officers who executed the search were briefed as to the nature of their investigation and that proposition gets short shrift.

WILLIAM YOUNG J:

But this is, of course, directly contrary to what was said in *Rural Timber* though, isn't it?

MR DAVISON QC:

In relation to the oral briefing?

WILLIAM YOUNG J:

Yes because it's only a few lines but they do treat what was said at the time, and was extraneous to the warrant as material to the miscarriage of justice issues.

MR DAVISON QC:
Yes, in a miscarriage context.

WILLIAM YOUNG J:
Yes.

ELIAS CJ:
It is, *Rural Timber*, of course, is pre-Bill of Rights Act. It's quite an early decision and the reasoning is not that easy to follow.

MR DAVISON QC:
Your Honour, I was going to make the submission to you that if one contextualises it, that it was decided in a different –

ELIAS CJ:
And a very simple case too.

MR DAVISON QC:
I won't go through the – in our written submissions reference is made to the Canadian *Re Church of Scientology and the Queen (No 6)* (1987) 31 CCC (3d) 449 case and there appears to have, this is in 1987, Court of Appeal for Ontario case which doesn't indicate any ability to go beyond the scope of the words of the warrant itself. Interestingly, going back to 1987, it was thought to be a big volume seizure. 39,000 files, or about two million documents, well, compared with 152 terabytes, we're talking about, that's just a drop in the ocean.

In the Australian context the case of *Majzoub v Kepreokis & Ors* [2009] NSWSC 314, which has been cited in our submissions at para 74, and there the Court at para 52 in the judgment set out 15 points being the principles relating to search warrants and none of them address any ability to use extraneous material. In the US the case of *Groh v Ramirez* 540 US 551, 557 (204) which is in bundle of authorities volume 2, tab 14, where there was a search of a farm, a rural residential farm property, on the basis of information there were a whole lot of firearms and grenades and rocket launchers or something there, and the search was taken – took place, nothing was located, and the Court noted, and this is at page 558 of the judgment, that there, there was an oral description of the scope of the warrant to parties at the premises, and the Court said there's the petitioner, who was the enforcement agent, agent of

the Alcohol, Tobacco and Firearms Agency, Bureau, argues, "That even though the warrant was invalid the search was reasonable within the meaning of the Fourth Amendment because he orally described to respondents, the items to be seized, and the search did not exceed the limits intended by the Magistrate and described by the petitioner. Thus the petitioner maintains the search of the respondents' ranch was functionally equivalent to a search authorised by a valid warrant." We disagree. The warrant, this warrant did not simply omit a few items from a list of many to be seized, or misdescribe a few of several items, not did it make what fairly could be characterised as a mere technical mistake or typographical error, the warrant did not describe the items to be seized at all.

And so in – perhaps in comparison to the other jurisdictions there is nothing to suggest that there is an established body of jurisprudence which would justify and permit the use of extraneous material to inform the requirements of a warrant such as was the case here. It's important also to note in this context that in this case Detective Sergeant Humphries who swore an affidavit which is at the case volume 5, tab 45, at paragraph 23 and following, describes his contact with Mr Dotcom on the 20th of January 2012, and at 0745 hours, so an hour after the warrant is said to have been, the search warrant is said to have been executed, he meets him in the dining room and explained that he was the officer in charge of the police operation, 24, explained that he'd be shortly going with a detective to explain his rights again, a few formalities to go through with him first. Showed him the original arrest warrant, provided him with a copy, he read it, explained that it was issued under the Extradition Act 1999 in relation to a variety of charges, the conspiracy to racketeering, money laundering, copyright infringement following an investigation. He asked what racketeering was. He said he understood it was the equivalent of participation in organised criminal group, but didn't know the specifics. He asked whether the case would be heard in New Zealand or whether it would be – he would be extradited to the United States. I advised him I understood the US would be applying.

He asked how a warrant for alleged offending in the United States could be valid in New Zealand, he explained. Then the next paragraph is one which Mr Dotcom has specifically challenged in his affidavit and he disputes its accuracy. The detective sergeant says, "He commented that we were just doing what the FBI told us to do. I explained that New Zealand and the United States are both parties to a treaty that allows the two countries to assist each other in criminal investigations. I further

explained that New Zealand will only act on requests for assistance from other countries," et cetera.

And then importantly para 31, "I showed him the original search warrant and gave him a copy." So at least an hour after arrival. "He read through it and I explained that it authorised the seizure of evidence relating to breach of copyright and money laundering such as computers, cellphones, electronic storage devices and documents." So even when handing it to him, he did not suggest anything to indicate he should be reading it beyond its four corners, and the seizure that he said was, it was being, that was being authorised, related to those two offences described as they are there as breach of copyright and money laundering. So that's at total odds with the notion of the Court of Appeal's rationalisation that Mr Dotcom should have done much more than that and should have put two documents together and filled in the gaps. In my submission the reality is far, far removed from that.

Mr Dotcom's affidavit at case volume 3, tab 24, is where, at para 23, is where he disputes the accuracy of that account.

ELIAS CJ:
Sorry, what's the tab?

MR DAVISON QC:
It's case on appeal 3, tab 24, paragraph 23, he says, "After a short time I was allowed back into the house and some clothing was located for me, which would be suitable for travel to the police station. I had been in night attire at the time the Police arrived and at the time I was located by the Police in the 'red room'. During this time, when I was seated with the police officers in the house, I asked on numerous occasions to be permitted to speak to my wife so as to be able to keep her calm and reassure her. The requests were refused. I reject the assertions in Detective Sergeant Humphries' affidavit sworn 11 July 2012, at paragraphs 28 and 30. I did not ask him whether I would be extradited to the United States and I do not recall him describing to me of the details of a New Zealand/US treaty." And then a passage at para 25, which is reproduced in the Court of Appeal's judgment, in expressing surprise that the operation related to alleged copyright infringement.

So it's my respectful submission that taken together, in legal principle and in fact, there is absolutely no justification for the conclusion that the arrest warrant contents

should be imported into the search warrant in an artificial ex post facto manner to validate it.

Now, Your Honours, the consequence of the same conclusion was reached by the High Court and it's my respectful submission that Her Honour Justice Winkelmann was correct in her conclusion that it was, the search warrant was a nullity. Her Honour's approach to taking a two-stage process of determining the validity prior to looking at any considerations of section 204 in my submission is the correct approach and her conclusion that it was a nullity for the reasons set our in her judgment provides very clear and, in my submission, compelling basis of the reasons why. She said that there were two separate aspects, firstly deficiencies in the description of the offences and she, these – and then secondly, the scope of things authorised to be searched for in relation to the description of the offences which she concluded that there were three respects. The warrant did not stipulate the offences of breach of copyright and money laundering and the failure to refer to the laws of the United States would cause confusion and one shouldn't have to read the warrants in a way that involves speculation and conclusions going beyond the scope of the document. The fact that the Mutual Assistance in Criminal Matters Act was involved, she said, was not much of a clue and with respect that's a correct statement. There was no statutory provision referred to, to enable anyone to refer back to the origins of what these alleged offences were and get, or get legal advice on them and the description "breach of copyright" is a phrase which doesn't, in any event, comply with section 45 as a description of the type of offence. It's, it requires an actual offence to be specified and that certainly doesn't do that.

The second area of deficiency was to the, is to the scope of things to be search warrant seized and Her Honour noted that MACMA only authorises the issue of warrants where the authority is limited to particular offences and His Honour the issuing Judge could not have been satisfied that there were reasonable grounds for suspecting that all of the items within the categories set out in appendix A contained evidence of breach and those categories were drawn so broadly and had he turned his mind to he, he would have identified that digital devices would involve the storing of mixed relevant and irrelevant personal and private as well as anything which might be business related and relevant. But there was no categorisation so that the police had such a broad category that there was – and they were able to seize anything and all and everything. Her Honour concluded that the defects were not minor or mere technical defects and in my submission she was absolutely correct.

Turning to section 204 which as its heading says, “Proceedings not to be questioned for want of form,” and in my submission this provision is properly characterised as a provision which is dealing with that level of defect, not defects of a kind which are legal defects or failures to comply with the statute. One couldn’t cure such a breach by reference to a remedial provision such as this in my submission and as Her Honour concluded and I submit, in any event, the effects here did give rise to a miscarriage of justice, a substantial prejudice. As first of all is set out in the written submissions, it’s my respectful submission that it is wrong in principle for those responsible for the warrant to bring about a state of affairs where it’s defective in some way and then the onus is cast upon the party affected who is then required to prove, even to the balance of probabilities, on the basis of Justice Fisher’s dicta in *Sanders*, that there has been such a miscarriage. That, in my submission, must be wrong in principle and the reverse should properly be the case that the party responsible for the defect should be under an obligation to demonstrate to the Court that no adverse consequences have been caused such as would amount to a miscarriage of justice. I know that’s contrary to what has been an accepted authority but it’s my submission that this is an opportunity for what is otherwise wrong in principle to be addressed.

So far as the prejudice is concerned, there has been in any event considerable prejudice and the prejudice should not be limited when one looks for it to something directly associated with the defect. What is prejudicial about the defect is that there has been a non-compliant warrant and in this case what was significant about the non-compliant warrant was the absence of conditions, amongst other things, which would have protected or preserved access or provided ongoing access notwithstanding the items were seized and the hardware was retained by the authorities. And one of the major features of prejudice and miscarriage of justice has been the continued deprivation of access to information and material by Mr Dotcom and his family of all of their family and in particular in relation to the information. Information that he so desperately needs and so fundamentally needs in order for him to prepare himself for any proceedings and an extradition hearing or whatever other reasons he wants to apply it to.

There was, in any event, a large amount of over-seizure and I’ve already addressed that by reference to the information provided to you as to the volume and the items handed back in December 2012. There were and there have been other items

handed back but that's the, sets out the majority of them. So that, it's my respectful submission that even if section 204 is held to apply, the situation here is not one which could be cured by section 204, having regard to the nature and extent of the miscarriage which has continued now for some two and half years.

The final point I wish to make Your Honours is that ever since *Entick v Carrington* (1765) 19 ST Tr 1029, the requirement for any intrusion into a property initially to be lawful, lawfully justified and authorised has been the law and the rights of privacy and the recognition of privacy in the modern era is such that it is – it's just the same but the methods of protecting it and the need to be vigilant to ensure that it is preserved are more and more acute and in my submission this case is one which has thrown into sharp relief the vulnerability of individuals to illegal search and seizure in the modern era and the invidious position that Mr Dotcom has been put in as a result, that had not this judicial review proceeding been commenced, all of this information, all this material would have gone to the United States and he would have been remediless and I ask the Court to hold that this warrant was unlawful and invalid and that everything taken pursuant to it was therefore wrongly seized and I seek relief accordingly. As Your Honours please.

ELIAS CJ:
Thank you Mr Davison. Have counsel discussed the order Mr Pilditch, are you next?

MR PILDITCH:
Ma'am, I can address the Court briefly next.

ELIAS CJ:
Yes, thank you Mr Pilditch.

MR PILDITCH:
May it please the Court. Rather than another main course I can indicate that I'll be pecking at the few crumbs left over from my learned friend's very careful and thorough submissions to the Court. Obviously on behalf of Mr Batato, the second appellant, the written submissions and the submissions of my learned friend Mr Davison are adopted, and I suppose in part I stand here today just to give voice to Mr Batato's position. Much has been said about Mr Dotcom in this litigation but it's helpful to keep in mind that there are four respondents all who have their own unique positions in respect to the issues.

Mr Batato filed an affidavit which Your Honours will find at volume 3, tab number 20. I'm not going to take the Court through it, that's unnecessary, I simply say by way of introduction that his position relative to the other three appellants is relatively unique because for a start he is no computer expert. He is an advertising man. He held sales and managerial roles in television and other media companies. But he did not join the Mega group of companies until 2007 and that date, in some sense, is of significance because the allegations that have been levelled against the respondents, the appellants in this Court today, relate to an allegation of conspiracy which is said to have commenced in 2005 and the broad tenor of the allegation reflected in the indictment, which is now before the District Court, is one of a conspiracy where the very architecture of the company, and its websites and its raison d'être was to infringe copyright, and if that is so that all occurred sometime prior to Mr Batato joining the company towards the end of 2007.

That has an impact with respect to the present matters in this sense as well. As the Court will readily appreciate from all that it has reviewed, and all that's been said, this is very much a case about the computers and the content of them, the data that's comprised in it, the communications between officers of this company, and again the allegation is one of architectural construction of a conspiracy at the outset using websites for the nefarious purpose of copyright infringement and profiteering. But Mr Batato was not privy to that period of time. He came to the company in 2007 and therefore the information that's at stake, the information that was seized, the information that my learned friends throughout the proceedings have been seeking, is information that's very important to him because he relies on his co-appellants and then senses to construct aspects of defence to the extradition proceedings where he wasn't a part of those events. He wasn't privy to the communications. He wasn't part of the narrative which the United States say is a narrative of criminality from the beginning of 2005. He only had one computer, it was unencrypted, and it was taken from him and it was returned in November last year. But he has a significant interest as an alleged co-conspirator with the data and information of his co-appellants in this Court today. And for those reasons he supports the submissions that have been made on behalf of Mr Dotcom and also his other co-appellants.

I just have some very brief points, if I may, just really taking on some of the submissions and dialogues that have been made today and to the present point in time. As far as the first issue and the offence description is concerned the primary

submission is that the description was utterly and totally inadequate. The reference to copyright infringement and a generic reference to money laundering would provide little assistance, the appellants would say, to any recipient of this warrant. But I might add to that discussion this observation, that not only were those descriptions inadequate, they didn't, in fact, cover all of the allegations and offending which were set out in the applications that were submitted to the District Court Judge. And there's something of a tension between the first page of the warrant and then appendix A in this regard. If I could just briefly take the Court to a copy of that. The copies of the warrant variously appear but I'm looking at tab 33 of the case, which is volume 4, and page 633 and 664. As Your Honours have been referred the first page, being the main body of the warrant, references the breach of copyright and money laundering but the very beginning of appendix A on the following page, which was attached to, to accompanied the warrant, refers to the crimes being investigated including but not limited to the following, so all evidence, fruits and instrumentalities of the crimes being investigated.

McGRATH J:

Sorry, what page are you at Mr Pilditch?

MR PILDITCH:

Page 664 now Sir. So this was the appendix and Your Honours will recall this was what I would perhaps crudely describe as the cut and paste that came from the request that was then placed into the authorisation which was then seen in the warrant application and now appears in the warrant. The only variation being the addition of bullet points and the last bullet point on the page. But the heading to appendix A is all evidence, fruits and instrumentalities of the crimes being investigated and then it purports to set out the various articles or things which are sought. Really the submission that I want to make is that one might read that and think of the crimes, if they can be called that, described in the first page of the search warrant, being the breach of copyright and the money laundering. But that only reflects really two aspects of a number of aspects of the crimes being investigated because as the Court will appreciate, and as can be see, again this is under the tab 33, being the annexures to the affidavit of Detective McMorran. The US offences include, which are set out at page 360, and following, the Court's been taken to that, covered not just the copyright aspect, or the money laundering, but, of course, the conspiracy aspects, the aiding and abetting or party liability aspects, and critically a substantive crimes of racketeering which stands alone, albeit it related to

the other offending. So my submission really is not only is the description of breach of copyright and money laundering inadequate to capture that aspect of the offending described in the application, these descriptions do not go so far as to cover all aspects of the offending for which assistance was sought. So we have an appendix which is purporting to authorise evidence relating to the crimes being investigated, but no reference to all of those crimes in the main body of the warrant.

There's been some useful discussion concerning the information which is set out in the forms and in particular form 5 and in the discussion today, but also in the cases that Your Honours will have read and have been referred to. There's some consideration of why information has to be provided to a recipient of a warrant, or to an affected person to the audience of the warrant, I suppose, and those considerations include matters such as the need to ensure that one is informed of the basis for the warrant, the powers that can be executed by the person executing the warrant, the ability to obtain legal advice in matters such as that, and I respectfully adopt, support, and endorse the submissions made by my learned friend in relation to the importance of that, but I do just want to add to that rationale for information being provided to an affected person this, which is a more fundamental proposition, through the construct of the mutual assistant legislation section 45, section 65 and the regulations and the form, Parliament has decided what information should be provided to a person who is affected by a warrant and in my respectful submission, what underlies this and really the requirements in all other legislation where warrants are reduced to writing and are issued, is a recognition that the execution of a warrant, is an intrusion onto the privacy of an individual, and when that occurs just as a matter of principle and as a matter of law, that person is entitled to get information about why they're being subjected to that process of law.

So the mandatory requirements of the Mutual Assistance legislation, indicates that Parliament requires the information to be provided. The form shall be used, the offences shall be prescribed, the form shall be used with the addition of the relevant information and really what my submission is, and it's a fairly simple submission, is just this, and that's a basic legal requirement, when people's privacy rights are being intruded upon. It informs them, it puts them in a position of getting legal advice if they need it, they may even be able to mount a challenge to the taking of certain items by the officers executing the warrant, but at a minimum.

ELIAS CJ:

Is that a submission that it's an end or a right in itself and one shouldn't simply assess it instrumentally?

MR PILDITCH:

Yes, in addition to assessing it instrumentally –

ELIAS CJ:

Yes.

MR PILDITCH:

– and the practicalities of being subjected to a warrant, there's a more fundamental proposition which is simply you've got a right to be told. And that's Parliament reflecting upon and recognising that any warrant is an intrusion of privacy, and an intrusion on the right shown in section 21, and if we go back to *Sanders* and Justice Fisher's summation of the key principles and I'm here referring to the fourth volume of the bundle of authorities, that's at tab 27, and page 467, where His Honour summarised some of the relevant principles that His Honour had been addressing at judgment from A through to F on that page and over to H on the following page. Even His Honour in *Sanders* may be viewed as the high water mark for the respondent's propositions in the present appeal, even His Honour held that search warrants are required broadly to follow form 50 in Summary Proceedings Regulations 1958 although minor variations from the prescribed form are permissible, the document must, as a minimum, show on its face it is addressed to a constable, recite the foundation and purpose of the warrant, et cetera. And I would submit that the Court would be hard pressed to find a judgment in this jurisdiction or any other jurisdiction where any Court has said it can be in the wrong form, or an unrelated form, that form being the manifestation or the representation of what Parliament directs an affected person to receive by way of information, which is a reflection of the intrusion on their privacy rights.

Turning briefly to section 204, the essence of the appellant's position is that point is simply not reached, because there's been this fundamental or legal invalidity by failing to use the correct form, and thereby failing to incorporate the relevant information, the prescribed information, that Parliament has determined it must be communicated to a person affected by the warrant.

Section 204 has been used in this jurisdiction to cure all manner of inadequacies, and dare I say mediocrities, in the manner in which warrants and other processes have been prepared and executed, but as the Court will no doubt readily appreciate even section 204 has its own boundaries and its own limitations, and I would venture and make this submission briefly in the context of this case, that what section 204 cannot do, is write down the mandatory requirements of the primary legislation. So if the Act says that it shall be in the prescribed form, and it shall specify the offences, if the net effect of applying section 204 to a situation such as the present is to lead to a point where the legislation is read, it may be in the prescribed form, and it may specify the offences, then that is an exercise with section 204 that's gone too far.

In my respectful submission the consideration of section 204 arises when that primary legal requirement for a warrant has been met. It is in the prescribed form, but there may be some inadequacies about the way in which the document has been prepared within those confines. It has prescribed the offences, but may be not perfectly, but whereas in here it's not in that form, it doesn't convey the prescriptive information required by Parliament and it fails to, on any rational or reasonable assessment to inform as to the offences, then in my submission the Court is not even in the territory of section 204, because to apply it, is effectively altering the mandatory terms of that legislation, and I would submit that is something of an indicia to where the point is reached that section 204 cannot apply because the defects and the faults are just too fundamental.

I just want to touch briefly if I may on the Rural Timber judgment. The first matter that I address is this, and that is to, if I may, make a submission about the way in which the Court of Appeal applied and treated Rural Timber in the context of its judgment and on that the first volume on the case on appeal, that's the orange cover, tab 10, and moving through to 115, under the heading, "The Terms of the Search Warrants", paragraph 51, the Court notes it has set out the terms of the search warrant and acknowledge that it omitted reference to the United States of America, but it did refer to an offensive breach of copyright and money laundering, noting there's no criminal offence of breach of copyright in New Zealand, but there is in the United States, I might add in relation to that, there's no criminal offence of breach of copyright in the United States, what there is, is a breach of – a wilful breach of copyright, and intentional breach of copyright, coupled with effectively the generation of revenue from that breach of copyright in the United States.

The Court then discussed appendix A and at paragraph 53 the reasonable reader in the position of the recipients, although again I add that Mr Batato, my client the appellant is not referenced in that provision in that paragraph. The Court concluded that the defects were in form not in substance, and then in the context of this discussion concerning the description of the offences and the articles sought, the Court then set out the provisional warrant for arrest issued under the Extradition Act on page 116 of the case. And then over to page 117, paragraph 58, in the second High Court Judgment, Justice Winkelmann rejected the submission for the Attorney-General that the information in the search warrants could bolster or clarify, be clarified by the information in the arrest warrants. So in my submission what appears to have been accepted by the Court of Appeal is that the arrest warrants issued under the Extradition Act were capable of addressing the validity issue, that is the description of the offences, and Your Honour Justice Young inquired as to whether or not this related to the miscarriage point, but with respect in my submission the Court actually used the arrest warrants at a much earlier stage in the analysis and that was in fact to determine the legal validity of the warrants.

WILLIAM YOUNG J:
I don't think that's right. If you look at page 184 of the report –

ELIAS CJ:
Of the report?

WILLIAM YOUNG J:
Of the report, that's of the Rural Trade – Rural –

ELIAS CJ:
Rural Timber –

MR PILDITCH:
Yes.

WILLIAM YOUNG J:
It's tab 28.

MR PILDITCH:
Tab 28 of the fourth bundle.

WILLIAM YOUNG J:
So at page 184, it's at the bottom of the page at 148.

MR PILDITCH:
Yes.

WILLIAM YOUNG J:
"Moreover there is evidence relevant to the question of miscarriage of justice that the nature of the alleged conspiracy and the general object of the searches was explained in the briefing of the traffic officer who participated and at the commencement of the searches to the company personnel then present"?

MR PILDITCH:
Yes.

WILLIAM YOUNG J:
So I don't, I think I did put it correctly.

MR PILDITCH:
Well with respect, if I can take Your Honour to line 41 and 42 and this –

ELIAS CJ:
Which page?

MR PILDITCH:
Sorry this is page 184, the very same page – in fact with respect the same paragraph but just at the beginning of that paragraph and my learned friend Mr Davison respectfully cautioned the Court against telescoping the issues of validity and miscarriage into the same question and with respect this is an of that very exercise. Because what the Court said was that the suspected offence was described somewhat inadequately in the warrant and that precise of the alleged conspiracy was not specified and no dates were given. Reading, "The warrant together with the schedule however, a reasonable reader would gather that hubodometers, instruments and tampering therewith were involved," and then the reasonable reader would infer from the warrant and the schedule that the conspiracy involved misrepresentations travelled by the company's vehicle.

WILLIAM YOUNG J:

I know all that. What I'm taking you to is the bit where the Court relied on matters that were entirely extraneous to the warrant –

MR PILDITCH:

Yes.

WILLIAM YOUNG J:

– in concluding that there was no miscarriage.

MR PILDITCH:

Exactly and that was in relation to the miscarriage point, having already determined that the misdescription was a defect in form or irregularity. So in other words the Court was already in the 204 jurisdiction.

WILLIAM YOUNG J:

Well I mean I suppose there are three areas aren't there – there's –

MR PILDITCH:

Yes.

WILLIAM YOUNG J:

– an error that's so bad that the document is a nothing.

MR PILDITCH:

Yes.

WILLIAM YOUNG J:

At the other end there's an area, an error that's significantly insufficient that even in the absence of section 204 it wouldn't matter?

MR PILDITCH:

Yes.

WILLIAM YOUNG J:

And then there are – it must be in the middle errors which are of a kind but for section 204 would result in invalidity that don't because there's not a miscarriage of justice?

MR PILDITCH:

Yes. And really what my submission is, is that the Court of Appeal utilised the *Rural Timber* in the first question, in other words to inform the description of the offences which is a validity point, not defect or form or whether it can be cured. That's really the submission that I'm endeavouring to make. In other words, with respect, the addition of the arrest warrant was a makeweight for the inadequate description of the offences as far as the Court of Appeal's reasoning is concerned and this all appears under the heading "the terms of the search warrants". And with respect I'm not even sure and no doubt my learned friend for the respondents will address the Court on this, I'm not even sure that the respondent is suggesting that what the Americans describe as "facial validity" or validity within the four corners of the warrant" can be viewed on the basis of anything other than the document itself. How the warrant's executed, other things that were gong on at the time, the provision of arrest warrants, that may or may not be relevant to the miscarriage point but my submission is that it can't be used in the first step which is, is this valid on its face and as my learned friend Mr Davison advanced, the rationale for that must be clear because the warrant must be valid for all people, for the full audience.

WILLIAM YOUNG J:

Well is that right?

MR PILDITCH:

Well how could it be valid –

WILLIAM YOUNG J:

Well sorry, might you not get a point where you say, well yes looking at the warrant alone it's invalid but when we come to look at how it was exercised we are satisfied there's no miscarriage of justice, therefore we won't set aside the warrant?

MR PILDITCH:

If it's invalid it's a nullity.

WILLIAM YOUNG J:

Well this is – all right. This is very old-fashioned administrative law –

ELIAS CJ:

However used by that not so old-fashioned administrative lawyer in the *Rural Timber.*

MR PILDITCH:

Yes, I mean as I indicated at the outset, the primary submission for the appellant is that it is so flawed that it just cannot be a valid warrant – the wrong form, no offence description of any meaning, too lightly drafted et cetera.

ELIAS CJ:

I'm just not sure if it's useful to have recourse to concepts of nullity. I know it's spoken of –

MR PILDITCH:

Yes.

ELIAS CJ:

– in these cases but a little unthinkingly repeated in some of the later cases.

MR PILDITCH:

Yes.

ELIAS CJ:

If the warrant does not comply with the law in a manner that is not simply a defect in form –

MR PILDITCH:

Yes – either it's a nullity or it's a miscarriage.

ELIAS CJ:

Well I don't know that you say it's a nullity, you just say it's not lawful.

MR PILDITCH:

Yes and which is another way of saying the execution of it was a miscarriage of – I'd respectfully agree.

WILLIAM YOUNG J:

Well it's another way of saying that the warrant doesn't authorise what happened.

MR PILDITCH:

Yes.

ELIAS CJ:

Yes, yes.

WILLIAM YOUNG J:

But in that sense is a, that the word that it's a nullity is a conclusion rather than a step in the reasoning I think –

ELIAS CJ:

I think it's a most unhelpful conclusion myself really.

MR PILDITCH:

But I suppose just really the point of emphasis that I did wish to make was simply that in that perhaps more traditional construct of nullity, is it just a defective form, if so has there been a miscarriage of justice?

WILLIAM YOUNG J:

But would you need section 204 if it's just a defective form?

MR PILDITCH:

It depends what the impact of the defect was.

ELIAS CJ:

I think you would need it because you're trying to prevent the Courts acting very conservatively in this area where they've traditionally been pretty hostile to any want of form and very insistent on proper forms being followed.

MR PILDITCH:

Yes. But as I –

ELIAS CJ:

But it bothers me a little the thought that 204 if a really concerning miscarriage in a broader sense and simply non-compliance of law, how that gets applied to a conviction.

MR PILDITCH:

Yes.

ELIAS CJ:

You know it just can't possibly be intended to.

MR PILDITCH:

And at the other end of the scale, the very strict causal nexus that His Honour Justice Fisher identified in *Sanders* of there must be something from the defect or the problem that's led to the miscarriage and, of course, in some documents or forms it's difficult to conceive how even –

ELIAS CJ:

Unless you take the view that a defect is a miscarriage –

MR PILDITCH:

Yes.

ELIAS CJ:

– except if it's simply a matter of form which is a much simpler way to view the provisions but –

MR PILDITCH:

Yes certainly. But I suppose putting, putting the submission in relation to the Court of Appeal's assessment, if the Court didn't have the arrest warrants it would be my submission it would have struggled to say that the warrants were lawful because of their lack of compliance with the Act, the forms, the need for an offence to be described, all the offences to be described which is absent in this warrant and the other matters that have already been addressed in terms of the breadth of the article sought and the conditions.

Just very briefly on the issue of articles, the cases are clear where there's a relatively broad allegation as there is in this case. There the category of items may also be broad but that doesn't prevent a more targeted description of articles by reference to the nature of the offending, the dates, the people involved, companies involved and that is such as that and there's been some discussion about what more particularity could have been provided rather than the cut and paste from the request but given the volume of material that was provided with the request and also the extradition warrant applications, there was a wealth of information which could have limited dates, conspiracies, people, companies, the targets, as it were, of these warrants which is absent in the articles which are described and on the subject on conditions, the broader the articles that are sought, the more acute becomes the need for conditions in my submission, there's a relativity between those matters, and here the respondents say, "Well you know, it's discretionary." The discretion's fairly broad, it's as the Court thinks fit in subsection (3) so clearly the Act invites the Court to engage with the notion of conditions to ensure that a proper balance is met in the circumstances of the case, and it's the appellant's submission that this was a case that called out for conditions and the treatment of the material that was taken, given the breadth of what it was and what was intended for it I'm not sure that I can add much more to that, and I said I would be brief.

ELIAS CJ:

Thank you Mr Pilditch. Mr Foley do you expect to be?

MR FOLEY:

Five minutes or less.

ELIAS CJ:

Five minutes. Yes Mr Foley, thank you.

MR FOLEY:

May it please Your Honours, I appear for the third and fourth appellants, Messrs Ortmann and Van der Kolk. Mr Ortmann was resident as a visitor at Mr Dotcom's home at the time of the execution of the raid or the search warrants. Mr Van der Kolk was living with his wife and his small child in Orakei, he had residence here. He was living in a house. Like Mr Dotcom he worked from home, but it was a home as well as a place where he worked generally, remotely, using computers.

I had many point to address the Court on. I've crossed most of them off as they've been covered by my learned friends Mr Davison and Mr Pilditch. I wish to address you in relation to four points which are the essence of the appellants' appeal and one supplementary point in relation to a question from Your Honour, Learned Chief Justice. Of those four points the first is that the search warrants in my respectful submission were fundamentally flawed. The second point is that appendix A in the search warrants is so broad, or was so broad as to be meaningless. My third point is that the defects within the warrants were such that they were likely to mislead the executing officers as well as the appellants in relation to both scope and to purpose of the warrants. And my fourth point is of course, in relation to this appeal to support the learned Chief High Court Judge's finding that the search could not be cured by section 204 Summary Proceedings Act, and to use Learned Chief Justice's encapsulation, the warrant was illegal.

The supplementary point is in respect of a question from Chief Justice to Mr Davison about an historic occurrence beyond my personal knowledge of computers or drives being shipped off complete overseas, and as I understood the exchange, that was a matter of necessity in terms of cost and time, effort, facilities, it was just simpler, and a practice had built up, something I don't know of.

ELIAS CJ:
No, sorry I didn't mean "offshore" I meant "off site".

MR FOLEY:
Oh off site.

ELIAS CJ:
The domestic practice as well.

MR FOLEY:
Yes, I understand that. In relation to this case so far as Mr Van der Kolk is concerned, I'd accept off site had to occur, but not offshore, which was about to occur, which is essentially horrendous from the appellants' point of view. My point here was, or is, in relation to the United States requesting access to the contents of these devices, the data of which there's a lot, there's a technology must ride to the rescue here with fast internet connections, there seems to be in terms of a practical fixt to this, after parties worked out reasonable provisions and a protocol, it could all

be uploaded to a New Zealand based server, US investigators, in the investigatory stage, could use their word searches, that could be monitored, audited if you like, in terms of the initial owners of those, or the owners of those particular drives, and it would be simpler and faster.

I of course respectfully adopt the submissions that my learned friends Mr Davison and Mr Pilditch as they apply to each of my two appellants. I can take Your Honours to the aspects of evidence relating to my men, and the use of search warrants to bolster the use of the arrest warrants, to bolster the search warrants, I'm in a like position as Mr Davison in terms of my acceptance that the Court of Appeal is to these men, seeing either the search warrants or the arrest warrants, but there was no concession beyond that, or at least no intention to make a concession beyond that.

Would it assist the Court if I gave the references within the case on appeal, to those men?

ELIAS CJ:
Yes, thank you.

MR FOLEY:
Right. For Mr Ortmann, a Detective Sergeant Humphries, case on appeal volume 5, tab 45, page 828.

GLAZEBROOK J:
Sorry can you just repeat that?

MR FOLEY:
Yes, sorry Your Honour. Volume 5, tab 45, page 828, paragraphs 39 to 45.

ELIAS CJ:
That's about what happened.

MR FOLEY:
Yes.

ELIAS CJ:
Yes.

MR FOLEY:

Yes. If you wish Your Honour I'll take you through that, but it's pretty simple.

WILLIAM YOUNG J:

Sorry what was the page number?

MR FOLEY:

The page Sir is 828.

WILLIAM YOUNG J:

828.

MR FOLEY:

So he – that's the officer in charge of the scene as a whole. He deals with Mr Ortmann at 43 he said, "I showed him the original arrest warrant and explained that it was issued under the Extradition Act in relation to a variety of charges, including conspiracy to commit racketeering, money laundering and copyright infringement, following an investigation by the FBI." Annexed and marked to that man's affidavit, there's a true copy of the arrest warrant. Paragraph 44, he says, "I showed him the original search warrant and explained that I was showing it to him because we may seize items from the house that belonged to him, such as his cellphone." His cellphone and laptop computer were taken, seized.

But Mr Ortmann filed an affidavit in the proceedings, and that's found at volume 3, tab 25, page 500, paragraph 7. Mr Ortmann says through his affidavit, "I was not given any documents," fits in with Mr Humphries showing these documents to him, "I was asked what it was about, and I was told, something to do with copyright infringement."

WILLIAM YOUNG J:

Was there oral evidence on this?

MR FOLEY:

No Sir. Mr Humphries was cross-examined not on this point. Mr Ortmann wasn't required by the police. At paragraph 9, Mr Ortmann refers to Kim Dotcom saying something like, "It's about copyright infringement, nothing to worry about." And for Mr Ortmann that was the extent of it. For Mr Van der Kolk in Orakei, a different scenario

there. Detective Sergeant Osbourne O-S-B-O-U-R-N-E, has given an affidavit at volume 5, tab 40, which was page 765. "Arrival at that address was coincident within two minutes I think of arrival at the Mansion." And he describes, surprisingly, that Mr Ortmann, Mr Van der Kolk appeared generally surprised to see the police. Paragraph 6, Mr Osbourne explained he had a search warrant, at 9 he showed Mr Van der Kolk the search warrant, and was handed to him by another Detective Smith. 15, it appears they took all the electronic equipment that could hold data, anything of interest of store data within the scope of their search warrant. Mr Van der Kolk didn't swear an affidavit at that stage in the proceedings. Those are my submissions in support of the third and fourth appellant. Is there anything further I might assist the Court with?

ELIAS CJ:

No. Thank you Mr Foley.

MR FOLEY:

Thank you Your Honours.

ELIAS CJ:

Thank you counsel.

COURT ADJOURNS:4:10 PM

COURT RESUMES ON TUESDAY 26 AUGUST 2014 AT 10.01 AM

ELIAS CJ:
Yes Mr Boldt.

MR BOLDT:
I have a few matters of housekeeping before I begin my submissions. I've handed overnight, and there should be before each of Your Honours, a handful of new documents. My learned friends have kindly supplied us with a full copy of the Search and Surveillance Act and I'll refer from time to time to the provisions of that Act, not because they were in force at the time of these events, but because they represent the most recent Parliamentary balancing of the various rights we've been talking about and actually touch –

ELIAS CJ:
You will need to explain how we can take those into account because they are quite a refrain in your submissions, Mr Boldt, but don't take time now but when you come to that because I'm slightly troubled by how we can use them.

MR BOLDT:
Well, Ma'am, perhaps I can address that question –

ELIAS CJ:
Yes.

MR BOLDT:
– because it is a discrete question, right away. We say, in effect, that the way these warrants were executed, and the way they were framed, what was done with the items when they were seized, reflected a lengthy period of settled authority, primarily from the Court of Appeal, and it is the submission, in effect, in this Court that the Court of Appeal had perhaps been too generous when it came to forgiving formal errors in a document, and also had perhaps been too permissive in terms of the way seized items should be dealt with. What the Search and Surveillance Act does is it indicates that, at least far from Parliament thinking the Courts have strayed too far from an appropriate course in this area, it reaffirms the approach the Court had been taking in a number of respects. So –

ELIAS CJ:

I accept that it's Parliamentary approval of the position followed by the Court. What do you say we can take from that?

MR BOLDT:

Well, it's a clear indication, in my respectful submission Ma'am, that any suggestion the Courts had been misapplying law or had been, or had strayed in the balance they had struck too far in favour of the intrusive powers of the State as opposed to the rights of the person being seized, can't be sustained when we see that upon review.

ELIAS CJ:

Well it's not an opinion shared by Parliament.

MR BOLDT:

It's not an opinion shared by Parliament.

ELIAS CJ:

Yes.

MR BOLDT:

And nor is it the law going forth and that is also important. Now the other additional documents I've handed up, one is by way of a replacement for Your Honours' bundles. Behind tab 10 of our authorities is a High Court decision in the *Gill v Attorney-General* HC Auckland CIV-2008-404-8247, 27 November 2009 case and –

ELIAS CJ:

You gave the costs one.

MR BOLDT:

We put the costs one in Ma'am by mistake. Of course we wanted the substantive decision and I've supplied that to Your Honours, not because there's any discrete question of principle that emerges from that case, but because it just sets out the terms of the warrant slightly more clearly than appear in the Court of Appeal decision. I've also handed up to Your Honours section 26 of the Interpretation Act which is the section which deals with prescribed forms. Perhaps I can indicate to Your Honours, I propose to provide Your Honours with an overview of my submissions to highlight the areas where I see there has been no dispute or disagreement between the parties

before going on to five areas where we do not agree and five discrete areas of issues which it appears the Court may need to address. Perhaps I can indicate the first two, the first three documents I'm going to refer to, so that Your Honours might have them handy, my written submissions, the decision of the Court of Appeal in *Sanders* and the decision of the Court of Appeal in *Hall* which can be found in our bundle behind tab 11. While Your Honours have got my submissions in front of you –

GLAZEBROOK J:
You better tell us where the *Sanders* is as well.

MR BOLDT:
Sanders is in my learned friend's bundle and it's in volume 4 behind tab 27 Ma'am.

GLAZEBROOK J:
I lost the next one as well while I was looking for other things.

MR BOLDT:
And the other case, Ma'am, is *Hall v Ministry of Transport* [1991] 2 NZLR 53 which is in the respondent's bundle and that's behind tab 11. There's actually a very quick point which is also in the nature of housekeeping. My learned friends have raised with me one quite unimportant sentence in my written submissions which they are concerned maybe open to misconstruction and I've promised to address that with Your Honours just so there is no misunderstanding about what is and is not intended by it. It's to be found at page 5 of my written submissions in paragraph 14. Your Honours will see there is a sentence there in parentheses starting six lines down. My friends are concerned that sentence is open to the construction that the Crown sought or obtained formal advice on that question of law before the claims were sent overseas I think. I assure Your Honours that isn't the intention I sought to convey with that sentence.

GLAZEBROOK J:
I'm sorry, which sentence?

MR BOLDT:
It's the sentence six lines down, Ma'am –

ELIAS CJ:

"The Crown believed, erroneously as it transpired," but the error wasn't –

GLAZEBROOK J:

Sorry, I'm not even on the right, what page?

MR BOLDT:

Page 5 of the written submissions, Your Honour, and it's paragraph 14 and the sentence to which a concern was raised is, "The Crown believed, erroneously as it transpired, that s 49 directions were required only for dealings with original items, not copies." I can indicate I certainly didn't intend to imply formal advice was given or sought on the point. But to save argument –

ELIAS CJ:

The Crown assumed rather than, yes. It is packing quite a lot in.

MR BOLDT:

It was intended as a quick glide through of the history before we get to the important parts.

ELIAS CJ:

Yes.

MR BOLDT:

But I'm actually entirely happy with Your Honour's formulation there. So turning to our submission. I can say, if we were to sum up our response to this appeal in a single sentence, it would be this. These warrants were not perfect but the imperfections in the warrants caused no prejudice to the appellants or to anyone else. So that's it in a nutshell and there have been many cases over the years where our Courts have dealt with similar errors in search warrants and the responses have always been entirely consistent. Perhaps one small paragraph which sums up the Court's consistent approach in this area can be found in the *Sanders* decision and I'm quoting here not from the decision of Justice Fisher, although I will refer to that extensively in the course of my submissions, but from the judgment of Lord Cooke and Justice Casey and that's at page 454 of the report. And it's the sentence which begins at line 27. And the Court said, "As to the applications and the warrants, there are various features of clumsiness, inaccuracy and irrelevance but we are satisfied

that in substance the affidavits showed reasonable ground for belief in terms of section 198(1)(b) and that the shortcomings in the expression of the warrants all fell within the words 'defect, irregularity, omission or want of form', in section 204. They occasioned no miscarriage of justice so section 204 saves the documents from invalidity." And there are, as Your Honours will have seen from the submissions, numerous examples in other cases of passages to similar effect.

Now as I say Your Honours, it might be useful at the outset to isolate some matters that do not appear to be in dispute in this appeal and then identify, as I say what I think the five areas of, the five principal areas of dispute are. So the first matter that does not appear to be in dispute is there has never been a challenge to the evidential basis on which these warrants were issued. Indeed yesterday my learned friend for the appellants took the Court through the veritable wealth of detail in the application and in the supporting material which was annexed to it including the Mutual Assistance Application from the United States. So we had, and it's never been contended otherwise, a commendably detailed affidavit that outlined the type of offending alleged, outlined the people involved, the links to the addresses being searched and provided a solid basis on which the Judge could be satisfied there were reasonable grounds to believe the items in the warrants would be there and would be relevant to the charges. And it's worth noting Your Honours that the learned District Court Judge didn't want to issue this warrant on the spot and instead he took away the application and the supporting documents and considered them overnight before issuing the warrants in the morning and that the reference to in the materials are, I'm sure Your Honours don't need to go there, but you can find that at volume 4 of the case on appeal at page 61, paragraph 5. There's a letter there which outlined the process by which the warrants were obtained. So the Judge took real care in considering this material before issuing the warrants.

So the problem in this case is not the foundation for the warrant, rather the complaint in this case is that the appellants say this wealth of supporting material was not then translated into a functioning search warrant. And that's important because as I'll come to, there's a line of, at least hitherto, unbroken and settled authority, that it is the foundation of the warrant is crucial and that provided there is a well-founded application on sworn evidence, our – the experience over the last at least 25 years is that the Courts have been prepared to excuse even quite serious errors on the face of the warrants themselves. And of course I appreciate that none of those authorities or indeed any authority is binding on this Court but it is significant, in my respectful

submission, that they represent over 40 years of settled law and approach in this country. In fact it is the need for sworn evidence presented to an independent judicial officer, who needs to be satisfied to the standard of reasonable grounds, to believe which is the thing that in New Zealand provides the principal safeguard against arbitrary or unreasonable intrusion into an individual's home or business premises. So we agree entirely with our friends that the starting point is that every person's home is their castle and in the absence of a warrant power and in the absence of sworn evidence we're right back in the position the Courts found themselves in the time of *Entick v Carrington.* Everyone's home is their castle although a salient feature of this case that some people's homes look more like castles than others and – but it's –

ELIAS CJ:

Mr Boldt you will need, for my purposes at any rate, to address the fact that that may represent a fairly old-fashioned view. A temporal concern, because what's available now is access not just to the home but to the minds of people in the sort of search that's available I'll just flag that.

MR BOLDT:

Ma'am when you say, "In the minds of people," –

ELIAS CJ:

Yes.

MR BOLDT:

– by that do I mean for example you're talking about content on a computer?

ELIAS CJ:

Yes, yes that sort of thing. Because I think we have to be very careful that we are on the cusp of some challenges for law that may not have been, they may not have been grappled with in earlier cases.

MR BOLDT:

Yes Ma'am and I'm very happy to do that although the – for example the *Church of Scientology* case which is in the bundle which is the decision of the Ontario Court of Appeal really does show there's nothing new under the sun because that was a pre-internet search involving –

ELIAS CJ:

Yes.

MR BOLDT:

– the uplifting of two million documents which had to be sorted for relevance of citing, in fact even thinking about *Entick v Carrington* itself, the Court there quite rightly and properly said, and I haven't got the decision with me, but the quote was something like a man's private papers are his dearest possession and we can entirely extrapolate that through –

ELIAS CJ:

Yes.

MR BOLDT:

– into the internet age. The answer however is that provided there is sworn evidence which provides reasonable grounds to believe devices of this kind are likely to be relevant, not only does our experience with case law to date say there is no basis for a different approach, that's another example of an area where Parliament has recently reaffirmed that the approach that had been in place prior to 2012 should continue and, indeed, should be expressly authorised and enhanced. But the point and it really is a basic one. We accept that in the absence of a warrant regime people can't go climbing into other people's homes or businesses but equally it's also tried to say that that expectation of privacy is displaced where the reasonably exacting requirements for a valid search warrant are met and by that, as I say, I mean the independent judicial officer who is satisfied to a fairly exacting standard on sworn evidence and that undoubtedly occurred in this case.

There is another way that it was put by the Court of Appeal in the *Andrews v R* [2010] NZCA 467 decision which I think was the last of the Court of Appeal decisions to deal with section 204. The Court there were faced with a perfectly good warrant application but a document which on its face didn't tell you what property could be searched, there were –

GLAZEBROOK J:

Well it did, there were just two different – one correct address and one wrong address on it which –

MR BOLDT:

Exactly.

GLAZEBROOK J:

– had obviously happened on a copying over situation.

MR BOLDT:

Exactly, but a person looking at the warrant on its face wouldn't know which was which –

GLAZEBROOK J:

No.

MR BOLDT:

– and the Court there, the way the Court put it was the police, based on their sworn application and affidavit, were entitled to a warrant to search the target property and that is what the Judge or registrar in that case thought. He or she would issue it and we can paraphrase that here on the basis of the wealth of evidence the police had. They were at least entitled to a warrant to search the mansion and Mr Van der Kolk's address for electronic items and other relevant material and in those circumstances section 204 says that a problem in the way the document is worded will cause invalidity only if there has been a miscarriage of justice.

ELIAS CJ:

It doesn't say that, though, does it? Is that the words, in the way it's worded?

MR BOLDT:

Well –

ELIAS CJ:

Is that what your overlay on effective –

MR BOLDT:

Well that's paraphrasing but it's a paraphrasing that has been consistently applied by the Courts.

ELIAS CJ:

Well there have been about three cases that have emphasised that aren't there? You mean the form, error in expression, that term?

MR BOLDT:

Well that's right Ma'am. The exact words are, "Any defect, irregularity, omission or want of form" –

ELIAS CJ:

Yes.

MR BOLDT:

– and the mistakes, to the extent there were mistakes in these documents, falls squarely, in my submission, into one or more of those categories.

McGRATH J:

What paragraph in *Andrews* are you relying on?

MR BOLDT:

That passage that I referred Your Honour to comes from paragraph 48 of *Andrews*. It was the reference to police being entitled to a warrant for that particular address.

GLAZEBROOK J:

I was also just going to ask you just to – as I understand the Crown accepts – well they certainly accept that the non-reference to the US was a mistake.

MR BOLDT:

Yes.

GLAZEBROOK J:

Just remind me was there something else or, because, perhaps it might be worth dealing with why the other things that were said to be mistakes by the – at some stage, when you get to that, by the appellants weren't, in the Crown submissions, mistakes.

MR BOLDT:

Yes Ma'am and I'll be very happy to do that and I'll, in particular, take Your Honours through what was in this warrant and compare it with what would have been in a perfectly regular form 5 warrant, and it's my submission that, with the exception of that detail that was omitted, the other information required by form 5 was all there, albeit the format of the document was different but all the material things were the same.

So anyway the first point, and that was perhaps a long-winded way of saying the first point is, that there was sufficient, clearly sufficient evidence there for a warrant to issue. Now the second area where there appears no dispute, and I base this on the exchange between Your Honours and my learned friends yesterday, is that the police were entitled, and indeed it was necessary, for electronic items to be seized for examination off site and it wouldn't have been possible for anyone, whether there were New Zealand Police, or FBI, just by looking at an electronic device to know whether it was relevant or not, and also it wouldn't have been either forensically sound or possible to examine items for relevance on site.

The third area which I think is not in dispute –

ELIAS CJ:

That's, of course, a fairly pregnant point that they're entitled to have it off site because it's on that basis that it is said that conditions were necessary in the warrant but that's something that you'll come to?

MR BOLDT:

Of the five areas which I believe are in dispute, conditions is number 4.

ELIAS CJ:

Yes.

MR BOLDT:

And I'll definitely come to that Your Honour. It is our –

ELIAS CJ:

Yes, the point that I'm making is that just because they're entitled to examine off site isn't the end of that enquiry.

MR BOLDT:

No. No, and I'd accept that.

ELIAS CJ:

Yes, not off the table.

MR BOLDT:

No, I'd accept that Your Honour. Now the third area which I think is not in dispute anymore is the combined effect of the search warrants and the arrest warrants. Now I'm not 100 per cent sure of the current status of the concession the appellants made in the Court of Appeal regarding the combined effect of these two documents. Certainly we understood, and it's not terribly different from the way the Court of Appeal put it in its judgment, that it was conceded or accepted on behalf of the appellants that if the search warrant had contained the same information and detail as the arrest warrants, then the search warrant would have been fine, and that's also, I can say, how I read footnote 80 in my learned friend's submissions.

GLAZEBROOK J:

Although yesterday I think there was a submission made that extra information should have been in there such as, I think possibly dates, although I must say I was not entirely sure what the submission was, but it did seem to be that it was slightly more than would have been in the arrest warrant and that, in any event, the two shouldn't be read together.

MR BOLDT:

Oh, of course, I totally understand that second point, and I will come to whether dates or material going into that level of detail are ever required in search warrants. Certainly the law in New Zealand to date is that, is that it isn't and, in fact, descriptions of offence provisions in search warrants are generally quite generic. Perhaps not always as generic as we have in this case but generally it simply sets out the type of offence and certainly doesn't go into the detail of names and dates and charges and, in fact, that was one of the challenges in *Rural Timber* which the Court expressly rejected.

Anyway, so, I will address the Court as one of the other issues which is in dispute, on how the search warrant would be read even without the additional information in the arrest warrant. But we certainly agree that there can't be the slightest, there couldn't

have been the slightest question of invalidity if the search warrant had contained the same detail as the arrest warrant.

Now, and this is a submission on facts, but what definitely is not in dispute in this case is that Mr Dotcom who was the occupier of the mansion, and who was there for the person who needed to be shown the warrant and given a copy, read and digested his arrest warrant before he saw the search warrant and that can be found in a number of places in the case on appeal. But, for example, at volume 5 of the case, behind tab 45, we have the evidence of Detective Sergeant Humphries and paragraphs 26 and 27 of that affidavit are particularly important. So the detective sergeant indicated that he met Mr Dotcom at quarter to eight, showed him the original arrest warrant and provided him with a copy. "He read the warrant. I explained that it was issued under the Extradition Act in relation to a variety of charges including conspiracy to commit racketeering, money laundering, and copyright infringement, following an investigation by the FBI. He asked what was meant by the term 'racketeering'. I advised that I understood the equivalent offence in New Zealand is 'participation in an organised criminal group' but that I did not know the specifics of the American charge."

I have to say my friends are critical of Detective Sergeant Humphries for not being able to rattle off a good definition of "racketeering". In fact, he did rattle off a pretty good definition of "racketeering" right there and in terms of equivalents of offending for extradition purposes, the equivalent offence in New Zealand is participation in an organised criminal group, so actually that was a pretty good effort on behalf of the detective. "He asked whether the case would be heard in New Zealand or whether he would extradited to the United States. I advised him that I understood the United States would be applying for his extradition."

And then over the page, "He asked how a warrant for alleged offending in the United States could be valid in New Zealand." This was explained and Mr Dotcom, and this is Detective Sergeant Humphries' evidence, and I note Mr Dotcom doesn't accept this bit, was that, "He commented that we were just doing what the FBI told us to do." And there's a response. Now even Mr Dotcom in his evidence accepts most of that exchange. He accepts that he read the paperwork. He accepts he knew the charges had been laid in the United States. He recalled that there were five counts that had been laid and he remembered asking about racketeering, and that can be

found in volume 6 of the case on appeal, the reference, and that's at pages 889 and 890 of the case, or pages 34 and 35 of the transcript.

McGRATH J:
So if he doesn't address it in an affidavit, he's cross-examined?

MR BOLDT:
Well I can – I'll take you to his affidavit as well Sir, in fact this was the – where he very directly addresses those passages in the detective's affidavit, and so at 889 and this is on page 34, if we see around about line 12 is where it starts, took you through the arrest warrant, and some proceeds as the confiscation order, "Yes I remember him showing me some documents you'll recall there was an arrest warrant that specified five counts laid in the United States, do you recall seeing that?" "Yeah." Then he disputes hearing about extradition. There was a question, "You knew the charges were from, were laid by the agents?" And then Mr Dotcom says, "I also asked," it overlays, and then over the top and at the start of page 35, he says "I also asked them what racketeering is, because I've never heard that before." So we've got there Mr Dotcom expressly acknowledging that he had read and actually had some engagement with the detective regarding the content of this arrest warrant, and what's important about that, is that Mr Dotcom therefore accepts he knew and had been given the very detail that was not in the search warrant and is said to be fatal to the search warrant, immediately before he got the search warrant.

ARNOLD J:
Mr Davison made the point yesterday that this was sometime after the search had begun. Now I'm not entirely clear of the time sequence, because –

WILLIAM YOUNG J:
It took quite a long time to find him I think.

ARNOLD J:
Well that's what I was going to ask. When Mr Dotcom went to the red room, how long is this occurring after he was found there?

MR BOLDT:
The sequence of events Sir, and I agree, he actually wasn't in the red room for terribly long, the police arrived at 6.45 in the morning, the way this operation was

structured and it is, as Your Honours will all be aware, controversial and it's the subject of its own civil proceeding, but the way this operation unfolded was the police did place a premium on getting into the house very quickly, and Your Honours will have seen for example, there were instructions at the gate house telling the guards to delay anytime the police turned up, and so the police went in with their helicopters; They were also concerned there were firearms present at the address as there were, so they used their special tactics group to clear the address and to make it safe for CIB staff to enter and to actually search the property. So the police went in at 6.45, Mr Dotcom went to the red room, he was in police custody however, by 7.00. The delay for the next, and there is an affidavit, I think it's from Detective Sergeant Perry, which deals with the intervening 45 minutes, but basically that period – the search warrant wasn't being executed in the sense that items were being looked for, for the purposes of the criminal inquiry, that was the process of the STG going through the property identifying the targets of the arrest warrants, locating and making safe the firearms. And it was at about – it was between 7.40 and 7.50 that the STG said that the property's clear and safe now, and that was when Detective Sergeant Humphries, who was the officer in charge of the search effectively, was able to enter the property, and that was when he met Mr Dotcom. So it certainly wasn't a case of the police having been already searching the property for evidence pursuant to the warrant, it was a preliminary stage where STG staff were clear. So the first thing Detective Sergeant Humphries did as officer in charge of the search was to go and meet Mr Dotcom and to take him through those documents, but that does account for the 45 minute-odd delay.

So, but this reference to what would have been known by Mr Dotcom even before he received the search warrant, this isn't an attempt as the appellants try to suggest to Your Honours, to say that the terms of the arrest warrants should somehow be incorporated into the search warrants. But it is highly relevant in my respectful submission, if we need to assess whether there has been a miscarriage of justice. It is relevant in my submission that the very information it's said to have invalidated the warrant, or the absence of that information was said to invalidate the warrants, when that very same information had been conveyed to Mr Dotcom and clearly understood moments earlier. And that's why we say if there was a problem with for example, the description of the offences in the search warrant, that was well and truly overcome in terms of there being no miscarriage, by the fact that same very detailed information, which I believe even the appellants accept, would've been sufficient to create a valid

search warrant, was conveyed only moments earlier. And not only conveyed, but clearly understood.

ARNOLD J:
Now that passage in the cross-examination that you took us to, talks about a restraining order –

MR BOLDT:
Yes.

ARNOLD J:
So all of this is happening at the same time? Arrest warrant, search warrant, the restraining order is under what?

MR BOLDT:
That also was issued under the Mutual Assistance in Criminal Matters Act, there was a United States restraining order over a number of household items over for example, Mr Dotcom's fleet of luxury vehicles.

ELIAS CJ:
Is that what the jewellery was taken under?

MR BOLDT:
Yes. Yes, the jewellery wasn't –

ELIAS CJ:
Because it doesn't seem to be within the search warrant?

MR BOLDT:
No, no, no, there's no suggestion that any of that material was taken under the search warrant.

ELIAS CJ:
Unless it's fruits I suppose.

WILLIAM YOUNG J:
Do we have a copy of the restraining order?

MR BOLDT:

No, Your Honour. That hasn't featured as a topic of discussion in this proceeding. The – it has given rise to its own stream of litigation as every sub strand of this case regrettably appears to have, but –

ELIAS CJ:

The only problem with that is, not that we want to get into the details of it, but we are being asked to infer that it was perfectly adequate for him to review these documents and some sense of the scope of what he was being asked to absorb might have been – it might be relevant to that.

MR BOLDT:

Well I accept that point Ma'am. What we can say though with some certainty, and we say it because it came out of Mr Dotcom's own mouth, is that he had absorbed – he read and understood to a point of being able to engage and ask questions about the particular content of the arrest warrant, and that was before the search warrant was even given to him, so he knew, even before he saw the search warrant, the detail of the five charges, and that it was the United States which was involved in laying those charges.

ARNOLD J:

Just one further point of background. We saw a reference to freezing a bank account or business records, bank accounts I think. Was that done under the restraining order, or is that another process as well?

MR BOLDT:

No, the bank accounts were frozen pursuant to the restraining order. What the police were interested in as part of this inquiry though, were the business records for obvious reasons. There was a money laundering charge in the indictment, and so of course any evidence at all about flows of funds or what money there was where, how much money the enterprise had generated over time, was all going to be highly relevant in furtherance of that money laundering charge. So what we had, as I say, was information supplied and in our submission with respect to Mr Dotcom at least, and he is the most important person who needed to understand this because it was his mansion and of course the great bulk of items were seized from him and so we know what he knew and understood. And there was also the passage the Court of Appeal referred to in its judgment which came from Mr Dotcom's own affidavit where

he refers to, “When I passed Mathias Ortmann I said words to the effect of, ‘It’s nothing to worry about, it’s only copyright,’ or words to that effect.” And the – I don’t I think need to take Your Honours to it, Your Honours will have seen that whole exchange as it was reproduced in the Court of Appeal but it indicated that he and Mr Ortmann had an exchange and Mr Dotcom had said, “I was surprised because we’d always been so careful to comply with our obligations,” which also indicates he was thinking about Megaupload, he was thinking look this was a business that was in the business of facilitating the exchange of files, “But we’d always tried,” he said, “To comply with our obligations.”

Now the fourth thing which isn’t in dispute in this case is that these weren’t great search warrants and I don’t shrink from that and it doesn’t give any pleasure to be speaking on behalf of documents which could so easily have been so much better. But it is an illustration Your Honours of how exceptional the course, the appellants are inviting this Court to embark on, is that the number of search warrants in New Zealand, certainly as far as our research is able to uncover, which have been held to be invalid purely because of the way they were written as opposed to the substance underlying the document –

ELIAS CJ:
As to whether they should have been issued?

MR BOLDT:
Indeed, indeed.

ELIAS CJ:
Yes, that’s what you mean by “the substance underlying”?

MR BOLDT:
Yes, the evidence available in the support of the document –

ELIAS CJ:
And do I take it that you, from what you said earlier that your view of miscarriage is that it has to go to whether the warrant should have been issued?

MR BOLDT:

No Ma'am, that's – if the evidential foundation for the warrant is inadequate, if the evidence does not disclose reasonable grounds to believe relevant evidence is likely to be in the address, then you can't have a search warrant – that's – you don't even get off the ground there and there are a number of decisions at the Court of Appeal over the last 20 years – *R v Williams* is a very good recent example which have said, look – and passages were referred to Your Honours by my friends yesterday, the judicial – the act of the judicial officer is not to be regarded as a rubber stamp, it's a real judicial discretion that has to be exercised in every case and if you don't give the judicial officer adequate material to enable him or her to cross that threshold of reasonable grounds to believe then you just don't get a warrant and I remember arguing cases where the police had adequate evidence but just hadn't put it in their warrant application and I remember getting into terrible strife in the Court of Appeal trying to say that that should be all right because the same thing would have happened if all had been well. But I completely agree and accept that unless there's adequate evidence in the warrant application itself, you can't have a valid search warrant. So you don't even get into miscarriage in that scenario, that really is a nullity. The –

WILLIAM YOUNG J:

But it's also a miscarriage because a warrant's been granted that shouldn't have been because as –

MR BOLDT:

Of course.

WILLIAM YOUNG J:

– Sir Robin Cooke said that the issues tend to merge.

MR BOLDT:

Well yes Sir, although in that case I wouldn't even suggest looking at section 204 because you don't even have a document there which is capable of salvation. But the way I describe miscarriage Ma'am and it's not –

ELIAS CJ:

Can you first tell me what, the way you describe invalidity for what you call "expression"?

MR BOLDT:

Well I can, I can – probably the best way I can explain or to –

ELIAS CJ:

Because the miscarriage is simply a saving provision that comes in to sweep up, the threshold question is what form of what you call "expression" is vitiating, subject to the application of there being no miscarriage?

MR BOLDT:

Well the short answer Ma'am is virtually nothing. It is an extreme and exceptional course of action which as best we can tell from our research has pretty much never happened in New Zealand on formal grounds alone.

GLAZEBROOK J:

Sorry, I think I missed the first part of that – you started for me half way through the answer to the question. So what's, what's virtually never happened, I'm sorry?

MR BOLDT:

It is almost unheard of and there are some very rare exceptions which have now been effectively overruled that I can come to but we've been able to find no case where a warrant has been declared invalid purely because of the way it was written as opposed to the underlying substance of the warrant.

GLAZEBROOK J:

So do you – because it's not purely the way it's written if it's misleading or it's – because the way it's written could be misleading, the way it's written could leave out a whole lot of things, the way it's written could make it too wide so that the police are supposedly entitled to search much wider than they would have been entitled to on the underlying information so do you encompass all of those things in your invalidity for expression – what it – so basically do you say that section 204 could be capable of validating anything except where the information given to get the warrant wasn't sufficient, is that the submission, ie, section 204 covers absolutely everything apart from where the evidential foundation for the warrant was missing?

MR BOLDT:

Well no Ma'am because there will definitely be cases where a document is completely unintelligible and unrecognisable as the document it purports to be so there –

GLAZEBROOK J:

Okay.

MR BOLDT:

– might be an absolutely extreme or exceptional case –

ELIAS CJ:

What's the principle though that you're contending, leaving aside for the moment where the case law is, what does the Crown say would – vitiate?

MR BOLDT:

Well Your Honour I think it can be best encapsulated in a very, in the very simple two-step test that I proposed in the written submissions which is first question is, is there an error in the document which is capable of affecting its validity?

ELIAS CJ:

Well that's what I'm asking though, what is capable? Do you have a working sort of suggestion for that?

MR BOLDT:

Well errors can certainly be capable of causing fundamental prejudice and in answer to the examples offered by Her Honour Justice Glazebrook a moment ago where it was put that warrants can appear far to wide on their face, warrants can be too narrow on their face, warrants can be issued for the wrong address – all of those things are capable of, of leading to a problem in the event there is a miscarriage of justice and that's the, that's the test and the standard that the Courts have applied now.

ELIAS CJ:

So that's all that there is, a miscarriage and that's a substantive problem of what, what's the miscarriage?

MR BOLDT:

Well the miscarriage is actual harm or prejudice which accrues to the person against whom the warrant was issued as a result of the error. And I mean a very good example of that would have if in the *Andrews* case the police had gone to the wrong address rather than the right address and had found material. Well obviously you've got a miscarriage.

GLAZEBROOK J:

But there wouldn't have been an evidential foundation then for –

MR BOLDT:

Well true, yes.

GLAZEBROOK J:

– going there so I don't think that is a good example.

MR BOLDT:

No, no, fair point.

GLAZEBROOK J:

But it's maybe a good example as where the wrong address was on the warrant but they went to the right address, ie, there wasn't two – there were two addresses in the warrant so in *Andrews* not without the saving of there being one right address and one wrong?

MR BOLDT:

Yes, yes, well that's a good example. Another good example would be if, because the warrant appeared to be excessive in its breadth –

ELIAS CJ:

Well I think that actually is the area that seems to me to be at the heart of the case, over breadth, and whether because of the capacity for pulling in information that was not relevant, greater care in expression such as a system of conditions should have been imposed.

MR BOLDT:

Well, and that's an issue that we'll come to Your Honour –

ELIAS CJ:

Yes.

MR BOLDT:

And I certainly agree that –

McGRATH J:

Perhaps Mr Boldt perhaps really taking up the Chief Justice's point, another way of putting this, of putting the example might be to say that the warrant failed to specify what it was that it authorised be seized. Just specify that.

MR BOLDT:

Yes Your Honour, that's perhaps a good way of encapsulating it with one reservation, and that is that the warrant, is that our case law as it has evolved over the last 15 years, has consistently held, in fact since at least since *Sanders* and possibly as long ago as *Rural Timber* has held that provided the evidence you seize is likely to be evidence of the crime being investigated, it doesn't matter whether the particular item, or even the type of item was specified in the warrant itself.

ELIAS CJ:

I wonder whether that's a fair way of putting it, because here the question is that it was likely to include relevant material. And the example that I think of, is if there had a warrant, if were just talking about a wholly documentary seizure here, if there had been a warrant to go into the house and seize all papers, that would be over broad. It would have to be all papers relating to something. Now if you had a case where all papers happened to be in German, so that you actually had to try and get them sorted, then is it inconceivable to say that the warrant couldn't have – the warrant would have to confront that, and make provision to protect against over expansive, over inclusion?

MR BOLDT:

Well the warrant itself provides its own inherent limitation, and that is what can be seized is limited to what is likely to be relevant to the offence. Now there is certainly a class of seizure, which is now enshrined in law by section 112 of the Search and Surveillance Act which is the seizure of items of uncertain status, and section 112 provides that where you have an item which you can't tell simply by looking at it

whether it is relevant or not. You're entitled to seize that for examination off site at a later time.

ELIAS CJ:
But under a statutory, protective regime.

MR BOLDT:
Well –

ELIAS CJ:
Isn't there any, I don't know.

WILLIAM YOUNG J:
Mr Boldt can I just ask questions as to how it can be dealt with. Say amongst the items seized was Mr Dotcom's iPhone, and a preliminary search revealed that there were text messages between him and his co-defendants –

MR BOLDT:
Yes.

WILLIAM YOUNG J:
What is the item, which is at it were, legitimately being seized? Is it the cellphone that's got lots of other stuff on it, but which may be necessary to understand the text messages, or when they were sent or where they were received from, or is it just a copy of the text messages?

MR BOLDT:
It's the former Your Honour. And there's been, again this is now clearly enshrined in the Search and Surveillance Act, but was also the law before the Search and Surveillance Act came into force. The particular feature of electronic devices isn't just that they contain information in forms of the form of words and images that might be of relevance. But the analogy is with a book, it's not only the words on the relevant page of the book that are likely to be evidence, but it's –

ELIAS CJ:
Thumbprints.

MR BOLDT:

Yes, indeed exactly, and it's the thumbprints, its where the item is in the book, when it was put there, what is all around it. And that's why the item of forensic value for evidential purposes is either the original item itself or a clone of that item.

WILLIAM YOUNG J:

So with your authority directly, can I take t he point the Chief Justice is working away at, is when the computers seized, there's lots of, there might only be a few messages on it, or something that's inconsequential in terms of volume, but the whole computer with everything else on it, goes into – into this seizure.

GLAZEBROOK J:

Is it really whether the – I would look at it as a diary analogy where you have the whole diary because you do – well for a start you don't really want to be destroying items, but secondly, you need to know where the diary entry is or is it a filing cabinet? If it's a filing cabinet you do want to know where in the filing cabinet the material was found in relation to other things around it, but you only want that information and the documents, so if you were searching that you might take a photograph of where the thing was found and maybe any timings that can be inferred from that in terms of where it's stacked.

MR BOLDT:

Indeed. In fact there have been a number of arguments in other jurisdictions, and also to an extent in New Zealand about which is the correct analogy. Is it to be regarded as a thing in and of itself, or is it to be regarded as a filing cabinet from which things are able to be extracted. In fact we put quite a wealth of authority on this point before the Court of Appeal when we were arguing about the export of the clones, which regrettably I haven't reproduced in the bundle for Your Honours, but what I might do over the lunch –

ELIAS CJ:

Well it's both isn't it? I mean you just have to establish relevance. But there will be irrelevant material and some indication of the proof of that, is how many of the vices have been returned in this case.

MR BOLDT:

Of course.

WILLIAM YOUNG J:
Note the device, that's where the tangible thing had nothing that's relevant on it.

MR BOLDT:
That's right. The way that the sifting process was undertaken was the devices were all screened for some relevant evidence, and that was consistent with the order Her Honour Justice Winkelmann made in the High Court. Her Honour declined to order what she described as a granular sifting of relevant from irrelevant material within individual devices. But rather directed, and of course this is a process that would always have been undertaken anyway, that the devices be checked to see whether there was any relevant material on them, with those for which there was no relevant material being returned. And that's entirely consistent too, with the way the law is now, under the –

ELIAS CJ:
Just pausing on that point. That was a system set up by the Court under the supervision of the Court. You say it would've happened anyway. But if you're talking about an intrusive Court ordered – Court order, is it not appropriate in these very difficult cases for the Court to retain some message of oversight?

MR BOLDT:
Well –

ELIAS CJ:
Because the Court of Appeal has said, "No".

MR BOLDT:
Yes.

ELIAS CJ:
And maybe that's not very sophisticated today.

MR BOLDT:
The reason the Court of Appeal said, "No" in this case Ma'am, is because the Mutual Assistance from Criminal Matters Act is – this is one of the few respects in which it is different from all other search and seizure regimes in force in New Zealand at the

moment, in the Search and Surveillance Act itself there's a reasonably detailed and prescriptive set of provisions which govern what becomes of items when they are seized. And that includes for example, a provision that any item that contains any relevant material can be retained and police may search within it without there being any legal difficulty, so the analogy is definitely the diary analogy whereby you just need a little bit of relevant material in order to make the entire device able to be retained and for there to be a search within it. And that's section 161 of the Search and Surveillance –

ELIAS CJ:
But not a seizure of irrelevant material within it surely?

MR BOLDT:
No. Once it's established there is no relevant material within it.

ELIAS CJ:
Once there is established there is something that is irrelevant, surely the police are not entitled to retain or use, it's probably more use, that?

MR BOLDT:
They in fact are Ma'am. That's the –

ELIAS CJ:
Is that so.

MR BOLDT:
That's the law as it stands now.

McGRATH J:
Mr Boldt can I just put it to you, I haven't taken aboard section 161 in terms of you saying – are you really saying that the regime doesn't – the MACMA regime doesn't contemplate there will be sifting of relevance from irrelevance in the context of a case like the present, before the warrant is executed? It's contemplating that that will be done after the warrant is executed.

MR BOLDT:
Correct. The point I was coming to –

McGRATH J:

So that would mean no protocols for conditions or the rest of it, for the Court to supervise ex ante as I gather they call it in Canada, and it would be done after the event?

MR BOLDT:

That's right Your Honour, and that is in the Mutual Assistance regime, entirely the province of the Attorney-General. What I was coming on to say was that this very detailed regime of provisions which govern how items which are seized pursuant to domestic warrant should be dealt with, which is prescribed by the series of rules and also mechanisms for judicial oversight. None of those provisions apply in the Mutual Assistance context. Some part –

GLAZEBROOK J:

What about the ability to attach conditions, is that just an empty ability under the MACMA Act?

MR BOLDT:

It's not an empty ability at all Ma'am.

GLAZEBROOK J:

What conditions would you impose then that don't encroach on the Attorney-General. In the Crown submission the sole right of the Attorney-General.

MR BOLDT:

In the Crown submission that is –

GLAZEBROOK J:

Maybe you're getting to it later, I'm sorry I probably anticipated.

MR BOLDT:

Well no, no, I'm happy to deal with it now Your Honour, it's certainly our submission that we're – the Act expressly provides that the determination of how seized items should be treated, is within the sole province of the Attorney-General, it would be inappropriate for the Court to intrude into that process by imposing pre-emptive conditions because that then cuts entirely across a discretion which has been quite deliberately vested entirely in the Attorney-General.

WILLIAM YOUNG J:
It is subject to review of course.

MR BOLDT:
Of course.

ELIAS CJ:
Relevance –

McGRATH J:
When you're talking about pre-emptive conditions, are you saying before the Attorney acts or before the search is executed?

MR BOLDT:
Well the answer is both Sir, because the –

McGRATH J:
Just in terms of then before the Attorney acts, the Courts must be able, and I think is what perhaps you have just conceived with Justice Young to restrain the Attorney from permitting the exports of material that is irrelevant which was unlawfully being sent overseas.

MR BOLDT:
I think if the – well I don't want to talk about situations in which judicial reviews of the Attorney's directions might succeed, that's going to turn on the facts of every case. The Attorney on its face at least, is given the power to make all manner of determinations regarding what should occur with seized items. All subject to review, as any other statutory power of decision is.

GLAZEBROOK J:
Yes, but often when the horse has bolted, one would've thought if there's absolutely no power to set conditions, because if the material goes immediately, then it's gone hasn't it, out of the jurisdiction? So the judicial review power that you say happens afterwards, is not overly useful is it?

MR BOLDT:

Well if we if we had a capricious Attorney who was making decisions of this kind without giving any sort of notice to the other parties involved, and who didn't act with any regard to the interests of the person from whom items had been seized, then that's a possibility, but I –

GLAZEBROOK J:

Although the police position in this case was that that was actually perfectly able to be done wasn't it?

MR BOLDT:

Well the police –

GLAZEBROOK J:

So no notice was actually given, apart from that very brief indication, the voluminous material that we were sent to, the intention was that this material go immediately.

MR BOLDT:

Well the police certainly anticipated that that would happen, but in fact the matter never reached the Attorney-General for a decision. What happened in this case was that within the statutory 30 days, the Attorney-General made another direction, because already there were concerns being expressed on behalf of the appellants that they might need access to their material. The Attorney-General effectively put a hold on things and said, "All right we're now going to enter into a discussion with a view to facilitating access for you to your devices" and there was then a lengthy period of negotiation between the parties where the parties sought to come to an agreement that would achieve the very things that are under discussion here. And this is a very good example of the Attorney acting in the way the Court of Appeal indicated quite rightly the Attorney should act, and that is in the public interest, but balancing the rights of the person from whom devices and other evidence is seized with the rights of the requesting State. It's an executive – it's something which is in the executive sphere particularly given it involves relations with other countries. But we can, I hope, rely on an independent law officer who has given this discretion, to do so with appropriate regard to the competing rights of everyone. It is telling –

GLAZEBROOK J:

But the Courts are complicit in that, aren't they, because they're required to give the search warrant and yet with absolutely no control, having been complicit in that. You say apart from judicial review afterwards, which may or may not give any decent remedy to somebody where the items have already gone?

MR BOLDT:

What I can say, and I'll certainly – I said this in the Court of Appeal and I'm happy for this to be recorded as the official position of the New Zealand Central Authority in this area, and that is the New Zealand Attorney-General would never issue a section 49 direction over items allowing them to be exported to another country without imposing a condition under section 29 of the Mutual Assistance in Criminal Matters Act, and section 29 provides that assistance can be given on the basis of conditions without imposing a condition that any items found to be irrelevant to the overseas criminal investigation are returned. That's always been the position of the New Zealand –

ELIAS CJ:

What about access?

MR BOLDT:

In terms of receiving copies?

GLAZEBROOK J:

Yes.

MR BOLDT:

Well it harks back to part of the discussion between Your Honours and my friends yesterday, is this a mechanism by which the appellants are seeing to secure criminal discovery at an early stage. In some cases it may be appropriate for cloned copies –

ELIAS CJ:

It's not discovery, it's their property.

MR BOLDT:

Well, again if we hark back to what's in the Search and Surveillance Act, the –

ELIAS CJ:

I really think we should address it as a matter of principle, on the state of the law as it existed. I mean maybe we have to look at it as a cross-check, but I don't think you can go there straight away.

GLAZEBROOK J:

The Search and Surveillance Act, not give access, but of course it's related to criminal discovery, the criminal discovery provisions and presumably just some common sense in terms of allowing people to carry on their businesses and matters of that kind.

MR BOLDT:

Of course.

WILLIAM YOUNG J:

Well there are two things aren't there? A, is criminal discovery, which I guess doesn't apply.

GLAZEBROOK J:

Well not in this circumstance, I'm sorry –

WILLIAM YOUNG J:

And B, letting someone carry on their own business with their own records.

MR BOLDT:

Of course. And –

WILLIAM YOUNG J:

And particularly if they're irrelevant to the prosecution.

MR BOLDT:

We can address that as a matter of principle first and the principle is that in some cases yes it will be appropriate for people to have cloned copies of their material. In other cases where there is material that it would not be appropriate to have handed back because it contains objectionable material, it contains access to perhaps overseas funds but it contains material that it wouldn't be appropriate to return, then cloned copies in that situation shouldn't be provided and that it's going to be a matter

of discretion in each case. That also can be the subject of conditions under section 29 of the Mutual Assistance Act. But what happened in this case, and again this is illustrative of had our Attorney-General simply done what the Americans wanted and shipped material directly to them –

ELIAS CJ:
The police did.

MR BOLDT:
Well we can come to that as well as well –

ELIAS CJ:
Well we probably don't need to come to it.

MR BOLDT:
No, but the original items all remain in New Zealand because the Attorney-General has directed that that should occur.

GLAZEBROOK J:
And of course one of the reasons for that is that it was relevant to the actual hearing that we have here in New Zealand, proceedings one assumes?

MR BOLDT:
No, that wasn't the reason particularly. Certainly from the –

GLAZEBROOK J:
I thought that's what you said that because they said they needed access for the extradition hearing the Attorney put a hold on things, sorry did I mishear that?

MR BOLDT:
No I suppose what I've potentially confused is that we maintain, much for the very reasons this Court gave in the first Dotcom case, that provision of detailed records for –

GLAZEBROOK J:
No, no I wasn't suggesting – I wasn't revisiting that.

ELIAS CJ:

When was that decision taken, that the originals had to be retained in New Zealand, was it before proceedings were issued?

MR BOLDT:

Yes.

ELIAS CJ:

Yes, thank you.

MR BOLDT:

It was taken on about the 19th or 20th of February 2012.

ELIAS CJ:

Because that's in the chronology?

MR BOLDT:

That is, it's actually in the first volume of the case on appeal as well, it's a letter from the Solicitor-General on behalf of the Attorney –

ELIAS CJ:

Yes we have seen that.

MR BOLDT:

– saying we, I direct that the items seized remain under the custody and control of the Commissioner of Police under further notice, in effect.

WILLIAM YOUNG J:

It's unlikely that the Attorney-General would act without giving people adversely affected an opportunity to be heard.

MR BOLDT:

Exactly, exactly and that's exactly what happened here. I mean had there been this desire simply to bundle it all up and ship it to the United States, that could have occurred but that was never going to occur here and there was then a process of negotiation which is outlined in the first decision of Her Honour Justice Winkelmann as part of the background to the dispute regarding the export of the clones where the

parties spent several weeks trying to come to the terms of an agreement by which cloned copies of the 19-odd devices which were likely to be the most rich in evidence could be returned to them. And that was the whole purpose of the FBI agents coming to New Zealand, that was why they made two sets of clones one of which, we now know unlawfully, they took away with them to the United States but the original devices remain here and the second set of clones has always remained here too and it was created only with one thing in mind and that was for the respondents to have access to it. Now it's taken a tragically long time for that access to actually be effected but there have been reasons for that and those were canvassed briefly yesterday but they, they centre on the provision of passwords for encryption codes. What I can say is that the appellant Mr Batato whose device wasn't encrypted at all received his clone last year. Messrs Ortmann and Van der Kolk have relatively recently, that is in the last couple of months, provided passwords to their devices and they now have their clones too. So the only devices among that initial 19 that remain outstanding are Mr Dotcom's and that's because we still have no passwords for the large encrypted portions of that.

ELIAS CJ:
Mr Boldt –

ARNOLD J:
It said that the Court either cannot or should not impose conditions under section 45(3) but might cut across the Attorney's discretion –

MR BOLDT:
Mmm.

ARNOLD J:
– to deal with the seized material after seizure, what then, what sort of conditions do you say section 45(3) envisages?

MR BOLDT:
Well as I say, that provision, that statutory provision in section 45 is, was a common one which was being inserted into statutes including many with an entirely domestic focus at around about the same time the Mutual Assistance Act was enacted in 1992 and it, it was just the way warrants were drafted then and it certainly didn't have a particular overseas focus to it, that section about conditions, but the sorts of

conditions were warrant, the sorts of conditions that have been envisaged are things like what time the warrant should be executed, any particular conditions associated with the manner in which the warrant is executed that might be relevant in the circumstances perhaps.

WILLIAM YOUNG J:
With privileged material is that stuff separately dealt with somewhere?

MR BOLDT:
Well – and that's another good example Sir of what under the, under the old regime might have, might have required conditions, although there's been concern expressed first by the Law Commission and later in the way the Search and Surveillance Act was enacted to avoid future cases where warrants are held invalid due to an absence of conditions. The outcome in cases where you had the Court retrospectively, you know sometimes many years later saying well this condition and this condition and this condition should have been imposed was regarded as an invitation to challenges and to Courts later on second guessing the judicial officer who issued the warrant. The Law Commission recommended that there be first of all a statutory code which governed privileged material and that's now been enacted, that there also should be provision to impose conditions where other confidential type material may be disgorged but the Law Commission went on to recommend that the absence of such conditions should not be a ground for challenge to the warrant, and I've set out in my written submissions the references to the Law Commission's recommendations in that regard. And what's –

GLAZEBROOK J:
So what does happen, well I'm not sure that it really matters what happens under the Search and Surveillance Act it seems.

MR BOLDT:
No and the Search and Surveillance Act itself provides for conditions to be able to be attached but they are of a very bald generic nature such as what time the warrant should be executed and notably in spite of the fact we have again in entirely broad discretion vested in the Attorney-General in terms of how seized items should be disposed of, the Search and Surveillance Act makes no special provision for conditions in Mutual Assistance cases. The provision for conditions in the Search

and Surveillance Act which is in, I think, section 103 of the Act is entirely standard across all New Zealand warrants and –

ELIAS CJ:
Sorry which – 103 of the MACMA Act?

MR BOLDT:
No, this is – of the Search and Surveillance Act Ma'am. At section 103(3)(b) it says and it says, "Subject to any conditions specified in the warrant that the issuing officer considers reasonable, including without limitation, any restriction on the time of the execution that's reasonable, a condition that the occupier or the person in charge must provide reasonable assistance," so the conditions can actually make the warrant more onerous than it might otherwise be. And also there can be – well those are the two examples that are provided and so although it's a broad power and no doubt my friends would say well that doesn't exclude highly prescriptive conditions for how items seized pursuant to a Mutual Assistance warrant should be treated, it's my respectful submission that conditions really do need to take their colour from the fairly bland and generic examples that are provided there. And that's especially where section 49(2) of the Act creates a very broad discretion for the Attorney-General which says, quite expressly, the Attorney-General may choose to send items overseas, it isn't obliged to but may and therefore that's a decision which is vested in the Attorney-General and it wouldn't be appropriate for an issuing officer to usurp a function that has very clearly and deliberately been left in the hands of a law officer.

ELIAS CJ:
Mr Boldt –

McGRATH J:
You take them slowly –

ELIAS CJ:
Sorry you go. But I would like to –

McGRATH J:
If you take that position you're really forcing the Court if it feels there's a need to protect privacy ownership of information to act before the warrant is issued to impose

conditions. You're really saying it cannot be done afterwards because the Attorney-General's powers cover the ground. Now you're then forcing and I'm really putting aside the Search and Surveillance Act at the moment –

MR BOLDT:
Sure.

McGRATH J:
– I have some attraction from the Canadian authority, which I hope you'll come to in *Vu* which is saying well the Court's got to be hesitant before it starts imposing protocols in this area. It's better that this is done later. But it seems to me the argument you're developing prevents the Court from preventing rights of property and privacy later, and if that's so then suddenly the power of the Courts to exercise protective functions before the warrant is issued suddenly seems more attractive.

MR BOLDT:
Well I don't, first of all I can see why Your Honour might express some disquiet about that because what we do have in section 49, quite unusually in a regime of this sort, is a power which is vested in the executive exclusively.

ELIAS CJ:
And as you say, is to be exercised in part for reasons of comity.

MR BOLDT:
Which is to be exercised in part for reasons of comity but it does create a quasi-judicial role for the Attorney-General in this situation and the Attorney-General's role is, as has already been determined, subject to review. It must, the decisions have to be taken impartially, they have to be taken not only in the interests of the requesting country but the interests of the person whose property –

ELIAS CJ:
I really wonder whether you want to advance the argument that it's a quasi-judicial role because that certainly ramps up the level of judicial review.

MR BOLDT:
Well, Your Honour, it's –

WILLIAM YOUNG J:

Pretty intense, anyway –

ELIAS CJ:

Not particularly.

WILLIAM YOUNG J:

– because it's all based on the Bill of Rights Act.

MR BOLDT:

It is Sir –

WILLIAM YOUNG J:

Would the Court give a margin of appreciation to the Attorney-General if, of the view that what was being done was unreasonable or didn't balance, was inappropriate under the Bill of Rights Act?

ELIAS CJ:

It depends what is relevant to the question of reasonableness and if that has all been – anyway.

MR BOLDT:

It does depend entirely but it also, as Your Honour says, takes into account the executive's role as Central Authority in maintaining relationships and partnerships with other jurisdictions and that's one of the critical features of the Mutual Assistance Act which is why these decisions are probably vested in the executive, albeit it acting in a, in the public interest and with proper regard to the rights of those whose property is seized and we have seen, with respect, a good example. There can't be any criticism, and I don't believe there is any criticism here, of the way the Attorney-General has exercised his discretion under section 49 in the present case. The appellants were, I'm sure, very pleased with, effectively, the stop order that was issued in the middle of February 2012 and subsequently all the section 49 directions that had been undertaken have been undertaken in consultation with the appellants and have been directed to putting in effect the orders made in the High Court.

ELIAS CJ:

I'd like to take you back to – on this question of ex ante or post, to the statute the MACMA, because there's nothing in that that authorises search warrants for other than relevant material is there?

MR BOLDT:

No. Well perhaps if you develop that question Ma'am because –

ELIAS CJ:

No, well if you look at, if you look at section 43, it's that thing, and that thing goes back, I think it's 43 isn't it? Oh 44, for warrants, but 43's the same, it's got to be relevant. 44, "May issue a search warrant in respect of that thing."

WILLIAM YOUNG J:

It depends on whether that thing is the iPhone or it's -

ELIAS CJ:

Entirely accepting that, although I thought we had got to the point where we've accepted that with these devices it's both, and we have to – we have to understand I think that world. But if therefore the Act requires – it requires relevance, it's really the Courts that have permitted, for reasons of practicality, seizure of material which could contain matters of relevance to take off site for searching. That's all judicially created, it's not in the statute, so why is it not in a case where it is inevitable that there will be irrelevant material, why is not part of the responsibility in issuing the warrant. I mean you can describe it as conditions, but it's really a necessary part of the scope of what is being authorised here.

MR BOLDT:

Well I accept Your Honour that that is always a necessary exercise to be conducted. The issue that arose initially in this case.

ELIAS CJ:

No, but whose responsibility to supervise is it? Because on the basis I'm putting to you, it could easily be quite validly the responsibility of the Court.

MR BOLDT:

Well in my respectful submission Ma'am it's the responsibility of the Attorney-General as Central Authority, and the reason for that is while I absolutely accept, and I can say this is not just me accepting this, the New Zealand Central Authority unhesitatingly accepts that where you have items of uncertain status which are seized, they need to be reviewed for relevance.

ELIAS CJ:

Well I'm talking more generally. I'm talking but if pre the Search and Surveillance Act, I'm concerned also about the domestic position. The Courts have been as Justice Glazebrook said, complicit in a practical solution. Why is it not part of that practical solution that the Courts set up a safe system, which ensures that there's not over-reach?

MR BOLDT:

Well in the non neutral assistance context, that simply hasn't been necessary in my understanding in any of the cases, if it proved necessary then there might need to be recourse –

GLAZEBROOK J:

Well it wasn't – it was *A Firm of Solicitors* necessary.

MR BOLDT:

Yes of courses Your Honour, but that was in an entirely different context where there was a particular statutory provision regarding, nothing in the Serious Fraud Office Act 1960, allowing the uplifting of privileged material.

GLAZEBROOK J:

Well I doubt it was – well it may have been, but that would've been the position no matter what, and the position would've been exactly the same in respect of the myriads of files that were at issue and that to do with somebody's family trust or their conveyancing transaction that had absolutely nothing whatsoever to do with the thing being investigated, so I don't think you can put it back on the statute.

MR BOLDT:

Well Your Honour, the way in practice this has worked has created very few problems even in the years leading up to the Search and Surveillance Act where it

now has statutory approval. The case of *Gill* is a very good example of that where it was necessary in that case to seize a huge range of material, a lot of which was always going to be irrelevant to the investigation. And where what happened was, it was taken away and it was sifted and the irrelevant material was returned.

ELIAS CJ:
We're being asked to consider whether really that's good enough.

MR BOLDT:
Well it's difficult now Ma'am to issue a prospect of judgment in this area, given the whole regime is now covered by the Search and Surveillance Act.

ELIAS CJ:
Except in this sort of case?

MR BOLDT:
Yes, well it's true –

WILLIAM YOUNG J:
Is this covered by the Search and Surveillance Act now, MACMA?

MR BOLDT:
MACMA is covered by the Search and Surveillance Act except in terms of how seized items are dealt with. And that's the critical thing, because whereas there is a statutory regime that governs domestic warrants, there's been a clear and deliberate statutory choice to leave Mutual Assistance warrants under the control of the Attorney-General or the way that items seized pursuant to the mutual assistance warrants, should be treated under the control of the Attorney-General. And Your Honours I've just noticed we've hit 11.30 would that –

ELIAS CJ:
If the Attorney-General can be reviewed for decisions he makes affecting material that is arguably irrelevant, why should the Court not also be concerned about relevance in granting warrants? They seem to be mirror images of each other really. Unless you take a very absolutist view that the Court is only a cipher in terms of matters of relevance in the warrant.

MR BOLDT:

Well I think the answer to that is quite a complicated one, because it involves drawing a distinction between the threshold that needs to be reached for a warrant to be issued, which is the presence of particular items that there are reasonable grounds to think will be relevant, and what may then be seized, because the Courts have held you're not just then restricted to the few relevant items that might have given rise to the warrant in the first place, but rather as long as there is reasonable evidence, or reasonable grounds to believe they can be evidence of the underlying crime, then they may also be seized. So a power which says you're entitled to go in and seize items likely to be relevant to the offending, including but not limited to the following things, is actually an honest and clear articulation of the search power as it stands, both in the statute and under the cases.

ELIAS CJ:

Well it's really under the cases, because the statute is strictly limited to what is relevant.

MR BOLDT:

Well yes Ma'am, except, and Your Honour may recall some decisions of the Court of Appeal under section 198(5) of the Summary Proceedings Act, which is the provision which says that a warrant authorises searches to search for an seize anything referred to in section 198,(1) which means evidence that the offence has been committed, items that upon which it may have been committed elsewhere, and there's a clear equivalent of that in the Mutual Assistance legislation in section 46(1)(d), which provides, "That subject to conditions, every warrant issued under section 44 shall authorise the constable executing the warrant to search for and seize anything referred to in section 44(1) and that is anything which there are reasonable grounds for believing will be evidence as to the commission of the offence."

WILLIAM YOUNG J:

So it doesn't have to be specified in the schedule?

MR BOLDT:

Correct. In the end –

GLAZEBROOK J:

That's not a – nobody's suggesting that does have to happen, that we're talking about matters that aren't relevant. Of course you can seize things that are relevant that you find in a legitimate search, and in fact you can under the old law, I'm sure what they did the Search and Surveillance, take things that are relevant to another crime that you find. I'm not sure under MACMA however because of course you're only doing the particular crime that there is a Mutual Assistance for, so.

McGRATH J:

It seems to me that the MACMA Act brings this complication that it sets out certain functions of the judicial, that the judicial officer undertakes. And then when those functions end, the executive Government undertakes. Sure it's the Attorney-General, sure it brings Attorney-General values, but the executive Government's taking over. Now we have to draw the line in terms of what the Act means as to where the judicial functions end in this area. And we have to draw the line on the basis that ensures that the proper balancing that's envisaged when a search warrant is issued between law enforcement and privacy interests, and property interests, is properly, is not interfered with.

MR BOLDT:

Yes. I suppose my only answer to that Sir is that lets imagine instead of saying, "The Attorney-General" in section 49, it said, "The District Court." Well there'd be no concern there that the function had improperly passed out of the hands of the judiciary, but what Parliament has decided …

ELIAS CJ:

What's the function being exercised at that stage? Because the intrusion has already occurred. That phase is over. It's only use you're talking about at that stage.

MR BOLDT:

That's right Ma'am, and I understood that to be His Honour Justice McGrath's point about what happens next? What happens to the items that have been seized under the Mutual Assistance warrant? And the answer is that although in domestic contexts, there is a regime for that to be dealt with by the Courts. There has been a very clear and recently reaffirmed Parliamentary decision that this is a matter for the Attorney-General to be exercised in the public interest.

ELIAS CJ:

But that's about things that are properly seized. I want to put to you things that are properly seized are for the Attorney-General to decide the use of. The question for the Court in granting a warrant is what should properly be seized.

MR BOLDT:

Yes.

ELIAS CJ:

And if that cannot be sorted on site, why doesn't the responsibility of the Court in authorising the search and seizure extend to ensuring that what is retained is only what is relevant?

MR BOLDT:

Well I think the answer to that is two-fold. The first is, because Parliament has entrusted that task to the Attorney-General but secondly because we can rely on the Attorney-General to exercise that function appropriately and with proper regard to the rights of the people whose property has been seized, as we have seen in the present case, and that's the – it is an officer of the executive Government but it's an offer of the executive Government acting impartially and in the public interest with regard to the interests of those whose property has been seized, together with the interests of the country who has made the request in the first place. That's the regime Parliament has chosen to create and that's the trust that's been reposed in the Attorney-General. Not, at least in my submission today, in a way that has caused any difficulties. Indeed this is the first case out of many, many Mutual Assistance warrants where there has even been a suggestion that conditions were required to ensure compliance with section 49. The reason for that is because section 49 has always worked well and has always been exercised properly. It is, I appreciate the level of discomfort on the part of the judiciary that's seeing a decision of this nature, and which is an important decision, taken outside the compass of the Courts and placed in the hands of an executive officer but that, for good reason, is a decision that the legislature has taken.

GLAZEBROOK J:

But isn't the decision that the Attorney-General decides what happens to relevant material that's been properly searched.

MR BOLDT:

Well what –

GLAZEBROOK J:

Rather than – that's what the Chief Justice is putting to you – actually, I'm sorry, we're probably going over it.

MR BOLDT:

Is it all right, I'll do my best to answer Your Honour's question and then maybe we can take the break and I'll come back and have another go if I need to. The answer is that an item is properly seized if it is properly uplifted from the property whether to be, whether for sifting or whether for evidential purposes. There will be cases, and I don't shrink from this, where that sifting exercise can take place more efficiently overseas for ironically the very reasons described by my learned friends yesterday, and that is that the overseas investigators will have a far better idea of what is relevant than officers in New Zealand, and provided there is always then a mechanism for irrelevant material to be returned promptly, that's a far better and more efficient system than one which requires the New Zealand Police, which may have nothing like the familiarity with the case, and may not be able to achieve that task anywhere near as accurately or quickly, it would be inappropriate, in my respectful submission, to force that role on the New Zealand Police when they are really stepping into the shoes of overseas investigators who know all the detail.

ELIAS CJ:

Of course that could be accommodated by order of the Court. Anyway, I think we'll take the break now for 15 minutes.

COURT ADJOURNS: 11.40 AM
COURT RESUMES: 11.58 AM

MR BOLDT:

Now Your Honours I'll briefly conclude the topic we were discussing before the break and then I'll move on. Section 29 of the Mutual Assistance Act provides that assistance under this part maybe provided to a requesting country, subject to such conditions as the Attorney-General determines in any particular case or class of case and that's an important provision, not only in terms of it being a safeguard for those whose property is seized in New Zealand, and who therefore have an interest in the

way it is dealt with overseas, but it's also going to be a significantly more effective provision in terms of ensuring compliance in the foreign country than the suggestion that maybe these are conditions that should be imposed by the Courts, because the Court is not the entity the foreign country has the relationship with. These are matters of comity. This is –

WILLIAM YOUNG J:
Can I just ask you something? What's the status of the United States? Is it just a designated country or is there a convention underlying it?

MR BOLDT:
No, in the United States is just another foreign country who can make requests to New Zealand under the Mutual Assistance regime.

WILLIAM YOUNG J:
But is there an underlying convention that gives effect –

MR BOLDT:
I don't believe there is now, Sir. The Act is all encompassing in terms of requests to or from any jurisdiction.

WILLIAM YOUNG J:
But was there some treaty or Mutual Assistance agreement that the Act, as it were, gives effect to?

MR BOLDT:
I would need to check that Sir. I don't believe so but I'll make a point of checking that over the luncheon adjournment.

WILLIAM YOUNG J:
Thank you.

MR BOLDT:
But it is a Government to Government relationship and it is an inevitable incident of comity that if the New Zealand Central Authority says to a foreign central authority, "We are providing you with this assistance but only pursuant to the following conditions," then in the way of matters diplomatic there is a clear expectation then

that that will be observed, and that's the mechanism by which these things are safeguarded in a way that orders of the Court can't be. This is an incident of inter-governmental relationships and that's one of the reasons why, in my respectful submission, this is a discretion which has been reposed in the Attorney-General Central Authority as the entity which has the relationship with the foreign jurisdiction. It's also worth noting, Your Honours, that –

ELIAS CJ:

Well I mean there are limits to that though because otherwise there'd be no need to obtain a warrant. So, I mean what we're looking at is what's the difference between what the Court is authorising and what the Attorney can do with properly obtained fruits of a search warrant?

MR BOLDT:

Well, and I apprehend that the particular area of concern covers this material where there's perhaps some doubt as to whether it is properly obtained –

ELIAS CJ:

Where the sorting has to be –

MR BOLDT:

Yes.

ELIAS CJ:

– out, off the premises, which the Courts have permitted, and that's all case law required, whether that keeps it within the purview of the warrant and the Court's responsibility, rather than passing it on for the separate responsibilities which the Attorney is exercising under section 49, which is a custody and disposal of things seized appropriately.

MR BOLDT:

Well, Your Honour, there is no impropriety associated with seizing items for examination later. That's an inevitable incident of a large scale search, it happens all the time, and I appreciate Your Honour's concern that by saying it should be for the Attorney-General to decide this, and I fully appreciate judicial concern and reluctance to hand that responsibility to the executive rather than to keep it within the judiciary, but –

McGRATH J:

It's not really our reluctance as you put it. It's really what the Act, where the Act draws the line, given that the Act does give a power to impose conditions before as to the manner in which the warrant is executed and what is sorted out finally –

MR BOLDT:

Of course.

McGRATH J:

– lawfully seized material.

MR BOLDT:

Yes and –

McGRATH J:

And to be passed to the Commissioner of Police.

MR BOLDT:

But these are areas where, with the exception of the legal professional privilege issue as it arose in the *Firm of Solicitors* case, the Courts have resisted any suggestion there should be conditions. There was, for example, a similar submission made in the *Gill* case. It was suggested there should have been a far more heavily –

McGRATH J:

But it's easy in the domestic context because the Court has power in the end to refuse to admit evidence and that it has abilities to do justice after the event. It's more difficult in a Mutual Assistance context and as I say it's a matter of where the Act draws the lines to – certainly Parliament clearly wanted judicial functions, international agreements the treaties contemplate, there will be judicial functions exercised and only at a certain point does the executive Government take over and deal internationally in terms of the treaty with the other party.

MR BOLDT:

Yes the corollary though of Your Honour's proposition is that this sorting exercise would always have to be done in New Zealand it appears.

McGRATH J:

Not necessarily. That's not what the Chief Justice put to you. Another possibility would be that the Courts would consider, perhaps before the warrant was issued, perhaps after if that can be done, it may not be able to be done, whether, because of the particular circumstances, the material had to go overseas because there was no proper capacity in New Zealand to do the sifting.

MR BOLDT:

And, of course, that's the exact exercise the Attorney-General undertakes as part of that independent law officer function under section 49(2). It's simply the question of who makes that decision.

ELIAS CJ:

Well there's nothing in the Act that says that the Attorney is brought into a sifting process for what is properly seized because relevant. All of that arises out of the Courts acceptance for practical reasons, that there will have to be some sort of sifting off site. Now it maybe, and you shouldn't be under any misapprehension, but I will need to be convinced that the Courts have really dealt with the matter adequately, even in a pre-existing domestic setting, because it maybe that it's a little bit sloppy to just leave it against dealing with it in terms of admissibility downstream.

MR BOLDT:

Well, there was careful consideration given to the role of conditions in search warrants by the Law Commission in the lead up to the Search and Surveillance Act and the Law Commission echoed the discomfort that the Court of Appeal had expressed on a number of occasions with challenges to warrants based on the absence of conditions on the basis, generally, that either the common law, albeit it now codified, in terms of cases such as *Gill* where large quantities –

ELIAS CJ:

There are very few cases really and one of the things that's striking is that they don't seem to be paralleled in other jurisdictions.

MR BOLDT:

Well I mean another – there is to a certain extent, so for example that's exactly what happened in the *Church of Scientology* case in Canada.

ELIAS CJ:

Yes.

MR BOLDT:

There were two million documents seized of which in the end around about half a million were returned once it was determined that they weren't relevant. The complaint in that case was this wasn't a search and seizure, it was a seizure and search, and the Court said, well, that's an inevitable incident of a search of this magnitude and in any event if there was over-seizure, that's a separate downstream matter which can be pursued by way of a separate proceeding. It can't retrospectively invalidate the warrant. And that's very much the way the Court approached the matter in *Gill* as well and it's now, as I say, enshrined in the Search and Surveillance Act and so it's not an – it is a normal incident, we would say, of the execution of a warrant where large scale seizure is likely to result. It's not a special case that requires special conditions, particularly, as I say, because we have a mechanism which is designed to build an appropriate case by case flexibility in the form of section 49(2), because the exact exercise Your Honours proposed for what the Court would say after a seizure, and which is, well, okay now let's have a look at what we've got, how much is seized, how complex is this inquiry, how easy would it be for this to be done on shore, is it necessary for it to be done offshore. All of that is an exercise the Attorney-General, as a person in whom that power reposes, is going to undertake when making a decision.

WILLIAM YOUNG J:

Can I just ask you, we talk about a sifting exercise but there really have to be two sifting exercises, don't there? Has this device got something on it that's relevant? If not, it goes back, and presumably that's been done now.

MR BOLDT:

Yes.

WILLIAM YOUNG J:

The second sifting exercise, which is of more uncertain legal effect or significance, is how much stuff on this device is relevant to the case. Now it maybe that if there's any stuff on the device that's relevant then the device remains relevantly seized and the sifting process is purely of forensic significance in terms of the way the case is

developed. Would you accept that if a device has been seized, had some material on it that's relevant, that device must be given back?

MR BOLDT:
Has some –

WILLIAM YOUNG J:
Has some relevant material on it. Emails, text messages.

MR BOLDT:
Well the answer, Sir, is it depends. It may very well be. There maybe –

WILLIAM YOUNG J:
It maybe able to be given back because the material can be looked at in isolation.

MR BOLDT:
Sorry, Sir, you say the – does the entire device need to go?

WILLIAM YOUNG J:
Yes.

MR BOLDT:
The answer, at least now under the Search and Surveillance Act is no. The entire device is retained and it is in the discretion of the seizing officer to make a determination as to whether a copy should be provided to the person from whom it was seized.

WILLIAM YOUNG J:
So in this case, other than in relation to Mr Dotcom, copies have been provided, clones have been provided to the appellants, and they will be to Mr Dotcom –

MR BOLDT:
Yes.

WILLIAM YOUNG J:
– once the pass, the encryption is disentangled.

MR BOLDT:

Yes. And I – of course apprehended frustration on the part of my learned friend yesterday in describing that process to you, and it has been a frustrating process for all of us involved in it, but the key thing is, and this is, in fact, an example of section 49 operation, or the negotiations have proved very difficult, but in terms of the Attorney-General's role, as I said before the break, there can be no criticism of that because his directions have ensured devices are here to be discussed and debated and for copies to be made available to the appellants.

McGRATH J:

Does this really go to prejudice, does it? I mean you speak of it, it's no criticism, but are you saying there's no prejudice?

MR BOLDT:

Well it has been put to the Court on the basis that the lack of access and the ongoing lack of access to this material is a prejudice. Well that's through no fault of the directions that have been issued by the Attorney under section 49. It's been a process where finding passwords has been difficult and reaching agreement on certain things has been difficult, but the key thing is, nothing has left the country and there was a section 49 direction to the effect nothing could leave the country, no original devices could leave the country. Now I take the point some clones went due to a misappreciation of section 49 extending to clones as well but it's the original items there was a stop put on that as soon as it was appreciated there needed to be this discussion before anything happened, and they remain in New Zealand, they haven't been sent and I suppose part of the concern, and this does go to prejudice, is that the warrant is said to be invalid due to an absence of conditions. But, on the basis that items could disappear offshore and never be seen again. Well, that's not happened in this case. No original device has left New Zealand. So, in fact, they remain emphatically under the control of the New Zealand Courts pursuant to the judicial review proceedings. But in any event this is something the Attorney-General recognised and that is why things were not simply shipped off.

I suppose the only other point I wanted to make, before I move onto the next topic, is the discussion we had before the break, and have been having since, effectively turns on the proposition that conditions are mandatory with respect to Mutual Assistance warrants. There needs always to be an anticipation of how the item is going to be dealt with following the –

GLAZEBROOK J:
I don't think anybody has suggested they're mandatory.

MR BOLDT:
Well, Ma'am, the submission on behalf of the appellants is that these warrants were invalid because they lacked conditions.

ELIAS CJ:
But that's only because contextually it was inevitable that irrelevant information would be seized. Irrelevant material would be seized.

MR BOLDT:
Well, even in cases that are going to involve large scale searches –

ELIAS CJ:
Accepted that that is going to happen. My concern is the law, is what happens in those cases and whether it's good enough for the Courts to maintain the position that we'll control it downstream when the prejudice is in the actual search and seizure of information that's irrelevant, because it's inevitable, and in that context, might it not be said that it's unreasonable for a warrant to authorise seizing everything without imposing conditions?

MR BOLDT:
Well, Ma'am, all I can say is that's not been the law as it was applied prior to the Search and Surveillance Act –

ELIAS CJ:
I understand that.

MR BOLDT:
– and it's not the law post-Search and Surveillance Act either –

GLAZEBROOK J:
I'm not even sure that's the case. I mean you say that hasn't been the law but it was certainly said to be the case in *A Firm of Solicitors* and a number of other cases. It's obviously going to be contextual independent on the circumstances of the case whether conditions should have been imposed.

MR BOLDT:

Well I think that's –

GLAZEBROOK J:

I mean it might have been the law now under the Search and Surveillance Act but I don't know that you can say it wasn't the law beforehand, and it was quite clear it wasn't the law beforehand because, in fact, it's only very recent – in fact in *A Firm of Solicitors*, from memory, or something else that I sat on, it was actually said that they shouldn't have taken the clones and taken the things off site in the first place, and that might have been one of the first times that actually came up and was allowed – no, actually, it wasn't *A Firm of Solicitors*, it was the other one, it was the Commerce Commission one I think. But in any event that was, from memory, a very serious argument put forward that the clones shouldn't have been taken, the computers shouldn't have been taken off site, and that case said, well that was all right.

MR BOLDT:

Well, two responses there. I mean the more recent decision of the Court of Appeal was *Gill* and in that case there was a strong submission made that conditions were required to protect the privacy of the patients whose documents and records were seized and the Court, and I'm looking at pages 454 and –

ELIAS CJ:

Sorry, where do we find it again?

MR BOLDT:

Gill is in the –

GLAZEBROOK J:

Didn't you just give us – you gave us the – didn't you give us the right –

MR BOLDT:

I gave you the High Court *Gill* but the Court of Appeal *Gill v Attorney-General* [2011] 1 NZLR 433 (CA) is in the appellant's bundle of authorities, volume 2, behind tab 13. Now *Gill* is an important case because it's a recent New Zealand example of a case where there was a relatively broad and generic description of the offence provision. There was a need to go into premises where there was going to be a good deal of private information. It was also inevitable in that case that substantial volumes of

irrelevant material would be seized and, in fact, there all the computer records and all the hard copy paper records were seized, in spite of the fact there were only a limited number of patients for whom, against whom or in respect of whom relevant concern was had and in *Gill* one of the criticisms of the search warrant was the absence of conditions. The specific concern that was said to be properly addressed by conditions was the privacy of the patients. At pages 454 and 455 the Court set out at length a rejection of the submission that a warrant could or should be held invalid due to the absence of conditions and the Court quoted from the *R v Serendip Physiotherapy Clinic* (2004) 245 DLR (4th) 88 (ONCA) decision of the Ontario Court of Appeal, that's at page 455 of the report Ma'am, and in fact most of the pages are quotes from that case, but in particular at paragraph 38 the passage is, "In the proper exercise of his or her discretion the judicial officer can impose conditions where the police seek to seize records containing private medical information… However, the failure to include such conditions in the case of every warrant to search for and seizes medical records does not affect the jurisdiction of the justice of the peace."

GLAZEBROOK J:
Where are you?

MR BOLDT:
This is 455 and you'll see there's quite –

GLAZEBROOK J:
I know I just wondered which paragraph?

MR BOLDT:
It's page 38. Sorry, paragraph 38, on page 455. And then over the page where the Court noted there's a similar discretion –

ELIAS CJ:
But nobody would argue that in the case of every warrant.

MR BOLDT:
No, Ma'am, but what we have in the case of *Gill* is a case which is in many respects similar to what is said to have occurred in the present case. We have a very large seizure of irrelevant material, which needed to be sorted off site and also quite a lot

of private material which could have been accommodated by conditions but wasn't, and the Court reiterated here in *Gill* the same concerns and sentiments it expressed in the TVNZ case about the general undesirability of conditions attaching to warrants, particularly where the general law makes provision for how the things that would be the subject of conditions should be dealt with, and that is an important point –

ELIAS CJ:
Where is that referred to?

MR BOLDT:
Actually that particular concern was expressed by the Court of Appeal in the *Television New Zealand* case.

McGRATH J:
Not as specifically as you put it though is it?

MR BOLDT:
Well what the Court said, and I'm paraphrasing here, I don't want to take more time than is necessary on a point we've already spent a long time with, is that the Court can be confident that the general law will provide the protection that was to be sought by way of the conditions and that's the concern about conditions that was picked up by the Law Commission in its report. The –

GLAZEBROOK J:
What general law protects this? That's what I don't understand. Because certainly in this case there's nothing that protects it apart from the Attorney-General.

MR BOLDT:
Well –

GLAZEBROOK J:
And in the domestic context what protects it if the idea is you just keep everything you've got?

MR BOLDT:
I'm sorry –

GLAZEBROOK J:

Subject to somebody saying, oh, well okay you can keep running your business or all right we won't trawl through all your private medical records when it's totally irrelevant to the case.

MR BOLDT:

Well what protects it in this case is the role of the Attorney-General and that's –

GLAZEBROOK J:

I think we're asking – the question was broader than this, because I picked you up on saying the Courts have always said this is all okay, because the Courts have not said anything of the sort and certainly not the, at least two cases that I've been involved in, in fact, Justice Baragwanath, from memory, actually said you can't take this off site, and you're not allowed to clone this stuff.

MR BOLDT:

That's the *Ministry of Fisheries* decision. Am I right in thinking Justice Baragwanath was dissenting in that case.

GLAZEBROOK J:

He was but all I'm saying is that to say the Courts have always said this, and it's always been understood this way, when in fact from memory that was the first time this had actually come up and was given a tick, but a tick which was not by unanimous decision. I'm sorry, I was just picking you up on this, on your very expansive –

MR BOLDT:

Well it depends what we're talking about has always been okay and it's certainly true that it's only –

ELIAS CJ:

And always is very limited really, isn't it, because none of this crops up until the hubodometer case and even there the authority specifically relied upon by the President, I forget the name of the case –

WILLIAM YOUNG J:

Rural Timber.

ELIAS CJ:

Yes – no, no, the preceding one – in that he specifically said that it might be unreasonable not to impose conditions in a particular context. And there's the, you know, overcoming all of this is first the Bill of Rights Act so that the wrong on one view is complete when irrelevant material is taken, which was not the case then, and secondly this huge information gathering that now is possible because everyone's lives are on, available electronically. So maybe the Courts need to be just a little bit more careful than they've been.

MR BOLDT:

Well, yes, I understand Your Honour's point and as I say I also recognise that it's, that in saying trust us, the Attorney-General will look after the interests of people in this situation, is one that there is some natural hesitation on the Court's part to accept. However –

ELIAS CJ:

Well, no, he can be trusted to fulfil the responsibility that's given to him but the Court has given the responsibility to grant warrants and that's really what we're dealing with here.

WILLIAM YOUNG J:

Can you just help me with this? Where a District Court Judge or perhaps a registrar or a JP grants a warrant and imposes conditions, who supervises the implementation of those conditions? Do Judges say that it's to come back to me once the warrant's been executed or are they functus officio then, or the registrar or the JP or whatever.

MR BOLDT:

Well I think there'd clearly be recourse to the Court in the event there was a conviction that wasn't fulfilled. The Court that issued the warrant.

WILLIAM YOUNG J:

Are there cases where that's happened?

MR BOLDT:

Not that I know of Sir. Conditions are – actual conditions, and certainly in my experience in reading, are very rare and, in fact, the issue of conditions tends to arise only where there is a complaint later about the absence of conditions and even there

I come back again to what the Law Commission said on this. The Law Commission was uncomfortable with this as a ground of potential challenge to search warrants and sought to put in place a regime that was going to eliminate this as a basis on which to say a search warrant was invalidly made or improperly issued, and that's why the Search and Surveillance Act itself has only – well it has what's on its face a broad condition making power, but one which, where there are examples provided which are of nothing like the sort of magnitude we're talking about here, and where there is, for example, no suggestion that conditions should be imposed more readily in cases involving wholesale seizures which need examination off site, nor is there any exception carved out in the Search and Surveillance Act for Mutual Assistance warrants. They are – Mutual Assistance warrants are issued under the Search and Surveillance Act now but there is no suggestion conditions need more readily to be imposed in Mutual Assistance cases than in other cases. Instead, in fact, the regime creates quite deliberately one which is less exacting and, in fact, hands control over seized items to the Attorney-General rather than subjecting it to the range of provisions that otherwise govern the seizure of material under a warrant. And that was a clear and deliberate decision because of the various matters of comity which is an additional dimension the Courts don't generally have to grapple with. It's a, it provides for a discretion to be exercised in the public interest by the Attorney-General with an eye on a number of interests, but including comity in relationship with other jurisdictions. That's why that discretion is vested there in this Act when it's not in purely domestic acts and it would, in my respectful submission, be inappropriate for the Court to, or for any Court to suggest conditions are mandatory in this area, I take Your Honour's point, we're not suggesting it's mandatory always, but that even in a particular class of case conditions are effectively mandatory and a warrant will be held invalid if they're absent. That was the very sort of argument and challenge the Law Commission was seeking to avoid when it made its recommendations on this point, and it's also inconsistent with a pretty recent reaffirmation of Parliamentary intent regarding the way items seized under Mutual Assistance warrants should be treated. There was, as I say, this deliberate carve-out of the Mutual Assistance Act which left it all on the shoulders of the Attorney-General and quite deliberately excluded it from the control of the Courts.

GLAZEBROOK J:

I was just going to say does it follow the warrants are invalid if there are no conditions attached?

MR BOLDT:

Well I don't know Ma'am –

GLAZEBROOK J:

But that, that obviously one can understand, but does it mean there's no power to impose conditions and there's nothing to say that they should have been imposed, because it might be a different – it might be a separate issue as to whether the warrant is invalid without conditions because it maybe that you say that it can be dealt with under judicial review afterwards if they're not and therefore there's no, if you say, mandatory requirement even in circumstances where it is desirable, but does it follow that there is no power to impose conditions in those circumstances?

MR BOLDT:

Well it would, in my submission, be inappropriate for the Court to impose a condition which effectively pre-empts the decision of the Attorney-General under section 49(2), because that's an area which Parliament has reserved for the Attorney-General in Mutual Assistance cases.

GLAZEBROOK J:

So that, we have to read that as not only deciding what happens to relevant material, but also to any process to work out what is relevant?

MR BOLDT:

Well it's –

GLAZEBROOK J:

So we read in something to that, do we?

MR BOLDT:

It's to deal with what happens with things seized. Now the things seized here are all the items that are taken from the property and which then, in some cases, will need to be sifted with items returned. There's no suggestion, for example, in the *Church of Scientology* case that the seizure of the irrelevant material was unlawful. It just had to be done. It was a temporary process while sifting occurred and then there was a return.

WILLIAM YOUNG J:

Well it might be implicit in the statute that the Attorney-General is not entitled to direct the return of an irrelevant material. Now by irrelevant I'm using it in a narrow sense, that is, devices which have nothing on them which are relevant. It would be very odd if the Attorney-General could direct that those be sent overseas.

MR BOLDT:

Well, Your Honour, as I say the complicating issue that would arise then would be there would always have to be a sifting exercise in New Zealand and there are 90 cases where it is far more effectively and efficiently and quickly and accurately undertaken by the overseas jurisdiction.

WILLIAM YOUNG J:

You may have to do a preliminary sifting exercise in New Zealand which has been done presumably?

MR BOLDT:

Well, what actually happened in this case in the end, because no one was sending anything to the United States because of the section 49 direction and then subsequently the decision of Her Honour, was that the United States sent investigators here.

WILLIAM YOUNG J:

So there was – so it did happen in New Zealand?

MR BOLDT:

So it happened in New Zealand with the assistance of the FBI staff who came over and who were able to advise the New Zealand Police with the benefit of their expert and detailed knowledge of the inquiry, what was going to be relevant.

McGRATH J:

Mr Boldt, one of the things you talk about the Act, the MACMA Act, as though it's all black and white as to where the functions of the judiciary end – the judicial functions and the Government's functions begin but we have to bear in mind, don't we, that we're dealing with something that perhaps in 1993 wasn't fully contemplated and that is computers and their capacity to hold information, even when the user, the owner of the computer thinks it's all been deleted. There are really particularly strong privacy

considerations of the kind that have to be balanced in the issuing of the warrant and that really means, it indicates to my mind that perhaps some special regard has to be paid to the nature of the information that is being sought to support, as evidence to support the charges by the requesting country. We're really contemplating, we have to interpret this Act in light of something that might not have been fully contemplated by Parliament when it was enacted.

MR BOLDT:

Well, Your Honour, I certainly agree that we do live in a different world now to 1992 when this Act was first passed, but it is important to note that it was comprehensively updated in 2008/2009 to accommodate the shift to universal forfeiture, by which I mean both criminal and civil forfeiture, and the precise relationship between search powers and the Attorney-General's role was recently reconsidered by Parliament only in 2011/2012 when a decision was made first of all to absorb the warrant making power entirely within the Search and Surveillance Act, so there's no longer any stand-alone section 44/45 that governs the making of Mutual Assistance search warrants, it's all subsumed within the Search and Surveillance Act. And secondly, a very deliberate decision within that regime to exclude those powers and provisions that deal with how information should be treated or –

McGRATH J:

And no attempt to make that regime retrospective?

MR BOLDT:

There's no?

McGRATH J:

It's not retrospective legislation?

MR BOLDT:

It isn't retrospective, Sir, but it is, in my submission, at least an answer to Your Honour's concern that the regime which provided for these matters to be dealt with by the Attorney-General is anachronistic somehow. It's being considered we can say, well the whole Act was considered in 2008/2009, albeit it not in force at the time, the Search and Surveillance Act provides a very clear and very simple affirmation of that. I don't know that I can take that any further but I do –

ARNOLD J:

Can I just raise an issue about *Gill*? I don't think you mentioned, and forgive me if you did, but in that case the Ministry of Health had quite an elaborate procedure for a protocol for addressing patient confidentiality issues in circumstances such as in that case and at paragraph 76 the Court makes the point that the process which was set out in paragraph 62 of the judgment had been followed and in that case I recall thinking about, well what sort of condition would be imposed and the condition would have been that the protocol be followed because the protocol had been developed by the Ministry, police did the seizure, and the Ministry assisted in sifting through the documents and sorting out which records were relevant and which had to go straight back, and in this case it seems to me if you were going to look at a condition, it would be a condition that would be at a fairly high level of generality, that there should be a process for determining what was relevant and irrelevant and so on, which is effectively what's happened.

MR BOLDT:

Well quite, Sir, and I can certainly indicate that there would have been no direction under section 49 for anything to leave the country without that sort of process being contemplated.

ARNOLD J:

It seems to me odd to think that the Court is going to involve itself in a detailed mechanism for, for example, searching through medical records or computer materials.

MR BOLDT:

Indeed, Sir, and I think that was one of the concerns that the Law Commission expressed. The way items are dealt with after seizure is a downstream matter, which is primarily the responsibility in New Zealand of the authority that seizes it and in New Zealand that responsibility shifts to the Attorney-General who has a statutory decision to make and it is, and I have said this several times, it is a statutory decision which has made balancing a number of competing interests, a critical one of which is the interests of the parties, and one key point, and I'm very happy for this to be formally recorded as the New Zealand Central Authority's position, is that it would never consent to any item of uncertain status leaving New Zealand in the absence of a condition under section 29, providing that it had to be returned forthwith upon examination and discovery that it didn't contain relevant material. That's the

mechanism we would rely on to safeguard that sorting process and there were other, there was other evidence about how, within the FBI was very sophisticated screening system for privileged material, it's actually in the United States dealt with by an entirely separate and independent team who is forbidden from discussing anything they've seen with the investigators and so there was evidence of that and how that would operate if the United States investigators had received this. But the key thing is that for New Zealand we recognise the critical importance of ensuring that irrelevant items are returned and we would always ensure that happened and that's why section 49, in this instance in my submission, does provide the answer to this question of conditions, particularly bearing in mind the, as Your Honour says, a condition would only have required the Attorney-General to do what would always have been done in terms of ensuring there was a mechanism for sorting relevant from irrelevant, and also against the Court's and the Law Commission's discomfort with having warrants challenged for absence of conditions.

Now, Your Honours, we've spent quite a bit of time on that. There are –

ELIAS CJ:
Well it is the principle issue, probably, and you must have covered a lot of your submissions during the course of it.

MR BOLDT:
I think so and it's time to perhaps just take stock and let's see where we are –

ELIAS CJ:
Yes.

MR BOLDT:
– with respect to the actual search warrants we've got because there are a couple of quick points I want to make, and I do have five areas that are in dispute and I think in light of this discussion we can probably skate through them relatively quickly. The submission on behalf of my learned friends is that this warrant is a nullity, it's a nothing, it's just a worthless piece of paper with writing on it. I would like to direct Your Honours' attention to the case of *Hall v Ministry of Transport* because that case does set out the extraordinarily high standard, or the extraordinarily low standard, that must be met before you can say a warrant is so deficient. This is *Hall v Ministry*

of Transport which is in the respondent's bundle, Ma'am, and it's behind tab 11, and I'd like to direct Your Honours in particular to page 57.

GLAZEBROOK J:
I think mine is buried somewhere. So tab 11?

MR BOLDT:
Tab 11 and it's page 57 and this is a decision again of the learned President. The Court, at the top of page 57, discussed this question of general warrants and I will discuss general warrants in due course with Your Honours. But the important passage is the one in the second paragraph, "Mahon J thought in *Police v Walker* [1974] 2 NZLR 418 … an information was so unintelligible that the exact nature of the supposed offence could not be ascertained, and characterised it as a nullity. He declined to apply the section." This is the important passage, "Nullity or otherwise can be a question of degree. No doubt if a document or proceeding is so gravely defective that it should be treated as completely non-existent, the section will not apply. The Court is slow, however, to reach such a drastic conclusion, even where there are substantial deficiencies; see, for example," and there are a couple of authorities cited. "Whether the defect in *Police v Walker* was correctly held to be in the rarer category of reducing the information to a mere nothing need not now be discussed, for the form used in the present case was certainly intelligible and complied with most of the extensive statutory requirements for an infringement notice … The Court is not constrained to go as far as to dismiss it as a nullity."

ELIAS CJ:
Is there a difference between an infringement notice and a warrant to intrude and seize material?

MR BOLDT:
Well not materially for the purposes of this provision Ma'am. There are other cases, and *Rural Timber* is a good example, where the Court has talked about the very rare cases where a document deserves to be stigmatised as a nullity and –

ELIAS CJ:
But earlier the President refers to the *Auckland Medical Aid Trust* as, "Reflecting the deep-rooted tradition of the common law against the validity of general

search warrants," so there is an acknowledgement there that's in a slightly different area.

MR BOLDT:

Well yes Ma'am but the *Auckland Medical Aid Trust* case is a case that needs to be considered carefully because it really illustrates the point I've been seeking to make with respect to search warrants which is that the Courts are concerned with the substantive underpinning to a warrant rather than the form in which it's issued. I mean certainly the warrant in Mutual Assistance was a poor one. It described, for example, the offence for which it was issued as abortion which there isn't, there wasn't, and isn't even such an offence, but what was interesting in that case is that all three members of the Court said, if that were the only problem, section 204 would solve it, there's no problem there, just with a generic misdescription of an offence provision. The problem was that there had been this –

ELIAS CJ:

No, I understand that –

MR BOLDT:

– disconnect between the warrant and, yes.

ELIAS CJ:

– and you've got a different argument on whether that – the application of that decision in this context. I'm just making the point that you're relying here on something which is dealing with the form of an information and I'm making the point that the common law has set itself against validity of defective search warrants because of the constitutional importance.

MR BOLDT:

The Courts had definitely set their face against the validity or against validating search warrants where there is a substantive deficiency in the evidence underpinning the warrant. Where the warrant isn't properly supported by evidence that authorises the search it purports to, then there is certainly a problem. But what is almost unheard of, and when I say "almost" there are a handful of cases that dealt with search warrants that had the wrong address printed on them, but with that sort of exception the Courts have rather been near infinitely forgiving when it comes to sloppiness in the drafting of the warrant. That's because the constitutional safeguard

we are concerned about is answered by the provision of sworn evidence to an independent judicial officer and the threshold that evidence has to meet.

So I would, with respect, adopt the three categories Your Honour Justice Young proposed yesterday of how you treat warrants and other judicial process of this kind which contain errors. The first category which Your Honour described was the category where there are mistakes or errors but they are of a nature that aren't ever going to go to the validity of the warrant. They're something might be misspelled or something and parts of the warrant might not make sense even, but as long as it can, as a whole, be read as a functioning and effective document, you don't even need to get to section 204. Then there's the second case which is where there is an error which is capable of causing prejudice. Is capable of rendering the warrant unable to be understood, for example, and – or renders the breadth of the search power unable to be ascertained simply by looking at the warrant on its face, and in those cases we are squarely in section 204 territory. The issue is, in those cases, has there been a miscarriage of justice, has – and that's as defined means is there any harm that has been done as a result of the particular problem that existed in the warrant, and unless the answer to that question is yes then you equally don't have a problem.

WILLIAM YOUNG J:
So you mean defined as in *Kestle* and *Hall*?

GLAZEBROOK J:
What's the harm really? Is the harm – say an overbroad warrant, overbroad search powers are, in fact, exercised, would that be a harm that you would accept?

MR BOLDT:
Possibly, Ma'am, certainly all the cases that have dealt with excessive breadth have said, well it's quite clear that the police knew what they were looking for and they went in and seized only items that were relevant to the offence, even if on its face.

GLAZEBROOK J:
No, no, sorry, I'm assuming that they were told that they were searching for refrigerators and they go and look in somebody's underwear drawer, because the warrant is drafted too broadly.

MR BOLDT:

Yes that could be a problem if there were seizure of things that a validly framed warrant would not have allowed.

GLAZEBROOK J:

That's what I meant.

MR BOLDT:

Yes, and that could be such, there could be harm of that sort. But where the search that occurs is exactly the same as the search that would have occurred if the warrant had been perfect, then you have no, in my respectful submission, well as the cases say, you have no material harm and you have no miscarriage of justice and therefore you don't have any invalidity.

Then there's the third case which is the extreme example of where a document simply can't be read or understood as a functioning document and that's the sort of situation we find where you've got a nullity. Now the case we have before us, at least with respect to the warrant on its face, is very closely analogous to multiple decisions of the Court of Appeal over many years. The problems which were identified by Her Honour in the two decisions in the High Court were twofold. There was a complaint about the way the offence provision – the way the offence was defined, and that's just the very broad and generic reference to breach of copyright and money laundering, rather than the more detailed formulation that would ideally have been present, and secondly Her Honour was concerned about the breadth of the appendix. Now it's our submission that this case is analogous in most respects with *Rural Timber* with *Briggs* and to an extent, for example, with *Andrews*. It's also analogous, to a degree, with *Gill*, although *Gill* was not a section 204 case. Generic misdescriptions of offence provisions have never, in and of themselves, been held to give rise to a miscarriage of justice. Again if there was a genuine misunderstanding as to the scope of the search as a result of the generic misdescription then there maybe cause for concern. But where that hasn't occurred, and I certainly will be submitting that that has not occurred here, you do not, you don't have a miscarriage at all. So –

ELIAS CJ:

But miscarriage you treat as downstream forensic prejudice.

MR BOLDT:

Yes or it's, I treat it Ma'am in the way it was described by the Court of Appeal in the *Sanders* –

ELIAS CJ:

Yes.

MR BOLDT:

– decision or described by Justice Fisher in the *Sanders* decision which has been adopted on a number of occasions in other decisions of the Court of Appeal notably *R v McColl* (1999) 17 CRNZ 136 (CA) and it was also adopted by the Court of Appeal in the present case and that is actual harm caused as a result of the error. In my submission that's an inevitable consequence of the purpose of the Act which is designed to ensure technical mistakes, defects in expression or omissions in expression, don't result in an invalidity unless actual harm is done and I note Your Honours' comments yesterday in discussion with my learned friend about whether a broader definition of "miscarriage" might be appropriate here and indeed whether any illegality might, in and of itself, give rise to a miscarriage. But that would, and section 204 is now effectively repealed anyway so a discussion of this sort will be of very limited ongoing relevance, but such an analysis would result in a near self-defeating provision. We would find ourselves in a situation where in almost every case the very problem identified with the warrant would, in and of itself, be deemed to create a miscarriage and the provision would have little, if any, effect. That's certainly the way, it certainly isn't the way the provision has been applied over the years. The fact there has almost never been a search warrant declared invalid as a result purely of the way its written is not because our police are masters of literary skill when it comes to drafting and creating search warrants. In fact there have been multiple examples of jumbled, confused, unintelligible search warrants which the Courts have said, "Look, that's fine, it's not great." We might need, for example, to look at the application to be confident the warrant was executed in the way it was intended but as long as that's the case the Courts have been very comfortable with section 204 as a provision that has excused those formal errors.

The only people, as I have indicated in my written submissions, who might really have cause for complaint are those who would seek to take an opportunistic advantage of a harmless error, because of course the error isn't harmless if actual

prejudice results then section 204 doesn't offer any protection to the informant or to the police. So it's against that background we come to analyse the present warrant –

ELIAS CJ:
It still does require you not to accept that substantive miscarriage occurs where the protection of the Bill of Rights Act is not observed. You require something further than that.

MR BOLDT:
Well, Ma'am, it's certainly my submission that a jumbled, sloppy, messy search warrant doesn't, in and of itself, breach the Bill of Rights Act. The Bill of Rights Act would be breached if the substantive protection of the need for sworn evidence and reasonable grounds to believe the independent judicial officer, et cetera, were absent. That's the substantive protection for an individual from an arbitrary or unreasonable intrusion into their home or to their privacy.

WILLIAM YOUNG J:
You'd probably say that if the search warrant is not invalided then the search is probably not unreasonable. They're not, the conclusion doesn't automatically follow from the premise that it –

ELIAS CJ:
But that's some of the problem I have with the argument.

MR BOLDT:
Well, Your Honour, as I've set out in my written submissions, it is instructed that the jurisprudence regarding section 204 has remained entirely consistent and indeed in *Andrews* the Court noted there was an increasing trend to apply section 204 robustly and even in relation to serious errors as recently as 2010 and –

ELIAS CJ:
Robustly meaning in correction of error.

MR BOLDT:
Well, but in correction of quite serious errors Ma'am –

ELIAS CJ:

Yes, yes, I understand that.

MR BOLDT:

And the point about the way section 204 has been implied there is that it has operated in parallel alongside, as I put in my written submissions, the deepening and the greater depth of perspective we now have about the Bill of Rights Act. The reason for that is the Court of Appeal, at least, always rejected the proposition that a mere technical defect was in and of itself a breach of the Bill of Rights Act. The Court said, and I've reproduced four references or four cases where the Court used the phrase, "The Bill of Rights is not a technical document," and it is entirely consistent with, in particular, the way Lord Cooke was concerned to protect substantive breaches, or substantial rights, but actually had very little time for complaints that documents weren't filled out correctly or that documents were sloppy.

ELIAS CJ:

The point I'm putting to you is that seizure of irrelevant material is not properly characterised as a technical complaint. It's the scope issue again.

MR BOLDT:

Well, Ma'am, that assumes that there was some illegality or defect –

ELIAS CJ:

Yes.

MR BOLDT:

– in the seizure of the irrelevant material and the – and perhaps we will come back to the authorities on that, because it certainly hasn't been the law, and is not now under the Search and Surveillance Act, the law that there is anything unlawful in the context of a search of the size and scope of this one, of seizing items for off site examination. Indeed that was one of the matters I understood to have been conceded yesterday in conversation between my learned friends and Your Honours. Looking at any hard drive or device at that address it would be impossible for anyone, whether they be FBI or New Zealand Police, to tell whether it contained relevant or irrelevant material and so for the search to be effective there needs to be a process by which there is sifting.

Now I fully understand there is concern about the process that was envisaged in this case which ultimately didn't occur anyway because there as no direction that the items be seized for, be sifted for relevance offshore, and it has now happened in New Zealand and the irrelevant material has been returned. But our key point on this is there was nothing in the search warrant which – and none of the complaints about the search warrant, in and of themselves, led to the seizure of items of uncertain status, I think that's possibly the better way to describe these items, because that would have been an inevitable incident of this search, regardless of what the warrant said and regardless of who executed it, and it would have been exactly the same in a domestic context as in the Mutual Assistance context.

ELIAS CJ:

Now tell us what you, I should not interrupt so much, after lunch tell us what you would like to cover after lunch? You want to take us to the authorities?

MR BOLDT:

Well I'd like to cover the form of the warrant, whether the departure from form 5 really was that much of a problem. I'd like, and Your Honours may not regard this issue of the warrant being a so called general warrant, as a particularly live issue now, but if it is then I'd like to address Your Honours on why this is not a general warrant. I'd like to address Your Honours about what the warrant says when you look at it in isolation, even without recourse to the arrest warrants. I'd like to examine this concept of miscarriage of justice in the present case, although that's something we've canvassed, and I could be very brief on that. I'd like to discuss, to the extent there's anything left to be said and perhaps there isn't, the question of conditions and then finally there were complaints yesterday about the manner in which the warrant was executed and I will be submitting it was entirely correct for the Court of Appeal to reject those criticisms as well and in fact the police showed that they executed this warrant in a properly discriminating manner and actually left behind quite a lot of stuff which, if this really was intended to be a completely wholesale seizure, they would have –

ELIAS CJ:

I'm not sure that that's a live issue at all Mr Boldt.

MR BOLDT:

If it's not, Ma'am, then I'll be more than happy not to address Your Honours on it.

ELIAS CJ:

None of us seem to think it is.

MR BOLDT:

All right. Well that's one off the list.

ELIAS CJ:

Yes, thank you. So you'd expect to be another hour and a half, maybe?

MR BOLDT:

Maybe, Ma'am.

ELIAS CJ:

I wonder whether we should agree that we'll take an afternoon tea adjournment and sit until five. All right. We'll take the lunch adjournment now.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.18 PM

MR BOLDT:

Now before the break I said I'd endeavour to answer Your Honour Justice Young's point about whether New Zealand is in a treaty relationship with the United States pursuant to the Mutual Assistance Act. The answer, and we're still checking, but the answer is that in 1999 the United States was designated a prescribed foreign country for the purposes of the Mutual Assistance Act. Now I believe, and this is what we're checking, that that distinction between prescribed foreign country and all other countries has now been swept away by the changes to the legislation because any country can make requests to New Zealand but the effect at the time of the prescribed foreign country designation is that it allowed the United States to make requests to New Zealand under –

WILLIAM YOUNG J:

Well the key to it is probably in the word "mutual" in the legislation.

MR BOLDT:

Yes.

WILLIAM YOUNG J:
Which is why I asked the question.

MR BOLDT:
And now, in fact, we get requests from all over the place. Often they are requests the Central Authority doesn't act on but if the request in an appropriate one then it is acted on. But I should say there is a proper discretion exercise in each case –

WILLIAM YOUNG J:
Right.

MR BOLDT:
– whenever there is a request.

GLAZEBROOK J:
So a request can come from any jurisdiction now is that the answer to that –

MR BOLDT:
It can, it can come from any jurisdiction.

GLAZEBROOK J:
It can but would not necessarily be acted on.

MR BOLDT:
Exactly. Now turning to the issues that remain the first I'd like to address Your Honours on is this question of whether the warrant is a nullity because it failed to comply with form 5 of the Mutual Assistance Regulations. Now this is a ground of objection to the warrant which is, I guess, expanded over the course of this proceeding. Her Honour Justice Winkelmann noted at page 42 of the case on appeal in Her Honour's first judgment behind tab 8 at 37, merely that, "The prescribed form referred to is form 5. It requires that the country under whose laws the offence is alleged to have been committed be stipulated," but Her Honour, aside from noting that as a departure, didn't attach – that wasn't the reason Her Honour found the warrant to be invalid but it is a point which has assumed greater significance in the argument since that first hearing.

Now it's our submission that the, there merely not following the correct form or format of the warrant isn't and can't be fatal on its own. The issue is what information would have been conveyed to a person reading a warrant which had been issued under form 5 and how does that compare with the information that was received by the appellants in this case. There are, in fact, two details that were not in the current warrant but which are referred to in form 5. The first, as we know, is the reference to the United States as the country making the, or on whose behalf the warrant has been issued. The second was that the offences, and form 5 goes on to say, "And being an offence punishable by imprisonment for a term of two years or more," and that detail was also missing from the warrant as handed to the appellants on the 20th of January. Now it's our submission that neither of those details is fatal to the warrant. They are both matters that ideally would have been present but the omission of those details couldn't, in any way, have impacted upon either the search power or the way the search power would have been understood by a person reading the warrant –

ELIAS CJ:
That's on the basis that a generic identification of the type of offence is sufficient.

MR BOLDT:
Well, yes Ma'am, and I'll certainly come to address that when we talk about this question of general warrants. But it's our submission that the requirement under form 5 of the Regulations is no difference in substance to the requirement under form 50 of the Summary Proceedings Regulations, or the equivalent form.

GLAZEBROOK J:
Can I just check the – the issue I have with the US is that that isn't an offence here, at least the money laundering will be but not the breach of copyright, and there – the issue is, if you wanted to have legal advice on the warrant itself, knowing it comes from the US and then maybe ringing US solicitors or, at least, seeking advice in that way, that that detail – and I realise that detail was on the arrest warrants.

MR BOLDT:
Well both details –

GLAZEBROOK J:

But let's assume, and I'm not worried in the least bit about imprisonment for two years or more, because I can't see how that impacts on getting legal advice, but the US reference might.

MR BOLDT:

Well, and I suppose that's the answer as it is in many cases where section 204 comes into play, yes it might, but did it here and the answer is no. if – and again this is possibly a good example of the type of prejudice that might be present hypothetically, arising from an error in form, if it could be, if there were an evidential foundation for a submission that if I'd known this was the United States I would immediately have made the following enquiries.

GLAZEBROOK J:

But, of course, he did know it was the United States in any event so…

MR BOLDT:

Of course and so that was the, and he knew that before he'd even seen the search warrant, so to that extent, yes, it might, in a hypothetical case be capable of giving rise to prejudice but here I think we can say quite confidently that it didn't and it didn't in any other way impact upon the scope of the search.

McGRATH J:

He knew that because Detective Humphries told him, is that your –

MR BOLDT:

He knew that –

McGRATH J:

– or is there some other…

MR BOLDT:

He knew that because Detective Humphries did tell him, yes, but also because even before Mr Dotcom had seen the search warrant he had seen and read and digested the arrest warrant and the arrest warrant does make it clear it came from the United States and it also, in fact, specifies the maximum penalty associated with each of the charges. So those details were there already so it plainly didn't matter in

this case. It's possible, as Your Honour points out, to imagine a case maybe where it might but here it didn't.

There are a couple of other points I'd like to make about the departure from the standard form. The first is, just to note two general provisions which deal with departure from standard forms, one is section 26 of the Interpretation Act 1999, which I handed to Your Honours this morning but it's only a short section and I can read it. "A form is not invalid just because it contains minor differences from a prescribed form as long as the form still has the same effect and is not misleading." And, with respect, I submit that standard is satisfied in the present case.

The other point of general application with respect to form 5 comes from within the Regulations themselves. Regulation 3, clause 3 provides, "Strict compliance with the prescribed forms is not necessary, and substantial compliance, or such compliance as the particular circumstances of the case allow, is sufficient." Here again where there are only two details neither of them, in our submission, are material which were missing again it's my submission we are within the scope of regulation 3, clause 3.

Finally for completion on this point it's worth noting what Justice Fisher said in *Sanders*. There is a passage at page 466 of the report in *Sanders* and it's just below the top of the page in that decision.

ELIAS CJ:
Sorry, which bundle again?

MR BOLDT:
This is bundle 4 of the appellant's submissions, behind tab 27. It's page 466. This was His Honour's discussion of prescribed forms in the Summary Proceedings Act context but the words are equally applicable here. "Prescribed forms must, of course, be adaptable to some degree to suit the circumstances of the individual case. Nor will it normally matter if for other reasons there are drafting variations which effect no changes of substance. However, the purposes indicated in s 198 suggest that certain irreducible elements must be expressed or implied in the warrant. These are that the warrant be addressed to a constable, recite the foundation and purpose of the warrant, confer authority to enter a defined location for the purpose of searching for, and seizing, defined things, and be issued by a District Court Judge, Justice or Registrar, not being a constable." And so His Honour really there was

boiling down search warrants to their essential minimum. And what is also significant about that passage in *Sanders* is that His Honour's irreducible minimum there in 466 correspond quite closely with section 45(4) of the Mutual Assistance Act, which governed this warrant. If we have a look at section 45(4), this really is setting out the bare essentials of a valid Mutual Assistance search warrant. "Every warrant shall contain the following particulars," and just like Justice Fisher in *Sanders* it says you've got to define the place, got to specify the offences, must describe the articles or things, and must specify the period during which the warrant may be execute, "Being a period not exceeding 14 days from the date of issue," and so, "and any conditions." And so what we have there is effectively a statutory expression of what really is essential in a mutual assistance warrant. Now my friend, particularly Mr Pilditch, said, "Well, it says every warrant issued under section 44 'shall' be in the prescribed form," but that's a "shall" which is subject to these other more general provisions. More importantly, if the detailed inception in the prescribed form, the, you can say the more peripheral details like the country and the period of imprisonment, were essential, then the section would need only have said every warrant shall contain details required in the prescribed form, it wouldn't have needed subsection (4).

ELIAS CJ:

Do we have the equivalent in the Summary Proceedings Act of section 45 in front of us?

MR BOLDT:

Well, I think it's section 118, Ma'am.

ELIAS CJ:

Do you have that? I'm just wondering.

MR BOLDT:

I'm not sure, Your Honour, whether we've, whether anyone's…

ELIAS CJ:

It's just –

WILLIAM YOUNG J:

It's probably set out in *Sanders*, isn't it?

ELIAS CJ:

It's almost certain – yes, probably is. I just wanted to compare what's in section 45(4) with what's there.

MR BOLDT:

Yes, well, that may be covered in *Sanders* in any event – sorry, Sir.

WILLIAM YOUNG J:

Well, it's at page 183 of *Rural Timber*, which is the earlier –

MR BOLDT:

Yes.

WILLIAM YOUNG J:

– earlier tab.

ELIAS CJ:

So which volume do we go to?

WILLIAM YOUNG J:

Volume 4.

GLAZEBROOK J:

198 is at page 458 of *Sanders.*

ELIAS CJ:

Sorry, I've now turned that away, so where's your…

WILLIAM YOUNG J:

Tab 28 –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

– page 183 of the report at the bottom.

ELIAS CJ:

Right, thank you. So it's not equivalent, doesn't have anything equivalent.

MR BOLDT:

Well, no.

GLAZEBROOK J:

And in fact it just mirrors the form, I think, to a degree.

ELIAS CJ:

Yes. So what we're contrasting –

GLAZEBROOK J:

A different form.

ELIAS CJ:

– here is a provision, is a form which specifies as opposed to a statutory provision in the mutual assistance legislation.

MR BOLDT:

Well, that's right, Ma'am. But what is of course important is that all of those details in 45(4) were present in this warrant, there was no, none of those –

ELIAS CJ:

Unless you take – unless the offence or offences in respect of which the warrant is issued, and you're going to refer us to, when you come to look at that, to cases decided not under this statutory provision but under the Summary Proceedings Act.

MR BOLDT:

Well, that's true, Ma'am, but that's only because I think this is the first time a mutual assistance warrant –

ELIAS CJ:

No, no, I'm just wondering whether there is –

MR BOLDT:

– has been challenged.

ELIAS CJ:

– a difference between a form which prescribes some material – I know it's a legislative instrument – but then there's reference, as you say, in the Interpretation Act and so on to forms, and a statutory requirement in primary legislation.

WILLIAM YOUNG J:

Both say, "In the prescribed form."

ELIAS CJ:

Well, they may, but it specifies the particulars that have to be –

WILLIAM YOUNG J:

Right.

ELIAS CJ:

– provided.

MR BOLDT:

Sure, Ma'am, and I, all I can say is what His Honour Justice Fisher distilled in that passage in *Sanders* in, at page 466, was His Honour's assessment of the essential rendering down that you require every time you have a valid search warrant you need, you certainly these irreducible minima, and it's small point, but those irreducible minima are similar to what is in section 45 subsection (4), and the important point is they were all present in this warrant. In fact, if we look at what was in this warrant, and this really is just the answer to the submission that the fact, the form, or, it's actually more the formatting of it, because 98 per cent is the same, it's just expressed in a different order with the, with occasionally slightly different wording, but the substance of form 50, which Your Honours looked at yesterday, and form 5, are in fact pretty close in terms of the detail they convey, and here we can see, in terms of important matters, this warrant was addressed to a constable, there were reasonable grounds recorded, which is exactly the same standard, it recited the purpose and foundation of the warrant, it conferred authorities on the constables too enter, it was headed with a reference to the Mutual Assistance Act, even if it didn't follow the Mutual Assistance Act, and interestingly and in a nod to this not being just a completely slavish copy of form 50, it correctly recorded that the timeframe within which it could be executed was 14 days, the actual warrant 14 days is the time within

which it could be executed, as opposed to the one month, which is the equivalent timeframe in the Summary Proceedings Act, and of course it was supported by a wealth of sworn evidence and it was issued by a properly qualified judicial officer. So that is, that is a search warrant, and it's a search warrant which meets the standard of the Mutual Assistance Act and which –

GLAZEBROOK J:
Well, as you say, it was drafted clearly having regard to the Act, but in ignorance of the regulations.

MR BOLDT:
It was, it was drafted having regard to the Act, but not to the form which was specified in the regulations. But it conveyed almost all of the same information. And a form is nothing more than a mechanism by which information is conveyed in any event, and the departures, we say at least, are not therefore material. And certainly it's our submission, Your Honours, that this is the very kind of error for which section 204 was designed. You can't get a more obvious example of a want of form than the use of the wrong –

WILLIAM YOUNG J:
A want of form.

MR BOLDT:
Yes, than the use of the wrong form. So the question there is, was there any prejudice, was there any miscarriage of justice, as a result of this mistake, and it's our respectful submission there was not.

So if we turn then to the question of whether the warrant was a general warrant –

GLAZEBROOK J:
Well, you actually say of course that you don't even need 204 because the Act's an Interpretation Act and the – oh, except in relation to those two matters.

MR BOLDT:
Indeed, and if – yes, indeed.

ELIAS CJ:
Sorry, the two matters…

GLAZEBROOK J:
The US and the –

ELIAS CJ:
Oh, yes, yes.

GLAZEBROOK J:
– two-year one.

ELIAS CJ:
Because those are substantive points, is that right?

MR BOLDT:
Well, they are details that the form 5 say, says should be in a warrant, but were not in this warrant.

So we turn then, Your Honours, to the question of whether these warrants were bad as general warrants, and that, as part of this discussion, will necessarily need to address how specifically the offending needed to be described in order for the warrant to avoid that description. Now, Your Honours have seen a number of cases referred to in the submissions where the warrant has been challenged on the basis that the offence described was described in generic or misleading or inaccurate terms. A very good example of that is the *Rural Timber* case, which would give a reader looking at the document on its face pretty much no idea what it was about, because the warrant simply said, "Conspiracy to defraud the Ministry of Works," which tells a reader absolutely nothing about what the specifics of the inquiry might have been. There's the *Briggs* case which in another generic misdescription simply listed the offence concerned as receiving and again the Court said well yes but everybody knew what was intended, everyone knew what was meant by that, and it was clear the police intended, and in fact conducted a properly targeted search. Similarly, as I said before lunch, the offence in the *Auckland Medical Aid Trust* case was simply listed as abortion, which is not an offence, but the Court said, look, section 204 will cover that and would have validated that warrant if that had been the only problem.

ELIAS CJ:

So all three of those, *Rural Timber*, *Briggs* and *Auckland Medical Aid Trust*, were those warrants under section 198?

MR BOLDT:

Those were all section 198 warrants, yes, but it's also important, and this is where the *Auckland Medical Aid Trust* case does assume some importance. One of the areas where Her Honour decided this warrant was invalid was on her analysis it did not describe a particular offence. It didn't have appropriate particularity in that the generic, on Her Honour's analysis misdescription of the offence provision, was the reason for that. Now these requirements for particularity have been around for a long time but they, as Her Honour's judgment indicates, with a particular emphasis in the *Auckland Medical Aid Trust* case, but that requirement for particularity needed to be read in light of what the problem in that case was and what the issue was. It's absolutely accepted that let's say my computer is stolen and the police track it by whatever means to a particular address. That the warrant will entitle them to search for and seize only my computer and it will, the warrant will be defined with respect to theft of this computer on this occasion. A warrant which simply said the offence was theft, and enabled the police to go in and seize any stolen property, would be void for being excessively broad because the very general search power conferred by the warrant would not be reflected in the underlying evidence in support. That was the problem in *Auckland Medical Aid Trust*. There was evidence of one unlawful termination, that was all police had evidence of, and yet the warrant went from there to authorising wholesale seizure of all medical files to see whether there was widespread abortion being performed, widespread unlawful termination being performed within that clinic, and it was that disconnect between the evidential foundation which supported seizure of a single item and the very general search the police not only conducted but intended all along that gave rise to that problem.

So generality in a search power is not inherently a problem provided there is evidence capable of justifying a broad search where a wide range of things are going to be seized. We can also see multiple examples of that in the cases before the Court. There was, of course, the *Scientology* case and the Ontario Court of Appeal in that decision noted how difficult it is where you're dealing with a very large scale inquiry and where there's always going to be large scale seizure, to define with any precision the sorts of things likely to be seized. You are always going to need to have broad and often quite generic descriptions. The discipline in terms of ensuring

the seizure doesn't become excessive is the need for there to be a connection between the item seized and the inquiry being undertaken. But a requirement for particularity in the sense of identifying only one or more individual particular incidents of an offence, is really only applicable where the evidence does no more than disclose one or two or three individual incidents. What we have in this case was evidence of many years of systematic offending, essentially since the inception of the Megaupload company as the supporting documents indicated, and that Megaupload, certainly on the FBI's analysis, had never done anything other than existed as an illegal file sharing enterprise. What that meant was, just as in *Rural Timber*, any document or thing that was connected with the company was likely to be relevant to this inquiry and where there is an evidential foundation that is as solid as that for a broad ranging search, then there is no problem with the schedule of things to be seized being expressed in similarly broad and generic terms.

Now the question about whether breach of copyright in the warrant in and of itself gave rise to a difficulty is one I can address with Your Honours in two ways. The first is by referring Your Honours back to the Court of Appeal's analysis of what this warrant revealed, even when read in isolation, because the first thing the Court did before going on to consider section 204 was to ask whether, even on its face and in the terms in which it was actually expressed, clumsy and generic though they were, there was any real possibility anyone would be misled regarding the content of the search or the scope of the search. The Court of Appeal concluded there was actually no risk of a reasonable reader in the position of the appellants being misled as to the scope of the search, even leaving aside what was in the arrest warrants which I'll come to in a moment, and Your Honours the Court of Appeal's analysis of that can be found, I'll just take Your Honours to the paragraphs in the Court of Appeal's decision, we're of course in volume 1 of the case on appeal and the passages which dealt with this issue begin at page 115 of the case, it's behind tab 10, page 115 of the case, and in particular paragraph 51 of the decision.

ELIAS CJ:
Sorry 115 of the case?

MR BOLDT:
115 of the case, yes, and that's, and I'm talking about paragraph 51 of the Court of Appeal's decision. Now the Court noted it had already set out the terms of the search warrant. Noted they omitted reference to the United States of America

but did refer to an offence of breach of copyright and money laundering, made the point about the equivalence in the offending. But what the Court then went on to do was to conduct the exercise the Court of Appeal had mandated in cases like *Rural Timber*, which was to read the warrant as a whole and on that analysis apply, if you like, some robust drawing of conclusions as to what was plainly intended by the scope of the warrant. It's helpful in this, in conducting this exercise to note there were two critical details that Her Honour Justice Winkelmann held should have been in the warrant, and if they had been in the warrant then we wouldn't have a problem. The first was, instead of simply saying, breach of copyright, the warrant should have referred to, criminal breach of copyright by electronic means, or words to that effect, using the Megaupload platform. So –

ELIAS CJ:

How were the charges – can you just remind us where we find the indictment or the –

MR BOLDT:

I'm sorry, Ma'am, the arrest warrant perhaps?

ELIAS CJ:

No, the – how the charges were expressed, the American charges.

MR BOLDT:

Well, Your Honours were given a copy of the actual indictment yesterday, but the way the American charges were expressed –

ELIAS CJ:

Ah, yes, the second.

MR BOLDT:

Are most conveniently set out in the arrest warrants, which are behind tabs 5 and 6 of volume 1 of the case on appeal. And Her Honour's analysis of what a valid warrant would have looked like here can be found at page 92 of the case, that's behind tab 9…

GLAZEBROOK J:

Yes, because interestingly those don't – the actual charges don't refer to electronic means.

MR BOLDT:

Not – the, number 4 does, to an extent, Ma'am.

GLAZEBROOK J:

Oh, computer network, yes.

MR BOLDT:

"Distributing a work on a computer network." Now, Her Honour's concern in the High Court was, look, breach of copyright can mean anything, there are lots of ways you can breach copyright, he could have been photocopying books in his basement, he could have been doing any number of other things, and breach of copyright doesn't tell you very much unless you know you're talking about electronic breach of copyright and that the mechanism or the platform by which this was occurring was Megaupload. Now – and so Her Honour, at paragraph 50 of the second judgment, which is page 92 of the case, set out this hypothetical description of what the offence should have looked like, "Criminal copyright infringement by distributing copyright works on the Megaupload platform and by that means also aiding and abetting criminal copyright infringement," and Her Honour said, "The warrants should have been sought and executed in those terms."

Now, what the Court of Appeal concluded at paragraphs 52 and 53 of its decision is that in effect applying the sort of straightforward commonsense reading mandated in cases like *Rural Timber* that's exactly what these warrants did show. If a reader was puzzling as to what kind of copyright infringement this warrant could possibly have related to, there was a wealth of clues, and in fact a wealth of explanation, contained within the appendix, and as we can see if we have a look at the items in the appendix – this is behind, for example, tab 4 of volume 1 of the case on appeal – there's actually plenty there to show this really was directed to electronic copyright infringement using not just Megaupload but other companies that were part of the Mega group, so obviously indicia of occupancy that's straightforward, but the second one is important, "In whatever form relating to the reproduction and distribution of copyrighted works, including, but not limited to," and what we see there are all electronic, all items that can be reproduced electronically – motion picture, TV programmes, musical recordings, e-books, et cetera.

ELIAS CJ:

Sorry, where's that?

MR BOLDT:

This is, Ma'am, page 23 –

ELIAS CJ:

I see, the second bullet.

MR BOLDT:

– this is the second bullet point. And then the third, the third bullet point, in case there was any doubt as to what, as to who this was alleged to have been done by, it's quite clear the warrant was directed to communications and activities of the Mega conspiracy, "Including but not limited to Megaupload, Megavideo and Megastuff Limited." And then when we look down at the list of items of digital devices to be seized, again the fact that there's a key focus on electronic copyright breach or electronic reproduction is, with respect, clear. This is particularly so, the Court of Appeal held, when we bear in mind that the reasonable reader who's looking at all this is, slips into the shoes of the person reading the warrant. And so this is not just a question of how you or I, Your Honour, would look at this coming without any background, although in my submission it would be clear even without any background that these were the things being sought by the warrant, but when you bear in mind that Mr Dotcom and Mr Ortmann, Mr Batato and Mr Van der Kolk were intimately involved in a business which was, whose lifeblood was the sharing of digital files. Now they say, obviously, "We knew nothing about any breaches of copyright," or, "We tried very hard to stop breaches of copyright, that was, I mean it was it was a constant battle for us," but nonetheless it's quite clear when there is a copyright investigation into Megaupload that that's exactly what the focus of the enquiry is going to have been.

So it's my submission that the Court of Appeal's analysis at those paragraphs, 51 and 52 of its decision were – I'm sorry, 52 and 53 of its decision – is exactly correct. Now that being the case, and if Your Honours accept the Court of Appeal reasoning with respect to the robust inference that a reasonable reader of this warrant who isn't being unduly pedantic but who reads the warrant genuinely as a whole, as all the cases mandate, if a Court agrees with the Court of Appeal's analysis there, then it may even be unnecessary for the Court to look at the extraneous material, the additional information provided, in form of the arrest warrants, because the warrant in fact itself conveys the requisite detail. But of course if we then do come on to

whether in fact anyone was misled – never mind whether a reasonable reader might be misled but whether in fact anyone was misled – the fact all the respondents, with the exception of Mr Van der Kolk, had their arrest warrants before they were shown the search warrants, and we can see that was the pattern in Detective Humphries' affidavit that he followed with all three of the respondents – of the appellants should I say – who were arrested at the mansion, first of all he presented them with the arrest warrants, which included the United States, and set out the charges in some detail, and then following that they were given the search warrants, it can be clear, it's clear, with respect, that no one was misled. As the Court of Appeal said, they would all immediately have understood that the broad and generic reference to breach of copyright in the search warrant was the same as the far more detailed offences set out in the arrest warrants. It's worth noting, as I said this morning, that there was that exchange between Mr Dotcom and Mr Ortmann on the lawn as Mr Dotcom was leaving with the police, paragraph 62 of the Court of Appeal's judgment reproduces that. The Court said, "It's clear Mr Dotcom understood from the warrants and the police explanations that allegations of copyright infringement were involved." Mr Dotcom deposed in one of his affidavits that shortly after his arrest, and he said, "As I passed Mona and Mathias Ortmann I expressed my surprise that this operation related to alleged copyright infringement, particularly as I believed we had endeavoured to be fully compliant with all of our obligations," and the Court then reproduces Mr Ortmann's effective corroboration of that exchange. The Court went on to note that, well – how – my learned friend Mr Foley had directed it to the relevant evidence regarding the other three respondents. So it's clear, with respect, not only was the warrant capable of being understood, particularly when read with the arrest warrant, it was, in fact, understood and it was understood the very terms that it was always intended to be understood.

ELIAS CJ:

What do you say that the search warrant authorised the police to take? I mean how is it, how are the things that are identified, leave aside the Megaupload stuff first of all, but how was it delineated? On appendix A it's delineated by reference to the crimes being investigated.

MR BOLDT:

Mmm.

ELIAS CJ:

Well what do the police, what could the police have understood that to mean from a warrant?

MR BOLDT:

Well, the police are always in a case of this kind going to have a detailed briefing as to what items are going to be looked for in the course of a search. The police are always going to have –

ELIAS CJ:

Well, what are they authorised to take?

MR BOLDT:

Well, they're authorised to take exactly what the warrant specifies, Ma'am, which is all evidence –

ELIAS CJ:

Everything?

MR BOLDT:

– relevant to the crime and if we assume the, and if the Court of Appeal is correct regarding the way a reasonable reader would approach this warrant, it would – the reasonable reader would appreciate this is a search directed to evidence of electronic copyright reproduction involving the companies that are operating out of the mansion. But it's also clear from the authorities that if there's any ambiguity as to what the police understood then evidence regarding briefings the police received, it becomes important –

ELIAS CJ:

Really?

MR BOLDT:

– at least relevant to the miscarriage of justice.

ELIAS CJ:

Really? What cases are those?

MR BOLDT:

Well *Rural Timber* is the best example, Ma'am, and that was –

ELIAS CJ:

About briefings?

MR BOLDT:

Yes.

ELIAS CJ:

By the police.

MR BOLDT:

Well, briefings given to the police regarding the scope of the search. You'll recall, Ma'am, what the terms of the warrant in *Rural Timber* said –

ELIAS CJ:

Yes.

MR BOLDT:

It was, you know, defrauding the –

ELIAS CJ:

Yes.

MR BOLDT:

– Minister of Works and then there was the list of items which seemed to have a focus on hubodometers.

ELIAS CJ:

Yes.

MR BOLDT:

But, in fact, what occurred in that case was that, in much the manner we've been debating so far today, there was a largely wholesale seizure with the expectation there would then be careful searching and sifting for relevant material off site.

ELIAS CJ:

It's just looking at this indictment it's not much of a restriction probably in the circumstances but the conspiracy is date delineated so it's 2005 to 2011, or to the date of the indictment, or whatever. There's no indication on the face of the warrant of anything like that. It's not just this case. I'm concerned about other cases where warrants of this breadth are used where there's a much narrower charge.

MR BOLDT:

Yes. Well, Your Honour, it's not common, and I'm sure Your Honours' experience bears this out for the description of offences in search warrants to be anything other than in relatively broad and generic terms. So, for example, drug manufacturing, it will simply say manufacture of methamphetamine, or possession of Class A, B and C controlled drugs, provided there's evidence to support that in the documentation.

ELIAS CJ:

But this is against the background of a statutory requirement that the offence or offences will be particularised in the warrant.

MR BOLDT:

Well yes, Ma'am, and what that means is particularised –

GLAZEBROOK J:

Does it say "particularised"? I just thought it said "specified".

MR BOLDT:

Well, a particular offence –

GLAZEBROOK J:

I thought it said "specified" which could just mean –

ELIAS CJ:

Well, "Shall contain the following particulars," sorry, "and they are the offence or offences in respect of which the warrant is issued."

MR BOLDT:

Yes, Ma'am, and really that's very similar to the sorts of descriptions that occur in Summary Proceedings Act warrants or occurred in Summary Proceedings Act warrants before the Search and Surveillance Act.

ELIAS CJ:

Without a requirement in primary legislation of this material to be provided in the warrant.

MR BOLDT:

Well that's true, Ma'am, and His Honour again Justice Fisher in *Sanders* addressed that and noted that you wouldn't expect the kind of particularity in a search warrant that you would expect in a charge sheet which, of course, includes times and dates and places. His Honour said, "There's got to be some particularisation. The important thing is that no one would look at it and think it authorises you just to search for anything relating to any offence at any time." Now here where we actually have a pretty, for all, and I make no, I certainly can't say that breach of copyright was great drafting, but what we do have is a breach of copyright which is then linked to a series of items, or categories of item, which are likely to yield relevant evidence for the offending, and it's that combination of breach of copyright, together with the sorts of things likely to contain the evidence which provides the reader with the scope for how the warrant should be executed, and in my respectful submission the Court of Appeal was right when it said, look we don't – well is said really even on the four corners of the warrant there was, in fact, the information Her Honour Justice Winkelmann said, "Ought to have been present," and would have represented the touchstone of a valid warrant in these circumstances.

McGRATH J:

Should it perhaps be the case that there was a reasonably high threshold before a Court should grant a warrant to search computers or the search of the type listed in appendix A on the basis that you need to have the sort of evidence that was contained in the application about the wide scope of activities allegedly being undertaken before you should be allowed to undertake what might be described as a search within computers generally. But you wouldn't, because a computer search is so privacy intrusive, that you wouldn't – that the judicial officer should not readily allow it. But once that threshold is met it's perhaps not that easy to get too much more particular.

MR BOLDT:

Exactly, Sir, and I think, and this really does dovetail with the submissions my learned friends made about the *Vu* case in Canada. It's no like thing. I mean a search warrant is no small thing ever. It is an intrusion into a people's home. It authorises conduct that would be unlawful in any other situation. A computer search, yes, there are going to be additional privacy interests associated with computers, because they will inevitably capture things that are irrelevant along with the relevant. But where you have, as you do here, a very, a comprehensive articulation of the nature of the offending, and where that is absolutely inseparable from the computers. This was computer-based offending. There's no other way to describe it. The computers, in many respects, are the scene of the crime. The, or the Internet here is the scene of the crime, as manifested through computers that were held, in among other places, at these properties, and once that – and so here what we can say about these warrants is that the evidential foundation for them passed with flying colours, even applying that harder look, Your Honour, refers to, about needing an enhanced threshold for searching electronic items. And it was inevitable, given the nature of this business, that virtually any item capable of holding digital data was going to need to be seized. It's important to note the police were, or the FBI, was not just interested in computers which revealed the organisation underpinning Megaupload, although certainly they were very concerned about that, and they weren't only concerned with things like communications between those alleged to be co-conspirators. The Court was also – the FBI was also interested in far more prosaic things like the presence of copyrighted material among the personal digital material used by the conspirators, because if they themselves had been downloading copyrighted material it would then become very hard for them to say later on that they had no idea there was readily accessible copyrighted material on Megaupload, and in fact the affidavit in support outlines some examples of individual downloadings, an the police were therefore, the police/FBI, were very keen to see whether this was occurring in this case. And that's also what explains the seizure of Kaleidescape system, by the way, and that was something my learned friend said yesterday, "How on earth could that possibly have been seized as part of this warrant, because it's a machine which is designed to only operate copyright-compliant material?" Well, the answer to that was, "Well, we need to see, and these are smart people, we need to compare what they call the hash, MD, hash, values of the recordings of the digital files on the system with those known to have been in Megaupload, because we need to make, we need to see whether this system was evidence of actual copyright infringement.

It's worth perhaps referring, Your Honours, to the evidence of Mr Allan Langille, who was the, he was the electronic crime laboratories expert, who made the decision about seizure of electronic material within the house. Because his affidavit – and that, Your Honours, you can find in volume 5 of the case on appeal, and I'll just give you the tab – yes, there are two of them. I'm looking at Mr Langille's second affidavit, which is behind tab 41. Mr Langille – and I'm interest to direct Your Honours to two passages within this affidavit, because they are useful at illustrating the search and how it was inevitable and necessary the search would adopt the focus it did. Firstly paragraph 13, and there Mr Langille outlines the background he had in understanding what the search was all about and what his role was, and so what we can see is there was a pretty detailed understanding of the nature of the offending alleged and the sorts of electronic items likely to be present at the property. But, more importantly still, we can see there was actually some genuine discrimination applied on – and ultimately Mr Langille was making the decisions about what items were to be seized – and if we go to page 4 of the affidavit, which is 774 of the case, we can see the way Mr Langille dealt with the electronic infrastructure within the house, and we can see, for example, he's down in the server room and he's looking, and there's a list of the devices that he located. And then at paragraph 27, "The two Powerware 9125, the two SKY receivers and the monitor were not seized, as it was believed they were not capable of storing data relevant to the investigation, the remaining six racks contained equipment such as patch panels, et cetera, and the majority were not seized. The following devices were seized, and it was believed they would assist FBI analysts to map or re-establish the network if required." And so what we can see there is –

GLAZEBROOK J:

So what paragraph was that, sorry?

MR BOLDT:

I was looking there, Ma'am, at, really between 27 –

GLAZEBROOK J:

Oh, 29, thank you.

MR BOLDT:

– and 29 of that affidavit. So we didn't just, as the appellants would have it, have the police storming in and seizing everything they could lay their hands on. What they

did, as best they could, was to seek to discriminate between electronic items which were not likely to have any material relevant to the investigation, and material which would be helpful to the FBI in reconstructing infrastructure or which might hold relevant data.

It's also interesting, given the criticism that was levelled yesterday regarding the seizure of the Kaleidescape system, is that Mr Poston which was the United States' investigator, the United States' lead investigator, specifically addressed the Kaleidescape system in one of his affidavits, and I think the one I'm looking for can be found at volume 4 of the case on appeal, behind tab 36, and it's at page 701, Mr Poston addresses this Kaleidescape home movie system. So this was the one where my friend had criticised Mr Langille for not really being able to articulate the likely basis on which it would be relevant. But Mr Poston himself sets out in detail why the seizure of that item was regarded as necessary by the FBI. So the suggestion, and in fact in my respectful submission, Mr Langille was being a little hard on himself when he said in cross-examination that really he didn't have enough information to draw clear distinctions between what was to be seized and what wasn't, because he in fact did exactly that, and it seems the items that were seized corresponded very closely to the items which were at least going to need to be checked by the FBI to determine whether they held relevant evidence.

So we reject, Your Honours, any submission that the police just blundered in there and grabbed absolutely everything, they did not, they did their best to conduct a properly discriminating search, and no one else would have been able to do that any differently. It wouldn't have mattered if there was a team of 10 FBI agents conducting the search because, as we've established, electronic devices need to be forensically examined before there can be a determination as to whether they contain relevant evidence or not.

ARNOLD J:
I read somewhere in this material, but I don't recall where, something about the various links that there were to property, fibre-optic satellite and all the rest of it. Where was that?

MR BOLDT:
Well…

ARNOLD J:

If you can just give me the reference so I could…

MR BOLDT:

Well, one place, Sir, is the affidavit of Mr Langille that I had just taken you – it's at paragraph 13, one of the subparagraphs –

ARNOLD J:

Oh, right.

MR BOLDT:

– I think of that affidavit – included a description of the very heavy-duty fibre optics and Internet capabilities going in and out of the mansion –

ARNOLD J:

Oh, yes, I see it, sorry, yes.

MR BOLDT:

And another place was, in the evidence of Mr Dotcom himself, he was asked what the Internet connectivity of his mansion was, and he gave a very detailed description, it was a very impressive custom-made high-speed Internet arrangement, as one would expect, with a wireless backup with his own custom link to the SKY tower providing 3G backup in case anything went wrong, and that was against the background that the police shouldn't have used helicopters because it would have been a simple method for them to switch off his Internet access and therefore he wouldn't have been able to delete or destroy evidence held on servers overseas, and of course the answer to that was, well, that would have been an extremely difficulty technical task for the police, but of course what it also wouldn't stop would be the deletion or encryption of evidence held on the New Zealand devices in the time it took the police to get into the property.

Now, Your Honours, taking stock of where I've got to, I've addressed the submission the warrant was a nullity. I think, or at least I hope, I've address to Your Honours' satisfaction this question of the way the offence was described and whether that was actually going to cause any problems in the way the warrant was executed. It's certainly our submission that, while the warrant wasn't great, it certainly did enough

to convey what it was all about, and of course it was made very clear to those being searched with reference to the seized – sorry, to the arrest warrants.

I've also addressed the question of miscarriage under section 204. It's certainly our submission, as I say, that the description in *Sanders* and as adopted by the Court of Appeal in this case of what's required for there to be a miscarriage is correct, and unless we first of all isolate the problem with the warrant and then ask, well, what would have been different if that problem hadn't by there, it's only upon undertaking that exercise that we can determine whether there in fact has been a miscarriage.

Now there are – and I think I've also, Your Honours, dealt largely with the way the warrant was executed. I've noted the fact this really was a properly discriminating search. But the second point, and which I haven't made but which is important, is to echo the comments made by the Court of Appeal in *Rural Timber*, which also were made by the Ontario Court of Appeal and the *Church of Scientology* case, that in any event if there were over-seizure this would be a separate downstream matter, it would be a matter that can be pursued by other means. It's interesting there was an attempt, albeit not a – it was obviously a necessarily truncated hearing, although it lasted four days, before Justice Winkelmann, in August 2012, where there was evidence about the seizure and Mr Langille was cross-examined, as the Court of Appeal noted, there was no finding, even in the course of Her Honour's rejection of the warrants, that any particular item had been wrongly seized. There were some challenges, for example, Mr Langille was asked, "Well, why did you seize these routers, what could they possibly have shown?" and in fact in some of the passages Your Honours were taken to yesterday in Mr Langille's evidence he said, "Well, actually, we find all sorts of good stuff, valuable forensic stuff, when we examine these things, and they certainly would help reconstruct the infrastructure, but may in and of themselves hold valuable information."

So those challenges were made, they were rejected by Mr Langille, and there was no finding from Her Honour that there would have been any difference in terms of what was seized if the warrant had been expressed in the terms Her Honour outlined. And that's not surprising, with respect, because if we accept that everyone proceeded on the basis that this was a search for evidence relevant to electronic copyright infringement using Megaupload, which was Her Honour's formulation, if we accept everybody proceeded on that basis when executing the warrant, then of course they

were going to have seized exactly the same material, regardless of whether those words were in the search warrant or not. So it's certainly submitted there is, that the warrant in fact got the job done on its face, and there is no evidence of any over-seizure as a result of the way the warrant was expressed. Even if there were, that's unfortunately one of the reasons we have a civil proceeding coming up in, probably it seems now, 2015, a trial in which Mr Dotcom and his associates will be seeking damages from the police for the way they executed these search warrants, and that's a case which is ongoing. So that's where detailed evidence about what should and shouldn't have been seized can be dealt with. It can't, as the authorities have held retrospectively, invalidate the warrant in any event.

And I should just note also there is a concern or complaint about the seizure of third party evidence, or the evidence of employees or others who were at the premises. Well, the answer to that can be found in the affidavit of Detective Inspector Wormald, and his evidence was – and I just need to quickly find which is the correct affidavit on this, I believe it was his second affidavit, which is vol 4, behind tab 37. The Detective Inspector, in any event, said, "We simply can't – no, I'm sorry, that may not be the correct affidavit, it must be his first affidavit, which is tab, page 706 of the case on appeal, and that's – I'm sorry, volume 5 – my learned friend's come to the rescue, page 565, tab 32, I do apologise, Your Honours. The key point there, and it's a relatively straightforward one, is that it's not the practice of the New Zealand Police simply to accept at face value when someone says, "Look, this belongs to me, it's not the property of this, the subject," but what then did occur was that there was a very quick return once the ownership of those items was established. So, again, the police were simply ensuring they weren't being hoodwinked as to who the real owner of the property was, and once that was established the property went back.

GLAZEBROOK J:
What does that mean? Sorry, does that mean that they couldn't turn them on at the time so they took…

MR BOLDT:
Well, it was, the question was, who did they belong to –

GLAZEBROOK J:
So not, is what he's saying is that normally you'd say, "Is this yours?" you know, "Turn it on and prove it," or something, is that…

MR BOLDT:

Well, yes, although some of the items were electronic items, others were things like a wristwatch, and what the police were seeking to do there was simply establish who they belonged to, but as soon as it was established they belonged to people who weren't connected with the investigation then they were given back.

GLAZEBROOK J:

But, I mean, let's say taking a wristwatch, wouldn't they just ask the wearer, or did they just take it off, off a bedside table or something?

MR BOLDT:

I believe that was taken from a bedroom, Ma'am, I would need to, I'd need to check. It certainly wouldn't have been – I shouldn't say that, "Certainly wouldn't have been," – I don't believe it was snatched from Mr Tempero's wrist during the course of the day.

Now, look, it's 3.30, Your Honours, and I think I'll have only about 10 minutes to go after the break. I do want to very briefly make a couple more points regarding this question of conditions, but I have very little more for Your Honours.

ELIAS CJ:

All right, thank you, we'll take the break now.

COURT ADJOURNS: 3.31 PM
COURT RESUMES: 3.48 PM

ELIAS CJ:

Thank you.

MR BOLDT:

Thank you, Your Honour, and I wish to return to the question of conditions only because that was plainly the area of our submissions that caused the most concern to the Court. The, and I don't, with respect, purport to distil the nature of the proposition I've been asked to meet, but I think it might be something along the lines that there needs, in every case, either every case generally or every case involving Mutual Assistance warrants, to be advanced provision made for off site sorting of items of uncertain status including where and by whom that sorting should take

place. I understand that to be the general nature of the proposition. Now it's important against hat background to consider how a regime of that sort would operate in practice, particularly where you have a Mutual Assistance warrant. Final decisions, for example, about where and by whom the sorting should take place, are logically going to be possible only after the search. It's only really once items are seized and an initial assessment can be made of them that people are going to be in a position to tell whether devices need to be sent away offshore to be screened, or whether they can comfortably be screened within New Zealand, bearing in mind that screening in New Zealand would be the preferable option but that there will be many cases where that's not actually a practical option. So if we accept that, in a good many cases at least, a final tailored decision is only going to be able to be made after the search has occurred. Perhaps the better question isn't how do we ensure conditions. The better question might be to characterise it as a form of supervision. Whose job is it to supervise the sorting of things seized and whose job is it to do that in the interests, not only of the public in the receiving country, but also the person whose devices have been seized during the search.

Now it's our submission that is a role not to be taken lightly or dismissed because it's with a member of the executive, but that is a role Parliament has assigned to the executive, and has assigned to the Attorney-General, and it's a discretion which is actually encapsulated within the four corners of section 49(2) of the Mutual Assistance in Criminal Matters Act. Section 49(2) expressly provides that the discretion includes a power to send the seized items to an appropriate authority of a foreign country. But, of course, that is by no means the inevitable direction that's going to be given in that situation. There is a flexibility and that is a flexibility which, I say again, will be exercised in the public interest, bearing in mind the additional demands of comity. The question, if there were to be conditions that had to be imposed in advance, is – well the question is, would it be appropriate, in those circumstances, for a Court effectively to say, well look I understand that section 49(2) entrusts this decision to the Attorney-General but nonetheless I'm going to require that it occur in this particular way in this particular case, and in my submission that would not be appropriate. Alternatively, you could have the very broad and generic type of condition which would just have to be an automatic condition attaching to everyone, which is there must promptly be put in place a mechanism for searching for irrelevant material. But, of course, that's the case the Attorney-General is going to undertake anyway.

ELIAS CJ:

Why do you say that though? Where's any clue to that role?

MR BOLDT:

Well, Ma'am –

ELIAS CJ:

It's just because it's after the event, after the execution of the warrant, isn't it?

MR BOLDT:

It is and it's because, to put it bluntly, someone has to have responsibility for that decision. The question is, who's the someone, and in our respectful submission at least we have a very deliberate decision to nominate the Attorney-General into that role and the Attorney-General is given the power to make the decision and also, as I say, to impose conditions on any grant of mutual assistance in the form of a direction under section 29. And so this does impose an unusual responsibility for a member of the executive but it's important, and plainly was regarded as important by Parliament, that this, because of the international dimension, is something more appropriately done within the executive branch, provided that is exercised in a manner appropriate to such an important decision.

ARNOLD J:

So, just to follow this, I mean if the issuing Judge said, well look, I've got all this material, I've been through it all, I'm entirely satisfied there's relevant material there, but I understand that computers are being seized so there may well be material that's irrelevant, I'd like to be satisfied that there's going to be a process put in place to ensure that the irrelevant is sifted from the relevant to the extent that you can.

MR BOLDT:

Yes.

ARNOLD J:

Do you say well the Judge is not even entitled to go there?

MR BOLDT:

Well, it's a little like what would have occurred in *Gill* if there had been conditions because this is something that needs to happen in every case where items which are

of uncertain status are seized in the course of a warrant. It is in no one's interest, and it's certainly not in the interests of the New Zealand Government, nor indeed is it in the interests of the requesting country, for them to have and retain irrelevant material. Irrelevant material is, by definition, material they don't need and it would be our –

ARNOLD J:
Well, I'm not sure myself that that is right. It depends what the irrelevant material is about.

MR BOLDT:
It would always be the New Zealand Government's practice to ensure that material was returned and that's an important aspect of acting in the public interest and in balancing the interest of the requesting country with the rights of the person from whom the material was seized in the first place. I suppose – and the question, and you're right, Your Honour, if you had a case where there was no consideration given to this exercise at any point, or say where the foreign jurisdiction refused to hand material back, you could say there you have a real actual prejudice. Now in my submission that's not something that, certainly it isn't something that's happened in this case, but equally it's not something the New Zealand Central Authority would allow to happen, because it's a responsibility that rests heavily on the New Zealand Central Authority to ensure this decision is exercised in proper terms.

ARNOLD J:
It seems to me that there are two things being mixed up here. One is, is there any prejudice that results from the process that, in fact, has been followed by the Attorney in this case, or in the *Gill* case by the police in conjunction with the Ministry of Health, that's one thing. But looking at it from the point of view of the issuing Judge, I mean what you're arguing is the issuing Judge has literally no jurisdiction because of the statutory structure, and it seems to me that you maybe right that there's not a lot that the issuing Judge could do, but for myself I find it difficult to accept that the issuing Judge can't even make an enquiry or set a general condition ie as a condition of this you've got to set up some process that deals with this problem.

MR BOLDT:

And what I submit, Your Honour, there isn't jurisdiction to do is to usurp the decision of the Attorney-General, is to actually take it in advance instead of leaving the way the sorting exercise is done, to the discretion of the Attorney-General.

ELIAS CJ:

You couldn't say no, that any evidence that's taken which is relevant must not be transmitted because that would cut across the statutory discretion which is conferred upon the Attorney.

MR BOLDT:

I'm sorry, Ma'am, any evidence which is?

ELIAS CJ:

Any which is relevant, which is covered by the warrant –

MR BOLDT:

Yes.

ELIAS CJ:

– because you have to accept that it covers, it authorises the seizure of relevant material.

MR BOLDT:

Well it's our submission, Your Honour, that it also authorises the seizure of –

ELIAS CJ:

Irrelevant material?

MR BOLDT:

No, items of uncertain status, that's the –

WILLIAM YOUNG J:

Well they're really items of mixed status, aren't they? They're items that have got some relevant material on them, some irrelevant material.

MR BOLDT:

Well –

ELIAS CJ:

They may not have because there are documents as well which are all being carted off to be sorted off site, which the Court's acquiesce.

WILLIAM YOUNG J:

Were there documents here?

MR BOLDT:

Yes there were, Sir, and they were certainly sorted and, in fact, copies returned promptly to the appellants and so it's – I certainly have no concern about the sort of exercise Your Honour Justice Arnold describes because what that would be, rather than being a condition that cuts across the Attorney-General discretion, would be a reminder to the Attorney-General to exercise that discretion and that could not be a matter of concern. What I would –

ELIAS CJ:

What do you say the Attorney-General's discretion is?

MR BOLDT:

The Attorney-General's discretion is to determine how the things seized should be dealt with. Whether they should be dealt with entirely in New Zealand –

ELIAS CJ:

Yes.

MR BOLDT:

– whether they should be sent overseas, whether they should be sent overseas on condition that they're returned if it's determined they're not relevant.

McGRATH J:

Your argument, Mr Boldt, arises solely because items have been seized and have been delivered into the custody of the Commissioner of Police. That's the – and then on a literal basis of reading the Act you're able to say it's now in the Attorney-General's territory. The problem we've got is that the purpose of this Act in relation to identifying things that may be properly seized under a search warrant is a

judicial function. Now I suppose one way of dealing with this argument with the Court's intruding into an area which Parliament has given to the executive, might be to say that for these matters which are indeterminate, as you like to put it, that the Court's might say, well, we won't let them get as far as the Commissioner of Police. We'll say that all of these computers must be put in a warehouse under the charge of the registrar of the District Court, subject to direction of the Judge, something of that kind. Now that's, I'm just trying to think through what, the implications of what you're saying. That would deal to your argument because the matters wouldn't have been seized. What would be happening is, that the warrant process would be continuing, matters hadn't yet got to the point of being seized. We have to deal with this Act in a realistic way that looks to the purposes and the proper division of functions –

MR BOLDT:
Mmm.

McGRATH J:
–to the judicial branch and to the executive branch. Now to take the sort of approach that, well, once it's got to the Commissioner of Police it's ours, on behalf of the Crown, isn't really helping that. This must have been addressed in other places, in Canada for example.

ELIAS CJ:
Well you mention the US, you mention the fact that they hold things almost in escrow. Was that, sort of, was that process arrived at through judicial oversight?

MR BOLDT:
I'm not sure –

ELIAS CJ:
It probably was.

MR BOLDT:
– of the answer to that, Ma'am, but it's certainly, I imagine so, in fact, I imagine the fact they have this very sophisticated system whereby privileged material is extracted and kept away from the investigators will be part of a judicially mandated process to ensure that privilege is preserved –

McGRATH J:

All material with the status in relation to privileged not having yet been determined.

MR BOLDT:

Yes Sir, that's right, that's right –

McGRATH J:

Because that's what we're dealing with. We're dealing with a situation in which, to my mind, in which the judicial functions in relation to a search haven't been truly completed because of the nature of what's being – of where the information is contained.

WILLIAM YOUNG J:

There is a problem. The direction, a statutory direction is on the constable who seizes something to give it to the Commissioner.

MR BOLDT:

Mmm and I –

WILLIAM YOUNG J:

It maybe difficult to read in an intermediate step there.

MR BOLDT:

I understand His Honour Justice McGrath's proposition would say that's not yet a seizure, it's not yet a seizure until it's cleared this intermediate step.

ELIAS CJ:

And an advantage would be that if it were necessary for the police to come back to the Court and say, well, we can't actually sort this here, we want to send it to the FBI, for the Court to authorise that subject to the sort of safeguards that you say the FBI apply in domestic cases.

MR BOLDT:

Well, yes, Your Honour, and that's why I come back to the question of, well, whose function is this, whose function is the supervision. In my respectful submission, and I agree with Your Honour, it realistically can only be done post-search, because it's

only post-search that you know what you've got and what the scale of it is and what the technical complexity is going to be.

McGRATH J:
"Post-search" may be a conclusory comment, but it may be that the search itself was being done in two stages, and it's not until the second stage that it is concluded, the second stage being relevance –

MR BOLDT:
Yes.

McGRATH J:
– et cetera is identified.

MR BOLDT:
Well, and I understand Your Honour's point. But, as I say, my question is, well, whose job is this? And I agree entirely with Your Honour the Chief Justice, there could be, there may very well be an enquiry, at which point the conclusion is, this can't realistically or practically be done in New Zealand, it needs to be done offshore. The only question is, whose job is it to make that call ultimately. Now, we say it's Parliament's choice that that should be the executive, or that should be the Attorney-General acting on the public interest, and as I say, this sort of process is not one that when the Search and Surveillance Act was recently passed, Parliament thought necessary in the context of a mutual assistance warrant, rather it was content to rely on the bald discretion, reposing in the Attorney-General. And so those are, it would be also, and I don't know what Your Honours' thinking might be in terms of the impact of this debate on the validity of these warrants, but it would be a, in my respectful submission, quite a tough call on the part of, to say the police ought to have anticipated the need for that intermediate step, because it's simply not something that's been dreamt of really, it's the police applying a very simply statutory regime.

ELIAS CJ:
What did the Chief Judge, what orders did, I can't remember now, what did she make…

MR BOLDT:

Well, Her Honour said, number one, "I'm not going to," Her Honour in her first judgment had hinted –

ELIAS CJ:

In the second judgment really, isn't it, that she's –

MR BOLDT:

Yes, it is. Her Honour in her second judgment said, "I'm not going to require a granular sifting of relevant from irrelevant material" –

ELIAS CJ:

Yes.

MR BOLDT:

– Her Honour said, "This, in effect, this exercise now needs to take place, but it needs to take place in New Zealand, it cannot take place in the United States." Now we in fact appealed that part of the decision on exactly this basis, that there may be cases where it is appropriate to direct there be seizure and sorting overseas. In fact in this case the Attorney-General didn't make any direction either way, the judicial review intervened, and so there was in fact no direction on the part of the Attorney-General on that issue. But we submitted to the Court of Appeal for future reference, because we say this is a function of the Attorney rather than of the Court, we challenge Her Honour's direction in that respect, but at the same time we got on and did it, I should say the police got on and did it, so it wasn't that the process was held up while we awaited the Court of Appeal. But what that did require was FBI agents to come to New Zealand and effectively conduct the sorting exercise at the electronic crime laboratory.

There was another aspect of Her Honour's orders which was under appeal and which I should indicate is still under appeal, because the Court of Appeal reserved leave if there was any need to go back to it on specific remedial orders, Your Honours will see Her Honour made a direction that personal photographs and videos should be stripped out of any devices that are sent to the United States and that the United States should get what Her Honour described as a "modified clone" –

ELIAS CJ:

Yes, that's 61, isn't it, roughly?

MR BOLDT:

– and we – yes, Ma'am – and we submit that that's not a forensically –

ELIAS CJ:

You say that cuts across, do you?

MR BOLDT:

Well, and also as it, from an investigative point of view, it's extremely difficult –

ELIAS CJ:

I see.

MR BOLDT:

– because it requires alteration of the device.

ELIAS CJ:

But is it not possible that the Judge is on the right track here? No, well, you might cavil a bit at the form of the order, but the Court of Appeal really says, well, there's nothing we can do, and I just – whereas this seems at least to be a way of meeting what is undoubtedly a real problem, and one that's going to crop up again, one would think.

MR BOLDT:

Yes, Ma'am, I – well, I agree with that. The – and of course in this, albeit that it was a very resource-intense exercise for New Zealand and it did require these FBI agents to come over, it was possible. But it may have been, and I should emphasis this, the Attorney-General had never actually made a decision as to where this sifting process should be. I can certainly say the inclination was that it would be better that it occurred in the United States because they are the investigators and have the sophisticated laboratories, it's not tying up our police, it's not costing our taxpayers, and –

ELIAS CJ:

And maybe that submission would have succeeded at first instance if there hadn't been this profound, well, this drip-feed of where things had got to, which must have caused a little irritation.

MR BOLDT:

Yes. And – but what I can say is, had the direction been, do it overseas, it would always have been accompanied with a condition, "and send back the irrelevant items." But it is our submission, Your Honours, that, given a couple of things, given the Attorney-General never actually did make a direction that these items be sent offshore to be sorted, and given the items all, all originals, remain here in New Zealand and are in fact under the supervision of our Courts, if the prejudice said to have arisen in this case is the possibility of items going overseas and disappearing, never to come back, well, that hasn't accrued here, it's a hypothetical prejudice that might arise in another case but it's not –

GLAZEBROOK J:

Well – oh, sorry.

ELIAS CJ:

Mr Boldt, one of – sorry – one, just because it hadn't really occurred to me before, although I did ask Mr Davison about what use is the declaration, am I right then in thinking that in fact the remedy that was provided has been implemented effectively, the material has been sorted?

MR BOLDT:

Well, yes, it has. Now what hasn't yet happened, and I should just quickly add what occurred in the Court of Appeal a couple of weeks ago, my learned friends went back to the Court of Appeal pursuant to the leave reserved and said, "Please, Your Honours, can we have back – we approached this application on the basis the warrants are invalid, because the Supreme Court is yet to hear the case, but please may we have back our 2013, what are called the 2013 clones," so these are all the devices that weren't copied by the FBI in 2012, this is all the others that were copied pursuant to Her Honour's orders, and we call them the "2013 clones" –

ELIAS CJ:

Oh, I see, yes.

MR BOLDT:

– because the clones were made in 2013, so they are not the 19 most evidence-rich items, they are all the others, and it's only actually relatively recently there'd been a request for those items to come back. And our response to that is, if the order regarding the 2013 clones is quashed, in other words, Her Honour's order were to go away entirely, that will then return the matter to the province of the Attorney-General, and the Attorney-General has undertaken that if that, that if the matter returns to him – and I should say this is the Attorney-General's delegate – if the matter returns to him, then he will make a direction that all clones that don't contain any encryption are returned as quickly as technically possible to the respondent – to the appellants. So that's the first direction that will be made. And the second is, all the others will go when there is the provision of passwords, the third part of it is, the United States should receive another clone of the same device at the same time as it's received by the appellants. So that's the kind of direction we're looking at here. Because the matter is still before the Court, before the Court of Appeal, we –

ELIAS CJ:

What's before the Court of Appeal?

MR BOLDT:

Well, that's, it went back to the Court of Appeal pursuant to leave reserved, my friends elected to go back before this Court ruled because they wanted their devices. But I have –

ELIAS CJ:

Yes, and that's parked pending this, yes.

MR BOLDT:

But we said "Look if, the moment – if the Court of Appeal were to quash those orders, the orders that relate to the 2013 clones, that's, that will be the response, unencrypted stuff straight away, encrypted stuff when the passwords come in. So again for all that there has been a very strong theme which has run through that the Crown and the police in league with the Americans are doing their best to keep material away from the respondents, the fact is we stand read as soon as the matter is returned to the jurisdiction of the Attorney-General to facilitate that straight away. So that's the basis, that's the way we have approached the issue, that's why, as I say, as soon as concerns were expressed in February 2012 about how these items,

about how the possibility of these items disappearing to the United States, there was a stop order made; and that is why when the FBI came over it made two clones, one for themselves, one for the appellants. So in terms of what has flowed from the absence of conditions in terms of the way these items should be dealt with the answer, with respect, is well not a great deal.

ELIAS CJ:

Well why did the Crown appeal these orders, it's a bit hard to work out why, why in a way the argument that we're hearing hasn't been overtaken?

MR BOLDT:

Well because Ma'am there was one bit of Her Honour's orders that was going to prove problematic and that was this order for personal photographs and videos to be excised from any clone of the material provided to the United States. That would by itself be an absolutely mammoth task because we're talking tens and tens of thousands of photographs, each of which would need to be individually assessed for relevance but also this concept of a modified clone which Her Honour creates in that judgment is, with respect, a contradiction in terms. The moment a device like that is modified it ceases to be clone.

ELIAS CJ:

But that doesn't affect those matters of practicality which could have been put to the Judge then or on – did she reserve leave, she probably did, did she?

MR BOLDT:

Well we, well Your Honour, for better or for worse that was a –

ELIAS CJ:

No I'm just, I'm just –

MR BOLDT:

– of Her Honour which we decided to appeal.

ELIAS CJ:

– trying to untangle what we're really being asked, what the, what we're really being asked to address here and what you're saying is, I think, that 58 and 59 and 60 are,

have been implemented so far as you can apart from the deletion or part ticking off material which causes problems, is that right?

MR BOLDT:
I'm sorry Ma'am, I'll just – you take 58 and 59, perhaps it's better to look at –

ELIAS CJ:
Page 94.

MR BOLDT:
Perhaps it's better Your Honours to look at page 96 because those are the, those are the actual orders Her Honour made. There's a sealed order in the case on appeal as well but we can look, since we've got the decision in front of us, no one appealed Your Honour against the order that the clones be provided to the plaintiffs upon provision of encryption codes and that remains entirely appropriate and no one contests that.

ELIAS CJ:
Where's that?

MR BOLDT:
That's over the page Ma'am, 97, (b)(i) and as I say if the matter were returned to the Attorney-General then a similar condition would be imposed with respect to the 2013 devices. Of those over in 97, the order by way of declaration that the removal of the clones was contrary to the Solicitor-General's direction is not contested. Numbers 2, 3, numbers 2 and 3 on that page have been complied with. In terms of the other orders, and this is the ones in paragraph 65(b)(ii) and these are the, these are the so-called 2013 clones. First of all there's an order from Her Honour that none of the material leave New Zealand. Well we ask, we'd ask the Court of Appeal to quash that order so clones at least can be supplied to the United States at the same time as the appellants receive them. Secondly –

GLAZEBROOK J:
Sorry is it 65(b)(ii), is that just the, oh, in respect of the items that have not yet been cloned –

MR BOLDT:

Yes so these are the –

GLAZEBROOK J:

– is that sorry, I see the 2013, yes.

MR BOLDT:

– what we call the 2013 clones. So –

McGRATH J:

65(b)(i) you need to have for your argument to be complete, to be successful you need to have that set aside?

MR BOLDT:

Yes Sir. On the basis that, we need to make some progress in providing relevant material to the United States. But secondly, 65(b)(ii) and then number 1, "Review of all items seized including the contents of digital storage devices for the purpose of identifying irrelevant material," yes that's happened. Number 2, "Items containing only irrelevant material are to be returned to the plaintiffs," yes that's happened. Three and four are the problematic ones there. "Two different clones must be prepared, one complete clone and one disclosable clone to be provided to the United States authorities after the plaintiffs have received their clone." And that's been the sticking point with respect to that order because we do say that order is wrong as a matter of principle but also practically impossible for police to comply with.

ELIAS CJ:

Well why is it wrong in principle, because in principle surely the irrelevant should, if it can be, excised?

MR BOLDT:

Well it's, it relates to what is required to create a viable forensic clone Ma'am and it really relates back to the discussion –

ELIAS CJ:

No but that's practicality, I'm just talking about in principle if you could do this, as the Judge seemed to think, you know you can deal with impossibility later?

MR BOLDT:

Your Honour if the relevant material were all severable –

ELIAS CJ:

Yes.

MR BOLDT:

– and we had unlimited resources and it wouldn't impact upon the evidential integrity of the item by destroying the status of the clone as an actual forensic clone.

ELIAS CJ:

Well that's really though a question of severability because you want the fingerprints.

WILLIAM YOUNG J:

But is this issue before the Court of Appeal now?

MR BOLDT:

Yes.

GLAZEBROOK J:

So it's not, this isn't before us but that's slightly unsatisfactory because we could be making all sorts of comments –

MR BOLDT:

Yes the Court of Appeal reserved leave and certainly it's our case that if the warrant is that –

GLAZEBROOK J:

But when they reserved leave you mean you didn't know about this at the time they reserved leave?

MR BOLDT:

Well we did –

GLAZEBROOK J:

Well I was just really asking why it wasn't argued in the Court of Appeal?

MR BOLDT:

It was, it was but –

GLAZEBROOK J:

But it wasn't dealt with?

MR BOLDT:

No.

GLAZEBROOK J:

Well it's very unsatisfactory for us to now supposedly be dealing with it some ways.

MR BOLDT:

Well I can explain why, what – it's pretty practical. We ran out of time and then the Court allowed the appeal, declared the warrant valid and said well okay now if there are issues that arise as a result of Her Honour's remaining orders, we haven't – we didn't hear proper argument about that –

ELIAS CJ:

But if the warrant's valid, if the warrant's valid surely all the orders drop away?

MR BOLDT:

And that's our submission Ma'am, and we – that's the very submission we've made to the Court of Appeal.

ELIAS CJ:

But if we're not with you on the validity because we say that some regime should have been set up, then we're back into all of this –

MR BOLDT:

Correct and then we –

ELIAS CJ:

– which is not before us.

MR BOLDT:

– we'd have to go back to the Court of Appeal Ma'am, that's right.

ELIAS CJ:
I see.

WILLIAM YOUNG J:
It may be –

MR BOLDT:
And so, but that's the – that was the, that was the – perhaps unsatisfactory way things concluded in the Court of Appeal, it's certainly our case though that there is no illegality of any kind associated with the 2013 claims, they're not affected by that unlawful export of the 2012 clones to the United States, they've been copied and kept in accordance with valid section 49 directions and so if the warrant remains valid it's our submission all of those orders should fall away and we've given, as I say, an indication of the section 49 direction that would follow if that were to occur and I mean I'm happy to set it out in public because we've already said it in public, this is what will happen. And it really is very close to what Her Honour ordered, it's just, it sets aside this business of the personal photos and videos and simply provides for a one for one exchanged, the plaintiffs receive their clone, the United States receives the same clone, and that would occur pretty much as soon as the matter was returned to section – the Attorney-General under section 49.

But I suppose it's our point, the question is does this affect the validity, could this affect the validity of the warrant generally, does it affect it in the present case, given, while I would appreciate my friends would have an argument if items had simply been, if original items had simply been sent off to the United States and they'd had no opportunity to intervene, or if the United States had taken it and hadn't, and there'd been no condition for assorting for relevance, we would have relevant prejudice perhaps in those circumstances. But in the circumstances where all of the items will remain here we're talking about a hypothetical prejudice which, in fact in this case, hasn't arisen, my friends say, "Well we need our items back," but the fact is the slowness in the return of the items has been because of all manner of other problems, including issues around passwords and as I say the request for the 2013 clones was only made in June or so of this year, and we've immediately said, "Well this is how we would propose to deal with it if we had them back in the jurisdiction of the Attorney-General." So –

WILLIAM YOUNG J:

Can I just ask you one question? How does the Search and Surveillance Act deal with physical control of computers on which information is stored? Now I recognise that it permits the relevant files to be cloned, but does it actually deal with what happens to a tangible item on which there is a mixture of relevant and irrelevant material?

MR BOLDT:

Yes. If I can take Your Honour to it.

GLAZEBROOK J:

And I was looking quickly at the privilege things, and I couldn't find anything too explicit in there quickly, so you might be able to point to that as well?

MR BOLDT:

Of course Ma'am. There's a whole section that, a whole part that deals with privileged material, so, -

GLAZEBROOK J:

I saw that, but I wasn't entirely sure what the technical – were they're technical – I only looked quickly?

MR BOLDT:

Well it provides for independent – for an identification of the privilege material by the privilege holder, so it cases an onus on the privilege holder and then the potential for independent review of that material before it's – before it passes to anybody else. So it's a little bit like the system they had in America.

ELIAS CJ:

The FBI system?

MR BOLDT:

Yes.

ELIAS CJ:

Sorry, what volume are we looking at?

MR BOLDT:

Oh I'm sorry Ma'am I think we were looking at the Search and Surveillance Act.

ELIAS CJ:

Have you got it separately?

MR BOLDT:

Well, first of all section 110.

ELIAS CJ:

Yes I have. So section 110.

MR BOLDT:

Well and this is simply the power to create clones. You can see this in section 110, paragraph (i). And then what becomes of the clones –

WILLIAM YOUNG J:

Well what actually becomes of the computer is what I'm interested in.

MR BOLDT:

That's evidence, it's retained as evidence.

WILLIAM YOUNG J:

So you say you just seize the computer and keep it?

MR BOLDT:

Yes, that is –

WILLIAM YOUNG J:

So that's – but there's nothing specific about that?

MR BOLDT:

In –

GLAZEBROOK J:

Where does it say that?

MR BOLDT:

Well we can have a look quickly at the provisions that deal with that. So if you look at section 152 Your Honour. So what that says is it's open to the seizer to give back the original or operate off a copy in their discretion. Then section 161 deals with what becomes of forensic clones and that again really is the same sort of mechanism we've been talking about. It's assessed for relevance. If it's not relevant at all, if there is no relevant material it gets returned or it gets deleted.

WILLIAM YOUNG J:

I see. So 161(2) says you can retain it and it's got a mixture on it?

MR BOLDT:

That's right, and search within it. And that really does highlight that we're talking about a document where – or a device where there's an awful lot of information in and around the particularly relevant part. And then 162 also says that the police can retain as part of their permanent records a clone that they are – that they have and they keep in accordance with these powers.

McGRATH J:

It contemplates the search is continuing, does it not, in section 161?

MR BOLDT:

Yes, a search within the device, yes.

McGRATH J:

Okay.

GLAZEBROOK J:

At 156 is the application for release, so there is an ability to – release of access.

MR BOLDT:

Yes, yes that's right. So this is the part, to be fair of the Act, which doesn't apply to mutual assistance warrants, this is the fairly detailed regime which Parliament in its wisdom excluded mutual assistance warrants from, instead of investing that power in the Attorney-General.

ELIAS CJ:

Well leaving the power?

MR BOLDT:

Well yes. Confirming that the fact that –

WILLIAM YOUNG J:

The status quo.

MR BOLDT:

The repository of the power is the Attorney-General rather than this far more elaborate regime.

ELIAS CJ:

But where's t he – is the independent scrutiny only in respect of privilege documents?

MR BOLDT:

Yes it is, that was one of the – that as one of the important, one of the important initiatives in this Act. I should check, it does apply to, it makes certain provisions to other forms of what it calls privileged material, and that's at section 144 Your Honour. And that talks about what happens where a seizure produces say medical records or communications with the Minister of Religion. But you can see there are interim steps in 146 and then the process by which privilege is claimed is set out in 147.

ELIAS CJ:

Is privilege defined do you know?

MR BOLDT:

Well I can check it.

ELIAS CJ:

No, I'll have a look, don't worry.

MR BOLDT:

It's there at 136 Your Honour.

ELIAS CJ:

Yes, thank you.

MR BOLDT:

So Your Honours it's certainly my submission that conditions, I think I've said many times, they're discretionary, they weren't – they're not mandatory in general, they certainly weren't mandatory in this case and the Law Commission's concerns, and I've referred Your Honours to the passage and I won't take you to them now in the Law Commission report, talking about, which talk about the undesirability of absence of conditions as a basis for a challenge to a warrant. Your Honours can see that in my written submissions in a couple of footnotes, but in fact I ask Your Honours to rather than take more time, have a look in my written submissions between paragraphs 62 and 68, which gives you all the references to the various passages in the Law Commission report with deal with this question. I do submit this isn't a matter that goes to the validity of the warrant, it might be something that gives cause for complaint regarding the way things are handled after the warrant, and in that respect it's in my submission analogist to the question of over-seizure, it might cause a problem and be the subject of separate proceedings, it might not, but in any event, in this case there's been no irretrievable loss of access to anything. None of the hypothetical prejudice averred to by my friends has actually arisen in this case because all the items are here in New Zealand still and in my submission that highlights why the problem, if there is one, is not with the warrant at all, but is with – it's the responsibility of those entrusted with handling them, and at the moment that's under the supervision of the Courts, but Your Honours have seen from my submission it's a matter the Attorney-General as the guardian and custodian of this type of material, takes very seriously, and would never exercise without proper regard to the rights of the persons from whom the material was seized.

Now, Your Honours, I realise it's been a long day. I believe I've covered everything. Is there anything else I can assist Your Honours with?

GLAZEBROOK J:

Can I just check, if you say you can't do a modified clone, how do the FBI deal with privileged material on computers, because surely there would have to be some kind of modified cloning in those circumstances, otherwise the privileged material would be going to the investigators? I know it's not before us but your submission was, I'm sorry, we can't do modified clones.

MR BOLDT:

Well that's an excellent question, Your Honour, and I would need to – what I can direct Your Honour to, I'm not sure if it –

GLAZEBROOK J:

I mean, we're not really going to be looking at it, but I would think but it's – it is relevant to a submission that one should somehow not be providing irrelevant material. If the answer is, well you have to provide the irrelevant material, because that can't be the answer because otherwise unprivileged material would be provided to investigators.

MR BOLDT:

Well if there's – what we can say, and Her Honour has ruled out the question of there being any real suggestion that legally privileged material is included among this seizure, and Her Honour made it clear she didn't – or at least didn't see the need to make any separate provision for privileged material.

ELIAS CJ:

But it's the same problem as what is being put to you

GLAZEBROOK J:

Yes.

MR BOLDT:

Mmm.

ELIAS CJ:

And indeed it must be the same problem under the Search and Surveillance Act, isn't it, with these independent people letting – for privilege.

MR BOLDT:

Well, Your Honour, that's – I must say that question hadn't appeared to me until a moment ago. I can direct Your Honours to the affidavit which describes the privilege filter in the United States.

ELIAS CJ:

But what's the section that describes the privilege filter – what gets passed over after the filter under the Search and Surveillance Act? What section does that?

MR BOLDT:

Yes, 146, I believe is the answer.

GLAZEBROOK J:

That's the interim one and then it's – well it must be that you don't look at it but…

MR BOLDT:

Yes and then 148 describes the consequence but it's 147 –

ELIAS CJ:

You apply to the Judge for relief.

MR BOLDT:

But it casts an onus, in any event, on the person. It says there is privilege material to identify it and it then is scrutinised in accordance with this section –

GLAZEBROOK J:

I wasn't really so much interested in the privileged material, I was just interested in the blanket assertion you made that the, a partial clone wasn't possible, and if that's right then I don't see how you can deal with privileged materials, so I was just saying I can't think it is right.

WILLIAM YOUNG J:

Well you might, the screening team may retain the original clone, release other material to the investigating team on the basis of what they understand the data on the computer reveals. If there's an issue well it can be tested against the original clone.

MR BOLDT:

And my learned junior has very kindly passed me a note to that exact effect Your Honour –

GLAZEBROOK J:

Well why can't that be done with irrelevant material? I mean I understand that there might be a practical issue in respect of this particular case but my concern is – well I certainly would be concerned as a judicial officer, if I was giving a blanket, without knowing that a clone was necessary in the particular case, if I was giving a blanket every time I gave a search warrant, that said you could look at a computer, that I was giving a blanket view that it would just disappear into the bowels of somewhere, relevant material, non relevant material, forever to be held, including clones, with a begging, can I have some back to continue my business, well no doubt then sense would prevail, but as a judicial officer, signing one of these, one would have some concerns about this.

MR BOLDT:

And interestingly sections 161 and 162 of the Search and Surveillance Act really do make, I think I can understand Your Honour's discomfort, but they do effectively say, once there is some relevant material on the device, it cannot only be –

GLAZEBROOK J:

Well you might just not be prepared to give a search warrant in those circumstances unless it could be shown something more than, well there may possibly be something on a computer.

MR BOLDT:

Well, I understand the point, I don't believe that's the way the legislature sought to frame this legislation, because of course you're ultimately know until you get the opportunity to look at it.

GLAZEBROOK J:

No, but what they're saying is they're supposed to give access to the computer, they've got requires for someone to give access. In most circumstances, that ought to be sufficient that someone is required to give access, you give access, you look at the computer on site, you pick out whatever it is that you think is relevant, and you go away again. So one might give much more particularised as in *A Firm of Solicitors*, if it's looking at one transaction you don't get to take away the thing.

MR BOLDT:

Well, Your Honour, that's true, and that would depend also on the extent to which, if you like, the metadata data is going to be relevant. In other words, a good example of that is what happened in *A Firm Of Solicitors v District Court at Auckland* [2006] 1 NZLR 586, because it wasn't only the actual documents that were relevant, but when they were created, is of – and how they were changed and where they sat in the sequence that was going to be relevant in that case, because of course the allegation there was ex post facto creation of a whole series of transactions that were ante dated to look real when, in fact, they're not.

So that was a good example of where you really would need the whole device because you would need to extract all of that material, and certainly this Act is designed to preserve evidential integrity of the whole of a device that contains some relevant material, and that was with the exception of the photos and videos, our other submission was unclear why Her Honour singled photos and videos out, but that was in the end Her Honour's approach, because I'm not going to require a granular sifting except for photos and videos, and in our submission, certainly in a mutual assistance context and we need to understand too a part of this is to facilitate the provision of evidence to the United States to whatever country, whatever partner country New Zealand is dealing with. And that's not going to be effectively or efficiently achieved by creating a process that requires literally hundreds and hundreds of hours of work on the part of New Zealand authorities, when really that's a task for the investigators in the requesting country.

There's been a theme throughout in this case to try and get as much of what should be decided in the United States remaining in New Zealand, but the investigation, the interrogation of computers and the identification of relevant evidence really should in our submission, be a matter for the United States and it shouldn't be an ongoing and enormously resource-intensive burden on the New Zealand Police.

But Your Honour, I'm not sure I can take that further, what I can say if Your Honours are interested in reading the evidence about the filter process for privileged material, that can be found in volume 5 of the case on appeal behind tab 39, that's an affidavit from Mr Prabhu, who is the United States official who was responsible for the American end of the Megaupload investigation.

But Your Honours I'm not sure I can assist further unless there are any areas where Your Honours think further attention would assist.

ELIAS CJ:

Thank you Mr Boldt that was very helpful. Now I think this matter was set down for Monday and Tuesday because of the difficulty someone had about going into Wednesday, was that – is that recollection correct? I'm just reluctant to ask you to reply at this stage Mr Davison if you would rather do it in the morning?

MR DAVISON QC:

Well Your Honour first of all, in terms of the two days I don't think there was any –

ELIAS CJ:

There wasn't.

MR DAVISON QC:

– constraint in relation to a third day's –

ELIAS CJ:

We don't normally sit on Monday so it's a bit strange.

McGRATH J:

An urgent fixture.

ELIAS CJ:

Was it, I'm not sure.

MR DAVISON QC:

I think that probably was the – Your Honours I expect I'll be about half an hour or so, so it would take us beyond the 5.00 pm. We are all – plan to return to –

ELIAS CJ:

Would you prefer to go on tonight?

MR DAVISON QC:

I would prefer to, but it's subject to the Court –

ELIAS CJ:

Well we'll do that. The only –

GLAZEBROOK J:

Well I can't go past – well I don't think we will be, half an hour's fine.

ELIAS CJ:

Hang on there are three replies, and the others may be brief, but half an hour is not something I'd want to be absolutely definite about. You need to stop at –

GLAZEBROOK J:

I can't go until just – I've got to go at just after 6.00.

MR DAVISON QC:

Well that would be well sufficient for me.

ELIAS CJ:

Well we'll take it in the reverse uncurl order, so you'll finish up Mr Davison. Mr Foley do you want to be heard in reply?

MR FOLEY:

May it please Your Honours, in reply to my learned friend Mr Boldt's submissions, as to the Attorney-General's directions having resulted in the devices remaining here, and available to the appellants, I'd like to speak to that in reply.

The plan was as I understand for all sifting other than the most coarse sifting exercise to have been carried out in the United States of America, Mr Boldt told you that the key thing is that nothing has left the country, and nothing will leave the country due to section 49 that was from, at my files, which I reviewed, something that happened quite late in the piece, after Mr Davison and myself indicated quite firmly to the Crown that we were concerned. Mr Boldt referred to a section 49 certificate dated the 9th of February, I think it's one dated the 16th of February, which is quite close to the 30 day requirement. Your Honours know from the large bundles of evidence you have before you, that the plan was that everything was to be shipped off, all of the computers, all of the data bearing hard-drives, almost immediately and you know that from Mr Wormald the offer –

WILLIAM YOUNG J:

Well we know that, and we know it didn't happen.

MR FOLEY:

Yes. But that was the plan.

WILLIAM YOUNG J:

And it's just repetitious – a repetition of what we know.

MR FOLEY:

It's late in the day and I don't want to repeat things Sir, but that was the plan, that was confirmed by Detective Wormald, Ms Laracy, Mr Langille. So the in reply the plan was Mr Langille told you at volume 6, page 220 in cross-examination, essentially anything that had the capacity to store digital information was selected, so it was selected and then the plan was that that was to be shipped off to the United States almost immediately, so all material whether privileged or not, whether relevant or not, was going to the States to be sorted.

ELIAS CJ:

But a lot has – a lot has been learnt during this process.

MR FOLEY:

Indeed, but in relation allowing – excluding the Court from imposing conditions –

ELIAS CJ:

Yes.

MR FOLEY:

– to filter here in New Zealand offsite, which I accept, the filtering was to occur offshore which is wrong, because it's lost to the jurisdiction, impossible to access. In relation to prejudice of ongoing seizures of items I have taken three aspects of the evidence, Mr Dotcom at volume 3, page 423 Mr Davison and I'll probably address you on that and again in his second affidavit at page 429 of the same volume, I'm sorry I don't have the tab number, paragraphs 33 and 34 in a relation to my two clients, Mr Dotcom again, volume 3, page 426 speaks of the ongoing prejudice. There are no other matters I wish to cover in reply thank you Your Honours.

GLAZEBROOK J:

Sorry what was the ongoing prejudice, the impossible to access, is that…

MR FOLEY:

Mr – sorry I'll just retrieve my bundle.

ELIAS CJ:

I think you were just being asked about what the topic was, what the subject of prejudice was?

MR FOLEY:

Impossible to access data, therefore impossible to prepare, impossible to carry on business, the difficulty in instructing counsel, impossibility for these men, perhaps Mr Ortmann's a good example. He was here on holiday, he had his laptop, he had access to nothing so his life was on his laptop and he didn't have it, hasn't had it, received it essentially just recently, so two years later.

ELIAS CJ:

Thank you. So it's access to information?

MR FOLEY:

Thank you. Yes.

ELIAS CJ:

Yes Mr Pilditch?

MR PILDITCH:

Your Honours if I may, just two points in response and in fairly broad terms. Your Honours yesterday were given a copy of the Mutual Assistance to Criminal Matters Act, that's a stapled document rather than in the bundles. Section 29 which is on page 34 is the provision my learned friend referred to in terms of the framing of conditions which has been the subject of discussion today and my submission is that when one views that provision in the broader context of the provisions that follow which relate to specific categories of assistance it would appear, in my submission, that this is really a provision that is directed at a pre-emptive suite of conditions imposed on the requesting state as a prerequisite to the Attorney taking steps to initiate the assistance that is sought because what follows assistance in locating or

identifying persons, assistance in obtaining evidence in New Zealand and then on to the provisions that this Court's concerned with in relation to the warrants at section 43. And so the Act itself in that regard, at least, anticipates that it maybe appropriate to contemplate conditions in terms of the assistance that is sought before the initiation of that assistance and in this case which in the appellants' submission has called four conditions that should have been imposed at the outset of the assistance sought, there's an absence of any consideration of conditions at that early stage at the time when the warrants were sought and executed and the rights of the people affected by that warrant, subjected to it.

The corollary of that, in my respectful submission, is that when section 29 is considered and also section 49 in which my friend has placed reliance, it's clear that what the Act recognises is the division of function between executive and Court and it's equally clear, in my submission, in terms of the question of who supervises, that it's the Court that supervises the police conduct in this country in terms of assessing the application issuing the warrant in terms that the Court considers strikes the appropriate balance between the acts of the executive and the interests of commonality and the rights of people who would be affected by the warrants. In other words there's recognition in this series of sections of that separation of role and power and in my submission it is quite wrong to read down the Court's role in the imposition of conditions or the expectation of conditions which if they had been framed prior to the commencement of assistance, the direction of the Attorney-General may have informed the Court's consideration in terms of issuing the warrant. In other words if there had been conditions framed and thought of by the Attorney at the section 29 stage as a pre-condition to assistance being provided, that would inform the Court's consideration in terms of the issue of the warrant. In the absence of that, in my submission, the Court would have been entitled to look to conditions, given the breadth and scope of this application and what was sought.

Final point is in relation to the form and the search warrant itself. The two points my friend identified as being different between the search warrant and form 5 which is in the first volume of authorities at tab 4, were in relation to the country in terms of the origins of the offences and the reference to two years. If I can just take the Court to that form and just note that that form also imposes two additional requirements that were absent the warrant and is absent from 50 of the section 198 Summary Proceedings Act variety which was a requirement that any person executing the warrant comply with section 47 of the Mutual Assistance in Criminal Matters Act and

that if you seize any article or thing you are required to comply with section 48. And so those two additional matters were absent from the warrant because the incorrect form was used and no doubt the respondent would say that that's an omission that just goes to form, not particularly important but in my submission, perhaps standing back, what really seems to have been submitted is that once grounds exist the document becomes unimportant but what I do submit on behalf of the appellants is that it's the document that defines the rights, responsibilities, the expectations of the people involved, those executing the warrant and also those people who are subject to it and it repeat the submission that that is fundamental in any society that places an emphasis on rights such as those that are being discussed in this Court. Ultimately a matter for this Court as to how the precise terms of these warrants are contemplated, but it's my submission that the more one drills down into appendix A, the more problematic that becomes. The language, the fruits and instrumentalities, including but not limited to, my friend relied on the references to the Mega companies in the third bullet, they are absent in all of the other bullet points. No reference whatsoever limiting it to those companies or articles or things related to that.

In my submission this was a warrant that failed to meet even the most base criteria for what should be expected, given the power that was being executed pursuant to it. May it please the Court.

ELIAS CJ:

Thank you Mr Pilditch. Yes Mr Davison?

MR DAVISON QC:

As Your Honours please. Your Honour's the first point I make in reply relates to the submission my learned friend has been making regarding the role of the Attorney-General in this MACMA context and in my submission what has been telescoped there is a role that has responsibilities, as he would put it, to the Attorney-General to determine issues that affect rights. That role is not that of the Attorney-General at all. Although the Attorney-General has to recognise the rights affected the Act, in my submission, makes it very clear, as my learned friend Mr Pilditch has just noted, that the Attorney-General's role, having authorised the police to seek a warrant, is then to await the Court's process whereby the Court supervises the adequacy of the application and in the course of doing so recognises the rights that will, in the end, yield a warrant that will authorise the seizure of that which is relevant under MACMA and give up to the Attorney-General's custody via the Commissioner those items

which are to be provided under the Mutual Assistance request regime. Here what miscarried was the idea of distinguishing that which was relevant from irrelevant was to be put to one side so far as the New Zealand process was concerned, the responsibilities abdicated in favour of sending it to the US to undertake that process, so as the police were instructed they weren't able to determine relevance beyond the broadest possible means of saying well anything which contained data will be sufficient to meet the requirement.

One needs only to go back to *Tranz Rail* to see the nature of the warrant there which was found to be invalid and general. There the warrant was to seize anything that the Commerce Commission, that might be related to their investigation. Here appendix A indicated that the items to be seized were matters relevant to the crimes being investigated. The two situations are quite closely connected or related in terms of that sort of scope. So what the police did was to go around and look for anything that was capable of storing data and then the preliminary process which would identify that which was relevant from that which was irrelevant was to be left to somebody else offshore and in my submission that that illustrates that the issue of relevance was not being properly addressed by the terms of the warrant and that the warrant needed to be refined by the imposition of conditions. It may be of some significance that form 5 refers to special conditions, as does 45(3), special conditions, and the sort of conditions which the Court would have in mind were those that were necessary to achieve a sifting. Now, although the New Zealand Police and Crown took the initial position that they were unable to do that in New Zealand, what they have demonstrated is they can do it and it has been done insofar as what has now been created as a series of clones, the 2013 clones. So in my submission this was always a matter that was capable of being dealt with by way of appropriate conditions and it went off the rails as a result of the use of a wrong form and the misinformation provided to the Court, which took the Court away from any consideration of special conditions, and as a result what was issued was a general warrant that was so broadly cast as to enable the seizure of anything containing digital data, and whether it ended up being relevant to the broadly described and inadequately described charge, or offence, was a matter that could not be determined and would not be determined by any police officer. So if anyone came to challenge the police, "You can't take that," the warrant said we can take anything, anything that contains data, and if one said, "Well it's not relevant." Well we don't know that. It potentially is relevant. It's going to be seized.

Your Honours, so far as the process is concerned it's my submission that the Search and Seizure *[sic]* Act, as it has now modified the legal landscape, has not led to the Attorney-General being given responsibility for the determination of this issue at all. Part 6 is excluded so that the Attorney-General's role remains as it always was, authorising a search warrant and directing the disposition pursuant to section 49. The Court's role is in no way diminished by the terms of the Search and Security, Search and Seizure Act as it's enacted and if one looks at section 103 in relation to conditions, conditions on the timing of the execution of a warrant and what have you, that they are no exclusive in any way. And I think the words are "without limitation". I'll just check that.

ELIAS CJ:
103.

MR DAVISON QC:
That is the phrase, "without limitation".

ELIAS CJ:
Is that the, sorry –

MR DAVISON QC:
Section 103 of the Search and Surveillance Act.

ELIAS CJ:
I see, sorry.

MR DAVISON QC:
They're in the Search and Surveillance Act regime, a condition can be imposed including the, it examples there but without limitation. And the, if one is to give that purpose of intention having regard to the New Zealand Bill of Rights Act and to recognise the existence of the right then a District Court Judge, an issuing officer, would be still within the power conferred by section 45(3) to impose special conditions to achieve the requisite balance, and in my submission when one stands back and looks at was this warrant or were these warrants as specific as the circumstances permitted or allowed, the answer is woefully short. Woefully short of that and if one adopts the language of *Tranz Rail* which I will just pick up, at para 45 – sorry Your Honours – yes it's at volume 4, 34. The passage that I will just

emphasise is at paragraph 45 on page 794 of the judgment where the Court said, "It would be unusual for the Court to say in the course of its reasoning, that the warrant was invalid but then declined to make a formal declaration to that effect. The most important point of all –

ELIAS CJ:
45, sorry.

MR DAVISON QC:
45 Your Honour. "The most important point of all is perhaps that to decline formally to declare the warrant –

McGRATH J:
Just hold on a moment.

GLAZEBROOK J:
Sorry I'm just catching up –

MR DAVISON QC:
I'm sorry Your Honour. I'm just racing a little, my apologies.

GLAZEBROOK J:
Yes so which tab?

MR DAVISON QC:
Volume 4, it's tab 34.

GLAZEBROOK J:
Thank you, yes mine had got buried I'm afraid.

MR DAVISON QC:
Right,

McGRATH J:
Para 45.

MR DAVISON QC:

Para 45 and it's page 794 of the report. The passage I will invite the Court's attention to at 45. "The most important point of all is perhaps to decline formally to declare the warrant invalid would be to exercise the Court's discretion in a way difficult to reconcile with the principle that general warrants of the present kind are fundamentally deficient," and a reference then to Justice McCarthy's, President McCarthy's decision in *Auckland Medical Aid Trust v Taylor.* He spoke of such a warrant as a miscarriage of justice in terms of the Summary Proceedings Act. In that case the warrant authorised, "The search and seizure of all the medical records held by the trust, not just by those of the patient or the specified patient as determination," et cetera. More than just a defect or irregularity and in my submission the same pertains here. Could I simply say in relation to *Gill v Attorney-General* there was there a specific protocol in place in the *Television New Zealand Limited v Attorney-General* context, there is in place a protocol whereby the media have with the police arrangements in relation to the execution of warrants by the police upon the media.

So in the absence of regulatory provisions, in the case of the Ministry of Health they've gone and got, done it themselves to ensure that their rights are being adjusted. In the case of the new media they have with the police, amongst themselves, established some protocols to ensure that rights of people affected by the suggestion of a search warrant are being addressed and in my submission the Court is in MACMA under a clear and just unconflicted judicial obligation to do the same and issue conditions in a case such as this where the volume is such as it was and the obvious way of dealing with it would be a two-stage process. First of all a preliminary sorting such as has been done now which has resulted in over a 100 items, hardware items coming back. Now had all of that gone across to the US and it would all of the sifting been done over there, that stuff may have come back pursuant to a section 49 condition but it would be a process beyond our jurisdiction to take action in the event of some problems arising. And perhaps more importantly, where there was mixed content and there was items which sought to be retained, access to the information would not have been provided by way of clone and so doing it in New Zealand would have achieved both objectives; one the differentiation between that which was relevant and that which was not relevant in total, in relation to those of mixed content – the ability to clone and provide access and the hardware to be delivered to the United States if that hardware was of evidential significance. So in my respectful submission the notion that the Attorney-General should supervise this, in my submission, is constitutionally misplaced, the obligation is that of the Court and

the Court is the party to whom the citizen goes to seek relief and remedy and shouldn't be put in a position of having to wait for a decision of the Attorney-General, that they may wish to take judicial review proceedings against.

I just re-emphasise what I said in my initial submissions. The right is a right to be secure and to be secure the Court has to act pre-emptively rather than reactively and in my submission that should inform the appropriate way of dealing with this matter.

Finally Your Honours I'd simply say that the failure to adhere to legal requirements of section 45 and to comply with form 5 was a failure of such a fundamental degree that one doesn't even get into the territory of looking at prejudice. The prejudice is inherent, it's the prejudice that's been guarded against by Parliament's enactment of the legislation with those built in safeguards and that's the strict requirement that ought to have been adhered to.

So in conclusion Your Honours, I simply submit that the requirements are such that on its face the warrant ought to have spoken clearly and precisely or sufficiently precisely as the circumstances allowed to both those affected by it and those who were responsible for executing it. And that anything less than that will render the warrant invalid and certainly the extent that we are dealing with here, we're not dealing with matters of form, we're not dealing with minor variations or minor defects; we're dealing with major defects and a defect of fundamental significance to the validity, so my submission is that the Court ought properly find the warrants to have been invalidly issued. Those are my submissions.

ELIAS CJ:

Thank you Mr Davison. Thank you all counsel for your very helpful submissions. We will reserve our decision in this matter.

COURT ADJOURNS: 5.15 PM