

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 54/2018
[2020] NZSC 120**

BETWEEN

**MATHIAS ORTMANN
First Appellant**

**BRAM VAN DER KOLK
Second Appellant**

**FINN HABIB BATATO
Third Appellant**

AND

**UNITED STATES OF AMERICA
First Respondent**

**DISTRICT COURT AT NORTH SHORE
Second Respondent**

SC 55/2018

BETWEEN

**FINN HABIB BATATO
Appellant**

AND

**UNITED STATES OF AMERICA
Respondent**

SC 56/2018

BETWEEN

**MATHIAS ORTMANN
First Appellant**

**BRAM VAN DER KOLK
Second Appellant**

AND

**UNITED STATES OF AMERICA
Respondent**

SC 57/2018

BETWEEN KIM DOTCOM
Appellant

AND UNITED STATES OF AMERICA
Respondent

SC 58/2018

BETWEEN KIM DOTCOM
Appellant

AND UNITED STATES OF AMERICA
First Respondent

DISTRICT COURT AT NORTH SHORE
Second Respondent

Hearing: 10–14 and 17 June 2019

Court: Winkelmann CJ, Glazebrook, O’Regan, Ellen France and
Williams JJ

Counsel: G M Illingworth QC, P J K Spring and A K Hyde for
Messrs Ortmann and van der Kolk
A G V Rogers and J Kim for Mr Batato
R M Mansfield, S L Cogan and K Creagh for Mr Dotcom
K Raftery QC, D J Boldt, F R J Sinclair and Z A Fuhr for
United States of America

Judgment: 4 November 2020

JUDGMENT OF THE COURT

- A The appeals in SC 54/2018 and SC 58/2018 relating to the applications for judicial review are allowed.**
- B The appeals in SC 55/2018, SC 56/2018 and SC 57/2018 are allowed in relation to count 3. The appellants are discharged in respect of count 3. The appeals in SC 55/2018, SC 56/2018 and SC 57/2018 are otherwise dismissed.**

- C The parties are to file submissions in accordance with the directions given at [597]–[598] of this judgment.**
- D The first respondent in SC 54/2018 and SC 58/2018 must pay the appellants in those appeals costs of \$15,000 and disbursements of \$5,000.**
- E Costs in the High Court and Court of Appeal in relation to the judicial review aspect of the proceedings in those Courts should be determined after the judicial review issues that remain outstanding have been resolved.**
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SUMMARY OF RESULT

[1] The principal issue on the appeal was whether Messrs Ortmann, van der Kolk, Batato and Dotcom (the appellants) are eligible to be extradited to the United States of America to face trial for criminal copyright infringement and other related charges. The District Court, High Court and Court of Appeal held that the appellants were eligible for surrender to the United States on all counts.

[2] The first issue was whether the United States was required to establish double criminality; whether the appellants' alleged conduct would, if proved, constitute an offence both in the United States and, if it had occurred here, in New Zealand. The Court has held that the United States, and any country requesting surrender under Part 3 of the Extradition Act 1999, must establish double criminality as a prerequisite to extradition.¹

[3] The second issue was what is required by s 24(2)(c) of the Extradition Act. The Court has held this requires the extradition court to be satisfied that the conduct relied upon (a) would constitute an offence contained in the extradition treaty; (b) would constitute an offence in the requesting country punishable by a maximum penalty of not less than 12 months' imprisonment; and (c) would constitute an offence under New Zealand law, again punishable by a maximum penalty of not less than 12 months' imprisonment, had it occurred in New Zealand.² The Court has held that the first two of these requirements were satisfied in respect of all counts.³

¹ At [148].

² At [151].

³ At [220]–[227].

[4] The next issue was whether the third of the s 24(2)(c) requirements was satisfied. The Court has held that the conduct alleged by the United States in counts 2 and 4–8 would constitute an offence in terms of s 131(1)(c), (d)(i), (d)(iii) and (e) of the Copyright Act 1994.⁴ The offences created by s 131 criminalise knowingly dealing with an infringing copy of a copyright work. The Court has also found that none of the carve-outs and exemptions to liability in the Copyright Act applies.⁵ On this basis, the Court has held that s 131 of the Copyright Act provides an available extradition pathway in respect of counts 2 and 4–8.⁶

[5] The Court then had to consider whether the conduct alleged would constitute offences under the Crimes Act 1961. The Court has held that the Copyright Act is not a code, so does not preclude liability under the Crimes Act for offences relating to copyright infringement.⁷ It has also found that the conduct alleged in counts 1, 2 and 4–13 would constitute various offences under the Crimes Act. Those Crimes Act offences therefore provide an extradition pathway for these counts.⁸ However, the Court has held that there is no available extradition pathway for count 3 as the conduct alleged would not amount to an offence under New Zealand law.⁹

[6] The fourth issue was whether the United States was required to prove the existence of copyright under s 24(2)(d)(i) of the Extradition Act for counts 4–8. Section 24(2)(d)(i) requires the requesting country to establish a prima facie case in respect of the matching New Zealand offence identified at the s 24(2)(c) stage.¹⁰ Contrary to the view of the High Court and Court of Appeal, this Court has held that copyright status is inextricably linked to the allegation of knowing infringement in counts 4–8 and therefore must be proved to a prima facie standard under s 24(2)(d)(i) of the Extradition Act.¹¹ However, the Court has held that the evidence tendered by the United States satisfies this requirement.¹²

⁴ At [432].

⁵ At [433].

⁶ At [389] and [434].

⁷ At [445].

⁸ At [496].

⁹ At [473] and [496].

¹⁰ At [161]–[162].

¹¹ At [422].

¹² At [431] and [435](b).

[7] The appellants appealed against the decision of the District Court that they were eligible for surrender by way of case stated. The fifth issue was whether it was open to the High Court and Court of Appeal to confirm the District Court decision on a case stated appeal given what the appellants argued were serious flaws in the District Court judgment. This Court has dismissed the appellants' arguments that the High Court and Court of Appeal acted beyond their powers in relation to the appeals.¹³

[8] The appellants also applied for judicial review of the District Court decision. The applications for judicial review were dismissed by the High Court. The Court of Appeal dismissed the appellants' appeals, finding the judicial review proceedings to be an abuse of process. The final issue was whether the Court of Appeal was correct to do so. This Court has held that the Court of Appeal erred in its finding that the judicial review proceedings were an abuse of process.¹⁴

[9] In the result, the Court has allowed the appeals in the judicial review proceedings.¹⁵ It has directed the parties to file submissions identifying the issues that remain outstanding in the judicial review proceedings and setting out their view as to which court should resolve these issues.¹⁶ The Court has also allowed the case stated appeals in part and discharged the appellants in respect of count 3. The case stated appeals were otherwise dismissed.¹⁷

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Appendix: Glossary of defined terms

A INTRODUCTION

Extradition request

[10] The United States of America has requested the extradition of Messrs Ortmann, van der Kolk, Batato and Dotcom (the appellants) to face trial in the United States for conspiracy to commit racketeering, conspiracy to commit copyright infringement, conspiracy to commit money laundering, criminal copyright infringement and wire

fraud. The request was made under the Treaty on extradition between New Zealand and the United States of America (the NZ/US Treaty).¹⁸ The request must be dealt with under the Extradition Act 1999 (the Extradition Act).

[11] The Extradition Act provides a two-stage process. First, the District Court must determine whether a person for whom an extradition request has been made is eligible for surrender to the requesting country.¹⁹ If the court finds the person is eligible for surrender, it is then for the Minister of Justice, at the second stage, to determine whether the person should be surrendered to the requesting country.²⁰

[12] These appeals relate to stage one only. The District Court determined that the appellants were eligible for surrender to the United States.²¹ That finding was upheld by both the High Court²² and the Court of Appeal.²³ The appellants sought leave to appeal to this Court against the Court of Appeal decision. This Court determined it had jurisdiction to hear the appeals²⁴ and gave the appellants leave to appeal against some aspects of the decision of the Court of Appeal.²⁵

The appellants

[13] In 2005 Mr Dotcom established a business providing cloud storage and file sharing facilities for internet users. The business had a number of companies and websites. Megaupload Ltd was the primary vehicle through which the business was run. Megaupload.com (the main storage site) and Megavideo.com (a video player site)

¹⁸ Treaty on extradition between New Zealand and the United States of America 791 UNTS 253 (signed 12 January 1970, entered into force 8 December 1970) [NZ/US Treaty]. See also Extradition (United States of America) Order 1970. A glossary of terms used in this judgment is included as an appendix.

¹⁹ Extradition Act 1999, s 24.

²⁰ Section 30. See below at [37].

²¹ *United States of America v Dotcom* DC North Shore CRI-2012-092-1647, 23 December 2015 (Judge Dawson) [DC judgment].

²² *Ortmann v The United States of America* [2017] NZHC 189 (Gilbert J) [HC judgment].

²³ *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475 (Kós P, French and Miller JJ) [CA judgment].

²⁴ *Ortmann v United States of America* [2018] NZSC 125 [SC jurisdiction judgment].

²⁵ *Ortmann v United States of America* [2018] NZSC 126 [SC leave judgment]. The approved question was whether the Court of Appeal was correct to dismiss the appellants' appeal to the Court of Appeal, but leave was declined on any aspect of the applications for leave seeking to challenge the refusal of leave to appeal to the Court of Appeal by that Court and also in relation to appeal CA302/2015.

were the most frequently visited of the websites.²⁶ In this judgment, unless it is necessary to distinguish between the various companies and websites, we refer to them globally as the Megagroup or the Megasites.

[14] Mr Dotcom was the chief executive officer of Megaupload Ltd until August 2011, when he became its chief innovation officer.²⁷ Mr Ortmann was a co-founder of Megaupload Ltd, its chief technical officer and a director.²⁸ Mr van der Kolk was also a co-founder. He was the chief programmer for the Megagroup.²⁹ Mr Batato was the chief marketing and sales officer for the Megagroup, primarily selling advertising space on Megaclick.com. He is the only appellant who had no equity interest in the group.

[15] Mr Ortmann and Mr van der Kolk filed joint submissions. Mr Dotcom and Mr Batato filed separate submissions. For the most part, each supported the submissions of the others and we treat all submissions as the submissions of the appellants unless the submissions diverged.

The allegations

[16] In essence, the United States alleges that the Megagroup business model (by design) encouraged third parties to upload to the Megasites digital files that infringed copyright, which could then be shared. The United States alleges that the appellants knew that third parties were uploading infringing material to Megasites and that they incentivised this and profited from it. The United States claims this is criminal conduct in the United States and meets the threshold for extradition under the NZ/US Treaty and under the Extradition Act.

²⁶ Related websites included Megaclick.com, Megaporn.com and Megaworld.com.

²⁷ According to the superseding indictment, Mr Dotcom (through related companies) owned 68 per cent of Megaupload Ltd, Megaupload.com, Megaclick.com and Megapix.com, and 100 per cent of the registered companies behind Megavideo.com, Megaporn.com and Megapay.com.

²⁸ Mr Ortmann indirectly held a 25 per cent shareholding in Megaupload Ltd and the websites it owned.

²⁹ Mr van der Kolk indirectly held a 2.5 per cent shareholding in Megaupload Ltd and the websites it owned.

[17] The formal charges are as follows:³⁰

- (a) Conspiracy to commit racketeering: essentially, this is an umbrella allegation of using a business enterprise in which all the appellants were participants to engage in the illegal activities alleged in the remaining counts (count 1).
- (b) Conspiracy to infringe copyright on a commercial scale: this is an allegation that the appellants conspired to commit copyright infringement through the Megasites for financial gain (count 2).
- (c) Conspiracy to commit money laundering: this is an allegation that the appellants conspired to deal with the money received from the unlawful activity alleged in the other counts (count 3).
- (d) A discrete count of wilful infringement of copyright by distributing an infringing pre-release copy of the movie *Taken* by making it available through one of the Megasites when the appellants knew or ought to have known it was intended for commercial distribution (count 4).
- (e) Discrete counts of wilful infringement of copyright by reproducing and distributing copyright works on the internet (counts 5–8).
- (f) Discrete counts of wire fraud³¹ by devising a scheme to obtain money by deceiving copyright owners into believing that take-down notices had been complied with (counts 9–13).³²

[18] The appellants deny any wrongdoing and argue they are therefore not eligible for surrender pursuant to the United States' extradition request. They say the United States has mischaracterised their business model and any wrongdoing was by

³⁰ These are broad descriptions only. The allegations are outlined in greater detail below at [448]–[490]. We emphasise that these are only allegations at this point.

³¹ In broad terms, wire fraud involves a scheme to defraud or obtain money based on false representations or promises made through electronic communications.

³² A take-down notice is a formal request by a copyright holder to an internet service provider (ISP) to remove or disable access to an infringing copy of a work. This is explained in greater detail below at [217].

third-party infringers. They say they are no different to any other large-scale internet service provider (ISP), providing storage and file sharing for the benefit of internet users.

The proceedings so far

[19] The District Court found the appellants eligible for surrender on all counts and dismissed the appellants' separate applications for a stay of proceedings.

[20] The appellants appealed the eligibility determination by way of case stated to the High Court.³³ The appellants also appealed against the District Court's refusal to grant a stay and commenced separate judicial review proceedings. The applications for judicial review alleged an array of procedural and substantive errors on the part of the District Court. The United States also appealed against aspects of the District Court judgment under the case stated procedure.

[21] The High Court dismissed the appeals by the appellants and by the United States. It also dismissed the appellants' judicial review applications. In respect of the judicial review applications, the Court addressed only the allegation of bias and predetermination on the part of the District Court Judge, treating the other grounds as repetitive of the issues on appeal.³⁴

[22] The appellants sought leave from the High Court to appeal against its determination of eligibility. They sought leave on a large number of questions, but the High Court granted leave to appeal on two questions only: whether the alleged conduct constituted an extradition offence within the meaning of s 24(2)(c) of the Extradition Act; and whether the United States was required to prove that copyright subsisted in particular works as a matter of United States law (in relation to counts 4–8).³⁵ The appellants appealed against the High Court appeal decision on the two grounds on

³³ Under s 68 of the Extradition Act. This section has been amended to allow for an appeal on a question of law but the case stated procedure applied to these proceedings: see below at nn 567–568.

³⁴ HC judgment, above n 22, at [8].

³⁵ *Ortmann v The United States of America* [2017] NZHC 1809 (Gilbert J) [HC leave judgment] at [49]. The United States also sought leave to appeal on certain questions of law, but leave was declined: at [50].

which leave had been given by the High Court. They also appealed against the dismissal of their applications for judicial review as of right.

[23] The appellants also applied to the Court of Appeal for special leave to appeal against the High Court appeal decision on what was described by that Court as “a large number of additional questions of law”.³⁶ The Court of Appeal declined the appellants’ special leave applications and dismissed the appeals against the High Court appeal decision on the two questions for which leave had been granted by the High Court.³⁷ The Court dismissed the appeals in relation to the judicial review applications and found that those grounds of review that repeated issues raised on the appeal against the eligibility determination were an abuse of process.³⁸

[24] In this Court, leave to appeal was granted on all matters addressed by the Court of Appeal but not otherwise. In particular, this Court determined that, to the extent the applications for leave sought to challenge any refusal of leave by the Court of Appeal, they were dismissed.³⁹

Principal issues on appeal

[25] The principal issues arising in this appeal are:

- (a) *Double criminality*: Whether the United States is required to show that the appellants’ alleged conduct would constitute offending in the United States and would, if it had occurred in New Zealand, constitute an offence under New Zealand law. This is referred to as the requirement or principle of double criminality.⁴⁰
- (b) *Eligibility requirements*: The first issue is what is required under s 24(2)(a), (c) and (d) of the Extradition Act for the District Court to

³⁶ CA judgment, above n 23, at [3].

³⁷ At [330]–[331]. The United States also sought special leave to appeal on certain questions of law, but this was declined.

³⁸ At [311].

³⁹ SC leave judgment, above n 25. Leave was also declined with respect to the appeal in CA302/2015, which was an appeal filed against a judicial review decision of Katz J: *Ortmann v The District Court at North Shore* [2015] NZHC 901. See CA judgment, above n 23, at [3].

⁴⁰ See below at [43]–[149].

determine eligibility of a requested person for surrender.⁴¹ The second is whether the requirements of s 24(2)(c) are satisfied in this case.⁴²

- (c) *Copyright*: If double criminality applies, the first issue is whether the alleged conduct, the online dissemination of digital copyright works in the course of business, is criminalised in New Zealand under s 131 of the Copyright Act 1994 (the Copyright Act).⁴³ The second issue is whether copyright in a particular work forms part of the appellants' conduct in counts 4–8 when considering the evidence under s 24(2)(d)(i) of the Extradition Act.⁴⁴
- (d) *Application of the Crimes Act*: The first issue under this heading is whether the Copyright Act offences displace any otherwise applicable Crimes Act 1961 offences.⁴⁵ If they do not, the issue is then whether, for the purposes of the double criminality requirement, the conduct alleged would, if it had occurred in New Zealand, amount to an offence in New Zealand in accordance with the requirements of a comparable Crimes Act offence.⁴⁶
- (e) *Case stated appeals*: The first issue here is whether, given the nature of the errors identified in the District Court judgment by the High Court Judge, it was open to the High Court Judge to confirm the determination made by the District Court that the appellants were eligible for surrender. The second is whether the Court of Appeal acted beyond its powers in the manner in which it dealt with the appeals to that Court.⁴⁷
- (f) *Judicial review*: The issues here are whether the Court of Appeal erred in dismissing the appeal against the High Court's refusal to grant

⁴¹ See below at [151]–[160] for s 24(2)(c), [161]–[164] for s 24(2)(d)(i) and [165]–[196] for s 24(2)(a).

⁴² See below at [197]–[229].

⁴³ See below at [230]–[388].

⁴⁴ See below at [395]–[431].

⁴⁵ See below at [437]–[445].

⁴⁶ See below at [446]–[496].

⁴⁷ See below at [497]–[557].

judicial review and, further, whether the Court of Appeal erred in characterising the judicial review proceedings as an abuse of process.⁴⁸

[26] Before turning to address these issues, we begin with an overview of relevant aspects of the New Zealand Extradition Act.

A brief history of New Zealand's extradition regime

[27] Until 1999 two separate extradition regimes applied in New Zealand – an artefact of New Zealand's place within the British Empire. In the late 19th century, and for most of the 20th century, the extradition of fugitives within the British Empire was regulated by the Fugitive Offenders Act 1881 (Imp).⁴⁹ Extradition of fugitives from countries outside the British Empire proceeded differently, requiring both a treaty and an Act of Parliament which permitted extradition pursuant to that treaty. Until 1965 the overriding statutory regime for extradition pursuant to treaties was The Extradition Act 1870 (Imp) (which we refer to as the 1870 Act).⁵⁰

[28] Both the Fugitive Offenders Act and the 1870 Act continued to apply in New Zealand after New Zealand became a fully sovereign nation. The 1870 Act applied until replaced by the Extradition Act 1965 (the 1965 Act). The Fugitive Offenders Act had a longer life than the 1870 Act, continuing to regulate the extradition of fugitives within the Commonwealth until enactment of the Extradition Act 1999.

[29] The 1965 Act retained the same model as the 1870 Act in the sense that it applied only to extradition to or from non-Commonwealth nations. And as with the 1870 Act, it was a treaty-based regime – there could be no extradition unless there was an extradition treaty with the country requesting extradition (the requesting country) and the Act was applied to that treaty by Order in Council.

⁴⁸ See below at [558]–[590].

⁴⁹ Fugitive Offenders Act 1881 (Imp) 44 & 45 Vict c 69.

⁵⁰ The Extradition Act 1870 (Imp) 33 & 34 Vict c 52 [1870 Act].

Framework of the Extradition Act 1999

[30] As the long title records, the current extradition legislation, the Extradition Act, consolidated and amended the law relating to the extradition of persons to and from New Zealand. For the first time, it brought together the different regimes for extradition both within and outside the Commonwealth. Also for the first time, it included procedures by which non-treaty, non-Commonwealth countries could request extradition.⁵¹

[31] The Treaty the subject of this appeal was concluded under the 1965 Act. However, s 104 of the current Extradition Act applies the Extradition Act to treaties where, as here, an Order in Council under the 1965 Act applying that Act to the treaty country was in effect immediately before the coming into force of the Extradition Act.⁵²

[32] The Extradition Act classifies nations according to which of the Act's processes applies to them. The United States falls under Part 3, which applies to certain categories of country including those which have concluded an extradition treaty with New Zealand and to which the Governor-General has, by Order in Council, applied Part 3 of the Act.⁵³ The United States is an "exempted" country, with the effect that different rules apply as to the admissibility of evidence.⁵⁴ In particular, a requesting country that is an exempted country may submit a "record of the case" (ROC) under s 25 of the Extradition Act containing a summary of the evidence supporting the request for surrender and other relevant documents. If a ROC is submitted in compliance with s 25, it is admissible as evidence for the purposes of the assessment required under s 24(2)(d)(i) as to whether the requesting country's evidence would justify a trial in New Zealand if the conduct constituting the offence

⁵¹ Refer to ss 13(d), 16 and 60 of the Extradition Act. By non-treaty we mean countries which do not have an extradition treaty with New Zealand.

⁵² Extradition (United States of America) Order, cl 2.

⁵³ Extradition Act, s 13(c). Part 3 also applies to Commonwealth countries and to non-Commonwealth countries to which Part 3 has been extended by Order in Council. And, finally, it applies where the Minister has decided to extend its application in respect of a single request made by a country outside the Commonwealth with which there is no extradition treaty, or in respect of which there is a treaty in force, but the offence alleged is not an extradition offence under the treaty.

⁵⁴ Extradition (Exempted Country: United States of America) Order 1999. See Extradition Act, s 17.

had occurred in New Zealand. A ROC was submitted by the United States in the present case.

[33] The basic framework of the Extradition Act as it affects Part 3 requests is as follows. A person is an extraditable person if accused of having committed an extradition offence against the law of the “extradition country” (the requesting country). Section 4 defines an extradition offence. It provides in material part:

4 Meaning of extradition offence

- (1) In this Act, **extradition offence** means, subject to an extradition treaty,—
 - (a) in relation to an extradition country, an offence punishable under the law of the extradition country for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty, and which satisfies the condition in subsection (2):
 - (b) in relation to a request by New Zealand, an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty.
- (2) The condition referred to in subsection (1)(a) is that if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time it would, if proved, have constituted an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty.

...

[34] This section brings double criminality into the statutory regime. Section 4(1)(a) requires that the offence be punishable in the requesting country by a term of imprisonment of not less than 12 months. Section 4(2) requires that equivalent conduct in New Zealand would have been an offence in New Zealand punishable by a term of imprisonment of not less than 12 months. The meaning and effect of s 4 is one issue on this appeal – in particular, whether or not the use of the phrase “subject to an extradition treaty” in s 4(1) means that treaties can vary the Extradition Act’s definition of extradition offence to dispense with the requirement for double criminality.

[35] The expression “conduct constituting the offence” used in s 4(2) is defined in s 5 as follows:

- (1) A reference in this Act to **conduct constituting an offence** is a reference to the acts or omissions, or both, by virtue of which the offence has, or is alleged to have, been committed.
- (2) In making a determination for the purposes of section 4(2), the totality of the acts or omissions alleged to have been committed by the person must be taken into account and it does not matter whether under the law of the extradition country and New Zealand—
 - (a) the acts or omissions are categorised or named differently; or
 - (b) the constituent elements of the offence differ.

...

[36] The effect of s 5 is that in looking for a matching New Zealand offence the court must focus on the conduct and not the technical definition of the offence.

[37] The Extradition Act divides functions between the Minister of Justice and the courts. If a foreign state requests surrender of a person within New Zealand in accordance with s 18 of the Act, the Minister may initiate the extradition process by notifying a District Court judge that the Minister has received the request and now requests the issue of an arrest warrant pursuant to s 19(1). For extradition under Part 3, it is then the task of the judge, pursuant to s 19(2), to decide whether to issue a warrant for the arrest of the person whose surrender is sought and then, under s 24, to determine whether the person is eligible for surrender.⁵⁵ If the court determines the requested person is eligible for surrender, the Minister must then, under s 30, determine whether the requested person will be surrendered, taking into account mandatory and discretionary restrictions on surrender in ss 7 and 8.

[38] Section 24 sets out the tasks for the court. It provides:

24 Determination of eligibility for surrender

- (1) Subject to section 23(4), if a person is brought before a court under this Part, the court must determine whether the person is eligible for

⁵⁵ Section 20 allows the District Court to issue a provisional arrest warrant in prescribed circumstances where it is necessary or desirable for an arrest warrant to be issued urgently. A provisional arrest warrant may be issued even though no request for surrender has been made.

surrender in relation to the offence or offences for which surrender is sought.

- (2) Subject to subsections (3) and (4), the person is eligible for surrender in relation to an extradition offence for which surrender is sought if—
- (a) the supporting documents (as described in section 18(4)) in relation to the offence have been produced to the court; and
 - (b) if—
 - (i) this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions, or qualifications that require the production to the court of any other documents; or
 - (ii) the terms of an extradition treaty in force between New Zealand and the extradition country require the production to the court of any other documents—those documents have been produced to the court; and
 - (c) the court is satisfied that the offence is an extradition offence in relation to the extradition country; and
 - (d) the court is satisfied that the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act,—
 - (i) in the case of a person accused of an extradition offence, justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand; or
 - (ii) in the case of a person alleged to have been convicted of an extradition offence, prove that the person was so convicted.
- (3) The person is not eligible for surrender if the person satisfies the court—
- (a) that a mandatory restriction on the surrender of the person applies under section 7; or
 - (b) except in relation to a matter referred to in section 30(2)(ab), that the person's surrender would not be in accordance with the provisions of the treaty (if any) between New Zealand and the extradition country.
- (4) The court may determine that the person is not eligible for surrender if the person satisfies the court that a discretionary restriction on the surrender of the person applies under section 8.
- (5) Subsections (3) and (4) are subject to section 105.

- (6) Without limiting the circumstances in which the court may adjourn a hearing, if—
- (a) a document or documents containing a deficiency or deficiencies of relevance to the proceedings are produced; and
 - (b) the court considers the deficiency or deficiencies to be minor in nature,—

the court may adjourn the hearing for such period as it considers reasonable to allow the deficiency or deficiencies to be remedied.

[39] Whether the requirements of s 24(2)(a) and (c) are met are issues in the appeal.⁵⁶

[40] Section 11 addresses the construction of the Extradition Act and extradition treaties. It provides:

11 Construction of extradition treaties

- (1) If there is an extradition treaty in force between New Zealand and an extradition country, the provisions of this Act must be construed to give effect to the treaty.
- (2) Despite subsection (1), no treaty may be construed to override—
 - (a) section 7; or
 - (b) section 24(2)(d) or section 45(5); or
 - (c) subsection (2)(b) or subsection (3)(a) of section 30 (including where those provisions are applied under section 49); or
 - (d) any provision conferring a particular function or power on the Minister or a court.
- (3) This section is subject to s 105.

[41] An issue arises on this appeal as to whether s 11 is simply an interpretive provision directing that an interpretation consistent with New Zealand’s treaty obligations be preferred, or whether it, along with s 4, provides statutory authority for extradition treaties to “override” the requirements of the Extradition Act, and if so, to what extent.

⁵⁶ Also in issue is whether the existence and ownership of copyright must be proved to a prima facie standard under s 24(2)(d)(i): see below at [395].

[42] Also relevant to this appeal is s 12, which provides that the principal object of the Extradition Act is to provide for the surrender of an accused or convicted person from New Zealand to a requesting country or from another country to New Zealand. Within this, particular, subsidiary objects include enabling New Zealand to carry out its obligations under extradition treaties.

B DOUBLE CRIMINALITY

For the purposes of s 24(2)(c) must the court be satisfied of double criminality?

[43] It is common ground that s 4(2) of the Extradition Act includes within the definition of “extradition offence” (an offence in respect of which extradition is available) a requirement of double criminality. In the decision of the *United States of America v Cullinane*, the Court of Appeal held that, properly construed, the Extradition Act allowed extradition treaties to dispense with the s 4(2) requirement, and that the NZ/US Treaty did so.⁵⁷ The High Court applied this finding in *Cullinane* in the present case, as it was bound to do.⁵⁸ But on appeal, the Court of Appeal departed from its own decision in *Cullinane*, finding that double criminality is required in any extradition between New Zealand and the United States.⁵⁹

[44] The United States challenges this aspect of the Court of Appeal’s judgment. Although the respondent on this appeal, it has served notice that it supports the judgment of that Court on the alternative ground that extradition between New Zealand and the United States does not require proof of double criminality. The United States argues that *Cullinane* was correctly decided and should not have been overruled. It says that, properly construed, the NZ/US Treaty overrides the Extradition Act definition of extradition offence, so all that is required is that the offences the subject of the request be amongst those listed in the Treaty. The Treaty contains its own carefully worked out extradition scheme requiring double criminality in limited circumstances only, none of which applied here. That scheme, it argues, therefore displaces the s 4(2) requirement of double criminality.

⁵⁷ *United States of America v Cullinane* [2003] 2 NZLR 1 (CA) at [63].

⁵⁸ HC judgment, above n 22, at [40] and [281].

⁵⁹ CA judgment, above n 23, at [104].

[45] The United States' argument raises two questions for us to address:

- (a) Does the Extradition Act allow for the double criminality element of the definition of extradition offence to be overridden by the provisions of any particular extradition treaty?
- (b) If the Extradition Act does allow "override", does the NZ/US Treaty dispense with the requirement for double criminality?

Can an extradition treaty dispense with the requirement of double criminality?

The principle of double criminality

[46] The obligation to surrender a fugitive to another state arises under treaty, or statute, or a combination of the two.⁶⁰ However, most extradition regimes share a common feature – a stipulation that an act is not extraditable unless it constitutes a crime according to the laws of both the requesting and the requested states. The requirement of double criminality is so ubiquitous in extradition arrangements that it can fairly be described as one of the fundamental organising principles of extradition law. Some commentators have gone further, suggesting that it is a rule of customary international law, but that is a point we need not resolve.⁶¹ It is sufficient for our purposes to say that the rule of double criminality forms part of the matrix of international law and accepted international standards within which extradition treaties fall to be interpreted.⁶²

[47] As to the function or purpose of the rule, it ensures that the requested person's liberty is not restricted by reason of extradition for conduct which would not amount to a criminal offence if committed in the country from which extradition is requested.⁶³

⁶⁰ See *United States of America v McVey* [1992] 3 SCR 475 at 508 per La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.

⁶¹ IA Shearer *Extradition in International Law* (Manchester University Press, Manchester, 1971) at 138; and M Cherif Bassiouni *International Extradition: United States Law and Practice* (6th ed, Oxford University Press, New York, 2014) at 502. But contrast *McVey*, above n 60, at 508; and *Riley v The Commonwealth of Australia* (1985) 159 CLR 1 at 12 per Gibbs CJ, Wilson and Dawson JJ and 16–17 per Deane J.

⁶² *Riley*, above n 61, at 16 per Deane J.

⁶³ *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 AC 920 at [88]. See also *Knowles v Government of the United States of America* [2006] UKPC 38, [2007] 1 WLR 47 at [12].

In his text *Extradition in International Law*, Professor Shearer says of this justification for the principle that:⁶⁴

The social conscience of a State is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment.

[48] The requirement of double criminality also reflects the historically reciprocal nature of the extradition process. It ensures that a state will not be obliged to extradite a person in circumstances in which that state would not itself make such a request.

Relevant New Zealand authority

[49] In earlier cases dealing with extradition requests by the United States under the 1965 Act, it was assumed double criminality was required.⁶⁵ The United States is not recorded as having argued against the proposition. That also remained true, at least initially, after the Extradition Act came into force. In *United States of America v Wong*, a decision of the High Court, Chambers J found that the absence of double criminality meant an offence was not an “extradition offence” as defined in s 4.⁶⁶ The United States did not advance argument in reliance upon s 11 or the presence of the qualifier “subject to” in s 4.

[50] The requirement of double criminality in extradition between the United States and New Zealand began to come into focus following the Court of Appeal decision in *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China*, which addressed the meaning and effect of s 11 of the Extradition Act.⁶⁷ The issue in *Yuen* was whether a judge or the Minister had power to exercise a discretion to refuse a request for surrender. The discretion was provided for in the

⁶⁴ Shearer, above n 61, at 137–138.

⁶⁵ *Mewes v Attorney-General* [1979] 1 NZLR 648 (SC) at 651 and 662; and *D’Cunha v United States of America* HC New Plymouth M24/97, 24 June 1997 at 7. See also *Re Translateur* [1982] 1 NZLR 700 (CA) at 700–701.

⁶⁶ *United States of America v Wong* [2001] 2 NZLR 472 (HC) at [70].

⁶⁷ *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 (CA). The year after *Yuen* was decided, a request for extradition to the United States was the subject of another Court of Appeal decision in *Edwards v United States of America* [2002] 3 NZLR 222 (CA). Although the Court was not required to address whether double criminality applied, it expressly noted that the application of s 4(2) (the double criminality requirement) to the NZ/US Treaty was not before the Court and so it did not comment on it: at [14].

extradition treaty between New Zealand and Hong Kong⁶⁸ and was wider than the discretionary restrictions on surrender provided in the Extradition Act. In deciding that question, Keith J, writing for the Court, said:

[15] Section 11(1) is a very strong direction. The “construction” it directs is more than the mere interpretation of the Act. It uses much stronger wording than the interpretation directions in the Interpretation Act 1999, s 4 and the New Zealand Bill of Rights Act 1990, s 6 which is also to be read with ss 4 and 5. To use the wording of [s 11(2)] of the Extradition Act, the Act is “overridden” by inconsistent treaty provisions or, as the equivalent provision in s 3(4) of the Extradition Act 1965 put it, the Act must be read “subject to” the terms of the treaty and construed to give effect to it.

[51] He continued:⁶⁹

[16] The process which s 11 of the [Extradition] Act requires can perhaps be better thought of as reconstruction of the Act, to the extent it is inconsistent with the treaty, to make it consistent. The strength of the direction recognises the basic principles of international law that treaties must be complied with and that a state cannot invoke its internal law to justify its failure to perform a treaty (arts 26 and 27 of the Vienna Convention on the Law of Treaties). In the specific context of extradition, the Act also recognises those principles in its objective stated in s 12: the Act, among other things, is an Act:

- (a) To enable New Zealand to carry out its obligations under extradition treaties.

[52] Keith J noted that the power to reconstruct the Extradition Act is subject to the reservations in s 11(2) which except basic protections from override. He explained s 11(2) as follows:⁷⁰

First, the basic protections in paras (a)–(c) are routinely included in bilateral extradition treaties or in one case (the torture exception) in a very widely accepted multilateral treaty ... ; and, so far as para (d) is concerned, it is not in general the practice for extradition treaties to dictate whether the executive or the judiciary is to exercise a particular function. Secondly, subs (2) is in effect a direction to the executive that in negotiating extradition treaties it is to ensure that the listed protections are incorporated; such directions are expressly given by ss 100 and 101 of the Extradition Act 1999 ... Thirdly, the protections stated in subs (2) essentially look to treaties concluded in the

⁶⁸ Agreement for the Surrender of Accused and Convicted Persons between the Government of New Zealand and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China [1998] HKTBA 15 (signed 3 April 1998, entered into force 1 October 1998). The Agreement is currently suspended: Extradition (Hong Kong Special Administrative Region of the People’s Republic of China) Order Revocation Order 2020.

⁶⁹ This observation was endorsed by McGrath and Blanchard JJ in *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 [*Dotcom* SC disclosure judgment] at [165].

⁷⁰ *Yuen*, above n 67, at [18].

future. That arises from subs (3) which makes s 11 subject to s 105, a provision concerned with treaties in force when the 1999 Act came into force.

[53] The Court of Appeal in *Yuen* thus took the view that s 11 of the Extradition Act allowed for extradition treaties to override the Extradition Act.⁷¹

United States of America v Cullinane

[54] The requirement for double criminality in extradition to the United States was squarely addressed by the Court of Appeal in *Cullinane*.⁷² The United States sought the extradition of Mr Cullinane to face charges of visa fraud, racketeering, alien smuggling and harbouring. The lower Courts had applied a three-stage test in deciding Mr Cullinane's eligibility for surrender:

- (a) Is the offence the subject of the request one of the offences mentioned in the NZ/US Treaty?
- (b) Is the offence punishable under the law of the requesting country by a maximum penalty of not less than 12 months' imprisonment (s 4(1)(a))?
- (c) Had the conduct of the requested person occurred in New Zealand, would it have constituted an offence in New Zealand for which the maximum penalty is not less than 12 months' imprisonment (s 4(2))?

[55] It seems that in *Cullinane* the parties argued the issue of eligibility for surrender in all Courts on the basis of a shared assumption that double criminality was required. But when the proceeding reached the Court of Appeal, the Court raised with counsel, and sought submissions on whether step (c), the requirement of matching criminality in New Zealand, was part of the determination of eligibility when considering a request made under the NZ/US Treaty. Having received argument on the point the Court concluded that the test applied in the lower Courts was wrong.⁷³

⁷¹ At [18]. See also at [29].

⁷² *Cullinane*, above n 57.

⁷³ At [49], [55] and [63].

[56] The Court observed that the Extradition Act embraced the eliminative approach in s 4, defining an extradition offence by reference to the severity of the penalty for the offence, and by requiring double criminality.⁷⁴

[57] But it said the definition of “extradition offence” was “subject to an extradition treaty”. Section 11, it observed, requires that the Extradition Act as a whole be construed so as to give effect to an applicable extradition treaty.⁷⁵ Treaty partners were therefore, on its construction of the Extradition Act, free to dispense with a requirement of double criminality. The Court rejected an argument that s 24(2)(d), one of the provisions preserved from treaty override by s 11, was itself a requirement for double criminality. The Court preferred the approach of the United States Supreme Court in *Factor v Laubheimer* that the provision was concerned only with issues of evidence and procedure, and did not import a double criminality requirement.⁷⁶

[58] As to whether the NZ/US Treaty dispensed with the requirement of double criminality, the Court said that there are two basic approaches by which States Parties to extradition treaties identify the types of conduct which make a person eligible for extradition: the enumerative and eliminative approaches.⁷⁷

[59] Treaties based upon the enumerative approach list offences for which extradition is permitted. Such treaties may also provide that extradition is permitted only where conduct is punishable by the laws of both countries.⁷⁸

[60] Treaties and legislation based upon the eliminative approach are different. Rather than listing offences for which extradition is available, they define extraditable offences as conduct punishable by sentences above a stated minimum. This approach almost invariably, said the Court, also explicitly requires double criminality.⁷⁹ The NZ/US Treaty, it was satisfied, applied the enumerative approach, but did not contain an express requirement of double criminality.⁸⁰

⁷⁴ At [52].

⁷⁵ At [53].

⁷⁶ At [65], citing *Factor v Laubheimer* 290 US 276 (1933).

⁷⁷ At [50].

⁷⁸ At [50].

⁷⁹ At [51].

⁸⁰ At [56].

[61] The Court said the fact the contracting parties chose not to use the eliminative approach, even though treaties based on it were extremely common by 1970, suggests they deliberately rejected the eliminative approach with its usual express double criminality requirement.⁸¹ In the Court's analysis, other provisions in the NZ/US Treaty were also supportive of this interpretation of the Treaty.⁸²

[62] The Court said that in light of s 11 and the provisions of the NZ/US Treaty, it was not appropriate to add the Treaty definition to the s 4 definition. Rather, the test for extradition provided in art 2 of the Treaty replaced the test set out in s 4.⁸³

Court of Appeal decision the subject of this appeal

[63] The Court of Appeal saw the task of interpreting the Extradition Act as significantly informed by its legislative antecedents. It noted the centrality of the requirement of double criminality in that legislative history.⁸⁴ The 1965 Act, under which the Treaty was negotiated, incorporated double criminality using the enumerative approach, listing in a schedule the New Zealand offences against which the alleged act or omission was to be gauged. The Court said that read as a whole, the 1965 Act contemplated that a treaty might curtail but not enlarge upon the offences for which extradition was available under the statute.⁸⁵ It said:⁸⁶

With the benefit of full argument, we have reached the conclusion that under the 1965 Act, which contained materially similar language, double criminality was required and treaties were incorporated into the definition because they might further restrict extradition, and we do not find in the 1999 Act any intention to depart from that policy.

[64] The Court also concluded that there was nothing in the legislative history of the Extradition Act suggesting an intention to change existing law regarding double criminality; and in particular to do so by leaving it to treaty negotiators rather than the courts to decide whether that requirement was incorporated in extradition arrangements between New Zealand and another state.⁸⁷

⁸¹ At [58].

⁸² At [61]–[62], referring to arts 2(7) and 18 of the NZ/US Treaty.

⁸³ At [55] and [63].

⁸⁴ CA judgment, above n 23, at [60]–[61].

⁸⁵ At [64].

⁸⁶ At [84] (footnote omitted).

⁸⁷ At [81].

[65] The Court said the expression “subject to” in s 4 did not authorise the subordination of the statutory definition of extradition offences to the provisions of the NZ/US Treaty. Rather, it recognised that a treaty might qualify that definition: “subject to” may mean in context “that the one may be affected by the other”.⁸⁸ The Court differed from the analysis in *Cullinane* that s 24(2)(d) simply confirmed the application of domestic procedure, finding instead that it requires of the Court that it be satisfied of double criminality. It said protection in the Extradition Act of this provision from being overridden by a treaty was consistent with the position under the 1965 Act that the requirement of double criminality could not be overridden.⁸⁹

[66] The Court also assessed the terms of the NZ/US Treaty, finding that there was nothing in it which conflicted with the definition of extradition offence in s 4 and accordingly no question arose of the Treaty displacing the statutory definition.⁹⁰ While there was no express requirement of double criminality, this was implicit in the Treaty’s use of the enumerative approach to defining extradition offences.⁹¹

Parties’ argument on appeal

[67] The appellants support the Court of Appeal’s analysis.

[68] The United States argues that the s 4 requirement of double criminality has no application in the face of the NZ/US Treaty which contains its own framework for determining which offences are captured. Section 4 is not amongst the provisions listed in s 11 as protected from being overridden by treaty; on the contrary, the s 4 definition is expressly subject to treaty. Yet it says, in holding that “subject to” meant “one may be affected by the other”, and by interpreting s 4 as only contemplating a treaty limiting extradition rights, the Court of Appeal effectively treated s 4 as a s 11(2) provision.

[69] The United States also argues that the Court of Appeal’s interpretation of the Extradition Act is an illogical one. Why, it asks, would countries enter into treaties

⁸⁸ At [66].

⁸⁹ At [84]–[85].

⁹⁰ At [93].

⁹¹ At [89].

which restrict the right to extradition? A country would be better to have no treaty, and simply rely upon the s 60 mechanism by which individual requests can be made to the Minister, who may decide that Part 3 is to apply to that request.

[70] The correct interpretation of “subject to”, it argues, is that the provisions of the subject section (s 4(2)) are subordinated to the provisions of the treaty, so in the case of a clash between the subject and master, the treaty prevails. This interpretation is supported by the legislative history of s 11, and by that section’s clear direction (as it was described in *Yuen*) that treaties could override almost all provisions. It is also consistent with the objects of the Extradition Act, which include enabling New Zealand to carry out its obligations under extradition treaties (s 12(a)).

Principles of interpretation

[71] The particular issue of interpretation is whether the expression “subject to” in s 4 allows treaty parties to expand the category of extradition offence, dispensing with any or all of the minimum criteria set out in s 4 and, in particular, whether it can dispense with the requirement of double criminality.

[72] As well as the standard principles of statutory interpretation, that a statute is to be construed in light of its text and its purpose, there are other principles which bear upon the issues of interpretation in this case. There is the direction in s 11 that the provisions of the Extradition Act must be construed to give effect to any extradition treaty in force between New Zealand and the requesting country. Also relevant is s 12(a), which provides that one of the objects of the Extradition Act is to enable New Zealand to fulfil its obligations under extradition treaties.⁹²

[73] The New Zealand Bill of Rights Act 1990 is also of relevance to this issue. Extradition involves the possibility of arrest, detention and forced removal from New Zealand. For that reason, rights preserved under the New Zealand Bill of Rights Act to freedom of movement, to be free from arbitrary arrest and detention, and to

⁹² We agree with the principles of interpretation set out by the Court of Appeal: CA judgment, above n 23, at [59].

natural justice are engaged.⁹³ Section 6 of the New Zealand Bill of Rights Act directs that an interpretation consistent with the relevant rights and freedoms in that Act is to be preferred.

Legislative history

[74] The issues of statutory interpretation on this appeal are not simple. They concern provisions which regulate the relationship between legislation and treaty and which have a long legislative history. We agree with the Court of Appeal that the Extradition Act's legislative antecedents and legislative history assist in understanding the purpose of the Extradition Act, and of ss 4 and 11 in particular.

[75] Of particular importance to the interpretation of the Extradition Act is the NZ/US Treaty. Treaties between states are binding at international law. The New Zealand legal system is dualist, so that, generally speaking, treaties are not directly enforceable in domestic law unless incorporated into New Zealand law.⁹⁴ There are a variety of ways that can occur.⁹⁵ The 1870 Act, the 1965 Act and Extradition Act all provided for the implementation of extradition treaties by Order in Council.⁹⁶

Extradition Act 1870

[76] We begin our discussion of the legislative history with the 1870 Act. As already noted, the 1870 Act applied to countries outside the then British Empire. It had an express requirement of double criminality.⁹⁷ Extradition to countries outside

⁹³ In the *Dotcom* SC disclosure judgment, above n 69, a majority of this Court found that the criminal process rights set out in ss 24 and 25 of the New Zealand Bill of Rights Act 1990 did not apply in the extradition process: at [115]–[116] per McGrath and Blanchard JJ and [208]–[212] per William Young J. Compare at [51] per Elias CJ and [277] and [281] per Glazebrook J.

⁹⁴ Treasa Dunworth “International Law in New Zealand Law” in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 597 at 598. See also Malcolm N Shaw *International Law* (8th ed, Cambridge University Press, Cambridge (UK), 2017) at 112–114; and James Crawford Brownlie’s *Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 45 and 59–60.

⁹⁵ See Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) at [44]–[45]. See also at [69] and [71].

⁹⁶ 1870 Act, s 2; Extradition Act 1965 (1965 Act), s 3; and Extradition Act, s 15. See Law Commission, above n 95, at [51]. The Order in Council incorporating the text of the treaty is a “legislative instrument” as defined in s 4 of the Legislation Act 2012.

⁹⁷ This was found in s 26, which provided that “[t]he term ‘extradition crime’ means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the First Schedule to this Act”.

the Empire was only possible if there was an extradition treaty, and if the Act had been applied to that treaty by Order in Council.

[77] The relationship between an extradition treaty and the 1870 Act was addressed in ss 2, 4 and 5 of that Act. As we come to, a narrative thread can be drawn between these provisions and ss 4 and 11 of the current Extradition Act.

[78] Section 2 of the 1870 Act allowed Her Majesty, by Order in Council, to apply the Act to any treaty made with a foreign state with respect to the surrender of fugitive criminals.⁹⁸ It further provided that the Order in Council could render the operation of the Order “subject to such conditions, exceptions, and qualifications as may be deemed expedient”.

[79] Section 4(2) provided that an Order in Council “shall not be made unless the arrangement [i]s in conformity with the provisions of this Act, and, in particular, with the restrictions on the surrender of fugitive criminals contained in this Act”.

[80] Section 5, the most significant for our purposes, provided that “this Act ... shall, so long as the Order remains in force, but subject to the limitations, restrictions, conditions, exceptions, and qualifications, if any, contained in the Order, apply in the case of such foreign State”.

[81] The effect of these provisions was discussed in a number of English authorities, but captured most succinctly for our purposes by Salmon J in *R v Governor of Brixton Prison, ex parte Caborn-Waterfield*.⁹⁹ In that case an argument was made that the treaty expanded the category of case provided for under the Act for extradition. In response to that argument Salmon J for the Court said:¹⁰⁰

Even if the suggested construction of the treaty were correct, which, in our judgment, it is not, it would not avail the respondents. The treaty may be prayed in aid to limit the scope of the Extradition Act, but not to extend it.

⁹⁸ The 1870 Act used the term “arrangement” instead of treaty.

⁹⁹ *R v Governor of Brixton Prison, ex parte Caborn-Waterfield* [1960] 2 QB 498 (QB). See also *R v Wilson* (1877) 3 QBD 42 (QB); *Government of the Federal Republic of Germany v Sotiriadis* [1975] AC 1 (HL) at 21 per Lord Diplock and 34 per Lord Kilbrandon; and *Re Nielsen* [1984] 1 AC 606 (HL) at 616 and 620–621.

¹⁰⁰ At 511 (citation omitted).

Were there any ambiguity in the Act it might be possible to look at the treaty in order to resolve the ambiguity.

Extradition Act 1965

[82] This was the background against which the 1965 Act was enacted. Consideration of the 1965 Act assists in understanding the purpose of the provisions the focus of this appeal. But the 1965 Act is also significant because it was the Act in force at the time that the NZ/US Treaty was negotiated.

[83] As earlier mentioned, like the 1870 Act (the Act it replaced), the 1965 Act created a regime for extradition outside of the Commonwealth. Like the 1870 Act, it was a treaty-based regime, and contained an express requirement of double criminality. And, like the 1870 Act, extradition treaties were directly implemented through Order in Council.

[84] The material part of the definition of extradition offence in s 2(1) of the Act is as follows:

“Extradition offence”, in relation to any foreign country, means any act or omission which, if it occurred in New Zealand, would be one of the crimes described in the First Schedule to this Act, and which amounts to one of the offences described in the extradition treaty with that country and is punishable in that country; ...

[85] This definition incorporated double criminality through the requirement that the conduct would constitute one of the crimes listed in sch 1 if it occurred in New Zealand. The offences in sch 1 were New Zealand offences, complete with their New Zealand statutory reference – references predominantly under the Crimes Act, but also The Bankruptcy Act 1908 and the Dangerous Drugs Act 1927.

[86] Section 3(4) dealt with the relationship between a treaty and the 1965 Act:

Except as provided in subsection (3) of this section, this Act shall be read subject to the terms of the treaty and shall be so construed as to give effect to the treaty.

[87] The explanatory note to the Bill stated “[u]nder each clause in the Bill there is a reference to the corresponding section of the United Kingdom Act and, where

appropriate, the Extradition Act of Canada”.¹⁰¹ The footer to s 3 recorded that section’s correspondence with ss 2, 4 and 5 of the 1870 Act. This in itself suggested an intention to carry forward the effect of those provisions in regulating the relationship between treaty and Act. Other aspects of the legislative history support this view. The explanatory note said that the 1965 Act was not intended to make material changes to the operation of extradition law in New Zealand. It stated:¹⁰²

In adapting the United Kingdom provisions to New Zealand, the law has been largely redrafted, but apart from the changes mentioned in the notes below there are no substantial changes in the law as set out in the present statutes and cases.

[88] The “notes below” referred to in the explanatory note made no mention of any intention to alter the basic framework under which extradition could occur, a framework which included a requirement of double criminality. The Hon JR Hanan, then Minister of Justice, described the modest aims of the new legislation throughout the parliamentary debates. During the first reading, he stated the purpose of the 1965 Act was to “[bring] our extradition law up to date, and [replace] the existing English legislation which goes back to 1870”. He said the only new provision was contained in cl 5 (which dealt with restrictions on surrender) and explained that because the Bill was of a “technical nature”, it was to be referred to the Statutes Revision Committee.¹⁰³

[89] At the Committee of the whole House stage, the Minister said: “Generally, the changes made in the Bill are in language and detail rather than in principle. For this reason, and because the Bill is somewhat technical in character, I do not propose to explain its provisions in detail.”¹⁰⁴

[90] It is clear from this legislative history that the 1965 Act was merely intended to prescribe the extradition processes provided for in the 1870 Act in a New Zealand statute. Allowing treaties to expand the situations in which extradition would be allowed beyond those provided for under the Act would have been a significant change to the 1870 scheme. It could not properly have been categorised as “technical”.

¹⁰¹ Extradition Bill 1965 (75-1) (explanatory note) at ii.

¹⁰² At ii.

¹⁰³ (24 August 1965) 343 NZPD 2118.

¹⁰⁴ (21 September 1965) 344 NZPD 2880.

Moreover, if the government had intended to confer on the Executive a power to disapply all but one of the provisions of the 1965 Act (s 5) in any treaty arrangement, it is to be expected that would have been highlighted by the responsible Minister and debated.

[91] We take the United States' point that in ordinary usage, the expression that a section is "subject to" another provision could indeed mean that the section can be overridden by that other provision. As Megarry J said in *C & J Clark Ltd v Inland Revenue Commissioners*:¹⁰⁵

... the phrase "subject to" is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail.

[92] The Court of Appeal in the judgment under appeal suggested an alternative meaning of the expression "subject to" in s 3(4) – that it may mean, in context, that one may be affected by the other. It said:¹⁰⁶

In ordinary usage "subject to" need not connote that one thing is subordinate to another. It may mean, in context, that the one may be affected by the other. To interpret it in the latter way in this example is to avoid what would otherwise be a conflict with the definition [of extradition offence] and to restrict the statutory injunction to a statement of principle, consistent with what we take to have been Parliament's intention.

[93] We agree with that interpretation. It is consistent with the way the phrase "subject to" was interpreted under the 1870 Act. It is also consistent with the s 2 definition of "extradition offence" in the 1965 Act, which expressly addressed how a treaty might affect what constitutes an extradition offence, or in other words how that definition was "subject to" the treaty. The definition provided that unless the offence was listed in the treaty, extradition would not be possible; that was so even if the conduct, if committed in New Zealand, would have amounted to one of the sch 1 offences. In other words, just as was the position under the 1870 Act, the treaty could reduce, but not expand, the circumstances in which an offence would be regarded as extraditable.

¹⁰⁵ *C & J Clark Ltd v Inland Revenue Commissioners* [1973] 1 WLR 905 (Ch) at 911.

¹⁰⁶ CA judgment, above n 23, at [66] (footnote omitted).

[94] Before leaving our discussion of the 1965 Act it is necessary to address the Court of Appeal’s characterisation of s 3(4) in the *Yuen* decision referred to earlier.¹⁰⁷ There, the Court of Appeal suggested the direction in s 3(4) to read the 1965 Act “subject to the terms of the treaty” and to construe that Act “to give effect to the treaty” was more than an interpretive principle. Likening it to s 11 of the Extradition Act, it said it authorised reconstruction of the Act, to the extent it was inconsistent with a treaty, to render it consistent.¹⁰⁸

[95] As we have explained, the language of s 3(4) and its legislative history strongly support the conclusion that s 3(4) is an interpretive principle, rather than statutory authority for subordinate legislation made by the Executive under delegated authority of Parliament¹⁰⁹ to override the provisions of the statute.¹¹⁰

[96] There is a principle of statutory interpretation that legislation should be read, so far as possible, consistently with New Zealand’s international obligations.¹¹¹ We are satisfied that s 3(4) was no more than a statutory expression of that principle.

[97] To conclude on this point, our consideration of the purpose of the 1965 Act, as gleaned from the legislative history, suggests that there were three aspects to s 3(4):

- (a) accommodating the s 2 definition of extradition offence, which defined extradition offence by reference to both sch 1 of the Act and the treaty in question;
- (b) giving effect to provisions in treaties that provide additional protections for the subject of an extradition request;¹¹² and

¹⁰⁷ *Yuen*, above n 67. See above at [50]–[53].

¹⁰⁸ At [15]–[16].

¹⁰⁹ Orders in Council are a form of subordinate legislation: see Legislation Act, s 4 definition of “legislative instrument”.

¹¹⁰ See *Mewes*, above n 65, at 665–667.

¹¹¹ *New Zealand Air Line Pilots’ Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Blanchard, Tipping, McGrath and Anderson JJ; *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J and [207] per Glazebrook J.

¹¹² *Yuen*, above n 67, at [18].

- (c) giving legislative expression to the interpretive presumption in favour of compliance with the treaty.

[98] Interpreting “subject to” in s 3(4) as meaning “one may be affected by the other” is consistent with this purpose. It is also supported by the text of the provision, the broader statutory context of the 1965 Act, and its legislative history.

Extradition Act 1999

[99] The explanatory note to the Bill which became the Extradition Act gives us a good idea of what the Act was intended to achieve. Its objectives were to consolidate the existing extradition regimes that applied in New Zealand into one Act, and to modernise the law of extradition to incorporate various changes in extradition practice that had gained international acceptance.¹¹³

[100] The Extradition Act brought together the Commonwealth and non-Commonwealth regimes, repealing the Fugitive Offenders Act. It dispensed with the requirement of a treaty with non-Commonwealth countries, allowing for extradition in response to requests even in the absence of a treaty, the situation that had previously applied only to Commonwealth countries. The Act expanded the scope of offences for which extradition was available by abandoning the “enumerative” approach (utilised in the 1965 Act where the specific offences for which extradition may be sought are listed) in favour of the “eliminative” approach.¹¹⁴

[101] The explanatory note to the Extradition Bill recorded that while extradition would be available for a wider range of offences, double criminality was required.¹¹⁵ In the original draft Bill, the definition of extradition offence, which included a requirement of double criminality, was not expressed to be “subject to” any treaty.¹¹⁶ Clause 14 provided that, by Order in Council, the Act could be applied to any country with which there was an extradition treaty, subject to “any limitations, conditions, exceptions, qualifications, or modifications that are necessary to give effect to the

¹¹³ Extradition Bill 1998 (146-1) (explanatory note) at i.

¹¹⁴ See above at [58]–[60].

¹¹⁵ Extradition Bill 1998 (146-1) (explanatory note) at iii.

¹¹⁶ Clause 4.

treaty”. Clause 16 provided that where there was a treaty, with limited exceptions, the provisions of the Act were to be construed to give effect to the provisions of the treaty. The limited exceptions listed in cl 16 related to restrictions on surrender.

[102] In its report on the Bill to the Foreign Affairs, Defence and Trade Committee, the Regulations Review Committee commented that cl 14 (and cl 15, a similar provision allowing the Governor-General to apply Part 3 to non-treaty, non-Commonwealth countries) seemed to allow Orders in Council to effect amendments to any or all of the provisions of Part 3 of the Act.¹¹⁷ The Committee expressed no “outright objection” to this approach because of the existence of what they understood to be a similar provision in the 1965 Act (s 3(4)) and in the extradition legislation in other countries. But it considered the approach in cls 14 and 15 required “very careful consideration”.¹¹⁸

[103] The Foreign Affairs, Defence and Trade Committee reported back in December 1998. The Committee did not recommend a departure from the longstanding requirement of double criminality as an essential feature of extradition. In the report the Committee noted the advice from the Regulations Review Committee. It said that in view of those comments, it had inserted a new clause to replace cl 16 and to clarify the relationship between a treaty and the Act. The general principle, it said, was that the Act is to be construed to give effect to the treaty, but that it should also comprehensively set out the ways in which a treaty may not override the Act.¹¹⁹

[104] The Bill as reported from the Committee amended the definition of extradition offence by adding the words “subject to an extradition treaty” to the s 4 definition of “extradition offence” and added a new cl 10A, which became s 11, to replace cl 16.

[105] Section 11 is not an easy provision to construe. While it contains what reads as no more than an interpretive principle (“must be construed to give effect to the treaty”), the language of s 11(2) appears to contemplate a treaty overriding the

¹¹⁷ Regulations Review Committee *Report of the Regulations Review Committee: Extradition Bill* (31 August 1998) at 1.

¹¹⁸ At 2. As discussed above at [93]–[95], we are satisfied s 3(4) of the 1965 Act did not confirm a general authority for treaties to amend the application of the 1965 Act. This was a mischaracterisation of the effect of s 3(4) by the Committee.

¹¹⁹ Extradition Bill 1998 (146-2) (select committee report) at iii.

provisions of the Extradition Act (“no treaty may be construed to override” the listed sections). Yet s 11(2) is intended only to save provisions from the effect of s 11(1) – it does not itself set out an interpretive principle.¹²⁰

Analysis

[106] We have addressed above the usual sense in which the expression “subject to” is used in legislation. It may mean, in context, that one may be affected by the other.¹²¹ In our view, that broadly accords with the sense in which it is applied in this context – that the definition in s 4 gives way to the provisions of an extradition treaty if the offence the subject of the request is not an extradition offence for the purposes of the treaty. The phrase “subject to an extradition treaty” does the work that ss 2 and 3(4) of the 1965 Act used to do – it adds in the requirement that the offence be an extradition offence for the purposes of the treaty. It is not enough for just the s 4 definition to be fulfilled because the offence must also be one listed in the treaty. Read in this way, the expression “subject to” allows the category of extradition offence to be reduced, but not expanded, by the treaty.

[107] The continuity of expression between s 3(4) of the 1965 Act and s 4 of the Extradition Act supports a reading of s 4 which allows only that a treaty may limit but not expand the categories of otherwise extraditable offences. It is also consistent with the legislative history, which contains no trace of an intention to depart from the longstanding position that double criminality is a required element of extradition arrangements.

[108] Such a reading is the most rights-consistent interpretation for the purposes of s 6 of the New Zealand Bill of Rights Act. It preserves the protections afforded by the requirements of double criminality thereby ensuring a person is not exposed to arrest, detention and removal from New Zealand for conduct which is not criminalised in New Zealand.

¹²⁰ Compare s BH 1(4) of the Income Tax Act 2007, which provides that double tax agreements, once implemented by Order in Council, override certain statutory provisions. The clear language of this provision contrasts with the wording of s 11(1) of the Extradition Act.

¹²¹ See above at [91]–[93].

[109] That still leaves the issue as to whether, irrespective of the meaning of the phrase “subject to” in s 4, s 11 provides that treaties may override any provision in the Act not expressly preserved from “override” by s 11(2). The United States argues that is the effect of s 11 and that the s 4(2) requirement of double criminality is not amongst those provisions saved from override.

[110] The proper interpretation of s 11 is an important issue. It would be unusual in New Zealand’s constitutional order to confer on the Executive an unfettered power to suspend generally, or disapply in individual cases, a statutory framework. The courts, anxious to protect the primacy of Parliament, the body with the democratic mandate to make legislation, would not lightly construe enactments as granting to the Executive the suspension power, declared in 1688 to be illegal, without Parliamentary consent.¹²²

[111] But the Court of Appeal in *Yuen* characterised s 11 as sufficient mandate to disapply provisions of the Extradition Act; it said it directed a reconstruction of the Act to achieve consistency with the treaty.¹²³ Arguably the discussion in *Yuen* was obiter. The issue in that case was whether treaty obligations, which created wider grounds for refusing surrender than the Extradition Act, could be enforced. The Court of Appeal held that they could.¹²⁴ In so finding, it was deciding the case consistently with the longstanding interpretation of s 4’s legislative antecedents, that the section allows limitation but not expansion of extradition rights through treaty. And in reaching a view as to the effect of s 11, the Court did not address the constitutional principle we have referred to above: that it is Parliament which has the power to amend or suspend legislation, and that clear words are required to confer such a power on others, including the Executive.¹²⁵

¹²² See Bill of Rights 1688 (Imp). In *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) at [87], this Court said: “Except with the antecedent authority of Parliament, subordinate legislation cannot repeal or interfere with the operation of a statute”. The Court cited the decision of the Court of Appeal in *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742 (CA) at 745 with approval. See also *Mewes*, above n 65, at 665–666; and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [43]–[45] and [50].

¹²³ *Yuen*, above n 67, at [15]–[16].

¹²⁴ At [17] and [30].

¹²⁵ The Court did, however, refer to the Regulations Review Committee report (above n 117), which canvassed that constitutional principle: at [15].

[112] We do not need to finally resolve whether s 11 is to be construed as authorising subordinate legislation to override the provisions of the Extradition Act other than those saved from override by s 11(2). The alternative construction is that it is merely an attempt to more clearly capture the relationship between statute and treaty that existed under the 1870 and 1965 Acts.¹²⁶ It is sufficient to find, as we do, that the double criminality rule is protected for Part 3 countries by s 11(2) of the Extradition Act. Our reasons for reaching this conclusion are as follows.

[113] First, as already mentioned, the legislative history suggests there was no intention to jettison the longstanding requirement of double criminality as a precondition to extradition.¹²⁷

[114] Secondly, the Extradition Act is structured around the idea of double criminality. It is, as we have said, expressly provided for in s 4(2), but that is not the only reference to it. Section 5(2) clarifies the meaning of “conduct constituting the offence” by reference to both the law of the requesting country and New Zealand.

[115] Sections 101B and 101C also assume double criminality. They contain an extensive list of New Zealand offences broadly related to transnational organised crime and people trafficking (s 101B), and child prostitution and pornography (s 101C). They provide that New Zealand must surrender foreign nationals whose surrender is sought for conduct that amounts to one of these offences had it occurred in New Zealand. The sections deem these New Zealand offences to be included in any extradition treaty to which New Zealand is a signatory. But that inclusion does not negate double criminality. This is made clear by the proviso in ss 101B(3) and 101C(3) that there will be no extradition in respect of an act “that, had it occurred within the jurisdiction of New Zealand, would not, at the time it occurred, have constituted an offence under New Zealand law”. These provisions echo the words of s 4(2).

¹²⁶ The question may arise more squarely in another case where the interpretation of s 11 is determinative of the issue.

¹²⁷ See above at [107].

[116] Thirdly, s 24(2)(d) appears in the list of provisions protected from being “overridden” in s 11(2). As noted earlier, s 24(2)(d) provides that the court must be satisfied that:

... the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act,—

- (i) in the case of a person accused of an extradition offence, justify the person’s trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand; or
- (ii) in the case of a person alleged to have been convicted of an extradition offence, prove that the person was so convicted.

[117] In our view that provision naturally reads as requiring proof of criminality in New Zealand. The United States argues that it is illogical to provide two double criminality provisions – ss 4(2) and 24(2)(d). It says it is also illogical for Parliament to protect double criminality from override in this way, without similarly protecting s 24(2)(c), since that protection could be undone by overriding the definition of extradition offence applied by the court under s 24(2)(c).

[118] We acknowledge that s 4(2) includes double criminality within the definition of extradition offence. But treating s 24(2)(d) as a double criminality provision does not simply duplicate the effect of s 4(2). Section 24(2)(d) performs a different function – it imposes on the court a requirement that it be satisfied there is sufficient evidence of the New Zealand side of the double criminality requirement. As to the United States’ other point, the tasks allocated to the court under the Extradition Act are already protected from override by the inclusion within the s 11(2) protected provisions (in para (d)) of “any provision conferring a particular function or power on ... a court”. We see the singling out of s 24(2)(d) in s 11(2) as reflecting that prima facie evidence of the New Zealand side of double criminality is treated as fundamental in the extradition regime.

[119] We differ from the analysis in *Cullinane* of s 24(2)(d). In *Cullinane* the Court said that s 24(2)(d) only addresses questions of evidence and criminal procedure, and does not import a double criminality requirement.¹²⁸ We acknowledge that in taking

¹²⁸ *Cullinane*, above n 57, at [65].

that view of s 24(2)(d), the Court in *Cullinane* could rely upon decisions of the United States Supreme Court in *Factor v Laubenheimer* and of the High Court of Australia in *Riley v The Commonwealth of Australia*.¹²⁹ It is therefore necessary for us to briefly discuss these two cases.

[120] In *Factor*, the Court held that the Treaty between the United States and the United Kingdom¹³⁰ contained no requirement of double criminality,¹³¹ and in the absence of any statutory minimum to that effect in the United States, proof of double criminality was not required for extradition.¹³² Although art 10 of the Treaty was in similar terms to s 24(2)(d), Stone J, writing for the majority, said that it dealt with a procedural matter only, the quantum of proof.¹³³

[121] *Factor* has been the subject of significant academic criticism and restrictive interpretation by the courts.¹³⁴ But it remains part of the law of the United States. There was, however, a dissenting judgment. Butler J said that the decision of the majority was in conflict with earlier Supreme Court authority that the principles governing interpretation of extradition treaties favoured the incorporation of double criminality, even absent express provision to that effect.¹³⁵ As to art 10, while he agreed it addressed the quantum of evidence required to support the demand for extradition, it significantly coincided with the double criminality principle, and thereby impliedly indicated that extradition was not available without it.¹³⁶ Brandeis and Roberts JJ joined in Butler J's dissent.

[122] We prefer the judgment of the minority which treated a s 24(2)(d)-type requirement of proof (art 10) as built on an assumption of double criminality.

¹²⁹ *Factor*, above n 76; and *Riley*, above n 61.

¹³⁰ Webster-Ashburton Treaty, United States of America-United Kingdom TS 119 (signed 9 August 1842, entered into force 13 October 1842). This was supplemented by the Extradition Convention, United States of America-United Kingdom TS 139 (signed 12 July 1889, entered into force 4 April 1890).

¹³¹ *Factor*, above n 76, at 290 and 292.

¹³² At 291.

¹³³ At 290–292.

¹³⁴ See Manley O Hudson “The Factor Case and Double Criminality in Extradition” (1934) 28 AJIL 274; and *Shapiro v Ferrandina* 478 F 2d 894 (2d Cir 1973) at 911–912.

¹³⁵ *Factor*, above n 76, at 305 and 315, citing *Wright v Henkel* 190 US 40 (1903).

¹³⁶ At 314.

[123] In *Riley*, a statutory provision almost identical to s 24(2)(d) was in issue.¹³⁷ All Judges were in agreement that the provision was procedural only, setting out the necessary standard of proof and not in itself amounting to a requirement for double criminality.¹³⁸

[124] The approach of the majority in *Factor* and of the Court in *Riley* to s 24(2)(d)-type provisions has not been followed in other jurisdictions. In *R v Governor of Pentonville Prison, ex parte Sinclair*, the House of Lords reiterated that the task of the extradition judge is to determine whether the conduct alleged is an offence at English law.¹³⁹ In numerous other decisions, English courts have proceeded upon the assumption that statutory equivalents of s 24(2)(d) are double criminality provisions.¹⁴⁰

[125] Canadian authorities are to similar effect. In *United States of America v McVey*, La Forest J for the majority outlined the way in which the extradition process divided tasks between those for the executive branch of government and those for the judicial branch:¹⁴¹

In essence, the treaty obligations are of a political character to be dealt with in the absence of statute by the political authorities. However, ... the liberty of the individual has not been forgotten in these rather special proceedings. The treaties, sensitive to the liberty of the individual, contain provisions for their protection. Most important is the requirement that there be prima facie evidence that the act charged would constitute a crime in Canada. This specific matter, about which judges are most competent, is the task assigned to a judge by the Extradition Act.

[126] Citing *McVey*, the Supreme Court in *United States of America v Dynar* held that:¹⁴²

[121] One of the most important functions of the extradition hearing is the protection of the liberty of the individual. It ensures that an individual will not be surrendered for trial in a foreign jurisdiction unless, as previously

¹³⁷ Section 17(6)(b) of the Extradition (Foreign States) Act 1966 (Cth).

¹³⁸ *Riley*, above n 61, at 8–9 and 13 per Gibbs CJ, Wilson and Dawson JJ and 20–21 per Deane J. Brennan J agreed with the reasons given by Gibbs CJ: at 14.

¹³⁹ *R v Governor of Pentonville Prison, ex parte Sinclair* [1991] 2 AC 64 (HL) at 83–86.

¹⁴⁰ See, for example, *Nielsen*, above n 99, at 615; *Government of the United States of America v McCaffery* [1984] 1 WLR 867 (HL) at 869–870; and *Sotiriadis*, above n 99, at 22 and 24 per Lord Diplock.

¹⁴¹ *McVey*, above n 60, at 519.

¹⁴² *United States of America v Dynar* [1997] 2 SCR 462.

mentioned, the Requesting State presents evidence that demonstrates on a prima facie basis that the individual has committed acts in the foreign jurisdiction that would constitute criminal conduct in Canada.

[127] We note that the Court in *Cullinane* does not seem to have had these authorities, which conflict with the approach of the majority in *Factor*, cited to them on this point. The view of the task for the court under s 24(2)(d) which emerges from the English and Canadian authorities is consistent with our interpretation of s 4; it places on the court a non-derogable duty to be satisfied of double criminality before finding the requested person eligible for surrender.

[128] To conclude on this point, although the Court of Appeal in *Yuen* and in *Cullinane* interpreted s 11 as authorising the Executive to negotiate treaties inconsistent with the fundamental regime of the Extradition Act, and in *Cullinane* held that this extended to the definition of an extraditable offence, we have held that the requirement of double criminality inherent in Part 3 of the Extradition Act cannot be overridden. As we have observed above, this is the interpretation most consistent with the rights affirmed by the New Zealand Bill of Rights Act,¹⁴³ the text of the Extradition Act and its legislative history. It follows then that the answer to the question, whether the Act allows for the double criminality element of the definition of extradition offence to be overridden by the provisions of an extradition treaty subject to Part 3, is no.¹⁴⁴ It also follows that the Court of Appeal was correct in the decision under appeal to depart from its own earlier decision in *Cullinane*.

[129] Given this finding, it is not necessary to decide the next issue, which is whether the NZ/US Treaty does in fact dispense with the requirement for double criminality. However, it was an additional ground the Court of Appeal relied upon in rejecting the United States' argument that double criminality was not a requirement, and we have heard argument on the point. We therefore address it.

¹⁴³ See above at [108].

¹⁴⁴ For these reasons we disagree with the statement in the Law Commission Report *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at [6.7] that the double criminality provisions do not apply if the offence is recognised as an extradition offence under a treaty. This statement is, however, based on the Court of Appeal decision in *Cullinane*, which we have held to be wrongly decided.

Does the NZ/US Treaty dispense with the requirement for double criminality?

[130] In *Cullinane*, the Court of Appeal cited *Factor* for the proposition that double criminality is not required in a treaty that employs an enumerative approach and which refers expressly to a requirement of double criminality in connection with only some of the offences listed in the treaty.¹⁴⁵ The Court in *Cullinane* noted that the NZ/US Treaty expressly employs double criminality in connection with one specified offence only – unlawful sexual connection with children under the age specified by the law of both parties (art 2(7)). It saw that as indicating that proof of double criminality was not otherwise required.¹⁴⁶ It said that the fact the contracting parties chose not to use the eliminative approach, even though treaties based on it were extremely common by 1970, suggests that the parties deliberately rejected the eliminative approach with its usual express double criminality requirement.¹⁴⁷

Law relating to interpretation of treaties

[131] The issue that arises under this heading is one of the interpretation of treaties. Article 31 of the Vienna Convention on the Law of Treaties describes general rules of interpretation.¹⁴⁸ The general principle is that set out in art 31(1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31(2) lists the factors that may comprise context for the purpose of interpretation. Article 31(3)(b) allows “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” to be taken into account, together with context, when interpreting the treaty. Article 32 also allows recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.¹⁴⁹

¹⁴⁵ *Cullinane*, above n 57, at [59] and [62].

¹⁴⁶ At [61]–[62].

¹⁴⁷ At [58].

¹⁴⁸ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

¹⁴⁹ Resort may be had to these supplementary materials in order to confirm the meaning resulting from the application of art 31, or to determine the meaning when the art 31 exercise leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

Analysis

[132] In this case it is critical context, as Ms Hyde submitted, that the NZ/US Treaty was negotiated and concluded against the legislative backdrop of the 1965 Act. As we have already noted, that Act did not allow the disapplication of the double criminality requirement.¹⁵⁰ If the 1965 Act did not allow the requirement of double criminality to be disappplied by treaty, then it is highly improbable that the parties agreed to do so. Without more, that is sufficient to dispose of the United States' argument that the NZ/US Treaty is inconsistent with a requirement of double criminality. But there is more that can be said to support a construction that the NZ/US Treaty was intended to operate with a requirement of double criminality.

[133] It is relevant, in accordance with the Vienna Convention interpretive principles, that the parties to the NZ/US Treaty proceeded, through several extradition requests under the 1965 Act, and for a time under the Extradition Act, upon the basis that double criminality was indeed an element of an extradition offence for the purposes of the Treaty.¹⁵¹ The contrary position was not taken by the United States until more than 30 years after the NZ/US Treaty was entered into.

[134] There are also indications in the Treaty that a double criminality regime was intended to apply: art 4, which duplicates the requirements of s 24(2)(d);¹⁵² and art 6(3), which prevents extradition if the offence would be time barred according to the laws of the requesting country *or* the country from which extradition is requested.

[135] The Court in *Cullinane* relied upon a number of matters in support of its conclusion that the Treaty was intended to dispense with the requirement of double criminality. We address each of these in turn.

[136] The Court proceeded on the basis that the eliminative rather than the enumerative style of treaty is generally associated with an extradition regime which incorporates a requirement of double criminality.¹⁵³ We do not agree. As

¹⁵⁰ See above at [93]–[98].

¹⁵¹ See above at [49].

¹⁵² See also arts 9 and 10.

¹⁵³ *Cullinane*, above n 57, at [50]–[51].

Professor Shearer says in his text *Extradition in International Law*, “The basic rule observed by the enumerative and ‘no list’ treaties alike is the rule of double criminality.”¹⁵⁴

[137] In fact, the NZ/US Treaty’s use of the enumerative approach supports the view that double criminality was required. The 1965 Act employed the enumerative approach, defining extradition offence by reference to the crimes listed in sch 1 to the Act, *and* in the extradition treaty, and as punishable in the requesting country. Given that context, it was sensible for the NZ/US Treaty to use the list in sch 1 as its base, and that is what it did. All of the crimes listed in art 2 of the NZ/US Treaty can be linked to a New Zealand-based offence listed in that schedule. This, we think, supports the intended application (perhaps better expressed as an assumption) of the requirement of double criminality.

[138] The Court of Appeal in *Cullinane* also attached significance to the fact that there was no express requirement for double criminality in the Treaty.¹⁵⁵ In argument before us, the United States pointed to other treaties in which there is express reference to the requirement of double criminality. It pointed to the United States/Sweden Treaty and the United States/Israel Treaty,¹⁵⁶ and also to New Zealand’s treaty with Fiji (the NZ/Fiji Treaty).¹⁵⁷ It argued that the absence of such express stipulation in the NZ/US Treaty is therefore significant.

[139] We consider that art 4, duplicating as it does the requirements of s 24(2)(d), is to be construed as an express requirement of double criminality. And even were that not so, this Treaty was, as we have observed, negotiated within the context of a

¹⁵⁴ Shearer, above n 61, at 137. See also Bassiouni, above n 61, at 500–502; Geoff Gilbert *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (Martinus Nijhoff Publishers, The Hague, 1998) at 104–112; and Gavan Griffith and Claire Harris “Recent Developments in the Law of Extradition” (2005) 6 MJIL 33 at 37–38.

¹⁵⁵ *Cullinane*, above n 57, at [56].

¹⁵⁶ Convention on Extradition between the United States of America and Sweden 494 UNTS 141 (signed 24 October 1961, entered into force 3 December 1963), art 1; and Convention on Extradition between the Government of the State of Israel and the Government of the United States of America 484 UNTS 283 (signed 10 December 1962, entered into force 5 December 1963), art 2.

¹⁵⁷ Agreement on Extradition between the Government of New Zealand and the Government of the Republic of Fiji [1992] NZTS 3 (signed 21 March 1992, entered into force 14 April 1992), art 1. See also Extradition (Republic of Fiji) Order 1992.

statutory framework (the 1965 Act) which included a mandatory requirement of double criminality.

[140] As to the United States' reliance on the text of other treaties, there is an obvious need to proceed carefully before concluding that anything from those treaties is relevant to the issue in this proceeding. This is particularly so where the treaties in question are treaties to which New Zealand is not party. We do not, for example, know what the domestic legislation in Sweden provides as to the requirement for double criminality. As to the position with Fiji, we do not accept the United States' argument that the NZ/Fiji Treaty requires double criminality in only limited circumstances. Article 4 of the NZ/Fiji Treaty is in almost identical terms to art 4 of the NZ/US Treaty. As we have said above, this article is properly construed as imposing an express requirement of double criminality.

[141] In short, we do not find reference to these other treaties, negotiated and applied as they are in different contexts, of assistance in the task of interpreting the Treaty before us.

[142] The Court of Appeal in *Cullinane* also relied upon the explicit reference to a requirement for double criminality in relation to sexual offending against children as inconsistent with a general requirement for double criminality.¹⁵⁸ Article 2(7) stipulates the enumerated offence in question as follows:

Unlawful sexual acts with or upon children under the age specified by the laws of both the requesting and requested parties.

[143] We do not read this as explicitly requiring double criminality, but rather as providing clarification as to how double criminality is to be assessed in respect of such offending. The relevant offences listed in sch 1 of the 1965 Act contain the age threshold applying in New Zealand at that time for those offences: "Sexual intercourse with girl under twelve" and "Sexual intercourse or indecency with girl between twelve and sixteen". It seems to us that the drafters have contemplated that the age threshold for criminalising sexual acts with or upon children may differ between the United States and New Zealand. Article 2(7) has the effect that in the case of this

¹⁵⁸ *Cullinane*, above n 57, at [61].

particular type of offending, it is the lower of the age thresholds enacted in the requesting country and the country from which extradition is requested that applies to determine double criminality. It clarifies that it would not be sufficient for double criminality if the sexual conduct was with or upon a child who was under the age limit specified in the requesting country but over the age limit specified in the country from which extradition is requested. In other words, it clarifies that when undertaking the conduct-based assessment under s 24(2)(c) (which we describe shortly), the particular age, rather than breach of a statutory age limit, is the essential element of the offence.

[144] The United States also refers to art 18, which provides that the Treaty applies to art 2 offences committed before as well as after the NZ/US Treaty came into force, unless it “was not an offence under the laws of both countries at the time of its commission”. Again, it says that this is an express requirement of double criminality limited to a particular circumstance, and thus inconsistent with an overall requirement of double criminality. We do not agree. Article 18 addresses the retrospective application of the NZ/US Treaty, and in so doing clarifies that double criminality is to be judged at the time of the commission of the offence. Why was such clarification necessary? It was necessary because prior to the Extradition Act, such authority as there was suggested that double criminality was to be assessed as at the date of the request. We note that the position has now been clarified and accords with that provided for in art 18.¹⁵⁹ Section 4(3) of the Extradition Act stipulates that the time to assess double criminality is the time at which the conduct is alleged to have occurred. In the same year it was enacted, 1999, Lord Browne-Wilkinson in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* clarified that under the 1870 Act, the relevant date was the conduct date, not the date of the request.¹⁶⁰

[145] We also address the United States’ argument that it is illogical for the United States to enter into such a treaty because it would have been better to simply use the request approach to extradition, now available under the Extradition Act to countries with which New Zealand does not have an extradition treaty. The

¹⁵⁹ Ivor Stanbrook and Clive Stanbrook *Extradition Law and Practice* (2nd ed, Oxford University Press, Oxford, 2000) at [2.10]–[2.19].

¹⁶⁰ *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL) at 196. See also at 230 per Lord Hope.

United States argues that at best, on the approach taken by the Court of Appeal in this proceeding, the Treaty is limiting of the rights available under the Extradition Act to non-treaty nations – this is because it limits the offences for which the United States may seek extradition. Such a limitation does not apply to countries without extradition treaties.

[146] Again, this argument overlooks the context within which the NZ/US Treaty was negotiated. It was negotiated against the backdrop of the 1965 Act under which non-Commonwealth countries required an extradition treaty with New Zealand in order to obtain extradition. Without a treaty there could be no extradition. The argument also overlooks the fact that under the Extradition Act, countries which come under Part 3, which include countries with which New Zealand has concluded an extradition treaty, can utilise the streamlined procedures set out there as of right. Countries making one-off requests must apply to the Minister under s 60 and the Minister must decide whether the request should be dealt with under Part 3.¹⁶¹

[147] We therefore do not interpret the NZ/US Treaty as intended to dispense with the requirement of double criminality. The textual indications relied upon by the Court of Appeal in *Cullinane* and by the United States in argument do not support that reading. There are, however, strong textual indications that the parties assumed that extradition requests would be determined within a double criminality regime. The conduct of the United States for the 30 years following the making of the Treaty, until *Cullinane*, is consistent with that interpretation.¹⁶² As is the fact it was negotiated against the backdrop of the 1965 Act, which required double criminality.¹⁶³

¹⁶¹ Section 60(3) sets out a list of factors the Minister must consider in deciding whether the request should be dealt with under the Extradition Act. Section 60(4) provides that if a request to which s 60 applies is made by a country that is party to a multilateral treaty and in respect of an offence that is a multilateral treaty offence in relation to that multilateral treaty, the Minister is not required to consider the matters set out in paras (a)–(c) of subs (3).

¹⁶² See above at [49] and [133].

¹⁶³ See above at [83]–[85] and [132].

Double criminality: summary

[148] We conclude that the United States is required to show that the appellants' conduct would constitute offending in both the United States and New Zealand. This is because:

- (a) Double criminality is a fundamental requirement of extradition law.¹⁶⁴ There is nothing in the legislative history to suggest that Parliament intended to jettison this fundamental and longstanding requirement from the Extradition Act.¹⁶⁵
- (b) The Extradition Act is structured around a requirement of double criminality. Double criminality is expressly provided for in s 4(2), and reflected in ss 5(2), 24(2)(c), 24(2)(d) and 101B–101C.¹⁶⁶
- (c) The double criminality requirement for extradition to Part 3 countries in s 24(2)(d) is expressly protected by s 11(2)(b) and cannot be overridden by an extradition treaty. This reflects the fact that prima facie evidence of the New Zealand side of the double criminality requirement is fundamental to the extradition regime.¹⁶⁷
- (d) Even if the double criminality requirement for extradition to Part 3 countries could be overridden by a treaty, the NZ/US Treaty does not, in fact, do this. Article 4 of the Treaty imports an express double criminality requirement. The use of the enumerative approach and the context in which the Treaty was negotiated support that conclusion.¹⁶⁸

[149] The Court of Appeal was therefore correct to overrule its earlier decision in *Cullinane*.

¹⁶⁴ At [46]–[48] and [136].

¹⁶⁵ At [107] and [113].

¹⁶⁶ At [114]–[115].

¹⁶⁷ At [116]–[118].

¹⁶⁸ At [136]–[147].

C ELIGIBILITY REQUIREMENTS

[150] We begin with a discussion of what is required for the District Court to determine eligibility of a requested person for surrender under s 24(2)(c)¹⁶⁹ and also discuss briefly what is required under s 24(2)(d)(i).¹⁷⁰ We also address the requirements under s 24(2)(a) for supporting documents that must be presented by a requesting country in support of its request for surrender of a requested person.¹⁷¹

Section 24(2)(c) of the Extradition Act

[151] As set out above, under s 24(2)(c) of the Extradition Act, the District Court must, in determining eligibility for surrender, assess whether it is satisfied that the offence is an extradition offence in relation to the requesting country.¹⁷² This in turn requires that the court be satisfied:

- (a) that the conduct relied upon is an offence contained in the extradition treaty (if there is one);
- (b) that the conduct would constitute an offence in the requesting country punishable with a maximum penalty of not less than 12 months' imprisonment (which we refer to as the requisite penalty); and
- (c) that the conduct alleged to constitute the offence, had it occurred in New Zealand, would constitute an offence under New Zealand law, again punishable with a maximum penalty of not less than 12 months' imprisonment (which we also refer to as the requisite penalty).

[152] We deal with the last two of these in more detail below.

¹⁶⁹ See below at [151]–[160].

¹⁷⁰ See below at [161]–[164].

¹⁷¹ See below at [165]–[196].

¹⁷² See above at [38].

Does the United States have to prove United States law for the purposes of s 24(2)(c)?

[153] The Court of Appeal said it was not usual for the court to inquire into the requesting country offence. It said that responsibility for satisfying that requirement rested with the Minister, on receipt of the requesting country documents, and before requesting the issue of an arrest warrant, and that the court does not inquire whether the alleged conduct sufficiently makes out the requesting country offence.¹⁷³

[154] We accept that the Minister would, before requesting an arrest warrant, have to be satisfied that the alleged offence is covered by a treaty (if any) and that it is an offence in the requesting country with the required minimum term of imprisonment. However, we do not accept the court has no role.

[155] As s 24(2)(c) of the Extradition Act makes clear, it is the task of the New Zealand court to satisfy itself that the alleged offence is punishable under the law of the requesting country with the level of penalty stipulated in s 4(1).¹⁷⁴ The task imposed upon the court in this regard is, however, limited. It is not necessary for the requesting country to prove foreign law to satisfy the requirement that the conduct constituting an offence under its law attracts the requisite penalty.¹⁷⁵ It is sufficient if there is a statement from a law officer of the requesting country covering this aspect of the definition of extradition offence.¹⁷⁶

How does the court identify the comparable New Zealand offence and assess the conduct against the elements of that offence for the purposes of s 24(2)(c)?

[156] The next step is for the court to address whether the conduct constituting the offence would be an offence in New Zealand attracting the requisite penalty, if committed here.

¹⁷³ CA judgment, above n 23, at [44] and [124].

¹⁷⁴ See also s 19(2)(ii) of the Extradition Act.

¹⁷⁵ *McVey*, above n 60, at 543 per La Forest, L'Heureux-Dubé, Gonthier and Cory JJ; and *Nielsen*, above n 99, at 624–625 per Lord Diplock.

¹⁷⁶ *Stanbrook and Stanbrook*, above n 159, at [2.61].

[157] Section 5 of the Extradition Act describes the fundamental nature of the task of matching an offence in the requesting country to an offence in New Zealand.¹⁷⁷

[158] The court therefore focusses upon the nature of the conduct alleged, and not upon the name or elements of the offence. The House of Lords in *Norris v Government of the United States of America* described the significance of the task of matching the relevant conduct, rather than the offence, as follows:¹⁷⁸

It is possible to define the crimes for which extradition is to be sought and ordered (extradition crimes) in terms either of conduct or of the elements of the foreign offence. That is the fundamental choice. The court can be required to make the comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extradition is sought) and an offence here, or between the conduct alleged against the accused abroad and an offence here. For convenience these may be called respectively the offence test and the conduct test. It need hardly be pointed out that if the offence test is adopted the requested state will invariably have to examine the legal ingredients of the foreign offence to ensure that there is no mismatch between it and the supposedly corresponding domestic offence. If, however, the conduct test is adopted, it will be necessary to decide, as a subsidiary question, where, within the documents emanating from the requesting state, the description of the relevant conduct is to be found.

[159] As to how a court goes about the task, we adopt the description given by Duff J in *Re Collins (No 3)*:¹⁷⁹

... you are to fasten your attention not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts, in their bearing upon the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with.

[160] This step is concerned with identifying a New Zealand offence which matches the alleged conduct. It is the necessary precondition to the s 24(2)(d)(i) task of assessing the prima facie case but, as we come to, is not to be confused with it.¹⁸⁰

¹⁷⁷ See above at [35]–[36].

¹⁷⁸ *Norris*, above n 63, at [65].

¹⁷⁹ *Re Collins (No 3)* (1905) 10 CCC 80 (BCSC) at 101.

¹⁸⁰ The submissions of the parties dealt in some detail with the concept of transposition in the context of the requirements of s 24(2)(c) and (d). We consider this is more logically discussed in the copyright context and deal with the meaning of transposition and its application below at [411]–[419].

What is the nature of the task for the court under s 24(2)(d)(i)?

[161] The task for the court under s 24(2)(d)(i) is to assess whether the requesting country has made out a prima facie case that the conduct of the person accused of an extradition offence would justify the person's trial if it had occurred within New Zealand.

[162] The offence against which the requesting country's case is to be measured is the matching New Zealand offence identified for the purposes of s 24(2)(c).

[163] It is well settled that this is to be a meaningful judicial assessment of the evidence tendered by the requesting country,¹⁸¹ in this case through the ROC procedure described earlier.¹⁸²

[164] The only issue on this appeal relating to s 24(2)(d)(i) is whether the Court of Appeal erred in its finding that for the purposes of s 24(2)(d)(i) it was not necessary for the United States to prove to a prima facie standard the copyright status of the allegedly infringing works.¹⁸³ We discuss this issue in our consideration of the copyright pathway to extradition.¹⁸⁴

Sufficiency of supporting documents (s 24(2)(a))

[165] We need to deal next with the appellants' argument that the supporting documents provided by the United States to satisfy the requirements of s 24(2)(a) were insufficient to meet the requirements imposed by s 18(3) of the Extradition Act. The issue about compliance arises because no separate deposition attaching a "statement of facts" describing the conduct constituting the alleged offences was provided.

¹⁸¹ *Dotcom* SC disclosure judgment, above n 69, at [181] and [184] per McGrath and Blanchard JJ, citing *United States of America v Ferras* 2006 SCC 33, [2006] 2 SCR 77. See also at [284] per Glazebrook J.

¹⁸² See above at [32].

¹⁸³ See below at [519].

¹⁸⁴ See below at [395]–[431].

[166] Section 18(3) states that a request for surrender “must be accompanied by duly authenticated supporting documents”. In material part, s 18(4) provides that “supporting documents” means:

- (c) in the case of any offence, a written deposition setting out—
 - (i) a description of, and the penalty applicable in respect of, the offence; and
 - (ii) the conduct constituting the offence.

[167] A “deposition” is relevantly defined in s 2(1) as including “an affidavit or statement made on oath”. Section 24(2) then brings the supporting documents into the court’s assessment by providing that, subject to s 24(3) and (4), a person is eligible for surrender if:

- (a) the supporting documents (as described in section 18(4)) in relation to the offence have been produced to the court; and

- (b) if—

...

- (ii) the terms of an extradition treaty in force between New Zealand and the extradition country require the production to the court of any other documents—

those documents have been produced to the court; and^[185]

...

[168] Article 10 of the NZ/US Treaty similarly provides that a request for extradition “shall be accompanied by”:¹⁸⁶

... *a statement of the facts* of the case, the text of the applicable laws of the requesting Party including the law defining the offence, the law prescribing the punishment for the offence, and the law relating to the limitation of the legal proceedings.

(emphasis added)

¹⁸⁵ The court has the power to adjourn an eligibility hearing to remedy minor deficiencies in documentation: s 24(6).

¹⁸⁶ The Treaty is incorporated into domestic law through s 2 and sch 1 to the Extradition (United States of America) Order. Article 10 refers to a “deposition or other evidence, given under oath”.

[169] Article 12 of the Treaty is also relevant. It provides that:

If the requested Party requires additional evidence or information to enable it to decide on the request for extradition, such evidence or information shall be submitted to it within such time as that Party shall require.

If the person sought is under arrest and the additional evidence or information submitted as aforesaid is not sufficient or if such evidence or information is not received within the period specified by the requested Party, he shall be discharged from custody. However, such discharge shall not bar the requesting Party from submitting another request in respect of the same offence.

The Courts below

[170] It is not clear how this matter was raised in the first instance. That is because whether the supporting documents provided met the requirements of s 18(4) was not addressed in the District Court. The Judge referred to the “appropriate supporting documentation” having been received¹⁸⁷ and noted the need for the Court to be satisfied the appropriate supporting material had been received.¹⁸⁸ But the Judge did not discuss the question of compliance with s 18(4). The case stated to the High Court in relation to Messrs Ortmann, van der Kolk and Batato after the delivery of the judgment did, however, include a question as to whether the Judge had correctly determined “expressly or by implication” that the United States had produced the required supporting documents. The case stated in relation to Mr Dotcom included a similar question.

[171] The matter was raised in Messrs Ortmann, van der Kolk and Batato’s amended statement of claim for judicial review of the District Court judgment. The relevant pleading reflects the language used in the case stated. It is one of the various errors of law said to lead to the invalidity of the eligibility determinations. This aspect was not referred to in Mr Dotcom’s application for judicial review.

[172] The matter was referred to, although briefly, in the High Court judgment. The High Court Judge stated as follows:

[425] Extensive submissions were presented to the District Court at the extradition hearing over a period of three months. As far as I can ascertain,

¹⁸⁷ DC judgment, above n 21, at [3].

¹⁸⁸ At [12] and [435].

no one suggested that the appellants were not eligible for surrender because the formalities under s 24(2)(a) and (b) had not been met. This no doubt explains why the Judge did not address this in his lengthy judgment. In any event, the documents required under these subsections were produced.

[173] The High Court Judge recorded in answer to the questions in the cases stated on this point that the District Court Judge was correct.

[174] The notice of appeal to the Court of Appeal recorded Messrs Ortmann, van der Kolk and Batato's appeal against the dismissal of the application for judicial review, but there was no specific reference to the question of compliance with s 18(4). Further, at least in the written submissions in the Court of Appeal for Messrs Ortmann and van der Kolk, the question of compliance with s 18(4)(c)(ii) was not advanced as a separate appeal ground.¹⁸⁹ The matter was not referred to by the Court of Appeal.

Submissions

[175] In this Court, the challenge is that contrary to s 18(4)(c)(ii) the United States did not provide a short, standalone, "summary of facts" description of the conduct. Mr Illingworth QC said at the hearing that this failure had not given rise to invalidity or created a jurisdictional bar to surrender. But, he said, the United States' approach was not best practice, it was unfair and it had, in fact, given rise to confusion in the District Court. That was because, Mr Illingworth submits, the District Court Judge conflated the allegations made against the appellants with the evidence in the ROC produced to establish the allegations.

[176] For the United States, the submission is that this question of compliance is governed by the Treaty provisions because of s 11 of the Act. Mr Raftery QC, who argued this part of the case for the United States, said that, in any event, neither the expression "statement of facts" in the Treaty nor the expression "supporting documents" in s 18(4)(c)(ii) are used as terms of art. Rather, what is required is

¹⁸⁹ There is a footnote reference in the submissions for Messrs Ortmann and van der Kolk to the issue in which it is said the United States is incorrect to suggest the relevant conduct can be identified "elsewhere in the request documents" and that such an approach would "short-circuit the statutory process". In Mr Batato's written submissions, the submission is made that the superseding indictment did not specify the allegedly fraudulent conduct with due particularity.

something from which the conduct is apparent. Here, he says, the nature of the conduct is apparent when the superseding indictment is considered.

Assessment

[177] The best assistance as to how compliance is to be assessed can be found in the cases discussing s 19(3)(c)(ii) of the Extradition Act 1988 (Cth) (the Australian Act). Section 18(4)(c)(ii) appears to have been modelled on this provision.¹⁹⁰

[178] Section 19 of the Australian Act deals with the determination of eligibility for surrender. Section 19(2)(a) states that for the purposes of s 19(1), a person is eligible for surrender only if “the supporting documents in relation to the offence have been produced” to the court. Section 19(3)(c) provides that the supporting documents are, relevantly:

- (i) a duly authenticated statement in writing setting out a description of, and the penalty applicable in respect of, the offence; and
- (ii) a duly authenticated statement in writing setting out the conduct constituting the offence.^[191]

[179] The approach taken to compliance with the requirements as to these documents in Australia can be summarised as follows.¹⁹² First, it is “well-accepted” that the statement setting out the conduct constituting the offence may comprise a number of documents.¹⁹³ Second, a “bare description or definition of the offence will not

¹⁹⁰ The “compare” note in the footer to s 18 of the New Zealand Extradition Act refers to s 19(3) of the Extradition Act 1988 (Cth). The predecessor to s 18, s 6 of the 1965 Act, did not refer to the information to be provided. Section 10(1)(b) of the 1965 Act provided for a court to order committal, relevantly, where the foreign warrant or a copy was “duly authenticated and such evidence is produced as would according to the law of New Zealand, ... justify ... committal for trial”.

¹⁹¹ Section 19(4) of the Australian Act equates to s 24(6) of the New Zealand Extradition Act and allows the court to adjourn proceedings for a reasonable period to allow minor deficiencies in the documentation to be remedied.

¹⁹² For a recent summary of these principles see *Matson v United States of America* [2018] FCAFC 57, (2018) 260 FCR 187 at [54]. See also *The Laws of Australia* (2015, online ed) vol 9 Criminal Law Principles at [9.4.570].

¹⁹³ *Griffiths v United States of America* [2005] FCAFC 34, (2005) 143 FCR 182 at [50], affirming *Dutton v O’Shane* [2003] FCAFC 195, (2003) 132 FCR 352 at [105].

suffice”.¹⁹⁴ In *Timar v Republic of Hungary*, the Federal Court summarised the position, saying the test is relevantly whether the statement:¹⁹⁵

... sets out the essential elements of each offence for which surrender is sought, clearly identifies the provisions of the foreign law creating the offence ... and gives sufficient particularity to ensure that the requested State and the person whose surrender is sought are left in no doubt as to the basis upon which the requisition is made.

[180] Third, the Full Court of the Federal Court in *Griffiths v United States of America* observed, “The statement must speak with sufficient specificity, clarity and coherence to serve its purpose”.¹⁹⁶ The Court in *Griffiths* also cited a passage from the decision of the Full Court of the Federal Court in *McDade v United Kingdom*, in which the Court said the document would not meet the statutory requirements “if it is so vague and general or so disorganised that the relevant acts and omissions cannot be reasonably identified”. In the excerpt cited, the Full Court also noted that whether the statement was sufficient was essentially a “matter of practical judgment and assessment, not for over-zealousness in discerning deficiencies”.¹⁹⁷

[181] The approach in *McDade* is also consistent with the earlier authority of *Harris v Attorney-General of the Commonwealth*, which took as its starting point in the interpretation of compliance with the treaty requirements the notion that “substance should be preferred to form”.¹⁹⁸

¹⁹⁴ *Griffiths*, above n 193, at [51].

¹⁹⁵ *Timar v Republic of Hungary* [1999] FCA 1518 at [64] per Weinberg J (citation omitted), affirmed in *Kalinovas v Republic of Lithuania* [2015] FCA 961 at [25(d)] per Bennett J.

¹⁹⁶ *Griffiths*, above n 193, at [52].

¹⁹⁷ At [52], citing *McDade v United Kingdom* [1999] FCA 1868 (FC) at [17] per Kenny J (with whom the other members of the Court agreed). Kenny J relied on *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282 (FC) at 294 and *Wiest v Director of Public Prosecutions* (1988) 23 FCR 472 (FC) at 519 per Gummow J. The relevant “acts or omissions” are the elements or ingredients of the offence as distinct from the particular evidence which will be adduced to prove those acts or omissions if there is extradition: *Zoeller* at 294. Inferences drawn from the facts in the supporting documents should be based on a fair reading of the materials, recognising the consequences of extradition and applying common sense: *O’Donoghue v Ireland* [2009] FCAFC 184, (2009) 263 ALR 392 at [46].

¹⁹⁸ *Harris v Attorney-General of the Commonwealth* (1994) 52 FCR 386 (FC) at 401. See also at 406. This approach was subsequently applied by the Full Court in *Todhunter v United States of America* (1995) 57 FCR 70 (FC) at 86.

[182] Fourth, in terms of the purpose of the statement, the Court in *Griffiths* noted the purpose was two-fold:¹⁹⁹

First, the facts relevant to the extradition offence are proved by that statement. Second, because the [court] making the eligibility determination is confined to the material adduced in the supporting document, the statement must be such as to permit the [court] to be satisfied that the conduct said to constitute the offence would constitute an extradition offence had it taken place in ... Australia ...

[183] In these cases, neither the statutory requirements nor the similarly expressed treaty requirements have been seen to necessitate provision of a single “summary of facts” document.²⁰⁰ The approach taken in *Griffiths* illustrates the point. The Court noted that while there was not a “single sequential description of the ‘elements or ingredients’ of the conspiracy offence in the supporting documents”, these were readily apparent from the indictment and the affidavits in support.²⁰¹

[184] In Canada, the Extradition Act 1999 (the Canadian Act) includes provision for the relevant Minister to issue an “authority to proceed”. This authorises the Attorney-General to seek an order for committal on behalf of the extradition partner.²⁰² Section 15(3) of that Act sets out the matters to be included in the authority to proceed, including:

- (c) the name of the offence or offences under Canadian law that correspond to the alleged conduct of the person or the conduct in respect of which the person was convicted, as long as one of the offences would be punishable in accordance with [the principle of double criminality].

[185] In *United States of America v Saad*, the Ontario Court of Appeal considered the consequences of a failure to comply with s 15(3).²⁰³ The case dealt with a man charged with drug and sexual offending said to have taken place in the United States. The appellant submitted that the authority to proceed (even when read with the ROC)

¹⁹⁹ *Griffiths*, above n 193, at [53].

²⁰⁰ There has been some debate in the Australian cases about the impact of the treaty requirements in these respects on the statutory requirements: compare *Todhunter*, above n 198, at 86; and *Hermanowski v United States of America* [2006] FCAFC 8, (2006) 149 FCR 93 at [47]–[48]. See also *Matson*, above n 192, at [28] where the Full Court did not reconsider the position as outlined in *Todhunter*.

²⁰¹ *Griffiths*, above n 193, at [61].

²⁰² Extradition Act SC 1999 c 18 [Canadian Act], s 15(1).

²⁰³ *United States of America v Saad* (2004) 237 DLR (4th) 623 (ONCA).

was inadequate because it did not specify the transactions which were the subject matter of the extradition request. The Court found that there was sufficient notice of the case to be met when the ROC and authority to proceed were read together.²⁰⁴ The Court did, however, encourage the Minister to “be as specific as possible”.²⁰⁵

[186] The approach in the United Kingdom on this point is not of assistance.

[187] The experience in relation to the very similar provision in the Australian Act suggests that the standard for compliance with the statutory and treaty requirements in this respect is determined by reference to the purposes of requiring these documents. A purposive approach is appropriate in the New Zealand context. The purpose is a dual one: to enable the court to determine eligibility for extradition and to ensure the subject of the request understands the case against him or her.

[188] As matters have transpired in the present case, it may well have been preferable for a “summary of facts” type document to have been produced by way of an affidavit. That may have assisted in a better focus on what it was that the United States relied on as the essential conduct and avoided shifts in the United States’ approach to this. It would also have avoided the parties and the Courts having to “fish around”, as Mr Illingworth aptly put it, to pull together the essential conduct. That said, the material provided as part of the sworn affidavits does set out that conduct in some detail. It is helpful at this point to set out what was provided by way of supporting documents.

The affidavits

[189] The relevant documentation comprises the sworn affidavits of Jay Prabhu in support of the requests for extradition for each of the appellants. Mr Prabhu is an Assistant United States Attorney with the United States Attorney’s Office for the

²⁰⁴ At [18].

²⁰⁵ At [22]. The Court also noted that: “With a more carefully crafted document, the parties and the judge will have a better understanding of the real matters in issue and can direct their attention to those matters accordingly.” A similar approach was taken in *United States of America v Khalife* (2005) 194 CCC (3d) 113 (ONCA) at [10]–[17].

Eastern District of Virginia. These were the affidavits accompanying the requests for surrender in February 2012.²⁰⁶

[190] The affidavits relating to each of the appellants explain the procedural history of the case which culminated in the issuing of the superseding indictment. Mr Prabhu also records the offences set out in the superseding indictment and the applicable penalties as is required by s 18(4)(c)(i). He sets out what the United States must prove to establish the offences and describes the nature of the evidence that will be called at trial. Relevantly, for present purposes, Mr Prabhu attaches a certified copy of the superseding indictment and the ROC is exhibited to each affidavit.²⁰⁷

[191] The superseding indictment begins with a description of the case against the Megagroup in general terms. For example, it is noted that:

Since at least September 2005, Megaupload.com has been used by the defendants ... to willfully reproduce and distribute many millions of infringing copies of copyrighted works, ...

[192] Various features relied on by the United States are then set out, such as the use of a rewards system, what happens when a user uploads a video file to Megaupload.com, and the way in which the unique 32-digit identification number for each file known as “MD5 hash” operates.²⁰⁸ The defendants are described.

[193] The superseding indictment goes on to describe the conduct relied on for each count. Some of this material is quite detailed and some of it is a little discursive. To illustrate the type of information provided, reference can be made to count 2, the charge of conspiracy to commit copyright infringement. The earlier factual allegations about Megaupload and the way it operates are repeated. The indictment then sets out the allegation, namely, conspiracy to “willfully infringe, for purposes of commercial advantage and private financial gain”, at least ten copies of copyrighted works with a total retail value of more than USD 2,500 within a 180-day period.

²⁰⁶ As attested to by Ms Pierce of the Ministry of Foreign Affairs and Trade.

²⁰⁷ There are numerous supplemental affidavits exhibiting the supplemental ROCs.

²⁰⁸ See the description which follows shortly at [202].

[194] The superseding indictment in relation to count 2 continues by setting out the “Ways, Manner, and Means of the Conspiracy”. That includes, by way of example, the reproduction of copyrighted works direct from third-party websites (including YouTube.com) “to make them available for reproduction and distribution on Megavideo.com, and to create the false impression that Megavideo.com hosted primarily user generated content instead of copyright-infringing content”. This part of the superseding indictment then sets out various “Overt Acts” relied on, for example, the “Uploader Rewards” programme and how that operated.²⁰⁹ There is also a description of specific emails, specifics of the rewards and of monetary transfers.

[195] Although we do not consider it is necessary to rely on the ROC for present purposes, as noted, the ROC was also attached to Mr Prabhu’s affidavits and therefore is also deposed for the purposes of s 2. While the superseding indictment in parts is a little discursive, it is not so general, vague or disorganised that what is meant is obscured or unclear. Hence, returning to count 2 as illustrative of the point, there was sufficient information provided in the superseding indictment to provide notice to the appellants of the case against them. Further, the Court of Appeal was able to describe the essential conduct relied on in relation to that count by reference to the superseding indictment.²¹⁰ Mr Illingworth takes issue with that description because he says the conduct alleged is, essentially, that the appellants conspired to induce others to commit copyright infringement. But that is not a question of the adequacy of the supporting documents as such. The Court of Appeal was also able to apply that description in the context of determining whether the requirement for double criminality was met.

[196] We are satisfied, therefore, that the supporting documents meet the requirements of ss 18(4) and 24(2)(b)(ii). In this case, interpreted purposively, the Treaty requirement does not add anything further.

Application to this case – s 24(2)(c)

[197] The next question is whether the requirements of s 24(2)(c) of the Extradition Act are met in this case.

²⁰⁹ See the description which follows shortly at [214].

²¹⁰ CA judgment, above n 23, at [171].

[198] As noted above,²¹¹ the first issue is whether the conduct relied on would constitute an offence covered by the NZ/US Treaty.²¹² The second issue is whether the conduct is an offence in the United States punishable by a maximum penalty of not less than 12 months' imprisonment.²¹³ The third issue relates to the New Zealand aspect of the double criminality standard and is whether the essential conduct in each count the appellants are charged with would, if it had occurred in New Zealand, constitute an offence in New Zealand punishable by not less than 12 months' imprisonment.²¹⁴

[199] We deal with the three issues in turn but, before doing so, it is helpful to set out the background and the allegations in more detail so that the extent and nature of the alleged conduct can be fully understood.

Further background

[200] As noted above, the Megagroup business was started in 2005 to provide cloud storage and file sharing facilities. There were several websites but Megaupload.com (Megaupload) and Megavideo.com (Megavideo) were the most frequently visited.

[201] Megaupload was at one point the 13th most visited site on the internet. By January 2012, the Megagroup had over 66 million registered users and, at its peak, was estimated to account for approximately four per cent of all internet traffic worldwide. The Megagroup was shut down in January 2012 when the New Zealand Police arrested the appellants.

[202] When a user uploaded a file to a Megasite, the file was reproduced on a server controlled by the Megagroup and the user was provided with a unique URL (uniform resource locator). In order to save space, instead of storing multiple instances of the same file separately uploaded by multiple users, only one instance of the file was stored on the Megasites. Through a process called "deduplication", the Megagroup's automated system created a unique 32-digit identification number for each file (an

²¹¹ See above at [151].

²¹² Addressed below at [220]–[223].

²¹³ Addressed below at [224]–[227].

²¹⁴ Addressed below at [228]–[229].

“MD5 hash”). If the MD5 hash already existed, no further file was uploaded. Users uploading the duplicate file were merely given their own unique URL to access the file. This process meant that there could be more than one URL for a file and multiple users would be able to access the same file via their own unique URL.

[203] Users shared such URLs on third-party “linking” websites not operated by the Megagroup. Some of these websites provided search engines to allow users to identify content they wished to download but the Megasites, apart from Megavideo, did not provide any search facilities. The Megagroup acknowledges significant traffic came from linking websites.

[204] A member of the public who wanted to watch or download a video file stored by the Megasites could search for it on any internet browser and find the URL on one of the linking websites. Anyone provided with the URL could access the file, either by watching the video in their browser on Megavideo or by downloading the file. Users could embed the Megavideo player to display the video file or utilise their own video-playing software.

[205] The Megagroup’s revenue was generated through selling premium subscriptions (enabling greater online storage capacity and greater bandwidth) and by selling advertisements via Megaclick. Megaupload also had a rewards programme which, until June 2011, paid users for uploading popular files that were widely viewed and downloaded.

[206] Megaupload’s terms of service provided that users must not upload any files that infringed copyright and warned users that such material would be deleted if discovered. Megaupload was entitled by the terms of service to suspend and terminate users, without notice, for unauthorised use of copyright material or for conduct that infringed copyright. The terms of service also made users responsible for anyone else who accessed their files and indemnified Megaupload against liability.

The case for the United States

[207] We emphasise that what is set out below are only allegations and that the appellants do not accept them.²¹⁵ However, the allegations form the basis of the conduct examined for the purpose of assessing under s 24(2)(c) whether the New Zealand part of the double criminality is met.

[208] The United States asserts that, although the Megagroup purported to be a cyberlocker offering cloud storage facilities, the group's business model was predicated on users uploading popular copyright-infringing material on the Megasites and allowing others to search for that material through third-party linking websites. Files uploaded to the Megasites included movies, games, electronic books, images, music and computer software. According to the United States, the files included copies of copyright works in each genre. The United States says the Megagroup's business model encouraged users to breach the terms of service (which prohibited uploading copyrighted material) and thus the business model "attract[ed] and monetis[ed] infringing content". The United States alleges that the appellants caused losses to copyright holders in excess of USD 500 million.

[209] In support of the contention that the Megagroup was not in fact operating as a cyberlocker, the United States says that, as at 19 January 2012, there were some 66.6 million users registered in the Megagroup's internal database but that, at most, only some 5.86 million users (less than nine per cent of registered users) had ever uploaded a file to Megaupload or Megavideo. Further, it is said that the service was designed in a way that meant only those who paid to be premium users had any realistic chance of private long-term storage because their files were the only ones not regularly deleted for non-use.²¹⁶ Premium users were just over one per cent of overall users.²¹⁷

²¹⁵ The allegations are founded on material identified by an undercover investigation by Special Agent Poston of the Federal Bureau of Investigation, which commenced in March 2010 and covered the time period from March 2006 to December 2011.

²¹⁶ There were a series of distinctions in the types of users and the type of use available to each class of members, depending on how often the files were downloaded. Unregistered anonymous users could upload and download files, but uploaded content was permanently deleted if not downloaded within 21 days. Registered users could upload and download files, and each uploaded file was required to be re-downloaded every 90 days to remain being stored by Megagroup. Premium users, who were registered and paid a premium, did not face deletion of their files for non-use/non-download.

²¹⁷ The United States asserts that of the approximately 66.6 million total registered users on or about 19 January 2012, approximately 800,000 were premium users.

[210] In support of the contention that the business model depended on the uploading and distribution of copyright-infringing material, the United States says that income for the Megagroup came from two sources: online advertising (which generated some USD 25 million revenue) and premium subscriptions (which generated over USD 150 million in revenue).

[211] Advertising revenue was, it is said, directly connected to downloads. Once non-premium users clicked to download files or when they watched a video on Megavideo, they first had to watch an advertisement. Because only premium users paid for the use of the Megasites, the United States asserts that the business strategy was to maximise the number of online downloads, thereby maximising advertising revenue. The appellants, it is asserted, knew that the most popular downloads were infringing copies of copyright works. Further, the popularity of copyright-infringing content attracted website visits, which increased advertising revenue.

[212] In terms of premium subscriptions, it is contended that there were incentives to become premium users, even if a user only wanted to download files. Wait and download times, usually over an hour for non-premium users, were reduced for premium users. At times, non-premium users were ineligible to download files over a certain size. Further, non-premium users could only watch 72 minutes of any video on Megavideo at a time. To watch the balance of the video, the viewer had to purchase a premium subscription to Megavideo. Nearly all commercial movies are longer than 72 minutes, providing an incentive to become a premium user. The United States asserts therefore that, because of the 72-minute limit, some users thus paid directly for access to infringing copies of copyright works by becoming a premium user.

[213] It is asserted that, at all relevant times, the appellants knew that there were hundreds of thousands of copyright works on the Megasites and that the appellants at times used the Megasites themselves for accessing copyright works. The Megasites' architecture kept the most frequently downloaded files in memory rather than storage on a number of dedicated high-end computer servers at two facilities belonging to one

of the world's leading broadband providers (Cogent Communications),²¹⁸ thus facilitating rapid mass distribution of those files. The United States contends that the vast majority of the files kept in memory were infringing copies of copyright works.

[214] Further, the United States alleges that the Megagroup provided financial incentives to premium subscribers to upload popular copyright works under the "Uploader Rewards" programme from at least September 2005 until late June 2011.²¹⁹ Near its conclusion, the programme paid up to USD 10,000 to users whose files were downloaded five million times. The United States alleges that payments under the programme were made to users who were known to have uploaded infringing copies and repeatedly infringed copyright and that Megaupload had received multiple take-down notices for URLs linked to copyright-infringing material these users had uploaded.²²⁰

[215] The United States accepts that the Megagroup did not own or operate the third-party linking websites used to host the URL for infringing works held on the Megasites. It asserts, however, that some of the appellants interacted with users of linking websites and some of the appellants instructed individual users on how to locate links to infringing content stored on the Megasites.²²¹ It also asserts there was a relationship between the Megasites and several linking websites that exclusively offered links to content stored on Megaupload.com, such as by offering premium users

²¹⁸ The ROC alleges that the software written by the Megagroup reproduced the most popular files onto faster Mega-controlled servers owned by Cogent Communications. The software ran every 60 seconds on a continuous loop, checking whether the Cogent servers had enough free space to host additional popular files. If there was free space available, the software would download and reproduce the popular file from the Mega-controlled server where it was originally stored onto the faster Cogent server. The file also remained on the original server, resulting in multiple copies. The software measured popularity based on how much bandwidth was consumed by the file at the time.

²¹⁹ The Uploader Rewards programme was revised from November 2006 and offered premium members one reward point for every download of their files, qualifying them for payments. At the time of its termination, the Uploader Rewards programme offered greater financial rewards than those offered in 2006.

²²⁰ Take-down notices are described below at [217].

²²¹ Specifically, the indictment provides that Mr Dotcom personally distributed a link to a copy of a copyright work on, and received at least one infringing copy of a copyright work from, the Megasites. Similarly, it is alleged that Mr Batato personally distributed a link to an infringing copy of a copyright work on a Megasite and that Mr Ortmann received a link to a copy of a copyright work associated with the Megasites. Lastly, the indictment charged Mr van der Kolk with personally uploading multiple infringing copies of copyright works to the Megasites and searching Megasite servers for infringing copies of copyright works at the request of some of the appellants.

a direct financial reward for posting URLs on linking websites to content stored by the Megasites. Because of that alleged relationship and because the linking websites were searchable, the United States asserts that Megaupload exploited linking websites as the “de facto indices of Megaupload’s content”.²²²

[216] The United States alleges that the appellants’ efforts to mask infringing content on the Megasites shows they knew about the copyright-infringing material stored on their websites. It asserts that the appellants manipulated Megaupload’s “Top 100” list to contain not its most popular downloads but only freely available works that were not infringing works. This was designed to make the Megasites appear more legitimate, while the Megagroup business model continued to rely on users accessing copyright-infringing content through URLs found on searchable third-party linking websites. Further, Megavideo’s front page contained user-generated videos, news media and reproduced copyright works from third-party websites including YouTube to create the false impression that Megavideo hosted primarily user-generated content, instead of copyright-infringing copies of popular movies and television series. Megavideo did provide a limited search function but this did not, according to the United States, include the ability to search for full-length infringing copyright works.

[217] The United States asserts further that the Megagroup did not comply with safe harbour provisions in United States domestic law – the Digital Millennium Copyright Act 1998 (DMCA).²²³ Copyright holders frequently asked Megasites to take-down infringing files by issuing a take-down notice in accordance with the DMCA.²²⁴ The United States maintains that the Megagroup did not respond to take-down notices by deleting or disabling all access to infringing files. Rather, it simply deleted the URL nominated in the take-down notice, leaving the actual infringing copy of the copyright work on the Mega-controlled server and the MD5 hash file accessible through other URLs. Although the Megagroup’s internal reference database tracked the URLs that

²²² The appellants’ position is that the Megagroup had no relationship with the linking websites.

²²³ Digital Millennium Copyright Act 17 USC § 512(c) (1998) (DMCA).

²²⁴ For example, the United States’ preliminary analysis of Megavideo on 19 January 2012 showed that the 8.6 million MD5 hash files that had been viewed at least once were accessible by 33 million total URL links. Of those 8.6 million files, 1.1 million were the subject of a take-down notice; of those 33 million URLs, 4.2 million were the subject of a take-down notice.

had been generated by the system through the deduplication process, duplicative links were not disclosed to copyright holders.²²⁵

[218] The Megagroup had negotiated the use of an “abuse tool” with some large United States copyright holders but again this only removed the particular URL identified and not the associated MD5 hash file. The United States says that this was contrary to what was represented to the copyright holders. Duplicative links were not disclosed to copyright holders.

[219] The United States says that the appellants had access to listings of actual files stored on their servers and the URL links to these files. The appellants had the ability to search files held on the Megagroup’s servers. Records kept by the group included the identity of the user who uploaded the file, the date of upload, the MD5 hash number, the Megasite links created that pointed to the content, the size of the file, the name the user provided for the file, the number of times the file had been downloaded, and whether a copyright infringement notice had been received for any link associated with the file. Despite this, no effort was made by the appellants to identify and block those users using the Megasites for copyright infringement purposes, or to identify copyright-infringing works. By contrast, when pornography and terrorism videos were uploaded to the Megasites, all MD5 hash numbers were automatically identified and deleted by the Megagroup but no similar system was instituted for copyright-infringing material. Further, the Megagroup did not terminate the rights of copyright-infringing users even though it had the ability under the terms of service to do so.

Is the conduct relied on an offence covered by the NZ/US Treaty?

[220] The High Court held that the essential conduct charged in count 2 amounts to conspiracy to defraud in terms of art 2(16) of the NZ/US Treaty.²²⁶ The conduct

²²⁵ There is a dispute as to whether merely taking down the URL specified in the notice was sufficient compliance with a take-down notice. The appellants submit that deduplication is industry practice, used to increase upload speed and reduce storage overheads. They further submit that disabling all URLs or deleting the underlying MD5 hash file could result in deleting another user’s lawful file in breach of the Megasite’s contract with that user. The United States disputes it is industry practice and says the issue only arises under s 24(2)(d)(i) of the Extradition Act.

²²⁶ HC judgment, above n 22, at [133].

alleged in counts 9–13 was also held to correspond to art 2(16) of the Treaty.²²⁷

Article 2(16) reads:

Obtaining property, money or valuable securities by false pretences or by conspiracy to defraud the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretence.

[221] The essential conduct alleged in count 3 was held by the High Court to correlate to the offence described in art 2(19) of the Treaty.²²⁸ Article 2(19) covers “[r]eceiving and transporting any money, valuable securities or other property knowing the same to have been unlawfully obtained”.

[222] The conduct in counts 4–8 was directed at specific instances of copyright infringement and therefore was held not to match the offending described in art 2(16) of the Treaty.²²⁹ The High Court held, however, that the essential conduct alleged in counts 1, 2 and 4–13 would be deemed under s 101B of the Extradition Act to be offences covered by the Treaty.²³⁰

[223] We agree.

Is the conduct an offence in the United States with the requisite penalty?

[224] As noted above, it is not necessary for the requesting country to prove foreign law to satisfy the requirement that the conduct constitutes an offence under its law that attracts the requisite penalty (the offence must be punishable by a term of imprisonment of not less than 12 months). A statement from a law officer of the requesting country covering this aspect of the definition of extradition offence suffices on this issue.²³¹

²²⁷ At [218].

²²⁸ At [212].

²²⁹ At [195].

²³⁰ At [157]–[158] and [237] (count 1), [160] (count 2), [196] and [198] (count 4), [201] (counts 5–8) and [221]–[222] (counts 9–13).

²³¹ See above at [155].

[225] In this case, Mr Prabhu (an Assistant United States Attorney)²³² gave evidence via affidavit that records the maximum penalty for each count the appellants are charged with. Those penalties are:

- (a) count 1: maximum penalty of twenty years' imprisonment;
- (b) count 2: maximum penalty of five years' imprisonment;
- (c) count 3: maximum penalty of twenty years' imprisonment;
- (d) count 4: maximum penalty of five years' imprisonment;
- (e) counts 5–8: maximum penalty of five years' imprisonment (for each count); and
- (f) counts 9–13: maximum penalty of twenty years' imprisonment (for each count).

[226] Mr Prabhu also swears that each offence the appellants are charged with is punishable under a statute that: (a) was the duly enacted law of the United States at the time the offence was committed; (b) was the duly enacted law of the United States at the time the indictment and superseding indictment were returned; and (c) is currently in effect.

[227] This means that the requirement that the conduct would constitute an offence in the United States with the requisite penalty is met.

Would the alleged conduct constitute an offence in New Zealand?

[228] On the third issue – whether the alleged conduct would constitute an offence punishable by not less than 12 months' imprisonment if it had occurred in New Zealand – we first consider whether the conduct would be criminal under the Copyright Act. In the course of the discussion on copyright, we also deal with the

²³² See above at [189].

question of whether, for the purposes of s 24(2)(d)(i) of the Extradition Act, copyright in a particular work forms part of the appellants' conduct for counts 4–8.²³³

[229] Section E of the judgment (titled “Crimes Act”) considers whether the Copyright Act is a code and if so, whether this precludes the application of other extradition pathways. Concluding it does not, we examine whether the alleged conduct would be criminal under the Crimes Act, attracting the requisite penalty.²³⁴

D COPYRIGHT

Copyright Act 1994: criminal provision

[230] Copyright is at the heart of the allegations against the appellants. Six of the thirteen counts relate specifically to copyright infringement. Count 2 is conspiracy to commit copyright infringement. Count 4 is criminal copyright infringement by distributing a copyright work being prepared for commercial distribution on a computer network, and aiding and abetting criminal copyright infringement. Counts 5–8 allege criminal copyright infringement by electronic means for various 180-day periods, and aiding and abetting such criminal copyright infringement. The other charges are all related offending for the same conduct and thus also rely on the copyright breaches.

[231] The issue dealt with in this section of the judgment is whether the conduct of the appellants would, if it had occurred in New Zealand, be in breach of s 131(1) of the Copyright Act, which provides:²³⁵

131 Criminal liability for making or dealing with infringing objects

- (1) Every person commits an offence against this section who, other than pursuant to a copyright licence,—
 - (a) makes for sale or hire; or

²³³ Addressed below at [395]–[431].

²³⁴ Addressed below at [436] and following.

²³⁵ Criminalisation of commercial copyright infringement has existed in New Zealand in essentially the same terms since 1913. The criminal offence provision in s 131(1) can be traced back to s 11(1) of the Copyright Act 1911 (Imp) 1 & 2 Geo V c 46, s 14(1) of the Copyright Act 1913 and s 28 of the Copyright Act 1962. The only significant changes made to s 131 in the Copyright Act 1994 were the use of the word “object” rather than “infringing copy” and the introduction of possession in the course of a business with a view to committing any act infringing copyright to mirror a development in s 107(1)(c) of the Copyright, Designs and Patents Act 1988 (UK).

- (b) imports into New Zealand otherwise than for that person's private and domestic use; or
- (c) possesses in the course of a business with a view to committing any act infringing the copyright; or
- (d) in the course of a business,—
 - (i) offers or exposes for sale or hire; or
 - (ii) exhibits in public; or
 - (iii) distributes; or
- (e) in the course of a business or otherwise, sells or lets for hire; or
- (f) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner—

an object that is, and that the person knows is, an infringing copy of a copyright work.

[232] Of particular relevance in this case is whether the alleged conduct of the Megagroup and the appellants comes within s 131(1)(c) or (d).

[233] In s 2(1), “copying” is defined in para (a) as “reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means”.²³⁶ The words “copy” and “copies” have corresponding meanings.

[234] Section 12 defines “infringing copy”:

12 Meaning of infringing copy

- (1) In this Act, the term **infringing copy**, in relation to a copyright work, shall be construed in accordance with this section.
- (2) An object is an infringing copy if its making constitutes an infringement of the copyright in the work in question.

...

²³⁶ This definition was introduced in the Copyright (New Technologies) Amendment Act 2008 (the 2008 Amendment Act): see below at [257].

[235] Pursuant to s 131(5)(a), conviction of an offence under s 131(1) can lead to financial penalties of up to \$10,000 for every infringing copy but not exceeding \$150,000 in respect of the same transaction, or to imprisonment of up to five years.²³⁷

[236] Where a s 131 offence is committed by a company, s 133 provides that directors and managers are also liable if it is proved:

- (a) that the act that constituted the offence took place with [their] authority, permission, or consent; and
- (b) that [they]
 - (i) knew, or could reasonably be expected to have known, that the offence was to be or was being committed; and
 - (ii) failed to take all reasonable steps to prevent or stop it.

Summary of the appellants' position on copyright

[237] Mr Mansfield submitted that the appellants' alleged conduct is not criminal under the Copyright Act, primarily because the legislative history shows that digital files are not subject to s 131. He also made a number of submissions on particular aspects of s 131(1), including that the conduct alleged does not meet the knowledge requirement.

[238] The appellants argue that various carve-outs and exemptions apply, including the safe harbour provisions for internet service providers (ISPs) in ss 92B–92C and the limitation period in s 131A of the Act. They also argue that copyright must be proved for the purposes of s 24(2)(d)(i). We will deal with these issues after considering the application of s 131(1).

[239] Before turning to the application of s 131(1), we first set out a more general description of the Copyright Act and outline the legislative history. Then, we summarise the decisions in the Courts below with regard to the application of s 131(1) and set out the parties' submissions on that issue in more detail.

²³⁷ This meets the requirement in s 4(2) of the Extradition Act that the maximum penalty for the New Zealand offence is imprisonment of not less than 12 months.

Copyright Act: summary of relevant provisions

The nature of copyright

[240] Copyright only exists as provided for in the Copyright Act.²³⁸ A work must belong in one of the categories of works set out in s 14(1), it must be original²³⁹ and the copyright term cannot have expired.²⁴⁰ There is no requirement to register copyright.²⁴¹ The list of works under s 14(1) in which copyright can exist under the Act includes literary, dramatic, musical and artistic works, sound recordings, films, and communication works. Since 1994, computer programs have been categorised as literary works.²⁴²

[241] Copyright protection extends to “expressions and not to ideas”.²⁴³ Literary, dramatic and musical works must thus be recorded in “writing or otherwise” for copyright to exist in them.²⁴⁴ Copyright, however, exists independently from any physical manifestation. Therefore, ownership of copyright (and the ability to do the restricted acts described below) does not pass when property in any physical

²³⁸ Copyright Act 1994, s 14(1).

²³⁹ Section 14(2) provides that a work is not original if it is (or to the extent that it is) a copy of another work, or if it infringes (or to the extent that it infringes) the copyright in another work. See generally Gillian Davies, Nicholas Caddick and Gwilym Harbottle *Copinger and Skone James on Copyright* (17th ed, Sweet & Maxwell, London, 2016) vol 1 [*Copinger and Skone James*] at [3-198]–[3-278]; and Susy Frankel *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) at 233–247.

²⁴⁰ Sections 22–25.

²⁴¹ In accordance with New Zealand’s international obligations under the Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 1161 UNTS 3 (opened for signature 24 July 1971, entered into force 10 October 1974) [Berne Convention], art 5(2). The Berne Convention was further amended on 28 September 1979. New Zealand only acceded to the Berne Convention on 17 December 2018 and it entered into force with respect to New Zealand (and Tokelau) on 17 March 2019. Depending on the type of work, copyright exists from when the work was made, when it was first published, or when it was made or received in New Zealand: Copyright Act, s 2(1) definition of “material time” and ss 17–20.

²⁴² Copyright Act, s 2(1) definition of “literary work”, para (b). This was required by the Marrakesh Agreement establishing the World Trade Organization 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1995), annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights) [TRIPS Agreement], art 10(1).

²⁴³ TRIPS Agreement, above n 242, art 9(2); and WIPO Copyright Treaty (WCT) (1996) (opened for signature 20 December 1996, entered into force 6 March 2002) 2186 UNTS 121 [WCT], art 2. See also the discussion in *Copinger and Skone James*, above n 239, at [2-06]; and Frankel, above n 239, at 236.

²⁴⁴ Section 15(1). See also Frankel, above n 239, at 260–261.

manifestation of the copyright is transferred, unless copyright ownership is separately assigned.²⁴⁵

[242] The rights of copyright owners are set out in s 16 of the Copyright Act. Each of the rights is independent of any other and can be held by separate persons. These rights are so-called “negative rights”. As put in *Laddie, Prescott and Vitoria*, “copyright is a right to stop someone from doing something”.²⁴⁶ This means that copyright owners have the ability to stop other persons from undertaking certain acts which are exclusively restricted to the copyright owner including, most importantly, copying the work.²⁴⁷ In relevant part, s 16(1) provides:

16 Acts restricted by copyright

- (1) The owner of the copyright in a work has the exclusive right to do ... the following acts in New Zealand:
 - (a) to copy the work:^[248]
 - (b) to issue copies of the work to the public, whether by sale or otherwise.^[249]
 - ...
 - (f) to communicate the work to the public:^[250]
 - ...
 - (i) to authorise another person to do any of the acts referred to in any of paragraphs (a) to (h).^[251]

²⁴⁵ See generally *Copinger and Skone James*, above n 239, at [5-68]; and Frankel, above n 239, at 206–207.

²⁴⁶ Adrian Speck and others *Laddie, Prescott and Vitoria: The Modern Law of Copyright* (5th ed, LexisNexis, United Kingdom, 2018) vol 1 [*Laddie, Prescott and Vitoria*] at [1.1].

²⁴⁷ Strategies for combatting piracy in the digital age go beyond copyright protections. They include technological protection measures such as digital watermarking and tracing online behaviour (see Copyright Act, ss 226–226E) and the use of contractual licences to permit access to and use of digital content (see Simon Stokes *Digital Copyright: Law and Practice* (5th ed, Hart Publishing, Oxford, 2019) at 21).

²⁴⁸ “Copying” is defined in s 2(1).

²⁴⁹ “Issue to the public” is defined in s 9.

²⁵⁰ “Communicate” is defined in s 2(1).

²⁵¹ “Authorised” with respect to anything done in relation to a work is defined in s 2(1): “done— (a) by or with the licence of the copyright owner; or (b) pursuant to section 62” (the provision for material communicated to the Crown in the course of public business). “Unauthorised” is also defined in s 2(1), with a corresponding (but negative) meaning. There is, however, debate still as to the scope of “authorise” in s 16(1)(i): see Frankel, above n 239, at 284–287.

[243] The right under s 16(1)(a) to copy the work is commonly referred to as the “reproduction right”.²⁵²

[244] The right under s 16(1)(b) to “issue to the public” is commonly referred to as the “distribution right”,²⁵³ although Professor Frankel calls it the “first sale” or “first distribution” principle.²⁵⁴ This nomenclature recognises that “issue to the public” is defined in s 9 to mean putting into circulation copies not previously circulated to the public and excludes subsequent sale, distribution,²⁵⁵ importation or, in most cases, hire²⁵⁶ of those copies. This means that the right in s 16(1)(b) is limited to the first issue of copies to the public.²⁵⁷

[245] The s 16(1)(f) right is referred to as the “communication right”.²⁵⁸ “Communicate” is defined in s 2(1) as meaning “to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system”.²⁵⁹ It thus includes the right to communicate the work to the public in such a way that the public may access the work at a time and from a place individually chosen by them.

²⁵² See generally Frankel, above n 239, at 262–273; and *Laddie, Prescott and Vitoria*, above n 246, at ch 14.

²⁵³ See generally Frankel, above n 239, at 273–279; *Copinger and Skone James*, above n 239, at [7-126]; and *Laddie, Prescott and Vitoria*, above n 246, at ch 15.

²⁵⁴ Frankel, above n 239, at 273–274.

²⁵⁵ Distribution is obviously used in the ordinary sense here rather than in the sense of “first issue to the public”: see further discussion of the ordinary meaning of distribution below at [341].

²⁵⁶ Section 9(1) provides that subsequent hiring of copies is subject to s 9(2)–(3), which provide that the issue of copies of works to the public in relation to computer programs, sound recordings and films includes rental copies of those works and rental subsequent to those works having been put into circulation.

²⁵⁷ This limit is permitted by international law: WCT, above n 243, art 6(2). However, the WCT distribution right is limited to “fixed copies that can be put into circulation as tangible objects”: World Intellectual Property Organization Diplomatic Conference *Agreed Statements concerning the WIPO Copyright Treaty* (20 December 1996) [*Agreed Statements*], arts 6–7.

²⁵⁸ See generally Frankel, above n 239, at 279–280; and *Laddie, Prescott and Vitoria*, above n 246, at ch 17.

²⁵⁹ “Communication technology” is not defined in the Act, but this phrase was introduced into the s 2(1) definition by s 4(2) of the Copyright (New Technologies) Amendment Act 2008 as part of a future-proofing response to concerns about not having a technology-neutral right (and generic term – “communication”) to cover both wired or wireless transmission and webcasting: Ministry of Economic Development *Digital Technology and the Copyright Act 1994: Position Paper* (December 2002) [MED Position Paper] at [60]–[62].

[246] The terms “reproduction right”, “distribution right” and “communication right” are important for the appellants’ arguments as we outline later,²⁶⁰ but we note that they are not used in the Copyright Act.

[247] Section 16(2) provides that s 16(1) is subject to Part 3 (acts permitted in relation to copyright works) and Part 8 (copyright licensing). At this stage we just note that, among other things, Part 3 deals with incidental and transient copying, as well as the safe harbour provisions for ISPs, both of which the appellants rely on. We also note that s 40 provides that the provisions in Part 3 are to be construed independently: “the fact that an act is not permitted by one provision does not mean that it is not permitted by another provision”. We deal with Part 3 and the appellants’ arguments on these provisions later.²⁶¹

Primary infringement

[248] Primary infringement of copyright occurs when a person, other than pursuant to a copyright licence, does any restricted act.²⁶² Under ss 30, 31 and 33 respectively, copying, issuing copies to the public and communicating a work to the public are all restricted acts. A person who does any of these restricted acts is liable for primary infringement of copyright. Knowledge that the work is subject to copyright is not necessary for primary infringement.²⁶³

Secondary infringement

[249] Secondary infringement generally depends on a primary act of infringement having first taken place (for example the making of an infringing copy).²⁶⁴ In this way, a person can infringe copyright even if they do not do one of the primary restricted acts themselves, provided they do one of the secondary infringement acts with the principal element of secondary infringement – actual or constructive

²⁶⁰ See below at [274]–[276].

²⁶¹ See below at [356]–[388].

²⁶² Copyright Act, s 29(1).

²⁶³ By contrast, secondary infringement does require knowledge: see Frankel, above n 239, at 289; and Ministry of Business, Innovation & Employment *Issues Paper: Review of the Copyright Act 1994* (November 2018) [MBIE Issues Paper] at [181].

²⁶⁴ See *Copinger and Skone James*, above n 239, at [8-01].

knowledge of copyright infringement.²⁶⁵ Section 36 is one of the sections dealing with secondary infringement. It provides:

36 Possessing or dealing with infringing copy

Copyright in a work is infringed by a person who, in New Zealand, other than pursuant to a copyright licence,—

- (a) possesses in the course of a business; or
- (b) in the course of a business or otherwise, sells or lets for hire; or
- (c) in the course of a business, offers or exposes for sale or hire; or
- (d) in the course of a business, exhibits in public or distributes; or
- (e) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner—

an object that is, and that the person knows or has reason to believe is, an infringing copy of the work.

[250] As can be seen, s 36 is similar to the criminal provision, s 131(1). The main difference between ss 36 and 131 is that a higher knowledge threshold is required for the criminal provision: s 131 requires that the person “knows” whereas s 36 requires that the person “knows or has reason to believe”. Another difference is that importing, covered by s 131(1)(b), is not covered in s 36 but rather has its own secondary infringement section, s 35. There is also no exact parallel for making for sale or hire covered by s 131(1)(a) in the secondary civil infringement provisions but that act seems to be covered by s 36(b) and (c). Lastly, possession of an infringing copy in the course of business under s 131(1)(c) must be with a view to committing infringement whereas possession of an infringing copy in the course of business in the civil context (s 36(a)) does not require a view to committing infringement.

The Copyright Act and digital technology

[251] The first domestic New Zealand copyright legislation was the Copyright Act 1913. This was replaced by the Copyright Act 1962 (the 1962 Act), which was in turn repealed and replaced in 1994 by the current Act. The 1994 Act was introduced in

²⁶⁵ Copyright Act, ss 35(1), 36, 37, 38(1) and 39.

response to New Zealand's accession to the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement).²⁶⁶ Partly as a result of the time pressure to comply with the TRIPS Agreement and partly because of New Zealand's historical reliance on United Kingdom copyright law, the 1994 Act was largely based on the Copyright, Designs and Patents Act 1988 (UK).²⁶⁷

[252] The 1994 Act was subjected to review by the Ministry of Economic Development in 2001 and 2002, mainly because of the need to respond to the challenges and opportunities of digital technology.²⁶⁸ Another impetus was the negotiation of two World Intellectual Property Organisation (WIPO) treaties.²⁶⁹ Of relevance to this appeal is the WIPO Copyright Treaty (WCT), which deals with protection of works and the rights of their authors in the digital environment.²⁷⁰

[253] The WCT requires parties to provide for a general right for authors to authorise the making available of works to the public, including on-demand transmissions.²⁷¹ States Parties to the WCT are, however, under what is called the "umbrella solution", free to determine whether to implement the obligations in the WCT through the distribution right or a communication right.²⁷² This was largely because the United States' position is that the international obligation was already recognised by domestic law under the distribution right.²⁷³ Although New Zealand did not accede to

²⁶⁶ TRIPS Agreement, above n 242. The TRIPS Agreement was negotiated during the Uruguay Round of the General Agreement on Tariffs and Trade and as such, accession to the TRIPS Agreement is part of World Trade Organization membership. The TRIPS Agreement, unlike the WCT, is not an optional protocol to the Berne Convention: Berne Convention, above n 241, art 20; and WCT, above n 243, art 1(1).

²⁶⁷ (29 November 1994) 545 NZPD 5272.

²⁶⁸ Ministry of Economic Development *Digital Technology and the Copyright Act 1994: A Discussion Paper* (July 2001) [MED Discussion Paper]; and MED Position Paper, above n 259.

²⁶⁹ WCT, above n 243, and WIPO Performances and Phonograms Treaty (WPPT) (1996) (opened for signature 20 December 1996, entered into force 20 May 2002) 2186 UNTS 203 [WPPT]. The WPPT deals with the rights of performers and producers of phonograms, again focussing on the digital environment.

²⁷⁰ The WCT importantly expanded the subject matter of the existing protection under the Berne Convention to all categories of works.

²⁷¹ WCT, above n 243, art 8. See also Mihály Ficsor *Collective Management of Copyright and Related Rights* (WIPO, Geneva, 2002) at [77].

²⁷² Mihály Ficsor *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford University Press, Oxford, 2002) at 500–501; and Andrew Christie and Eloise Dias "The New Right of Communication in Australia" (2005) 27 Syd LR 237 at 243.

²⁷³ See Bruce A Lehman *Intellectual Property and the National Information Institute: The Report of the Working Group on Intellectual Property Rights* (Information Infrastructure Task Force, Washington DC, September 1995) at 213–217.

the WCT until December 2018, one of the issues considered in the 2001–2002 review was whether the existing 1994 Act was sufficient to comply with the WCT (anticipating that New Zealand may wish to become a party in the future).²⁷⁴

[254] In its 2002 Position Paper, the Ministry of Economic Development concluded that the scope of the reproduction right (and the definition of copying) in the 1994 Act was already sufficient to allow copyright owners to control the digital reproduction of their works. Digitisation and digital copying were said to be covered by “reproducing or recording a work in any material form” in the then-existing definition of “copying”. The Paper did recommend, for the avoidance of doubt and to increase certainty, that “material form” specifically be amended to include digital formats.²⁷⁵

[255] The Paper also recommended the introduction of a technology-neutral right of communication to the public to replace the existing broadcasting right, which was dependent on particular technologies (wired or wireless) and was limited to real-time transmission.²⁷⁶ Having a technology-dependent right was of concern because those methods of communicating works through the internet did not account for the internet making works available “on-demand”, where the user could watch the work at a time and place of their choosing.²⁷⁷ The new communication right would cover both transmission (whether wired or wireless) and the making available of works (webcasting).²⁷⁸ This proposal was seen as reflecting the growing importance of the communication right as opposed to the reproduction right, preserving the balance between owners and users of copyright works, and ensuring New Zealand copyright law had international credibility.²⁷⁹

²⁷⁴ MED Discussion Paper, above n 268, at [67]; and MED Position Paper, above n 259, at [155], [201]–[213] and Appendix A.

²⁷⁵ MED Position Paper, above n 259, at [37]–[38]. The Ministry of Economic Development agreed that the phrase “storing [a] ... work in any medium by any means” in the definition of “copying” was sufficiently broad to cover the digitisation of literary, dramatic, musical or artistic works, but doubted whether that also applied to storage of other works such as sound recordings and films: MED Discussion Paper, above n 268, at [86]; and MED Position Paper, above n 259, at [40]–[42].

²⁷⁶ MED Position Paper, above n 259, at [61]. In 2002, s 16(1)(f) of the Copyright Act read “To broadcast the work or include the work in a cable programme service”. This right was dependent on the technology, either wired (a cable programme) or wireless (a broadcast).

²⁷⁷ See MED Discussion Paper, above n 268, at [112]–[113].

²⁷⁸ MED Position Paper, above n 259, at [61]. The MED Discussion Paper, above n 268, at [119] considered that literary, dramatic, musical or artistic works (but not sound recordings, films or typographical arrangements) could already be made available electronically under the existing legislation under the definitions of “publication” (s 10) and issuing copies to the public (s 9).

²⁷⁹ MED Position Paper, above n 259, at [62]–[64].

[256] The 1994 Act was eventually amended in 2008 by the Copyright (New Technologies) Amendment Act 2008 (the 2008 Amendment Act). The explanatory note to the Bill said:²⁸⁰

The Bill amends the Act to clarify the application of existing rights and exceptions in the digital environment and to take account of international developments. It also seeks to create a more technology-neutral framework for the Act. It is not intended to change the balance between protection and access already established in the Act, but to ensure that the balance continues to operate in the face of new technologies.

[257] Among other things, the 2008 Amendment Act introduced the new technology-neutral communication right in s 16(1)(f).²⁸¹ It also amended the definition of “copying” in s 2 to be “in any material form (*including any digital format*)”.²⁸²

Decisions on the application of s 131(1) in the Courts below

District Court decision

[258] The District Court considered s 131(1) of the Copyright Act when it was considering whether there was a prima facie case under s 24(2)(d)(i) of the Extradition Act. It did not address s 131(1) in the context of s 24(2)(c).²⁸³ It is nevertheless useful to summarise the District Court’s reasoning in assessing the prima facie case because in the course of assessing the evidence, the Court was necessarily considering whether the alleged conduct was an offence under s 131(1).

[259] The District Court held that the evidence in the ROC²⁸⁴ supported the allegations as to the appellants’ conduct. With regard to s 131(1)(c) and count 2, it was held that the evidence would support a finding that the appellants possessed objects (digital files); that these digital files were, to the knowledge of the appellants, infringing copies of copyright works; and that the digital files were possessed with a

²⁸⁰ Copyright (New Technologies and Performers’ Rights) Amendment Bill 2006 (102-1) (explanatory note) at 2.

²⁸¹ Copyright (New Technologies) Amendment Act, s 12. See Copyright (New Technologies and Performers’ Rights) Amendment Bill 2006 (102-1) (explanatory note); and (29 November 1994) 545 NZPD 5271.

²⁸² Copyright (New Technologies) Amendment Act, s 4(3) (emphasis added).

²⁸³ This was held to be an error by the High Court: HC judgment, above n 22, at [47].

²⁸⁴ For an explanation of the “record of case” (ROC) procedure, see above at [32].

view to committing an act infringing the copyright. The digital files were possessed without a copyright licence and in the course of a business.²⁸⁵

[260] For s 131(1)(d)(ii) or (iii) and count 2, it was held there was evidence that the appellants exhibited in public digital files or distributed them, which, to the knowledge of the appellants, included infringing copies of copyright works. The appellants did so other than pursuant to a copyright licence and in the course of a business.²⁸⁶

[261] The allegation for count 4 is that Mr van der Kolk uploaded to Megaupload a copy of the film *Taken*. He then sent a URL link to another person that day. The District Court held there was evidence the other appellants knew Mr van der Kolk downloaded infringing files and that the Megasites were used to make use of copyright-infringing material.²⁸⁷ There was a prima facie case for an offence under s 131(1)(c) and 131(1)(d)(ii) or (iii).²⁸⁸

[262] Count 5 relates to the distribution of copyright-infringing content for a 180-day period up to and including 19 January 2012, with the elements of the alleged offending the same as for count 2.²⁸⁹ By way of example, it is alleged the movie *Puss in Boots* was viewed at least 10,000 times. The MD5 hash for the file²⁹⁰ had 150 URL links of which 119 were still active at the end of the period. At least 14 had been removed in response to take-down notices. Again, a prima facie case was found as to distribution of copyright-infringing objects (s 131(1)(d)(iii)).²⁹¹

[263] Counts 6–8 relate to other 180-day periods. Again, by way of example, the movie *Ip Man 2* was downloaded at least 750,000 times and viewed at least 50,000 times from the Megasites. The unique MD5 hash for the file had more than 200 URL links of which 168 were still active in January 2012. Three of the 200 links had been removed following take-down notices. For count 7 (180 days ending on

²⁸⁵ DC judgment, above n 21, at [618].

²⁸⁶ At [619].

²⁸⁷ At [646].

²⁸⁸ At [650]. The Judge held that counts 4–8 are a furtherance of the copyright conspiracy in count 2: at [627] and [643].

²⁸⁹ At [651]–[652].

²⁹⁰ On the operation of MD5 hash numbers and URLs, see above at [202].

²⁹¹ DC judgment, above n 21, at [655].

16 August 2008), the movie *Cloverfield* had been downloaded “up to” 506,535 times from the Megasites.

[264] Again, a prima facie case was found for counts 6–8 but, for counts 7 and 8, only under ss 249 and 228 of the Crimes Act.²⁹² The Judge held that the time bar in force at the relevant time (s 131A of the Copyright Act) meant the appellants were not eligible for surrender on counts 7 and 8 under s 131 of the Copyright Act.²⁹³ We discuss s 131A below.²⁹⁴

High Court decision

[265] As noted above, the High Court was bound by *Cullinane*.²⁹⁵ The Judge therefore proceeded on the basis that the definition of “extradition offence” in s 4 is replaced by art 11 of the NZ/US Treaty.²⁹⁶ The Court saw the task of the extradition court under s 24(2)(c) of the Extradition Act as being to consider whether the totality of the alleged conduct comes within the description of an extradition offence for the purposes of the Treaty.²⁹⁷ The Treaty should be interpreted in accordance with the ordinary meaning of the relevant terms.²⁹⁸ The High Court agreed with the District Court that the essential conduct charged in count 2 amounts to conspiracy to defraud in terms of art 2(16) of the NZ/US Treaty and therefore is an extradition offence.²⁹⁹ It therefore was not strictly necessary to consider the alternative extradition pathways (including the Copyright Act pathway), but it proceeded to do so for completeness as full argument had been heard.³⁰⁰

²⁹² The prima facie case for count 6 was made out in relation to s 131 of the Copyright Act and ss 228 and 249 of the Crimes Act: at [656]–[658]. See the conclusion on count 7 at [666] and on count 8 at [670].

²⁹³ At [663]–[665] and [670]. We assume the reference at [670] to paragraphs [633]–[636] is mistaken and the Court meant to refer to [663]–[666].

²⁹⁴ Addressed below at [350]–[355].

²⁹⁵ See above at [43], referring to *Cullinane*, above n 57.

²⁹⁶ HC judgment, above n 22, at [40].

²⁹⁷ At [43]–[44], citing *Edwards*, above n 67, at [27]. The High Court at [49]–[50] held that the District Court wrongly considered that the task under s 24(2)(c) was to decide whether the relevant offence is an extradition offence *in the United States*.

²⁹⁸ At [43]–[44], referring to art 31(1) of the Vienna Convention, above n 148; and *Edwards*, above n 67, at [28].

²⁹⁹ At [133].

³⁰⁰ At [133].

[266] The High Court held that online communication of copyright protected works to the public is not a criminal offence under s 131(1) of the Copyright Act and therefore that s 131(1) does not provide an extradition pathway.³⁰¹ The Court considered that the key terms in s 131(1) were “possesses”, “exhibits in public”, “distributes” and “an object”. The Court said that, as these terms are not defined in the Copyright Act, “[t]heir meaning must be determined in the context of the Act as a whole and in light of the legislative purpose”.³⁰²

[267] The High Court concluded that, in light of the legislative history, including the WCT, s 131 did not extend to digital dissemination.³⁰³ When the Copyright Act was amended by the 2008 Amendment Act, the existing communication right was expanded to cover online communication of copyright protected works,³⁰⁴ but there was no amendment to s 131 to criminalise online communication of copyright protected works.³⁰⁵ Thus the High Court considered it was “clear that Parliament made a deliberate choice not to amend s 131”.³⁰⁶

[268] The High Court said it is clear from the legislative history and context that the existing offences in s 131(1) of the Act relate to physical infringement in the sense that the breach involves tangible copies of infringing works (“an object”).³⁰⁷ Civil remedies alone are available for any breaches of copyright relating to the dissemination of digital works. Parliament chose not to follow the approach taken in the United Kingdom of making infringement of the communication right a criminal offence in relation to copyright works, despite being urged to do so by industry participants.³⁰⁸ The Court held that s 131 of the Copyright Act did not provide an available extradition pathway.³⁰⁹

³⁰¹ At [591].

³⁰² At [170].

³⁰³ At [171]–[178].

³⁰⁴ At [179].

³⁰⁵ At [182].

³⁰⁶ At [183]. See also at [188] and [190].

³⁰⁷ At [191].

³⁰⁸ At [191(d)].

³⁰⁹ At [192].

Court of Appeal decision

[269] The Court of Appeal saw the heart of the question of whether s 131 of the Copyright Act imposes a criminal sanction for online dissemination of digital copies of copyright protected works as being whether the term “object” in ss 12 and 131 is limited to physical tangible copies or whether it extends to digital files.³¹⁰

[270] The Court said that the most fundamental right of a copyright owner (and the starting point of its analysis) was the right to make a copy of a protected work. Copying has always been in relation to “the work in any material form” and the 2008 Amendment Act made explicit that this included “any digital format”.³¹¹ The Court held that, even before the 2008 amendments, the definition of “copying” as it stood in 1994 was broad enough to prohibit unauthorised copying of material in digital form.³¹²

[271] The Court saw “no warrant to infer that Parliament intended ‘object’ to be read down, thus limiting both secondary civil infringement and criminal responsibility under s 131” simply because of the change from “article” in the 1962 Act to “object” in the 1994 Act.³¹³ The context of the 1994 regime overhaul was to comply with the TRIPS Agreement, including a requirement for sufficiently deterring penalties for copyright piracy on a commercial scale.³¹⁴ The Court said:³¹⁵

We do not construe “object” to mean anything other than the output or product of the act of copying a copyright protected work, the infringement of the most fundamental copyright. In many instances that product will be a tangible, physical article. But it need not be so in the increasingly digital age with which the 1994 Act is concerned.

[272] The Court of Appeal rejected the High Court’s reliance on the 2008 amendment of the communication right. While those amendments added an exclusive communication right, it was added:³¹⁶

... right on top of the fundamental right already identified, which was the exclusive right to copy that work, and to control or prevent its copying by

³¹⁰ CA judgment, above n 23, at [143]. See also at [136].

³¹¹ At [144].

³¹² At [152]–[154].

³¹³ At [147].

³¹⁴ At [147].

³¹⁵ At [148].

³¹⁶ At [150].

others. The means by which that copying occurred was not of critical concern, so long as there had been copying.

[273] The Court of Appeal concluded that it will be an offence when a person, in the course of business and with a view to committing any infringing act (including of the communication right), is knowingly in possession of an infringing copy of a copyright work (including a digital copy). The same will apply where the infringing copy is exhibited in public or distributed in the course of a business.³¹⁷

Submissions on s 131(1) of the Copyright Act

Submissions of the appellants

[274] In the appellants' submission, the essential conduct alleged by the United States is the knowing, online dissemination of user-generated, copyright-infringing works. In their submission, this conduct does not come within s 131 of the Copyright Act. It could only be an infringement of the communication right, attracting civil liability – it is not criminalised. The appellants emphasise that no amendment was made to s 131 by the 2008 Amendment Act. In the appellants' submission, it is clear from the legislative background, including the context of reform in light of the WCT (regardless of the fact New Zealand had not formally acceded to this Treaty at the time of legislative reform in 2008), that this was by design.

[275] The appellants submit that the Court of Appeal minimised the significance of this legislative history and wrongly concentrated on the word “object” in s 131, despite the appellants accepting in that Court that this term could include a digital file. For the purposes of s 131, the appellants agree that the form of the copy is immaterial. They say that the issue is whether the manner of dealing or disseminating a digital file comes within one of the restricted acts under s 131(1). They say that it does not in this case.³¹⁸

[276] In this regard, by focussing on copying, it is submitted that the Court of Appeal failed to recognise the significance of Parliament's decision in 2008 to introduce a

³¹⁷ At [156]. See also at [187].

³¹⁸ As noted below at [279], their argument is rather that, although digital files can be objects, they cannot be possessed in terms of s 131(1)(c) and they cannot be distributed in the sense required for s 131(1)(d)(iii).

communication right rather than expanding the distribution right.³¹⁹ While secondary infringement of the distribution right is included in ss 36 and 131(1),³²⁰ the appellants say this is confined to tangible, physical copies. Online distribution can only infringe the communication right (primary infringement) and that is not included in s 131(1). The appellants point out that, unlike in the United Kingdom where infringement of the communication right is specifically criminalised, s 131(1) was not amended in 2008 to criminalise infringement of the communication right, despite Parliament turning its mind to and making consequential amendments across the Act regarding the communication right. Nor, in their submission, did s 131(1) before the 2008 amendments or its predecessor under the 1962 Act criminalise infringement of the broadcast right, the predecessor to the communication right.

[277] Turning to the specific requirements of s 131(1), the appellants submit that s 131(1) requires actual knowledge of infringing files, rather than generalised knowledge that there might be infringing material on the Megasites.³²¹ They rely in particular on *Viacom International Inc v YouTube Inc* for the proposition that general knowledge or estimates that significant quantities of material were infringing do not alone establish knowledge of the existence of particular instances of infringement.³²²

[278] It is submitted that the Megagroup simply provided cloud storage facilities. The real complaint is thus that the Megagroup provided machinery to allow others to infringe copyright. To provide machinery which can be used for either lawful or unlawful behaviour, depending on the choices made by others, is not an offence.³²³

³¹⁹ They say that the introduction of the communication right in s 16(1)(f) would have been redundant had it already been covered by ss 30, 35 and 36.

³²⁰ The appellants say that for example selling, offering for sale or hire, exhibiting in public and distributing in s 36(c)–(e) all relate to the distribution right and that they are criminalised in s 131(1)(d) and (f).

³²¹ The appellants also rely on *BMG Rights Management (US) LLC v Cox Communications Inc* 881 F 3d 293 (4th Cir 2018); *Sony Corp of America v Universal City Studios Inc* 464 US 417 (1984); and *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 US 913 (2005).

³²² *Viacom International Inc v YouTube Inc* 676 F 3d 19 (2d Cir 2012).

³²³ The appellants cite *Sony*, above n 321, at 442; and *Grokster*, above n 321, at 937, for the proposition that generalised knowledge that infringement was happening is not enough to ground ISP liability, particularly where the technology can be used for substantial non-infringing uses as well as infringement.

Further, if the allegation is that the Megagroup deliberately encouraged others to commit an offence, the primary offence would need to be proved.³²⁴

[279] It is submitted further that possession in s 131(1)(c) is also confined to tangible, physical objects. No bailment can exist in relation to other than tangible objects.³²⁵ In any event an ISP does not possess the users' files. Further, an ISP has no control over its users' files unless those users are in breach of the terms of service. In the appellants' submission, residual control in this sense is not possession. In addition, in relation to s 131(1)(d)(iii), "distribute" has a specialised meaning and does not relate to digital files.

Submissions of the United States

[280] On the issue of whether s 131 applies in relation to digital infringing copies, the United States supports the Court of Appeal's conclusion. In its submission, to decide otherwise would put New Zealand in breach of its TRIPS Agreement obligations by exempting from penalty the most significant form of commercial-scale infringement.

[281] The United States submits that the WCT does not support such an interpretation. The addition of a communication right was a gap-filler and was not a radical departure from existing international copyright law.³²⁶ It related to civil liability only and did not affect the obligations under the Berne Convention or the TRIPS Agreement obligations related to criminalisation of commercial copyright infringement. The United States also submits that the WCT was meant to be broad

³²⁴ For conspiracy (under s 310 of the Crimes Act), there must be an agreement to commit an unlawful act (in this context, breach of s 131 of the Copyright Act) and intention that the agreement would be carried out. It seems to be accepted by the appellants that, for a conspiracy charge, the United States is not required to show that the underlying offence was in fact committed but it is still required to prove that an agreement to commit that offence be shown, with evidence sufficient to establish the required mens rea.

³²⁵ The appellants rely on *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41. In that case the Court of Appeal of England and Wales was concerned with a common law lien over the electronic storage by one company of another company's subscribers' records. The Court held that it was not possible to possess intangible property (which the Court characterised as including electronic data) and thus it was not possible for a common law lien to exist over intangible property.

³²⁶ The United States cites Jane Ginsburg *The (New?) Right of Making Available to the Public* (Public Law and Legal Theory Working Paper Group No 04-78, Columbia Law School, 2004) regarding how the WCT (above n 257) clarifies a prior ambiguity in the Berne Convention (above n 241) about whether the Convention's right to communicate to the public excluded "pull technologies".

enough so that it could be implemented in domestic legislation in the manner States Parties see fit; the WCT provides a floor, not a ceiling, in terms of what the distribution right applies to.

[282] The United States does not accept that the Megasites were neutral cyberlockers (“dumb pipes”) not directly involved in dealing in infringing works. It is alleged the Megagroup’s whole business model was predicated on copyright infringement. The United States says that take-down notices are prima facie evidence that the Megagroup had knowledge of infringement and yet continued to host and distribute files. The United States submits that the Megagroup’s conduct was not comparable to that of YouTube in the *YouTube* case³²⁷ but rather was akin to the activities of Hotfile in *Disney Enterprises Inc v Hotfile Corp.*³²⁸

[283] Hotfile was a cloud storage business and its claim to safe harbour under the DMCA was set aside on summary judgment by the District Court of Florida. The United States submits that Megaupload and Hotfile had similar features: storing a copy of a user-uploaded file on their servers, allowing anyone with the URL link to access it, not indexing stored files, having fee-paying subscribers, and removing offending URLs but not the actual offending file when issued with take-down notices.

[284] The Court in *Hotfile* remarked on Hotfile’s practice of removing the URL specified in take-down notices but not the underlying file, which it considered:³²⁹

... may mean that Hotfile knew of particular infringing files and failed to bar further access. Hotfile will also have to explain how, in each of these instances, it was unaware of the offending nature of the activity, did not intend to contribute to it, and could not utilize existing technology to prevent infringement.

[285] The United States submits that the Megagroup had possession of infringing copies in terms of s 131(1)(c): it had exclusive control over its servers, physical possession of the files on them, and rights of control over those files including the right to delete them.

³²⁷ Referring to *YouTube*, above n 322.

³²⁸ *Disney Enterprises Inc v Hotfile Corp* No 11-20427-CIV WL 6336286 (SD Fla, 20 September 2013). This case was decided by the United States District Court for the Southern District of Florida (a federal court).

³²⁹ At 38 and n 24.

[286] The United States also submits that the Megagroup distributed infringing copies under s 131(1)(d). It refers to *Ming v HKSAR* in which the Court of Final Appeal of Hong Kong held that Mr Ming had breached the Hong Kong equivalent of s 131(1)(f).³³⁰ Importantly, in *Ming*, the Court held that the term “distribution” was not defined in the Copyright Ordinance 1997 (HK)³³¹ and thus should receive its ordinary meaning.³³² That ordinary meaning would encompass the distributor making the item available electronically and the recipients taking steps of their own to obtain it.³³³

[287] The United States also cites cases from other jurisdictions in which digital copies were distributed: *London-Sire Records Inc v Doe I* (from the United States)³³⁴ and *Griffiths* (from Australia).³³⁵ The United States also makes an analogy to this Court’s decision in *Dixon v R* in terms of obtaining digital property (as opposed to distributing digital property).³³⁶

Issues

[288] The main question arising from the appellants’ submissions in relation to the applicability of the s 131(1) offences is whether that section applies to digital files. This requires a consideration of the text and context of s 131(1), policy considerations, the position before the 2008 amendment, the introduction of the communication right, the fact that there was no amendment to s 131(1) in 2008 to criminalise breach of the communication right explicitly, and New Zealand’s international obligations.

[289] The subsequent questions about the applicability of the various paragraphs of s 131(1) are:

- (a) Does the alleged conduct of the appellants show knowledge of infringing copies?

³³⁰ *Ming v HKSAR* [2007] 2 HKLRD 489 (CFA).

³³¹ Copyright Ordinance (Cap 528) 1997 (HK), s 118(1)(f). Section 118(1) is substantially similar to s 131(1) of the Copyright Act.

³³² *Ming*, above n 330, at [45].

³³³ At [54].

³³⁴ *London-Sire Records Inc v Doe I* 542 F Supp 2d 153 (D Mass 2008).

³³⁵ *Griffiths*, above n 193.

³³⁶ *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678 at [51] and n 70. *Dixon* was a case under s 249 of the Crimes Act (accessing a computer system for a dishonest purpose).

- (b) Does the alleged conduct come within s 131(1)(c)?
- (c) Does the alleged conduct of the appellants mean that s 131(1)(d) or (e) would be breached?

[290] For convenience we set out s 131(1) again:

131 Criminal liability for making or dealing with infringing objects

- (1) Every person commits an offence against this section who, other than pursuant to a copyright licence,—
 - (a) makes for sale or hire; or
 - (b) imports into New Zealand otherwise than for that person's private and domestic use; or
 - (c) possesses in the course of a business with a view to committing any act infringing the copyright; or
 - (d) in the course of a business,—
 - (i) offers or exposes for sale or hire; or
 - (ii) exhibits in public; or
 - (iii) distributes; or
 - (e) in the course of a business or otherwise, sells or lets for hire; or
 - (f) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner—
 an object that is, and that the person knows is, an infringing copy of a copyright work.

Does s 131(1) of the Copyright Act apply to digital files?

[291] The appellants submit that s 131(1) only applies to infringing copies in tangible form.³³⁷ We do not accept that any of the sub-paragraphs of s 131(1) are so limited for the reasons that follow.

³³⁷ See above at [275]–[276] and [279].

Text and context

[292] In order to be an offence under s 131(1), a person must have, other than pursuant to a copyright licence, done one of the acts set out in s 131(1)(a)–(f) with regard to “an object that is, and that the person knows is, an infringing copy of a copyright work”.

[293] There is nothing in the wording of s 131 to suggest that this applies only to infringing copies in tangible form. To the contrary, since 2008, copying has been defined in s 2(1) as including reproducing, recording or storing a work in any material form including any digital format.³³⁸ Copy and copies have had a corresponding meaning. If the operation of some or all of the sub-paragraphs of s 131(1) were restricted to infringing copies in tangible form, it would have been made clear in s 131 that the s 2(1) definition did not apply.³³⁹

Policy

[294] There is no obvious policy reason why any of the sub-paragraphs of s 131(1) should be interpreted as being confined to copies in tangible form, particularly as the 2008 amendments were designed to be technology-neutral.³⁴⁰ If it had been intended to exclude from the criminal provision this type of infringement, we would have expected this to have been discussed in the legislative materials. It was not.

[295] Digital technology and the internet have changed the way works are disseminated, including the digitisation of works (remastering and re-releasing works originally recorded in analogue format),³⁴¹ the often free dissemination of works via the internet,³⁴² and the threat of unlimited, perfect quality copies being made at no

³³⁸ Copyright Act, s 2(1) definition of “copying”, para (a).

³³⁹ As discussed below at [299], we consider that the definition of “copy” would in any event, even before the 2008 amendments, have been interpreted to include digital copies. In this context, the appellants were correct to concede that the term “object” in s 131 is not limited to tangible objects.

³⁴⁰ Copyright (New Technologies and Performers’ Rights) Amendment Bill 2006 (102-1) (explanatory note) at 2.

³⁴¹ MED Discussion Paper, above n 268, at [31].

³⁴² On how compulsory licensing could be used to balance the interests of access and the copyright owner’s income, see Susy Frankel “The International Copyright Problem and Durable Solutions” (2015) 18 Vand J Ent & Tech L 39 at 63–64. On these issues in the context of “Web 2.0” (user-generated content platforms), see Stokes, above n 247, at 216–219.

cost.³⁴³ These changes have led to a growing online market for digital works but also to increased opportunities for piracy.³⁴⁴

[296] One of the reasons for the inclusion of criminal provisions in legislation of this kind is deterrence.³⁴⁵ Excluding digital infringing copies from the ambit of s 131 would mean that this deterrence is lacking for one category of serious copyright infringement. Dissemination over the internet is not only often cheaper for the infringer but also likely to reach more people, thus potentially being more profitable for infringers and infringing the copyright owners' rights in a more serious fashion.

[297] We also note that, given the similarities between s 36 (one of the secondary infringement sections)³⁴⁶ and s 131(1), accepting the appellants' argument would also mean that secondary infringement under s 36 would similarly be limited to tangible infringing copies. There is no obvious policy reason why civil liability for dealing with or possessing infringing copies should be restricted in this manner. And in any event again there is nothing in the wording of s 36 to suggest that the s 2(1) definition of "copying" (and "copy") does not apply. The appellants' argument is in effect that the expansion of the primary infringement section led to the removal of liability under the secondary infringement sections. There is no logical reason why that would be so.

Was there a gap in coverage before the 2008 amendments?

[298] The appellants' argument that the legislative history supports the view that s 131(1) does not include digital copies is based to a degree on the notion that there was a gap in the coverage of the 1994 Act that was filled in 2008 by the introduction of the technology-neutral communication right and the change to the definition of copying. We do not consider that to be the case.

³⁴³ *Copinger and Skone James*, above n 239, at [2-82].

³⁴⁴ MED Discussion Paper, above n 268, at [35].

³⁴⁵ As early as the 1980s, raising penalties for criminal copyright to deter piracy was on the minds of law reformers: Law Reform Division *Reform of the Copyright Act 1962: A discussion paper* (Department of Justice, April 1985) at 20. Deterrence was also why the TRIPS Agreement, above n 242, required increased penalties: art 61. See also *Copinger and Skone James*, above n 239, at [22-59].

³⁴⁶ See above at [249]–[250].

[299] We agree with the view set out in the 2002 Position Paper that the original definition of “copying” in the 1994 Act was broad (“in any material form”, “in relation to any description of work” and “in any medium by any means”)³⁴⁷ and would have been interpreted to include digital copies.³⁴⁸ This is reinforced by the fact that the 1994 Act defined “literary work” as including computer programs.³⁴⁹

[300] Further, as dissemination over the internet inevitably involves copying, dissemination over the internet by other than the copyright owner or a person authorised by the copyright owner would in any event have constituted infringement of the reproduction right.³⁵⁰

Introduction of communication right

[301] The appellants’ primary argument is based on the introduction in 2008 of a broader communication right.³⁵¹ They say that it was a conscious decision to introduce this right rather than to expand the distribution right to include digital copies.

[302] We do not consider the introduction of the communication right to be of significance in determining whether s 131 applies to digital files.

[303] First, s 131(1) criminalises certain actions related to making or dealing with infringing copies – that is to say, it criminalises actions taken in respect of copies made in breach of the reproduction right contained in s 16(1)(a).³⁵² In that context, it is not immediately obvious why the inclusion of a communication right in s 16(1)(f) would

³⁴⁷ MED Position Paper, above n 259, at [40]. The phrase “in any material form” in the definition of copying relating to any description of work simply reflects that copyright protects the expression of ideas rather than the ideas themselves: see above at [241].

³⁴⁸ At [37]. Going beyond the MED Position Paper, we also consider this interpretation is proper under s 6 of the Interpretation Act 1999 and would be supported by analogy to *R v Misic* [2001] 3 NZLR 1 (CA) at [31]–[32], in which the Court of Appeal held that computer programs and disks were “documents” under the previous s 229A of the Crimes Act because they were things that provide evidence or information, or serve as a record, and it did not matter which medium they were.

³⁴⁹ Section 2(1) definition of “literary work”, para (b). See also above at n 242.

³⁵⁰ We note that in the WCT, above n 243, storage in a digital form is reproduction: *Agreed Statements*, above n 257, art 1(4).

³⁵¹ The appellants say that a “communication right” already existed prior to 2008 in a narrower form in the right to broadcast and that breach of this right was not criminalised.

³⁵² Or which are otherwise infringing copies. The actions in s 131 are similar to those in the civil secondary infringement provisions but the knowledge requirement is more onerous for criminal infringement than civil infringement. See above at [249]–[250].

affect the interpretation of s 131(1). The communication right was introduced primarily to replace the previous broadcasting right with a technology-neutral right.³⁵³

[304] Secondly, although commonly called the distribution right, s 16(1)(b) only applies to the first issue of copies to the public.³⁵⁴ Section 16(1)(b) does not relate to distribution more generally.³⁵⁵ Section 131(1) is not so limited. It applies to infringing copies made in breach of the reproduction right. Digital copies must be included in s 131(1), by virtue of the definition of copying, as discussed above.

[305] Thirdly, there is in any event nothing in s 16(1)(b) to suggest that “copies” in that sub-paragraph does not include digital copies. In other words, there is nothing to suggest that the s 2(1) definition of copy does not apply and therefore that s 16(1)(b) is limited to tangible copies. The mere inclusion of a wider communication right does not lead to the conclusion that the distribution right in s 16(1)(b) is limited to tangible copies.

[306] It is true that the Diplomatic Conference’s Agreed Statements to the WCT provide that the right of distribution in art 6 of the WCT is limited to tangible objects.³⁵⁶ We note, however, that the Agreed Statement to art 1(4) of the WCT provides that storage of a protected work in digital form in an electronic medium is reproduction. It is also clear from s 2(1) of the 1994 Act that storage in a digital form constitutes copying. We would accept the United States’ submission that the WCT contemplates but does not require the distribution right being limited in this way. Rather, art 6 of the WCT provides a floor not a ceiling.³⁵⁷

[307] Finally, we note that the 2002 Position Paper considered that the 1994 Act before its amendment did allow copyright owners control over digital reproduction of

³⁵³ See above at [255].

³⁵⁴ See above at [244]. “Distribution right” is not a term used in the Act: see above at [246]. We discuss the meaning of the term “distributes” in s 131(1)(d)(iii) below at [340]–[344].

³⁵⁵ This reduces the significance of the s 16(1)(b) distribution right. It does remain important when the reproduction right belongs to a different owner, or when former copyright owners continue to sell their existing stock of (non-infringing) copies: *Laddie, Prescott and Vitoria*, above n 246, at [15.4].

³⁵⁶ *Agreed Statements*, above n 257, arts 6–7.

³⁵⁷ This was the position taken by the Hong Kong Court of Final Appeal in *Ming*, above n 330, at [47] in which the Court regarded the WCT, above n 243, as “an agreement as to minimum levels of copyright protection to be implemented”.

their works.³⁵⁸ The Paper recommended the introduction of a technology-neutral right of communication to the public that would cover both transmission (whether wired or wireless) and making works available online for the public to access.³⁵⁹ This recommendation was not because of a perceived gap in the coverage of the legislation. Rather, it was to recognise the importance of the internet in the digital age and was considered essential to maintaining international credibility with regard to the civil remedies for infringement, even though New Zealand was not a party to the WCT.³⁶⁰

No amendment to s 131(1) in 2008

[308] We do not attach significance to the fact that there were amendments to other sections of the Copyright Act in 2008 but not to s 131(1). The other amendments made to the Copyright Act in 2008 were mainly designed so that technology-neutral references replaced references to broadcasting and cable programmes.³⁶¹

[309] We also do not attach significance to the fact that the United Kingdom introduced a specific criminal provision related to the infringement of the communication right (s 107(2A) of the Copyright, Designs and Patents Act (UK)). We accept the submission of the United States that the fact that the United Kingdom introduced a specific offence for breach of the communication right, in response to European obligations, does not illuminate the meaning of s 131(1) of New Zealand's Copyright Act, either before or after New Zealand's 2008 amendments.

[310] We accept that it has been suggested that, by adding s 107(2A), the United Kingdom closed a loophole in its criminal provisions.³⁶² We do not consider

³⁵⁸ See above at [254]. Although the Ministry's preferred policy response was to leave the definition of "copying" unchanged, it acknowledged that greater certainty could be provided by amending the definition, for the avoidance of doubt, to include digital formats. See also Copyright (New Technologies and Performers' Rights) Amendment Bill 2006 (102-1) (explanatory note) at 2, quoted above at [256].

³⁵⁹ It noted that creating a specific right to webcast would only provide a temporary solution as new technologies develop and the technology-neutral communication right would cover any combination of technologies: MED Position Paper, above n 259, at [60]–[61].

³⁶⁰ At [62]–[64].

³⁶¹ For example, s 131(4), which mentioned broadcasts and cable programmes, was amended to refer to a "communication work" (different from the "communication right" and not at issue in this case). While this new category of work was consistent with the WCT, it was not required by the WCT and New Zealand alone responded to the Treaty obligation to prevent the communication of works in this way: see Frankel, above n 239, at 227.

³⁶² *Copinger and Skone James*, above n 239, at [22-11].

there was a loophole in New Zealand and therefore the fact that New Zealand chose not to follow the lead of the United Kingdom and add a specific offence for breach of the communication right cannot affect the interpretation of the existing criminal provision.³⁶³ It certainly cannot be taken as an indication that s 131 does not apply to digital infringing copies.

International obligations

[311] As discussed above, the 1994 Act was passed to accede to the TRIPS Agreement.³⁶⁴ The TRIPS Agreement requires States Parties to criminalise wilful copyright piracy on a commercial scale and to have penalties “sufficient to provide a deterrent”, including imprisonment and/or fines.³⁶⁵

[312] These obligations are not affected by the WCT (and in any event, as noted above, New Zealand did not accede to the WCT until December 2018). First, the WCT only deals with civil infringement. It does not purport to regulate criminal infringement. Secondly, art 1(1) of the WCT makes it clear that it does not affect obligations under other treaties. It thus does not affect the TRIPS Agreement obligations to provide criminal penalties for commercial infringement.

[313] The 2008 Amendment Act was enacted to align with movements in international copyright law with regard to digital technology.³⁶⁶ In this context, it is inconceivable that it would be intended to put New Zealand in breach of its obligations under the TRIPS Agreement. In any event, there is a presumption that Parliament does not intend to legislate contrary to international obligations and statutes are interpreted accordingly.³⁶⁷ That of course is subject to the words of an Act allowing such a

³⁶³ See discussion at [298]–[300] and [340]–[344]. We note that New Zealand’s criminal provision before 1994 was already different from the Copyright, Designs and Patents Act (UK) on which the 1994 Act was based. For example, the New Zealand provision requires actual knowledge (rather than reason to believe, as was enacted in the United Kingdom Act). The United Kingdom provision also differentiates between types of criminal copyright infringement and applies different penalties for different copyright infringement offences, whereas New Zealand’s maximum penalty is the same for all offences.

³⁶⁴ See above at [251]. For example, art 10(1) of the TRIPS Agreement, above n 242, required that computer programs be protected as literary works under the Berne Convention, above n 241.

³⁶⁵ TRIPS Agreement, above n 242, arts 41 and 61.

³⁶⁶ See Copyright (New Technologies and Performers’ Rights) Amendment Bill 2006 (102-1) (explanatory note) at 2; Copyright (New Technologies and Performers’ Rights Amendment Bill 2006 (102-2) (select committee report) at 1; and Frankel, above n 239, at 45.

³⁶⁷ See the authorities cited above at n 111.

construction.³⁶⁸ In this case, as noted above, the plain words of the Act in fact clearly show digital files are covered and thus that the TRIPS Agreement is complied with by applying s 131 to digital files.

Summary

[314] In summary, the argument that s 131 does not apply to digital copies fails on the basis of the wording of the Copyright Act, its scheme and purpose, the policy behind it, its legislative history and New Zealand's international obligations to criminalise commercial copyright infringement.

Does the alleged conduct show knowledge of infringing copies?

[315] The appellants submit that liability under s 131 requires something more than generalised knowledge that there might be infringing files on the Megasites. What would need to be shown is specific knowledge of infringing copies and, in the appellants' submission, what is alleged falls short of this.

The law

[316] Section 131(1) requires knowledge that an object is an infringing copy of a copyright work. Unlike the United Kingdom's criminal copyright provision, reason to believe is not sufficient to found liability under s 131. We thus agree that mere general knowledge that there might be infringing copies of copyright works on the Megasites would not suffice for criminal liability unless there was wilful blindness. Knowledge may be inferred from wilful blindness.³⁶⁹

³⁶⁸ *New Zealand Air Line Pilots'*, above n 111, at 289; *LM v R* [2014] NZSC 110, [2015] 1 NZLR 23 at [52] per Glazebrook and Arnold JJ (concurring with the result but for different reasons to the majority); *Ye*, above n 111, at [24]; and *R v D* [2003] 1 NZLR 41 (CA) at [25].

³⁶⁹ *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [77]. It is accepted by Mr Dotcom that wilful blindness to specific and identifiable instances of infringement will suffice; the other appellants did not indicate they disagreed with this. See also the discussion on wilful blindness in *YouTube*, above n 322, at 34–35 in which the Court held that the wilful blindness doctrine may be applied in appropriate circumstances to demonstrate knowledge or awareness or specific instances of infringement under the DMCA. It is not necessary for us to decide in the present case whether recklessness in the *Cameron* sense (recognition of the likelihood that the copies in question are infringing and an unreasonable disregard of that risk) would suffice: *Cameron* at [13].

[317] Caselaw (although not in a criminal context) would also suggest that more than generalised knowledge that there may be infringement is needed.³⁷⁰ In *Sony Corp of America v Universal City Studios Inc*, the Supreme Court of the United States held that constructive knowledge that customers may use their newly-purchased home video recorders to make unauthorised copies of copyrighted material was not sufficient to impose vicarious liability for copyright infringement on manufacturers selling those recorders.³⁷¹

[318] We note that some twenty years after *Sony*, again not in a criminal context, the Supreme Court of the United States distinguished *Sony* in *Metro Goldwyn-Mayer Studios Inc v Grokster Ltd*. It was held that, where the evidence goes beyond knowledge that a product may be put to infringing uses and shows statements or actions directed to promoting infringement, the rule in *Sony* will not preclude inducement liability.³⁷² That Grokster was merely aware its customers used its software for downloading copyrighted files would not, however, have sufficed. We have already referred to two other relevant United States cases about ISP liability for secondary copyright infringement, *YouTube*³⁷³ and *Hotfile*.³⁷⁴ These cases were decided after *Sony*.

This case

[319] In this case, the conduct that is alleged does not rely on generalised knowledge of the possibility of infringement. It relies on actual knowledge and wilful blindness.

[320] The allegation is that the Megagroup business model was, like in *Grokster*, based on encouraging and facilitating large-scale copyright infringement.³⁷⁵ It is asserted that the Megagroup did not operate a true cloud storage facility, that the vast bulk of its users had never uploaded a file,³⁷⁶ that a large part of its revenue came from

³⁷⁰ The appellants relied on *Sony* and *Grokster*, both above n 321. The United States relies on *Hotfile*, above n 328.

³⁷¹ *Sony*, above n 321, at 442.

³⁷² *Grokster*, above n 321, at 935. In the event, the Court held that the summary judgment that had been given in favour of Grokster was in error: at 941.

³⁷³ *YouTube*, above n 322.

³⁷⁴ *Hotfile*, above n 328, was relied on by the United States (as discussed above at [282]–[284]).

³⁷⁵ See above at [208].

³⁷⁶ See above at [209].

advertisements associated with popular downloads of infringing files³⁷⁷ and that, for a long period, it operated a rewards system encouraging the uploading of copyright-infringing works.³⁷⁸ It is also alleged that the 72-minute limit on viewing time was tied to the length of commercial films and designed to encourage viewers to become premium members, the other source of the Megagroup's income.³⁷⁹ This strategy of encouraging and facilitating wide-scale copyright infringement is said to have been responsible for the financial success of the Megagroup.

[321] Actual knowledge of the success of this strategy and actual knowledge of or wilful blindness to copyright infringement relating to particular files is alleged. The United States says that the appellants had access to listings of actual files stored on their servers, the URLs to these files, the name given to the file by the user and the ability to search files held on the Megagroup's servers. Records kept by the group included the number of times a file had been downloaded and whether a take-down notice had been received for any URL associated with the file.³⁸⁰

[322] It is alleged that the appellants knew that the most popular downloads were of copyright-infringing files and that uploaders had been paid under the rewards programme, despite the appellants knowing those users had repeatedly infringed copyright.³⁸¹ The Megagroup also received some four million copyright infringement notices for URLs, which would have alerted it to specific infringing files.³⁸² In addition, it is alleged that the appellants themselves at times accessed copyright-infringing material on the sites.³⁸³ There are also alleged admissions by the appellants, including alleged comments that "legit users" are "not what we make \$ with" and of "99.999%" of the videos on the sites not being "legit".

[323] It is also alleged that the appellants' knowledge (or wilful blindness) can be inferred from their efforts to mask infringing content on the Megasites; for example,

³⁷⁷ See above at [210]–[211].

³⁷⁸ See above at [214].

³⁷⁹ See above at [212].

³⁸⁰ See above at [219].

³⁸¹ See above at [211] and [214].

³⁸² See above n 224. We examine below at [367]–[388] whether the appellants come within the safe harbour provisions with regard to the response to those take-down notices. The comments from *Hotfile*, above n 328, may be relevant here: see above at [284].

³⁸³ See above at [215] and n 221.

by manipulating Megaupload's Top 100 list and crafting Megavideo's front page to give the false impression that Megavideo primarily hosted user-generated content.³⁸⁴ We agree that this would be an available inference.

[324] We therefore consider that the conduct alleged meets the requisite knowledge requirement of s 131(1) of the Copyright Act of knowledge of or wilful blindness to specific copyright-infringing files.

Does the alleged conduct come within s 131(1)(c)?

[325] This requires consideration of the following questions:

- (a) Can digital files be possessed?
- (b) Does the alleged conduct of the appellants mean they would have been in possession of the infringing copies in terms of s 131(1)(c)?
- (c) If so, does the alleged conduct show the files were possessed for the purpose of infringing copyright?

Can digital files be possessed?

[326] We do not accept the appellants' submission that s 131(1)(c) does not apply because intangible objects, such as digital files, cannot be possessed.³⁸⁵

[327] We consider that, under s 131(1)(c) of the Copyright Act, digital files are able to be possessed. The meaning of the term "possess" must be assessed in the light of the scheme of the sections in which it appears (including ss 36 and 131) and the Act generally. The Copyright Act was intended to be technology-neutral in 1994 when it was passed and in subsequent amendments.

[328] In this regard, we note that computer programs were in 1994 included as literary works and the definition of copying, from 2008, explicitly includes files in

³⁸⁴ See above at [216].

³⁸⁵ See above at [279].

digital format. From 1994, “electronic” was defined broadly as including electric, magnetic, electro-magnetic, electro-chemical and electro-mechanical energy.³⁸⁶ When “Internet service provider” was introduced as a defined term in 2008, it was left broad: a person who offers “transmission, routing, or providing of connections for digital online communications” and or “hosts material on websites or other electronic retrieval systems that can be accessed by a user”.³⁸⁷ “Document”, when introduced in 2011, was also framed broadly as including information electronically stored or recorded and information derived from that information.³⁸⁸ As we have held above, the term “infringing copy” in ss 36 and 131 includes unauthorised digital copies. Given this context, we consider that the Copyright Act assumes that electronic/digital files can be possessed, whatever the position at common law in respect of bailment.³⁸⁹

[329] In other statutory contexts, it is assumed that digital files can be possessed. For example, s 131(1) of the Films, Videos, and Publications Classification Act 1993 criminalises possession of an objectionable publication. Section 131(2A) of that Act, which s 131(2C) points to as enacted “for the avoidance of doubt”, specifies that an electronic publication falls under the main offence (possession). That Act also defines “publication” as explicitly including discs, or electronic or computer files.³⁹⁰ This is schematically similar to how the Copyright Act defines “copy” as explicitly including digital copies.

[330] We note in any event that the position in common law bailment is not as clear as the appellants submit.³⁹¹ As discussed in *Dixon*,³⁹² the position taken in *Your Response Ltd v Datateam Business Media Ltd*³⁹³ (the case relied upon by the appellants) is contrary to the view taken by the Court of Appeals of New York in *Thyroff v Nationwide Mutual Insurance Co*³⁹⁴ in respect of electronic records and databases in the tort of conversion. The Court in *Thyroff* found no reason “in law or

³⁸⁶ Copyright Act, s 2(1).

³⁸⁷ Copyright (New Technologies) Amendment Act, s 4(2).

³⁸⁸ Copyright Amendment Act 2011, s 4. Note that the definition of “document” applies only to Part 6A (ss 134A–134ZF) and ss 144A and 144C–144E.

³⁸⁹ See the appellants’ submissions recorded above at [279].

³⁹⁰ Films, Videos, and Publications Classification Act 1993, s 2 definition of “publication”, para (d).

³⁹¹ See the appellants’ submission recorded above at [279] and n 325.

³⁹² *Dixon*, above n 336, at [47].

³⁹³ *Your Response*, above n 325, at [32].

³⁹⁴ *Thyroff v Nationwide Mutual Insurance Co* 864 NE 2d 1272 (NY 2007).

logic” to treat a document stored on a computer hard drive (intangible property) differently from paper documents stored in filing cabinets (tangible property), particularly given society’s substantial reliance on computers and electronic data.³⁹⁵ *Your Response* has been cited in England and Wales and has not been directly reconsidered.³⁹⁶ United States state courts remain divided on the issue and it has not been heard at the federal level.³⁹⁷ It is not, however, necessary for the purposes of this appeal to decide which of the lines of authority New Zealand would follow in terms of common law bailment or conversion.

Does the alleged conduct of the appellants mean they would have been in possession of the infringing copies?

[331] The appellants submit that the files in this case belonged to the users and that the Megagroup had no control over the content of the files or over the files themselves unless the terms of service were breached. In the appellants’ submission, this level of residual control does not amount to possession. We do not accept that submission.

[332] Possession requires both knowledge and control.³⁹⁸ In this case, control over the computer files and knowledge that they had been uploaded would therefore be required, as well as knowledge that what was uploaded were infringing copies of copyright works.

[333] We accept the United States’ submission that the allegations are that the Megagroup had control of the relevant digital files. They were stored on servers physically possessed by the Megagroup and under its control. By virtue of this, we also accept the submission that the Megagroup had control over the files stored on those servers.

³⁹⁵ At 1277–1278.

³⁹⁶ See for example *Environment Agency v Churngold Recycling* [2014] EWCA Civ 909, [2015] Env LR 13 at [16] and [18]. See also *Capita Plc v Darch* [2017] EWHC 1248 (Ch), [2017] IRLR 718 at [71].

³⁹⁷ *People v Aleynikov* 148 AD 3d 77 (NY SC App Div 2017) at 86; but see *Ogbolumani v Young* No 1-14-1930 2015 WL 1284064 (IL App, 20 March 2015) at [33].

³⁹⁸ *The New Zealand Law Dictionary* defines possession as the condition of having something, and criminal possession as having a physical element of custody and a mental element of knowledge: Peter Spiller *New Zealand Law Dictionary* (9th ed, LexisNexis, Wellington, 2019) at 231, citing *Taueki v R* [2013] NZSC 146, [2014] 1 NZLR 235. In terms of possession of drugs (an offence under s 7 of the Misuse of Drugs Act 1975), the physical element is satisfied either by custody of the item in question or control of it. The mental element involves knowledge of the presence of the item and an intention to exercise control over it: *Simon v R* [2017] NZCA 277 at [14].

[334] It is true that the Megagroup had contracted with users of the Megasites to exercise that control only in specified circumstances, such as deletion for non-use and where there was infringement of copyright.³⁹⁹ However, it is alleged that there was, to the knowledge of the appellants, widespread infringement of copyright. The contract gave the Megagroup the right to delete the infringing files. In such circumstances, the allegations show the requisite control.⁴⁰⁰ This conclusion is strengthened by the fact that the control was in fact exercised in relation to pornographic and terrorism-related material.⁴⁰¹

Does the alleged conduct show the files were possessed for the purpose of copyright infringement?

[335] The public accessed the copyright-infringing files through third-party “linking” websites, some of which contained search engines that could be used to search for infringing content on the Megasites. Although these sites were not owned or controlled by the Megagroup, it is alleged that there was a relationship between some of the appellants and some of these linking sites and that some users were instructed by some of the appellants on using those linking sites.⁴⁰² The use of the third-party linking websites to give access to infringing copies stored on the Megasites to the public and to gain revenue is alleged to have been part of the Megagroup business design.⁴⁰³

[336] The online accessing and downloading of digital files necessarily involves the reproduction (copying) of those files at various stages of transmission by the ISP and other parties. This is because the online transmission process generates copies.⁴⁰⁴ It may be virtually impossible to identify when and where the copies are made. Copying without authorisation breaches the reproduction right. Making available an infringing copy to the public breaches the communication right.

³⁹⁹ See above at [206] and n 216.

⁴⁰⁰ We do not need to interpret the terms of service in respect of the extent to which contractual provisions may mean the ISP may have no control or possession for the purposes of this case.

⁴⁰¹ See above at [219].

⁴⁰² See above at [208] and [215].

⁴⁰³ See above at [216].

⁴⁰⁴ On this process, see Stokes, above n 247, at 21; and MED Position Paper, above n 259, at [75]. This is why the ISP exemptions from liability were introduced: Copyright (New Technologies and Performers’ Rights) Amendment Bill 2006 (102-1) (explanatory note) at 4–5.

[337] The conduct alleged (including the use of the third-party websites) therefore would mean the copyright-infringing files were possessed by the Megagroup for the purpose of copyright infringement – essentially providing access to the public which necessarily breached the reproduction and communication rights – and that such infringement was in the course of the Megagroup’s business.⁴⁰⁵

Conclusion

[338] For all of the above reasons we agree with the Court of Appeal and the District Court that the alleged conduct comes within s 131(1)(c) of the Copyright Act.⁴⁰⁶

Does the alleged conduct mean that s 131(1)(d) or (e) would be breached?

[339] The issues here are whether the conduct alleged amounts to distribution under s 131(1)(d)(iii), sale or hire under s 131(1)(d)(i) or 131(1)(e) or exhibition under s 131(1)(d)(ii).

Distributes: s 131(1)(d)(iii)

[340] The appellants submit that “distributes” has a specialised meaning in copyright law and this means that s 131(1)(d)(iii) only applies to physical tangible copies and not to digital copies.⁴⁰⁷ The appellants also submit that “distributes” in s 131(1)(d)(iii) criminalises the distribution right. Making copyright-infringing material available online falls under the communication right, which they say is not criminalised by s 131(1).⁴⁰⁸

[341] We have already rejected the appellants’ submission that digital copies are not included in s 131(1).⁴⁰⁹ As to the argument that the term “distributes” has a specialised meaning in the Copyright Act, we first reiterate that “distribution right” is not a term used in the Copyright Act.⁴¹⁰ In any event what is commonly called the distribution

⁴⁰⁵ This finding is of course subject to the Megagroup not having a safe harbour under ss 92B–92C (which we determine it does not, below at [384]–[386]).

⁴⁰⁶ CA judgment, above n 23, at [186]–[188]. This was the view of the District Court also, albeit under s 24(2)(d): DC judgment, above n 21, at [617]–[618] and [627].

⁴⁰⁷ See above at [279].

⁴⁰⁸ See above at [274]–[276].

⁴⁰⁹ See above at [291] and [314].

⁴¹⁰ See above at [246].

right in s 16(1)(b) only relates to the first issue to the public.⁴¹¹ We do not consider that “distributes” in s 131 is used as a specialised term. It is used in its ordinary sense. The term “distributes” would be apt to describe the alleged conduct of disseminating the copyright-infringing digital files to the public.

[342] We agree with the reasoning in *Ming* on Hong Kong’s parallel provision to s 131(1) in this regard.⁴¹² In *Ming*, the Court held that “distributes” in s 118(1)(f) of the Copyright Ordinance took its ordinary meaning and could include a distributor making a digital copy available and recipients taking steps of their own to obtain it at a time that suited them.⁴¹³

[343] For completeness, we note that in *Ming*, the distributor was involved in transferring infringing files and publicising links to those files. The conduct was thus not passive.⁴¹⁴ It is alleged that the business design of the Megagroup was predicated on encouraging and promoting copyright breaches.⁴¹⁵ The alleged conduct of the appellants in this case is therefore not passive.

[344] For the above reasons we conclude that the conduct alleged would amount to distribution.

Sale or hire: s 131(1)(d)(i) or 131(1)(e)

[345] We also consider that the alleged actions of Megagroup are encompassed in the phrases “offers or exposes for sale or hire” in s 131(1)(d)(i) and “sells or lets for hire” in the course of business or otherwise in s 131(1)(e). This is the case where users had to buy a premium membership if they wanted to continue watching a film, due to the 72-minute limit. There is also a good argument that the selling of advertising tied to popular downloads would qualify as sale or hire of the infringing copies. We do not, however, need to make a definitive finding on this point.

⁴¹¹ See above at [244].

⁴¹² See the United States’ submission recorded above at [286].

⁴¹³ *Ming*, above n 330, at [43]–[46] and [53]–[57].

⁴¹⁴ At [54]. The appellant in *Ming* seems to have made a similar argument to the “dumb pipe” submission made by the appellants (see above at [278] and [282]), albeit in relation to a different distribution method: see at [19]–[30].

⁴¹⁵ See above at [16] and [208]–[219].

Exhibits: s 131(1)(d)(ii)

[346] The District Court considered that the alleged conduct would also amount to exhibiting an infringing copy in the course of business in breach of s 131(1)(d)(ii).⁴¹⁶ The Court of Appeal did not decide whether or not the conduct would amount to a breach of s 131(1)(d)(ii) or (iii).⁴¹⁷

[347] “Exhibits” in the Act tends to relate to artistic works.⁴¹⁸ The relevant *Shorter Oxford English Dictionary* meaning of “exhibit” is “[s]how (an item) publicly for entertainment, instruction, or in a competition; have (an item) on show in an exhibition”.⁴¹⁹

[348] There is no reason why, in the context of the Copyright Act, there could not be a digital exhibition. However, we do not think the term “exhibits” is apt to describe the alleged conduct in this case. We thus differ from the District Court on this point.

Exemptions and carve-outs

[349] The appellants submit that various carve-outs and exemptions to liability under s 131 apply. This gives rise to the following questions:

- (a) Does the limitation period in s 131A apply?
- (b) Do the incidental or transient copying provisions apply?
- (c) Do the safe harbour provisions for ISPs apply?

⁴¹⁶ DC judgment, above n 21, at [617] and [627].

⁴¹⁷ CA judgment, above n 23, at [187].

⁴¹⁸ This can be seen through the usage of “exhibit” in s 10(4)(b)(i) of the Copyright Act as only coming under the sub-heading of artistic works.

⁴¹⁹ Angus Stevenson (ed) *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007) vol 1 at 893.

Does the limitation period in s 131A apply?

[350] Section 131A provided at the relevant time:⁴²⁰

Despite section 14 of the Summary Proceedings Act 1957, an information in respect of an offence against section 131 may be laid at any time within 3 years of the time when the matter of the information arose.

High Court decision

[351] Because of the Court's conclusion on s 131 of the Copyright Act, it was not necessary for the Court to consider the statutory limitation period in s 131A.⁴²¹ The High Court nevertheless commented that it would have been for the Minister and not the extradition court to consider whether there was a restriction on surrender in this regard.⁴²²

Court of Appeal decision

[352] The Court of Appeal considered, contrary to the view of the High Court, that the extradition court (rather than the Minister) must decide whether a domestic limitation period applies. The Court, however, was satisfied that the time limitation in s 131A did not apply.⁴²³ It read s 131A as applying only to proceedings brought summarily.⁴²⁴

Submissions of the appellants

[353] The appellants submit that the conduct on which counts 4, 7 and 8 are based would not have amounted to a New Zealand offence because of the time bar in s 131A of the Copyright Act.⁴²⁵ It is submitted that the limitation period for the filing of an information was not intended, contrary to the view of the Court of Appeal, to apply only to charges laid summarily.

⁴²⁰ Section 131A has been repealed by s 413 of the Criminal Procedure Act 2011.

⁴²¹ It was common ground in the High Court that, if the statutory limitation period applied, it applied to count 4, as well as counts 7 and 8: HC judgment, above n 22, at [295]–[296].

⁴²² At [301].

⁴²³ CA judgment, above n 23, at [159].

⁴²⁴ At [161].

⁴²⁵ As noted above at n 421, it is common ground that the counts where the time bar issue could potentially arise are counts 4, 7 and 8, contrary to the District Court's finding that s 131A only applied to counts 7 and 8: DC judgment, above n 21, at [665] and [670].

Submissions of the United States

[354] The United States submits that the issue of s 131A of the Copyright Act is not encompassed in the grant of leave as it could only be relevant to the exercise under s 24(2)(d)(i) of the Extradition Act. The United States submits that in any event count 2 could not be affected by the time bar as it is framed as a continuing offence and is not dependent upon proof of infringement of any specific work. The United States also supports the Court of Appeal’s conclusion that s 131A would not have applied to charges laid indictably.

Our assessment

[355] We agree with the Court of Appeal, for the reasons it gave, that s 131A simply operated as a dispensation from the six-month limit for summary proceedings in s 14 of the Summary Proceedings Act 1957 but did not affect a prosecution brought indictably.⁴²⁶ Because of this we do not need to deal with the other arguments of the United States on this issue.

Do the incidental or transient copying provisions (ss 41 and 43A of the Copyright Act) apply?

Submissions of the appellants

[356] The appellants submit that the activities of the Megagroup involved only incidental or transient copying and thus, if they had occurred in New Zealand, would not constitute copyright infringement.⁴²⁷

Submissions of the United States

[357] The United States submits that the introduction of s 43A in 2008 illustrates that Parliament did not intend to immunise ISPs for all activities covered by the term “communication”.

⁴²⁶ CA judgment, above n 23, at [161].

⁴²⁷ The appellants submit that the incidental and transient copying provisions are not defences but rather that, if they apply, there is no infringement. The appellants make the same argument in respect of the safe harbour provisions: see below at [381]–[383].

The legislation

[358] Sections 41 and 43A permit use of copies. Copying that would otherwise be a breach of the reproduction right will be permissible in the case of incidental or transient copying that falls within the boundaries of these sections.

[359] Section 41 provides:

41 Incidental copying of copyright work

- (1) Copyright in a work is not infringed by—
 - (a) the incidental copying of the work in an artistic work, a sound recording, a film, or a communication work; or
 - (b) the issue to the public of copies of an artistic work, the playing of a sound recording, the showing of a film, or the communication of a work to the public, in which a copyright work has been incidentally copied; or
 - (c) the issue to the public of copies of a sound recording, film, or communication work to which paragraph (a) or (b) applies.
- (2) For the purposes of subsection (1), a musical work, words spoken or sung with music, or so much of a sound recording or communication work as includes a musical work or those words, must not be regarded as incidentally copied in another work if the musical work or the words, sound recording, or communication work is deliberately copied.

[360] Section 41 was enacted in 1994 and amended in 2008 to update the references in the section to broadcasts and cable programmes to communication works. Section 41 had a precursor in s 20(3) of the 1962 Act but the wording of s 41 was based on s 31 of the Copyright, Designs and Patents Act (UK). “Incidental copying” was left undefined in the United Kingdom Act (and thus in the New Zealand 1994 Act).

[361] As seen from s 41(2), incidental copying cannot be deliberate. Section 41 was intended to cover the inadvertent capture of copyright works. Note also that s 41 does not apply to literary works.⁴²⁸ Under United Kingdom caselaw, whether copying is

⁴²⁸ This can be understood on the basis that copying of literary works is likely to be deliberate: MBIE Issues Paper, above n 263, at [283].

incidental is to be determined according to an objective assessment of the circumstances in which the work was created. It is not a matter of subjective intent.⁴²⁹

[362] The more pertinent provision in relation to digital copying is s 43A, because “transient” goes to copying that is not permanently stored and thus covers copies made as part of digital transmission processes.⁴³⁰ Section 43A provides:⁴³¹

43A Transient reproduction of work

A reproduction of a work does not infringe copyright in the work if the reproduction—

- (a) is transient or incidental; and
- (b) is an integral and essential part of a technological process for—
 - (i) making or receiving a communication that does not infringe copyright; or
 - (ii) enabling the lawful use of, or lawful dealing in, the work; and
- (c) has no independent economic significance.

[363] The Ministry of Economic Development’s 2002 Position Paper explained the need for this provision in the following manner:⁴³²

The Ministry considers that the current definition of copying is sufficiently broad to include transient copying. Liability for unauthorised copying could, therefore, arise in relation to transient and incidental copies. For example, copies created in a computer’s random access memory (“RAM”) when a user browses the World Wide Web may give rise to infringement. It has been argued that this is in essence the digital equivalent of the “right to read” in the analogue environment. The argument that RAM copies are transient and, therefore, not reproductions (because they disappear when a computer is switched off) has generally been unsuccessful in the courts. This has implications for individual web users and Internet service providers. It has been suggested, therefore, that the Act should expressly state whether or not

⁴²⁹ *Football Association Premier League Ltd v Panini UK Ltd* [2003] EWCA Civ 995, [2004] 1 WLR 1147 at [24] and [27] per Chadwick LJ. See also Frankel, above n 239, at 330–331.

⁴³⁰ Note that the issue of transient copying was highly contentious (and therefore left unsettled) in the negotiation of the WCT and WPPT: see MED Discussion Paper, above n 268, at [88]–[90]. By the end of the 2001–2002 review period, the Ministry’s view was that the definition of “copying” was already broad enough to include transient copying, but the Ministry noted that reform would clarify the issue: MED Position Paper, above n 259, at [45]–[46]. See also Copyright (New Technologies and Performers’ Rights) Amendment Bill 2006 (102-1) (explanatory note) at 4–5.

⁴³¹ Section 43A of the Copyright Act was enacted by amendment: Copyright (New Technologies) Amendment Act, s 24.

⁴³² MED Position Paper, above n 259, at [45]. See also MED Discussion Paper, above n 268, at [79].

transient copying forms part of the copyright owner's exclusive reproduction right.

[364] Professor Frankel accepts that transient copies arise from the mere act of visiting a webpage but says that it is difficult to see how such copying could cause the copyright owner a loss.⁴³³

[365] The explanatory note to the Bill that became the 2008 Amendment Act recognised that liability can arise for “transient or incidental copies that are a necessary part of the computer or communications processes, for example, when browsing websites on the Internet”.⁴³⁴ The provision that became s 43A was designed to provide “a limited exception from infringement for such copying where the resulting copies have no independent economic significance”.⁴³⁵

Our assessment

[366] As is clear from our discussion above, the alleged activities of the Megagroup fall outside the boundaries of ss 41 and 43A. The alleged activities go well beyond incidental copying of a work within another work (s 41) or transient copying with no economic significance (s 43A). It is alleged (among other things) that the Megagroup earned substantial advertising revenue from users accessing the copyright-infringing material.⁴³⁶

Do the safe harbour provisions for ISPs apply?

[367] The next issue is whether, as the appellants assert, the safe harbour provisions for ISPs in ss 92B and 92C of the Copyright Act would apply to the appellants' activities if they had occurred in New Zealand.

⁴³³ Frankel, above n 239, at 852–853. See also MED Discussion Paper, above n 268, at [89]–[90], in which the Ministry concluded that New Zealand's copyright legislation, as it was then, could be interpreted as complying with the general obligation under the WCT, above n 243, to provide a right of reproduction in the digital environment, and that the WCT and WPPT largely left the issue of transient copying to states, depending on whether they considered that “reproduction” included transient, technical reproductions or not.

⁴³⁴ Copyright (New Technologies and Performers' Rights) Amendment Bill 2006 (102-1) (explanatory note) at 3.

⁴³⁵ At 3.

⁴³⁶ See above at [210]–[211].

The legislation

[368] “Internet service provider” is defined in s 2(1) as meaning:

... a person who does either or both of the following things:

- (a) offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing:
- (b) hosts material on websites or other electronic retrieval systems that can be accessed by a user

[369] Section 92B deals with ISP liability if a user of its services infringes copyright:

92B Internet service provider liability if user infringes copyright

- (1) This section applies if a person (A) infringes the copyright in a work by using 1 or more of the Internet services of an Internet service provider to do a restricted act without the consent of the copyright owner.
 - (2) Merely because A uses the Internet services of the Internet service provider in infringing the copyright, the Internet service provider, without more,—
 - (a) does not infringe the copyright in the work:
 - (b) must not be taken to have authorised A’s infringement of copyright in the work:
 - (c) subject to subsection (3), must not be subject to any civil remedy or criminal sanction.
- ...
- (4) In subsections (1) and (2), **Internet services** means the services referred to in the definition of Internet service provider in section 2(1).

[370] Section 92B is of particular note because it provides that “without more”, ISPs are immune from liability where users of an ISP’s services breach copyright. The issue will be whether there is “something more” alleged with regard to the Megagroup services.

[371] Section 92C deals with ISP liability for storing infringing material. It provides in relevant part:

92C Internet service provider liability for storing infringing material

- (1) This section applies if—
 - (a) an Internet service provider stores material provided by a user of the service; and
 - (b) the material infringes copyright in a work (other than as a result of any modification by the Internet service provider).
- (2) The Internet service provider does not infringe copyright in the work by storing the material unless—
 - (a) the Internet service provider—
 - (i) knows or has reason to believe that the material infringes copyright in the work; and
 - (ii) does not, as soon as possible after becoming aware of the infringing material, delete the material or prevent access to it; or
 - (b) the user of the service who provided the material is acting on behalf of, or at the direction of, the Internet service provider.

...

[372] Applying that section to this case, the question is whether the appellants knew or had reason to believe that material stored on their servers infringed copyright and did not delete the material or prevent access to it as soon as possible after becoming aware of the infringement.

[373] Section 92D sets out the requirements for notices of infringement and s 92E provides a limited exception with regard to ISPs caching infringing material. “Cache” is defined in s 92E(4) as the storage of material by an ISP that is controlled through an automated process, temporary, and for the sole purpose of enabling the ISP to transmit the material efficiently to other users of the service on their request.

[374] It is worth mentioning at this point ss 122A–122U of the Copyright Act, which relate to infringing file sharing. These provisions were inserted by s 6 of the Copyright (Infringing File Sharing) Amendment Act 2011 (the Infringing File Sharing Amendment Act). The infringing file sharing regime is a special regime that enables

copyright owners to take enforcement action against people who infringe copyright through file sharing, largely through requiring internet protocol address providers (IPAPs)⁴³⁷ to issue detection notices, warning notices and enforcement notices against alleged infringers at the instigation of copyright owners. The Infringing File Sharing Amendment Act also introduced s 92B(2A) under which an ISP must comply with the obligations set out in ss 122A to 122U to avoid liability for infringing file sharing. Section 92B(2A) provides:

An Internet service provider does not infringe the copyright in the work, or authorise A's infringement of the copyright in the work, merely because the Internet service provider knows of the infringement from information received as a result of anything done under sections 122A to 122U, provided that, in relation to the alleged infringement, the Internet service provider complies with all its obligations under those sections and under any regulations made under section 234(eb) to (eh).

Legislative history

[375] Sections 92B and 92C were introduced in 2008 to limit ISPs' liability in certain circumstances.⁴³⁸ Given that copying is a central function of the internet and central to services provided by ISPs and that it may be impossible to identify when and where copies of a material subject to copyright protection are made during the course of a transmission, ISPs were exposed to potential liability for both primary and secondary infringement of copyright.⁴³⁹ The explanatory note to the Bill explained the circumstances in which ISP liability was to therefore be limited in the following way:⁴⁴⁰

In terms of primary liability, the Bill provides that an ISP is not liable where it is merely providing the physical facilities to enable a communication to take place. With regard to secondary liability, the Bill limits liability in respect of caching and storing of infringing material where the ISP does not know or have reason to believe that the material is infringing, and acts within a reasonable time to delete it or prevent access to it upon obtaining such knowledge.

⁴³⁷ An internet protocol address provider (IPAP) is defined in s 122A(1) of the Copyright Act as a person that operates a business that, other than as an incidental feature of its main business activities, provides connections for digital online communication, allocates Internet protocol addresses to its account holders, charges account holders for its services and is not primarily operated to cater for transient users.

⁴³⁸ Copyright (New Technologies And Performers' Rights) Amendment Bill 2006 (102-1) (explanatory note) at 4.

⁴³⁹ At 4. This was a concern during the 2001–2002 Review: MED Discussion Paper, above n 268, at [144]–[145]; and MED Position Paper, above n 259, at [88]–[94].

⁴⁴⁰ At 4–5.

District Court decision

[376] The District Court accepted there was evidence that the Megagroup came within the definition of an ISP.⁴⁴¹ The Court considered that s 92B, although providing exemptions from liability, was not a complete shield.⁴⁴² That followed because s 92C provides that an ISP does not infringe copyright by storing users' infringing material unless it knows or has reason to believe the material is infringing and, on becoming aware, does not delete or prevent access to it as soon as possible.

[377] The District Court held that s 92C did not protect the appellants. There was evidence that the appellants knew there was infringing material on the Megasites and failed to delete access to it. Their response to take-down notices was to delete the identified URL only, leaving other URLs providing access to the infringing file. Further, there was evidence that they misled the copyright owners into thinking they had deleted the infringing material. The District Court considered there was evidence that the appellants' "claim that the other URL link[s] would or might have the copyright owner's authority to retain the remaining URL links was self-serving and disingenuous".⁴⁴³

[378] The Court considered that the "purpose and intent of s 92B is to provide a 'safe harbour' for ISPs that unintentionally have their storage used by others to store illegitimate materials, a true 'dumb pipe'".⁴⁴⁴ The Megagroup did not fit that description. The Court concluded:

[627] Protection under s 92B is not available on the evidence adduced at this hearing. There is evidence before the Court sufficient to establish that the respondents were in the course of a business that knowingly uploaded copies of copyright protected material, they kept it with a view to committing acts that would infringe the copyright, they were complicit in promulgating that they possessed such material, and distributed it to large numbers of people for their own financial gain.

⁴⁴¹ DC judgment, above n 21, at [621].

⁴⁴² At [623].

⁴⁴³ At [625].

⁴⁴⁴ At [626].

High Court decision

[379] The High Court rejected the submission that the Megagroup was protected by the safe harbour provisions in the Copyright Act. The Court considered that, if the Megagroup's activities were as alleged by the United States, it could not qualify for the "without more" immunity under s 92B.⁴⁴⁵ Further, an interpretation of s 92B that would cover the Megagroup's activities would deprive s 92C of any effect as s 92B(2) would mean ISPs would not be subject to any civil remedy or criminal sanction.⁴⁴⁶ The Court considered that the protection under s 92C was also not available.

Court of Appeal decision

[380] The Court of Appeal considered the safe harbour provisions to be in the nature of a defence and thus not within the purview of the extradition court.⁴⁴⁷

Submissions of the appellants

[381] The appellants submit that the characterisation of the safe harbours as defences is contrary to the legislative history as well as the scheme of the Act. The safe harbour provisions would serve no purpose as defences, because if they apply, there will be no infringement in any event because an essential element of infringement will not be made out.

[382] It is accepted by the appellants that, if copyright infringement was notified to the Megagroup, only the identified URL was disabled either by the Megagroup or by verified copyright owners using the "abuse tool".⁴⁴⁸ The original file would remain on Megaupload. It is submitted, however, that, while a file may be infringing for one user, that does not necessarily mean it is infringing for all users. Other users, with different URLs to the same file, may have had the right to copy the file. It would have put Megaupload in breach of its terms of service if it had deleted the file. It is therefore argued that the only obligation on the Megagroup was to delete the offending URL.

⁴⁴⁵ HC judgment, above n 22, at [121].

⁴⁴⁶ At [122]–[126].

⁴⁴⁷ CA judgment, above n 23, at [189].

⁴⁴⁸ The "abuse tool" refers to Megaupload's direct delete function, by which a copyright owner could themselves disable a URL link they considered provided access to infringing content. See above at [218].

The appellants had also applied unsuccessfully in both the High Court and the Court of Appeal to adduce evidence of a review into the DMCA safe harbour provisions and whether ISPs should be obliged to detect and delete all infringing copies of a work rather than merely the copy identified in a take-down notice.⁴⁴⁹

Submissions of the United States

[383] The United States submits the safe harbour provisions for ISPs are a defence and do not apply to the appellants. Rather than permitting dishonest possession, the safe harbour provisions (and in particular s 92C) only provide a grace period for unwitting infringers.

Our assessment

[384] We accept the appellants' submission that ss 92B and 92C are not defences.⁴⁵⁰ Rather, if they apply, there is no copyright infringement and, if that is the case, s 131(1) cannot apply. We also accept that the Megagroup comes within the definition of ISP.

[385] We do not, however, accept that the Megagroup could avail itself of the protection of s 92B(2). As noted above, that subsection provides that an ISP cannot be subject to criminal sanctions merely because someone uses its services to infringe copyright "without more". In this case there is much more alleged. The allegation is that the Megagroup business model was designed to encourage and facilitate widespread copyright infringement. We also agree with the High Court that an interpretation of s 92B that would cover the Megagroup's activities would deprive s 92C of any effect.⁴⁵¹

[386] Turning now to s 92C, the protection is not available if the ISP knows or has reason to believe it is storing infringing material and does not delete the material or prevent access as soon as possible after becoming aware of the infringement. In this case the allegation is that the whole business design was to encourage users to ignore

⁴⁴⁹ See CA judgment, above n 23, at [263]–[264].

⁴⁵⁰ As we have decided that ss 92B and 92C are not defences, we are not to be taken as commenting on defences more generally or on whether or not there would be any obligation to adduce evidence to rebut any such defence to a *prima facie* standard.

⁴⁵¹ HC judgment, above n 22, at [125].

the Megaupload terms of service with regard to copyright, and that the appellants knew or at the very least had reason to believe that the Megasites contained a large amount of copyright-infringing material and failed to delete it or to prevent access, despite having the means to do so. Indeed, to the contrary, it is alleged that the Megagroup facilitated and encouraged access to infringing files by, among other things, copying the most popular content to Cogent Communications servers to enable more rapid distribution.⁴⁵² The alleged conduct means s 92C does not apply.

[387] The appellants' submissions on s 92C concentrated on the Megagroup's response to the copyright infringement notices (take-down notices) and the abuse tool. But the United States' case on knowledge is wider than this and does not suggest that the Megagroup's knowledge of infringement arose only because of the take-down notices.⁴⁵³ Even if the Megagroup's response to those notices or the design of the abuse tool was adequate, this is not a complete answer.⁴⁵⁴

[388] The response to the take-down notices certainly forms part of the allegations about knowledge on the basis that take-down notices are an assertion that copyright exists and belongs to someone else. By responding to the take-down notices, it is alleged that the Megagroup must have accepted there was copyright infringement with regard to the particular URL and the take-down notice must have alerted it to the fact that there was copyright infringement by other users having URLs to the same file. We are thus inclined to accept the above argument on this point, but it is not necessary to come to a definite conclusion. In any event, safe harbour provisions in the United States will be a focus at trial.

Conclusion on Copyright Act pathways

[389] Our conclusion that none of the carve-outs or exemptions from liability in the Copyright Act applies means that s 131(1)(c), (d)(i), (d)(iii) and (e) provide available extradition pathways for counts 2 and 4–8.

⁴⁵² See above n 218 for a description of how the Cogent Communications servers worked.

⁴⁵³ See above at [319]–[323].

⁴⁵⁴ This means we do not need to decide whether the appellants' response to the take-down notices was adequate or not. It is in any event appropriate that this is left to trial.

Final copyright issues

[390] The final copyright issues (apart from the code issue discussed in the next section) are:

- (a) the effect if only accessory liability is alleged; and
- (b) whether copyright needs to be proved, either for the purposes of s 24(2)(c) or under s 24(2)(d)(i).

What is the effect if only accessory liability is alleged?

Submissions of the appellants

[391] The appellants submit that the crux of most of the allegations is that they are party to offences committed by others. It is said that the ROC does not attempt to identify who the primary infringers were and certainly does not prove any offences were committed by the users of the sites.

[392] Mr Batato also submits that he is in a different position because he is not a shareholder in or director of any of the companies in the Megagroup. In his submission, there is no evidence of offending by him either as a principal or secondary party with regard to infringement of copyright.⁴⁵⁵

Our assessment

[393] All that is at issue at this stage is whether the alleged conduct would constitute an offence if it had occurred in New Zealand. Any question of proof arises under s 24(2)(d)(i) of the Extradition Act. For the purposes of s 24(2)(c), it does not matter therefore if the conduct alleged would be an offence as a principal or only as a secondary party. Further, count 2 is a conspiracy charge and this means all are charged as principals as part of that conspiracy. Conspiracies can involve unknown persons.

⁴⁵⁵ Section 66(1) of the Crimes Act imposes liability for parties to offending.

[394] With regard to Mr Batato, he was employed as Megaupload's chief marketing and sales officer.⁴⁵⁶ He is in effect in the same position as the other appellants because s 133 of the Copyright Act provides that, in certain circumstances, every person concerned in the management of the body corporate is also guilty if the body corporate is convicted of an offence against s 131. Further, because count 2 is a conspiracy charge, Mr Batato is essentially alleged to have ratified the earlier steps of the agreement to commit the offence that occurred before he joined the conspiracy.⁴⁵⁷ This means that he is alleged to have ratified the business design of the Megagroup when he joined the conspiracy.

Does copyright need to be proved for the purposes of s 24(2)(c) and (d) of the Extradition Act?

[395] The main question dealt with in this section is whether under s 24(2)(d)(i) there has to be prima facie proof of the existence of copyright for counts 4–8 for there to be an extradition pathway.⁴⁵⁸ Because of the way this was dealt with in the Courts below, we also make some comments on what has to be shown under s 24(2)(c) in this regard.

High Court decision

[396] In line with the view based on *Cullinane* (by which the High Court was bound), the High Court held that it was not necessary under s 24(2)(d)(i) to determine whether the conduct constituting the offence would have been an offence under New Zealand law had it occurred in New Zealand at the relevant time.⁴⁵⁹ In the Court's view, the enquiry directed by s 24(2)(d)(i) is whether there is prima facie proof that the person whose surrender is sought committed the acts or omissions constituting the extradition

⁴⁵⁶ As noted above at [14].

⁴⁵⁷ While these cases are about admissibility of statements made by co-conspirators before the person joined the conspiracy, they stand for the proposition that a later co-conspirator is taken as impliedly ratifying earlier steps taken by co-conspirators: *R v Mahutoto* [2001] 2 NZLR 115 (HC) at [35] per Chambers J; confirmed by *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 at [21]; and *Winter v R* [2019] NZSC 98, [2019] 1 NZLR 710 at [34]–[35].

⁴⁵⁸ As noted above at [164], this is the only issue on appeal related to s 24(2)(d)(i).

⁴⁵⁹ HC judgment, above n 22, at [281], applying *Cullinane*, above n 57.

offence. Consideration of foreign law is also not required.⁴⁶⁰ The Court said that the test relates to the conduct and not foreign law.⁴⁶¹

[397] The High Court therefore held that it was not necessary to prove copyright. The Court said that “the question of whether or not copyright subsisted in the relevant work in the United States at the relevant time is not an act or omission of the requested person and falls outside the scope of the enquiry”.⁴⁶² It would require an enquiry into foreign law, which the Court held the extradition court would be ill-suited to undertake. In the Court’s view, “The existence of copyright in the works at the time is a circumstance or ‘state of things’ that is transposed to New Zealand as part of the relevant legal environment against which the evidence of the requested person’s conduct must be assessed.”⁴⁶³

Court of Appeal decision

[398] The Court of Appeal held that the extradition court does not enquire into whether the alleged conduct would constitute an offence in the requesting country. The task is to enquire whether the conduct, if proved, would be a qualifying domestic offence if it had occurred in New Zealand and whether extradition for that offence is precluded or qualified under any applicable extradition treaty. The extradition court must then assess the evidence against the elements of that offence.⁴⁶⁴

[399] For the purposes of assessing sufficiency of evidence, the court must assume that the conduct happened in New Zealand, undertaking “some degree of transposition”.⁴⁶⁵ The Court referred to the comment of Duff J in *Re Collins*.⁴⁶⁶

... if you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and

⁴⁶⁰ At [283] and [294].

⁴⁶¹ At [284]–[293], relying on *McVey*, above n 60, at [40] and [73]; *Norris*, above n 63, at [89]; *Griffiths*, above n 193, at [85]–[87]; and *Federal Republic of Germany v Schreiber* (2006) 264 DLR (4th) 211 (ONCA) at [42]–[43].

⁴⁶² At [294].

⁴⁶³ At [294].

⁴⁶⁴ CA judgment, above n 23, at [124].

⁴⁶⁵ At [125], citing *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556 at [107] per Lord Millett.

⁴⁶⁶ At [125], quoting *Re Collins*, above n 179, at 103.

rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged.

[400] The Court considered that transposition of circumstances is undertaken when identifying an extradition offence under s 24(2)(c) but also when assessing sufficiency of evidence under s 24(2)(d)(i).⁴⁶⁷ The appellants' argument that transposition is confined to s 24(2)(c) and does not apply to s 24(2)(d) was therefore rejected.

[401] The Court, however, said that the extent to which a court must engage in transposition of conduct and circumstances will vary depending on the circumstances. It should be done only as far as necessary and care should be taken not to weaken the effectiveness of the double criminality principle.⁴⁶⁸

[402] In the Court's view, the transposition process at both the s 24(2)(c) and (d) stages will import circumstances not connected to the core criminality.⁴⁶⁹ At the s 24(2)(d)(i) stage, it is unnecessary to test the evidence for sufficiency against any imported elements that are not part of the core criminality alleged. A refusal to surrender a person on such non-essential features (for example, policy differences disconnected from the core criminality at issue) would be inconsistent with the fundamental features of the extradition regime, including comity between states.⁴⁷⁰

[403] In this case the Court of Appeal agreed with the High Court that copyright status is inessential and not part of the appellants' conduct. Rather, the extradition court should assume the works enjoy copyright status in New Zealand law when assessing the sufficiency of evidence. It therefore agreed with the High Court that copyright need not be proved for the purposes of s 24(2)(d)(i) of the Extradition Act.⁴⁷¹

⁴⁶⁷ At [126], relying on *Schreiber*, above n 461, at [38]–[43]; *Griffiths*, above n 193, at [86]; and *Re Collins*, above n 179, at 103.

⁴⁶⁸ At [129].

⁴⁶⁹ At [127].

⁴⁷⁰ At [128].

⁴⁷¹ At [130], [132] and [330(b)].

Submissions of the appellants

[404] It seems to be accepted by Messrs Ortmann, van der Kolk and Dotcom that proof of copyright is not required for the purposes of s 24(2)(c).⁴⁷²

[405] The appellants submit, however, that the Court of Appeal erred by finding that the existence of copyright need not be proved to a prima facie standard by the United States under s 24(2)(d)(i) of the Extradition Act. They submit that s 24(2)(d)(i) requires sufficient evidence of each essential element of the offence, which for copyright infringement includes whether the work is subject to copyright.⁴⁷³ Infringement cannot be determined, it is submitted, without first determining whether and to what extent the work in question is subject to copyright. Identifying the work is a further prerequisite and must be done before it can be determined whether the work is subject to copyright.

[406] In their submission, the Court of Appeal created a “fundamental disconnect between the essential conduct which is mapped against the relevant New Zealand offence for the purposes of s 24(2)(c) and the conduct the requesting state is required to prove to a prima facie standard for the purposes of s 24(2)(d)”. They say that their argument is bolstered by the fact that knowledge is required for the criminal offence under s 131 and knowledge cannot exist without knowing whether the work in question is subject to copyright.

[407] On behalf of Messrs Ortmann and van der Kolk it is submitted that the existence of copyright has to be proved under both New Zealand and United States law. In their submission, s 24(2)(d)(i) does not dispense with proof of foreign law issues where the extradition court needs to consider matters of conduct for the purpose of assessing whether a prima facie case has been established.⁴⁷⁴

⁴⁷² The point does not appear to have been addressed by Mr Batato.

⁴⁷³ The Court of Appeal addressed this point specifically in relation to counts 4–8 because this was the question on which the High Court granted leave: see HC leave judgment, above n 35, at [49(b)]; and CA judgment, above n 23, at [132].

⁴⁷⁴ Citing *Re Collins*, above n 179, at 87–90.

Submissions of the United States

[408] The United States submits that the legal status of any particular file does not form part of the conduct that makes a foreign offence an extradition offence and so s 24(2)(d)(i) does not require evidence of the file’s legal status. The United States submits that nothing in s 24(2)(d)(i) requires such legal status to be proved under either New Zealand or United States law.

[409] The United States supports the High Court and Court of Appeal conclusions that copyright is a state and not part of the conduct assessment, referring to the Australian decision *Griffiths* on this point. In *Griffiths*, the Court held that the “conduct constituting the offence” involves only conduct in relation to a type of work that could be protected by copyright law and did not require proof that copyright subsisted in the relevant work (software in that case) in either the United States or Australia.⁴⁷⁵

[410] In any event, it is submitted that the existence of copyright can be inferred from the evidence in the ROC, as the Court of Appeal found.⁴⁷⁶ It is submitted that this finding, which relates to the existence of a prima facie case, cannot be challenged on appeal as it is outside the scope of the leave granted by this Court. The leave granted by this Court excluded from its ambit any application for leave seeking to challenge the refusal of leave by the Court of Appeal.⁴⁷⁷ Because the Court of Appeal denied special leave on all questions concerning the existence of a prima facie case and satisfaction of s 24(2)(d)(i), the United States says this evidential finding cannot be challenged in this Court.

Transposition

[411] Before discussing the issue of proof of copyright, it is necessary to discuss the concept of transposition because it was relied on in the Courts below and in submissions before us. We do so only briefly because, as we explain, we do not see it as having any bearing on this appeal. We make two preliminary points.

⁴⁷⁵ *Griffiths*, above n 193, at [85]–[86].

⁴⁷⁶ CA judgment, above n 23, at [252].

⁴⁷⁷ SC leave judgment, above n 25, Order C.

[412] The first is that the term “transposition” in the extradition context is not usually used to describe the hypothetical exercise whereby an extradition court assumes for the purposes of the s 24(2)(c) enquiry that the conduct occurred in New Zealand. The term is usually used to cover the situation where part of the requesting country’s environment is “transposed” to New Zealand in the manner we describe below.⁴⁷⁸

[413] The second preliminary point is a very important one. It is necessary to be careful to keep the distinction between what is required for finding an equivalent New Zealand offence under s 24(2)(c) and what is required for the exercise of assessing the sufficiency of evidence under s 24(2)(d)(i).

[414] As we have explained, when considering whether the requirements of double criminality are met under s 24(2)(c), the extradition court must consider whether the conduct constituting the foreign offence, if committed in New Zealand at the time it is alleged to have occurred, would, if proved, have constituted an offence against New Zealand law attracting the requisite penalty.⁴⁷⁹ As the Law Commission has said recently, the two offences must have a degree of similarity, but it does not matter if the acts or omissions are categorised or named differently, or if the constituent elements of the offences differ.⁴⁸⁰

[415] The Law Commission went on to say that, in relying on the fiction that the facts giving rise to what would be foreign offending occurred in New Zealand, sometimes there will be no parallel offence. This can arise for technical reasons because of the way the New Zealand offences are described. In such circumstances, in order to undertake the hypothetical exercise under s 24(2)(c) of finding whether there is an equivalent New Zealand offence, certain traits of the foreign country may, where necessary, be transposed into the New Zealand context to allow the double criminality assessment to take place. No more is changed than is necessary because,

⁴⁷⁸ See above at [399], where the Court of Appeal relied on Duff J’s comments in *Re Collins*, above n 179, at 103. While we adopt the comments of Duff J at 101 (see above at [159]), we think the comments of Duff J at 103 put the bar too high. Rather, as discussed below at [415], transposition of traits of the foreign country occurs only where necessary and to the extent possible.

⁴⁷⁹ See above at [151](c).

⁴⁸⁰ Law Commission, above n 144, at [6.18].

if taken to the extreme, the exercise of transposing the traits of the foreign country could undermine the entire point of having a double criminality requirement.⁴⁸¹

[416] The Law Commission saw tax law as the best example of where transposition is justified.⁴⁸² It said that a person may be charged with tax evasion in one country but it will never be the same as tax evasion in New Zealand as there will inevitably be significant differences in the way the countries structure their tax regimes.⁴⁸³ Beyond tax offending, the Law Commission thought that it is too difficult to draw a bright line in relation to what is and what is not appropriate to transpose.⁴⁸⁴

[417] The next issue is the relevance of transposition for s 24(2)(d). That paragraph serves two important purposes. As noted above, it is a double criminality provision.⁴⁸⁵ Secondly, it has the function of ensuring there is evidence of the alleged conduct to a prima facie standard. This is why it is singled out for special protection in s 11(2).⁴⁸⁶ Section 24(2)(d)(i) thus not only ensures there is an equivalent offence in the requesting country but also ensures a person is only extradited where the evidence of the offence suffices to justify a trial.

[418] If there has been a need for transposition at the s 24(2)(c) level, this does not absolve the requesting country from the obligation to provide evidence of the relevant conduct to the requisite standard. If it did, the second function of s 24(2)(d) would not be fulfilled. Where transposition has occurred, the s 24(2)(d) exercise may require consideration of the elements of the foreign offence to assess what the relevant conduct is and therefore the evidence required for it. The High Court and Court of Appeal were wrong to the extent they were suggesting that there does not need to be evidence of any transposed conduct for the purposes of s 24(2)(d).⁴⁸⁷ We do agree with the

⁴⁸¹ At [6.19]–[6.20].

⁴⁸² At [6.19]. An example of extradition for tax offending is the Canadian case of *Schreiber*, above n 461.

⁴⁸³ At [6.20]. There may be a limit to the level of generality that is allowable even in tax law: for example, where extradition is sought for taxes such as wealth, estate or capital gains taxes that do not exist in New Zealand. It is not necessary for us to come to any view on this issue for the purposes of this appeal. We note that, in any event, there may be Crimes Act pathways for extradition in such cases if specialist tax offences do not apply.

⁴⁸⁴ Another example may be oaths: see *Re Collins*, above n 179; and *Mewes*, above n 65.

⁴⁸⁵ See above at [117].

⁴⁸⁶ See above at [118] and [148](c).

⁴⁸⁷ HC judgment, above n 22, at [294]; and CA judgment, above n 23, at [130].

Court of Appeal, however, that the evidence required is of the conduct rather than the technical, non-essential elements of the foreign offence.⁴⁸⁸

[419] Overseas authorities on transposition do not assist in answering the question of the extent to which evidence of transposed elements is required for the purposes of s 24(2)(d). We note that *Griffiths*, which assessed the “conduct constituting the offence”, was only looking at an exercise equivalent to s 24(2)(c).⁴⁸⁹ *McVey* made it clear that the extradition court is to consider the conduct according to domestic law, which falls under the equivalent to the s 24(2)(c) exercise.⁴⁹⁰

This case

[420] Given the network of international copyright treaties, copyright can be seen as effectively universal. We thus do not consider there was a need for any transposition at either the s 24(2)(c) or s 24(2)(d)(i) stage in this case.⁴⁹¹ This also disposes of the argument on the part of Messrs Ortmann and van der Kolk that proof of copyright under United States law is required under s 24(2)(d)(i). If proof of copyright is required, it will be proof of copyright under New Zealand law.

[421] We deal first with s 24(2)(c). The exercise under that paragraph is to assess whether the alleged conduct would constitute an offence if it had occurred in New Zealand. It is a hypothetical exercise. As a result, the appellants were right to concede that copyright does not need to be proved for the purpose of s 24(2)(c). Instead, what needs to be shown is that the type of works at issue are capable of attracting copyright protection in New Zealand.⁴⁹² That is established in this case given that the type of works outlined in the counts are in the categories outlined in s 14(1) of the Copyright Act and the fact the works were recent (the copyright term

⁴⁸⁸ CA judgment, above n 23, at [128].

⁴⁸⁹ *Griffiths*, above n 193, at [85]–[87]. See also Extradition Act (Cth), s 19(2)(c) (there is no requirement equivalent to New Zealand’s s 24(2)(d) exercise).

⁴⁹⁰ *McVey*, above n 60, at 514–515, relying on the now repealed Extradition Act RSC 1970 c E-21, ss 2, 18(1)(b) and 34 to conclude that “what the extradition judge must determine is whether a prima facie case exists that the act charged constitutes a crime according to Canadian law”.

⁴⁹¹ There is no question in this case of a relevant mismatch between the copyright provisions in the United States and in New Zealand. For example, the request does not relate to a copyright work where the copyright would have expired in New Zealand but not in the United States. We therefore do not need to deal with the issue of what would occur in the event of such a mismatch.

⁴⁹² *Griffiths*, above n 193, at [86]. We note that the Court of Appeal explicitly expressed no view on this proposition: CA judgment, above n 23, at [130], n 203.

will not have expired). There was no argument before this Court that the works at issue were not original.

[422] Turning now to s 24(2)(d)(i), contrary to the view of the Court of Appeal and the submissions of the United States,⁴⁹³ we consider that existence of copyright is integral to the offences under the Copyright Act.⁴⁹⁴ A person can only be guilty of an offence under s 131(1) of the Copyright Act if that person performs one of the criminalised acts in relation to a copy of a work, knowing that the copy infringes copyright. The relevant conduct – knowing infringement – is so inextricably linked to the existence of copyright that the conduct only has meaning as an offence if copyright is also proved.

[423] That this is the case is supported by s 133A of the Copyright Act which deals with evidence in criminal proceedings:

133A Evidence in proceedings

- (1) In proceedings for an offence against section 131, whether by way of a hearing in the first instance or by way of appeal or otherwise, the court may receive an affidavit as evidence of the existence and ownership of copyright.
- (2) A party to the proceedings may apply to the court to require a person whose evidence has been given by affidavit to attend the proceedings for the purposes of cross-examination; and the court may make an order accordingly.

[424] A prima facie case as to existence and ownership of copyright, which is required under s 24(2)(d)(i) for the copyright counts, may be shown either by direct assertion by the owner as envisaged by s 133A(1) of the Copyright Act or by inference from other evidence. We note that under s 133A an assertion of the existence and ownership of copyright by affidavits of the owner would, subject to contrary evidence (including that of cross-examination at trial), be accepted as sufficient proof of the existence and ownership of copyright. Section 133A(2) suggests that it is envisaged that, once the requirement in s 133A(1) is met, any challenges to the existence and ownership of copyright will be dealt with at trial.

⁴⁹³ CA judgment, above n 23, at [130], [132] and [330(b)]. See the United States' submission above at [409].

⁴⁹⁴ We accept the submission of the United States that this does not apply to the conspiracy charge.

[425] Whether there has been proof of copyright to the required standard must be seen against the background that the United States is an exempted country and can use the ROC procedure outlined in s 25 of the Extradition Act for the purposes of any determination under s 24(2)(d)(i). Section 25(2)(a) provides that the ROC must contain “a summary of the evidence acquired to support the request for the surrender of the person”. In *Dotcom v United States of America* this Court said that, where the ROC process is used, “the evidence may be presented in summary form rather than fully recited”.⁴⁹⁵ Not all documents or exhibits relied on have to be produced.⁴⁹⁶ Further, the “certification provisions in s 25 mean that, in general, reliability of the evidence presented by the requesting state is presumed, although that is rebuttable”.⁴⁹⁷

[426] In this case, the ROC says that representatives of various industry groups, as well as other copyright owners, will testify as to the infringing copies of copyright works that were available on the Megasites, that they were copyrighted at the time they were downloaded and that the Megagroup had no authorisation to reproduce or to distribute the relevant copyright works.⁴⁹⁸

[427] The United States also points to the following factors from which the existence and ownership of copyright can be inferred.⁴⁹⁹ For count 4, the existence and ownership of copyright can be inferred from the pre-release timing and circumstances of Mr van der Kolk’s upload of the film *Taken* and the name of the file (“Taken 2008 DVDRip Repack [A Release Lounge H264 By Micky22].mp4”).

⁴⁹⁵ *Dotcom* SC disclosure judgment, above n 69, at [190] per McGrath and Blanchard JJ. William Young J agreed with that paragraph at [228], n 248 and [229], n 249. They formed the majority on this point. The reasons of Glazebrook J were consistent with this finding but did not explicitly endorse [190]. The United States relies on *United States of America v Doak* 2015 BCCA 145, (2015) 323 CCC (3d) 219 at [29]–[30]; and *United States of America v Fraser* 2015 BCSC 604, 121 WCB (2d) 377 at [41]–[43] to similar effect.

⁴⁹⁶ At [145] per McGrath and Blanchard JJ. See also the comments of McGrath and Blanchard JJ at [146] that the reference to “other relevant documents” in s 25(2)(b) is to documents which the requesting state relied on but which it was not convenient or feasible to summarise in the ROC (with whom William Young J agreed at [241] and Glazebrook J agreed at [252]–[256]); compare at [42]–[43] per Elias CJ that the reference in s 25(2)(b) to “other relevant documents” must include documents which otherwise would be produced as exhibits.

⁴⁹⁷ At [190] per McGrath and Blanchard JJ.

⁴⁹⁸ We comment that it is understandable given the sheer volume of allegedly infringing copies on the Megasites that this was summarised in this fashion in the ROC. This is consistent with the aim of the ROC procedure: *Dotcom* SC disclosure judgment, above n 69, at [191]–[192] per McGrath and Blanchard JJ and [270] per Glazebrook J.

⁴⁹⁹ By “ownership”, we mean ownership by other than the Megagroup and/or its users.

[428] For counts 5–7, copyright status can be inferred from the fact that the files viewed by United States investigators were all well-known and recent commercial films, television programmes and software, and that identified URLs were deleted in response to take-down notices by copyright owners.

[429] For count 8, copyright status and ownership can be inferred from the fact that the owners of the YouTube clips asserted copyright in the works uploaded on that website and that infringing copies were reproduced on the Megasites without the owners’ authorisation. There was also evidence that the appellants acquired these clips by way of their own automated download software, “praying” that YouTube was not running a “fraud detection system”.

[430] We agree with the Court of Appeal that:⁵⁰⁰

It is unrealistic to suggest that copyright did not attach to major films such as the Lord of the Rings trilogy, or to ignore the tens of thousands of take-down notices issued by copyright owners, or to overlook evidence that the appellants themselves admitted to being pirates.

[431] The existence and ownership of copyright must be proved to a prima facie standard under s 24(2)(d)(i) of the Extradition Act. We conclude that this requirement was met by the material in the ROC, either directly or by inference.⁵⁰¹

Conclusion on copyright issues

[432] In summary, our conclusions on the s 131(1) issues are:

- (a) Digital files are covered by s 131(1).⁵⁰²
- (b) The conduct alleged shows sufficient specific knowledge of infringing copies on the Megasites to meet the knowledge requirement in s 131(1).⁵⁰³

⁵⁰⁰ CA judgment, above n 23, at [252].

⁵⁰¹ Because of our conclusion on this issue we do not need to deal with the United States’ submission (see above at [410]) that the issue of a prima facie case is not within the grant of leave. But note comments at n 651.

⁵⁰² See above at [291]–[314].

⁵⁰³ See above at [315]–[324].

- (c) The conduct alleged comes within s 131(1)(c) because:
- (i) Digital files can be possessed.⁵⁰⁴
 - (ii) Sufficient control is alleged for the appellants to be in possession of the infringing files. The infringing files were stored on servers physically possessed by the Megagroup and on servers under its control. The Megagroup also had the right to delete infringing files under the terms of service.⁵⁰⁵
 - (iii) It is alleged the appellants were in possession of the files for the purpose of copyright infringement. The use of third-party linking websites and the breach of the reproduction right and the communication right was alleged to be part of the Megagroup business design.⁵⁰⁶
- (d) The conduct alleged would amount to distribution, selling or letting for hire, and offering to sell or let for hire infringing copies in breach of s 131(1)(d)(i) and (iii) and s 131(1)(e).⁵⁰⁷

[433] Our conclusions on the exemptions and carve-outs are as follows:

- (a) The time bar in s 131A was limited to summary proceedings and therefore did not apply in this case.⁵⁰⁸
- (b) The infringing copies were neither incidental nor transient for the purposes of ss 41 or 43A.⁵⁰⁹
- (c) The Megagroup companies are ISPs as defined in s 2(1), but they are not protected by ss 92B and 92C because the conduct alleged was more

⁵⁰⁴ See above at [326]–[330].

⁵⁰⁵ See above at [331]–[334].

⁵⁰⁶ See above at [335]–[337].

⁵⁰⁷ See above at [341]–[345].

⁵⁰⁸ See above at [350]–[355].

⁵⁰⁹ See above at [356]–[366].

than being a passive service provider. Further, they did not remove material they knew was infringing.⁵¹⁰

[434] The conduct alleged in relation to counts 2 and 4–8 would, if it had occurred in New Zealand, amount to criminal offences under s 131(1)(c), (d)(i), (d)(iii) and (e) attracting the requisite penalty. Those provisions therefore provide available extradition pathways for counts 2 and 4–8.⁵¹¹

[435] With regard to the final copyright issues we conclude:

- (a) It does not matter if only accessory liability is alleged.⁵¹²
- (b) Copyright does have to be proved to the prima facie standard for the purposes of s 24(2)(d)(i) with regard to counts 4–8, but that requirement was met.⁵¹³

E CRIMES ACT

Crimes Act pathways

[436] The next section of the judgment examines whether, for the purposes of s 24(2)(c), the conduct alleged would be an offence under the Crimes Act. Before we consider this question, we need to deal with the appellants' submission that the Copyright Act is a code and that therefore the Crimes Act does not apply.

Is the Copyright Act a code?

[437] The first issue is whether the Copyright Act is a code which would, as the appellants allege, exclude the application of the Crimes Act to the type of conduct alleged in this case.

⁵¹⁰ See above at [384]–[388].

⁵¹¹ See above at [389].

⁵¹² See above at [391]–[394].

⁵¹³ See above at [420]–[431].

High Court decision

[438] The High Court considered that Parliament had chosen not to criminalise breach of the communication right under s 131.⁵¹⁴ It held, however, that the Copyright Act is not a code. This meant that Crimes Act provisions can apply to specific types of copyright infringement, even though in the High Court's view, Parliament had chosen not to criminalise such conduct under the Copyright Act.⁵¹⁵

Court of Appeal decision

[439] In respect of the argument that the Copyright Act is a code and therefore excludes criminalisation for conspiracy under the Crimes Act, the Court of Appeal agreed with the High Court's analysis and its rejection of the appellants' argument.⁵¹⁶

Submissions of the appellants

[440] The appellants submit that the Copyright Act is a code and is the only pathway to extradition. The appellants rely on s 14 of the Copyright Act, which provides that copyright exists in accordance with that Act, and s 225(2), which provides that no copyright shall exist otherwise than under the Copyright Act or some other enactment in that behalf.

[441] They also rely on *World TV Ltd v Best TV Ltd [Claim]*, in which Baragwanath J determined that the purpose of the Copyright Act is to provide an exhaustive legislative code.⁵¹⁷ In that case it was held that a general provision under the Fair Trading Act 1986 was inconsistent with a specific provision in the Copyright Act. The Fair Trading Act provision therefore should be read down so as to be consistent with the Copyright Act under the principle of *generalia specialibus non derogant*.⁵¹⁸

⁵¹⁴ HC judgment, above n 22, at [183]. We have of course come to a different view on this point: see above at [309]–[310].

⁵¹⁵ At [111]–[112], relying on *R v Walters* [1993] 1 NZLR 533 (CA) at 537 (a case about a conspiracy to evade the Fisheries Act 1983). The High Court said that its finding was subject to the effect of the safe harbour provisions.

⁵¹⁶ CA judgment, above n 23, at [168]–[169].

⁵¹⁷ *World TV Ltd v Best TV Ltd [Claim]* (2011) 11 TCLR 247 (HC) at [48].

⁵¹⁸ At [56].

[442] The appellants submit that this principle of statutory interpretation would apply even if this Court did not accept that the Copyright Act was a code. The appellants submit therefore that, as the alleged conduct is not an offence under the Copyright Act, it cannot be an offence under more general legislation such as the Crimes Act. It is submitted that to go outside the Copyright Act and rely on general Crimes Act dishonesty provisions both subverts Parliament's intent and seeks to extradite the appellants for a civil wrong.

Submissions of the United States

[443] The United States supports the Court of Appeal's finding that the Copyright Act is not a code and submits that, if the drafters of the Copyright Act had intended to exclude the application of the Crimes Act to copyright, express language would have been used. The United States says that while the Copyright Act does claim as its exclusive domain the establishment of copyright, it does not claim similar exclusivity over remedies for misconduct in relation to copyright works. Moreover, even if the Copyright Act was a code, it does not necessarily preclude prosecutions using the Crimes Act.⁵¹⁹

Our assessment

[444] The appellants' argument largely falls away as we have held that the alleged conduct does come within s 131(1) of the Copyright Act.⁵²⁰ The appellants would not therefore be extradited for a civil wrong.

[445] We also reject any wider argument based on the Copyright Act being a code. Parliament's intention in the Crimes Act was broad-reaching: it cuts across all activity. This is clear from s 10 of the Crimes Act which provides that, where conduct constitutes an offence under the Crimes Act and any other Act (here, the Copyright Act), the offender may be prosecuted and punished under either Act. Like the High Court and the Court of Appeal, we consider that there is no reason for limiting

⁵¹⁹ Relying on s 10 of the Crimes Act.

⁵²⁰ We do not need to decide whether *World TV*, above n 517, would be the correct approach in other situations.

the words of either s 131(1) of the Copyright Act or the Crimes Act provisions in such a way to exclude the application of the Crimes Act.

Availability of the Crimes Act pathways

[446] The key question in this part of the judgment is whether the various provisions of the Crimes Act provide a pathway by which criminality can be established, in other words, whether the requirements of s 24(2)(c) of the Extradition Act are met. Given the position we have reached on the availability of s 131 of the Copyright Act as a pathway, it is not strictly necessary for us to consider the possible Crimes Act pathways for counts 2 and 4–8. We nonetheless address all of the counts fairly briefly with a focus on those Crimes Act offences which do not raise questions of more general application, as we discuss shortly.⁵²¹

[447] We deal with the requirements of s 24(2)(c) by considering each count and the relevant pathways for that count in turn. Adopting the approach of the Court of Appeal, count 2 is addressed first and count 1 is addressed last.

Count 2: conspiracy to commit copyright infringement

[448] As we have noted, the essence of the conduct alleged in relation to this count is that the appellants conspired “to commit copyright infringement through Megaupload and associated sites for financial gain”.⁵²² The Court of Appeal noted that the heart of the conspiracy “rests upon the claim that Megaupload was designed to encourage and profit from unlawful infringement while sheltering behind a pretence that it was a mere storage provider”.⁵²³

[449] The Courts below accepted that both the relevant Crimes Act pathways relied on were available for count 2: s 228 (dishonestly taking or using a document) and s 249 (accessing computer system for dishonest purpose).⁵²⁴ We deal with s 228. We see the issues relating to s 249 as raising questions about the scope of that section

⁵²¹ See below at [449].

⁵²² CA judgment, above n 23, at [170].

⁵²³ At [21].

⁵²⁴ CA judgment, above n 23, at [181] and [185]; HC judgment, above n 22, at [146], [160] and [168]; and DC judgment, above n 21, at [609] and [615].

which are better addressed in the context of a criminal trial in New Zealand. In terms of s 24(2)(c), there need be no more than one pathway for a count in order for the person to be extradited and stand trial in respect of the count in the requesting country. For that reason, we do not see the principle of speciality as requiring us to consider all possible pathways. The effect of the principle is that an individual may stand trial only on the offences for which he or she is extradited and not for other pre-extradition offences.⁵²⁵

Section 228: Dishonestly taking or using document

[450] Section 228 of the Crimes Act provided at the relevant time:⁵²⁶

Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to obtain any property, service, pecuniary advantage, or valuable consideration,—

- (a) dishonestly and without claim of right, takes or obtains any document; or
- (b) dishonestly and without claim of right, uses or attempts to use any document.

[451] “Dishonestly” means:⁵²⁷

... in relation to an act or omission, ... done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority

[452] “Document” is defined broadly and means “a document, or part of a document, in any form; and includes, without limitation”:⁵²⁸

- (a) any paper ... ; or
- (b) any photograph, ... ; or

⁵²⁵ *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480 at [82], n 68 per McGrath and Ellen France JJ; and Anne Warner La Forest *La Forest’s Extradition to and from Canada* (3rd ed, Canada Law Book, Aurora (ON), 1991) at 31–32. See also Extradition Act, ss 30(5), 40(3)(c) and 64; and NZ/US Treaty, art 13.

⁵²⁶ As noted above at [144], the relevant time for assessing whether the conduct would have constituted a New Zealand offence if it had occurred in New Zealand is the time at which the conduct occurred: s 4(2) and (3). The conduct here is said to have occurred from September 2005 to January 2012 so the provisions of the Crimes Act referred to reflect the position over that period. We note that the changes to this provision which occurred in 2015 are not material.

⁵²⁷ Crimes Act, s 217 definition of “dishonestly”.

⁵²⁸ Section 217 definition of “document”.

- (c) any disc, tape, wire, sound track, card, or other material or device in or on which information, sounds, or other data are recorded, stored (whether temporarily or permanently), or embodied so as to be capable, with or without the aid of some other equipment, of being reproduced; or
- (d) any material by means of which information is supplied, whether directly or by means of any equipment, to any device used for recording or storing or processing information; or
- (e) any material derived, whether directly or by means of any equipment, from information recorded or stored or processed by any device used for recording or storing or processing information

Submissions

[453] On appeal, the appellants' main challenge to the availability of this pathway is what can be described as the "s 131" or the "copyright" point. There are two main aspects to this argument. The first of these is that the United States' claim this conduct is criminal is based on the impact the appellants' actions are said to have had on third party rights. These alleged rights arise under copyright law. However, the alleged conduct is not criminalised under the Copyright Act, and since that Act is a code (it is argued), the alleged conduct cannot be criminalised under the Crimes Act. We have already rejected both of those arguments and so proceed to consider the claimed Crimes Act pathways. The second aspect relates to the elements of the charge. It is said that for this count (and for all of the counts) deliberate infringement of copyright provides the element of dishonesty but cannot be proved when the appellants have not knowingly infringed copyright.

[454] The appellants say that the availability of s 228 turns on dishonesty. They argue that this cannot be established for a number of reasons reflecting the copyright point discussed above. In particular, the appellants say:

- (a) There cannot be dishonesty if there is no copyright infringement and no knowledge of copyright infringement.
- (b) The alleged dishonesty is the breach of the very right created, but not criminalised, by the Copyright Act.

- (c) There cannot be dishonesty where the appellants held a genuine belief that the Megagroup's processes were compliant with the DMCA and consistent with standard industry practice or where the Court of Appeal wrongly equated the response to DMCA take-down notices with dishonesty and/or an intent to deceive.
- (d) Deleting a link in response to a take-down notice that referred only to deletion does not equate to dishonesty and/or intent to deceive. In this respect, it is said that the Court of Appeal conflated the absence of a safe harbour with the presence of criminal liability. Finally, relying on *R v Hayes*,⁵²⁹ it is emphasised that a mistaken belief in facts or circumstances that would, if correct, exculpate does not have to be reasonable or based on reasonable grounds, although here the appellants say that it was.

[455] Finally, Messrs Ortmann and van der Kolk submit the United States' approach is deficient because it does not begin with the conduct by virtue of which the United States charge is said to have been committed. The complaint is that the United States first identifies the components of the Crimes Act offences and then asserts there is an allegation in the United States' case which can be related. The argument is that the conduct therefore is "shoehorned" or unnaturally shaped so as to fit into the counterpart offence. Mr Illingworth submits that this approach is inconsistent with *Norris*.⁵³⁰ In effect, however, this is another way of saying that what is alleged is that the appellants conspired to induce others to infringe copyright.

The Court of Appeal

[456] In upholding the High Court's conclusion that s 228 of the Crimes Act was an available pathway, the Court of Appeal noted that, apart from the challenge based on s 131 of the Copyright Act, there was no real challenge to the Judge's finding on this point.⁵³¹ In terms of the argument made before us, similarly, a large part of the argument has disappeared. That is because we have determined there is an extradition

⁵²⁹ *R v Hayes* [2008] NZSC 3, [2008] 2 NZLR 321 at [52]–[58].

⁵³⁰ *Norris*, above n 63.

⁵³¹ CA judgment, above n 23, at [185].

pathway under s 131 of the Copyright Act (although the Court of Appeal did not consider liability under s 131 was required in any event) and have rejected the argument that the Copyright Act is a code.⁵³²

Availability of s 228 pathway

[457] In terms of the first element, the District Court focussed on s 228(b) (using a document). We consider that the conduct alleged fits better under s 228(a) (taking or obtaining a document) but, in any event, that is the only material difference between the elements. The elements of the s 228(a) offence are as follows:⁵³³

- (a) taking or obtaining a document;
- (b) with the intent to obtain a pecuniary advantage or valuable consideration; and
- (c) dishonestly and without claim of right.

[458] We take each element in turn.

[459] “[O]btain” is defined in s 217 to mean “obtain” or “retain” for the defendant or for any other person. The conduct alleged involves “obtaining” a document in the sense of retaining a document by hosting and distributing the infringing files (including the acquisition of YouTube files). The High Court, in determining that s 228 provided an extradition pathway for count 2, made this point.⁵³⁴

[460] Next, in terms of the second element, the intent to obtain a pecuniary advantage, the conduct alleged here is that the appellants acted to enhance their financial position. That comes within the definition of “pecuniary advantage” which

⁵³² See above at [445].

⁵³³ The elements of the s 228(b) offence are the same except that s 228(b) requires the “use or attempted use” of a document, rather than “taking or obtaining” a document: DC judgment, above n 21, at [612]. The identification of these elements by the District Court is consistent with the discussion of the elements in *Hayes*, above n 529, at [23].

⁵³⁴ HC judgment, above n 22, at [144].

means “simply anything that enhances the accused’s financial position”.⁵³⁵ This Court in *Hayes* stated:⁵³⁶

It is that enhancement which constitutes the element of advantage. If what the accused person is seeking to obtain is of that kind, it does not matter whether he or she is entitled to it, ...

[461] In this case, the allegation is that the use of the copyright material was for financial gain through selling premium subscriptions and advertising. The alleged benefits conferred on the appellants as a consequence of the alleged conduct would, if the conduct had occurred in New Zealand, comprise a pecuniary advantage for the purposes of s 228.

[462] The element of dishonesty is met where, as the High Court Judge put it, the conduct alleged.⁵³⁷

... distinguishes Megaupload from a cloud storage company that acts purely as a cyber-locker. The essence of the conduct charged in count 2 is that Megaupload’s business was based on making use of popular copyright infringing material stored on its servers to generate subscription and advertising revenue.

[463] The allegation of wilful infringement of copyright involves dishonesty as, if proved, it is an act done without a belief that there was express or implied consent to, or authority for, the act from the copyright holder.

[464] Finally, it is necessary to deal with the appellants’ argument based on *Hayes*. In *Hayes*, this Court concluded there was no “reasonableness qualification” of the relevant beliefs.⁵³⁸ In other words, there was no requirement that the belief referred to in the definitions of dishonestly in s 217 and claim of right in s 2 must be reasonable, although the Court accepted that reasonableness would be relevant to determining whether the belief was actually held. It is, however, difficult to see how this assists the appellants where the alleged conduct is based on setting up and running a business with the purpose of profiting from the unlawful infringement of copyright.

⁵³⁵ *Hayes*, above n 529, at [16].

⁵³⁶ At [16].

⁵³⁷ HC judgment, above n 22, at [144].

⁵³⁸ *Hayes*, above n 529, at [58].

[465] For these reasons, the Court of Appeal was correct as to the availability of an extradition pathway for this count. Section 228(a) of the Crimes Act provides an available extradition pathway.⁵³⁹

Count 3: conspiracy to commit money laundering

[466] In the superseding indictment, the relevant conduct alleged is that the appellants conspired to commit these money laundering offences:

- (a) to knowingly conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, which in fact involved the proceeds of the specified unlawful activities of criminal copyright infringement and wire fraud with the intent to promote the carrying on of the specified unlawful activities of criminal copyright infringement and wire fraud, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i);
- (b) to transport, transmit, and transfer and attempt to transport, transmit, and transfer a monetary instrument and funds from a place in the United States to and through a place outside the United States, and to a place in the United States from or through a place outside the United States, with the intent to promote the carrying on of the specified unlawful activities of criminal copyright infringement and wire fraud, in violation of Title 18, United States Code, Section 1956(a)(2)(A); and
- (c) to knowingly engage and attempt to engage in monetary transactions in criminally derived property of a value greater than \$10,000 that is derived from the specified unlawful activities of criminal copyright infringement and wire fraud, in violation of Title 18, United States Code, Section 1957.

[467] As the Court of Appeal noted:

[203] The essence of the alleged conduct is the transfer of funds which were the proceeds of criminal activity at various times between August 2005 and July 2011.

[468] This count can be dealt with briefly. The starting point is, as the Court of Appeal recorded, that the United States accepted that the reversal of *Cullinane* caused

⁵³⁹ The offence is punishable by a maximum term of seven years' imprisonment. This meets the requirement in s 4(2) of the Extradition Act that the maximum penalty for the New Zealand offence is imprisonment of not less than 12 months.

a problem for the United States in terms of finding that count 3 was an extradition offence. The Court noted:⁵⁴⁰

The United States was hitherto reliant on art II.19 of the New Zealand – United States Treaty. Absent the Treaty as a primary source of the counterpart offence, the United States was driven to ss 246 and 310 of the Crimes Act (receiving and conspiracy).^[541]

[469] Section 246(1) of the Crimes Act provided at the relevant time:⁵⁴²

Every one is guilty of receiving who receives any property stolen or obtained by any other crime, knowing that property to have been stolen or so obtained, or being reckless as to whether or not the property had been stolen or so obtained.

[470] The Court of Appeal took the view that s 246 provided an extradition pathway.⁵⁴³ The United States accepts, however, there is “some justification” in the appellants’ submission that count 3 “is not a comfortable fit with s 246”. That is because under s 246(1), receiving requires the stolen property to have been supplied to the person charged with receiving it by someone other than the receiver.⁵⁴⁴ The United States accepts that there are difficulties in characterising the receipt of funds from the Megagroup as the appellants obtaining property from someone else for the purpose of s 246. We consider this factor means s 246 is not an available extradition pathway.

[471] The Court of Appeal’s approach was that it was nonetheless sufficient if the charges were put in the alternative. The Court said that it would be “permissible for a further, alternative charge to be laid that even if the appellants did not receive those money payments as a direct result of that offending, they each received that money knowingly or recklessly as to whether that money had been obtained by the commission of a different imprisonable offence by another”.⁵⁴⁵ This requires an

⁵⁴⁰ CA judgment, above n 23, at [204]. The United States did not rely on the offence of money laundering in s 243 of the Crimes Act, which, as the Court of Appeal noted at [206], requires concealment or conversion of proceeds of crime.

⁵⁴¹ Broadly speaking, s 310 of the Crimes Act provides that every person who conspires with another to commit an offence which would be an offence in New Zealand commits an offence.

⁵⁴² Section 246(1) was amended by substituting the words “imprisonable offence” for “crime” from 1 July 2013 by s 7 of the Crimes Amendment Act 2013.

⁵⁴³ CA judgment, above n 23, at [208].

⁵⁴⁴ Section 246(3) recognises joint control.

⁵⁴⁵ CA judgment, above n 23, at [207].

unduly expansive reading of s 246. Further, as Mr Illingworth submitted, it is not alleged that the funds had been obtained as a result of the commission of a separate offence by another party.⁵⁴⁶ The fact the allegation is of a conspiracy is a further complication when considering s 246 as an extradition pathway.

[472] The United States makes an alternative argument based on art 2(16) of the NZ/US Treaty on the assumption double criminality is required.⁵⁴⁷ The argument is that the allegation in count 3 can be seen as additional steps taken in pursuit of the other Crimes Act and Copyright Act pathways. That approach, however, would undercut the double criminality requirement and cannot be correct for that reason alone.

[473] There is therefore no extradition pathway under the Crimes Act or via the NZ/US Treaty with respect to count 3.

Count 4: a discrete act of copyright infringement by distributing the film *Taken* and aiding and abetting copyright infringement

[474] Count 4 in the superseding indictment alleges that on or about 25 October 2008, the appellants wilfully and for the purposes of commercial advantage and private financial gain, infringed copyright by distributing a work being prepared for commercial distribution in the United States by making it available on a computer network accessible to members of the public when they knew, and should have known, that the work was intended for commercial distribution. The work in question was the motion picture *Taken* – which would not be commercially distributed until on or about 30 January 2009.

The Courts below

[475] The Courts below found that the pathways relied on by the United States, s 228 and s 249, were available.⁵⁴⁸ We address only s 228. On s 228, the High Court concluded count 4 qualified as an extradition offence applying the same reasons as for

⁵⁴⁶ *R v Nichols* [1998] 1 NZLR 608 (HC) at 615. The “obtaining” of an object envisaged in what was then s 258(1)(a) of the Crimes Act was not the obtaining by the defendant but by another person.

⁵⁴⁷ Article 2(16) is set out in full above at [220].

⁵⁴⁸ CA judgment, above n 23, at [200]–[201]; HC judgment, above n 22, at [196] and [199]; and DC judgment, above n 21, at [643] and [650].

count 2.⁵⁴⁹ The Court of Appeal took the same approach in the absence of any substantial challenge to that view (apart from the s 131 point) and upheld the reasoning of the High Court, noting as follows:⁵⁵⁰

The allegation of wilful infringement for purposes of a commercial or financial gain satisfied the requirement in ss 228 and 249 that the relevant acts were committed with intent to obtain pecuniary advantage or valuable consideration. The allegation that the appellants wilfully infringed copyright by making the film available to members of the public satisfied the requirement they obtained and or used a document (that is, a digital file) dishonestly without claim of right. And the alleged conduct also involved “accessing” a computer, satisfying that requirement of s 249.

[476] The Court of Appeal said it followed from the conclusion count 2 was an extradition offence that the same result applied to count 4.⁵⁵¹

Submissions

[477] In relation to the reliance on s 228(b), the appellants submit the gravamen of the United States’ accusation (uploading of a file known to infringe copyright) is the infringement of copyright to obtain a gain or advantage. They say that carries the same problems as discussed above in relation to count 2. Further, the appellants submit the conduct is being shoehorned inappropriately to fit into this offence.

Our assessment

[478] We accept the United States’ submission that dishonesty can arise from the ability to provide access to the movie *Taken* without Mr van der Kolk or the others using the file paying for that access. The movie has been accessed and no benefit has passed to the copyright owner. This is on the basis that a file known to infringe copyright has been uploaded to Megaupload and a link sent to another person. There is accordingly conduct alleged which, if it had occurred in New Zealand, could meet the elements of s 228(b) (dishonest use of a document with the intent to obtain a pecuniary advantage).⁵⁵²

⁵⁴⁹ HC judgment, above n 22, at [196].

⁵⁵⁰ CA judgment, above n 23, at [198] (footnote omitted).

⁵⁵¹ At [201].

⁵⁵² See above at [457] and n 533 for a breakdown of the elements of this offence. As noted above at n 539, the offence is punishable by not less than 12 months’ imprisonment.

Counts 5–8: discrete acts of copyright infringement and aiding and abetting copyright infringement

[479] As the Court of Appeal said, counts 5–8 “allege wilful reproduction and distribution of various copyright works on the internet”.⁵⁵³ The different counts here reflect different time periods, but allege the same conduct. The focus in terms of s 228(b) is primarily on the use of the documents (distribution of the files), and dishonesty is said to follow from the preservation of access to the files after some links were disabled for copyright infringement. These counts do not raise any different questions from those discussed in relation to counts 2 and 4. Section 228(b) therefore provides an available extradition pathway for counts 5–8.

Counts 9–13: wire fraud and aiding and abetting wire fraud

[480] These counts relate to communications from the Megagroup to copyright owners about, for example, the “abuse tool” and the “notice-and-takedown procedure”. The Court of Appeal described the essential conduct in this way:⁵⁵⁴

... the use of Megaupload email accounts by the appellants to send deceptive messages to copyright owners calculated to cause those copyright owners to believe that the appellants were taking more effective steps to curb copyright infringement by users than was in fact the case.

[481] The Court of Appeal adopted the description of the essential conduct for these counts given by the High Court, namely:⁵⁵⁵

[213] Counts 9 to 13 allege that the appellants devised a scheme to defraud copyright owners and obtain money by means of false and fraudulent pretences, representations and promises, including:

- (a) misleading copyright holders into believing that the notifications of infringing copies of copyright works would result in the removal of the file or access to the file being disabled when, in fact, only the link identified by the copyright holder was disabled;
- (b) falsely representing to copyright holders that repeat infringers would have their access terminated pursuant to Megaupload’s terms of service whereas they were allowed to continue their

⁵⁵³ CA judgment, above n 23, at [196]. The Court of Appeal dealt with count 4 and counts 5–8 together.

⁵⁵⁴ At [212].

⁵⁵⁵ At [213], referring to HC judgment, above n 22, at [213]–[215].

infringement and sometimes even rewarded financially for it;
and

- (c) misrepresenting to copyright holders [Megaupload's] "Abuse Tool" and "notice-and-takedown" procedure.

[214] The United States alleges in the superseding indictment that the scheme allowed infringing copies of copyrighted works to remain on the servers controlled by [Megaupload] thereby allowing it to obtain advertising revenue:

101. The scheme allowed infringing copies of copyrighted works to remain on the servers controlled by [Megaupload] and accessible to members of the public ...

...

103. It was further part of the scheme that [Megaupload] obtained advertising revenue as a result of the continued availability of files known to be infringing ...

[215] Each count relates to a specific wire communication in furtherance of the allegedly fraudulent scheme.

[482] The United States relied on three pathways in respect of these counts: ss 228, 240 and 249. On these potential extradition pathways the appellants submit, first, that these umbrella charges fail because the predicate offences fail. Secondly, they argue that proof of copyright ownership is necessary and is lacking. Thirdly, it is said that the factual allegations are not capable of being interpreted as including an intention to deceive on the part of the appellants. In relation to s 240 and the allegation of deception it is also submitted it is not an offence to obtain an interest not recognised in law as belonging to someone else (an aspect of the "copyright" point).

[483] All three Courts below upheld the availability of the three pathways relied on by the United States.⁵⁵⁶ We do not address s 249.

Availability of s 228 pathway

[484] We agree, essentially for the reasons advanced by the United States, that the conduct alleged would, if the conduct had occurred in New Zealand, be an offence under s 228(b). First, the various electronic messages fall within the definition in s 217

⁵⁵⁶ CA judgment, above n 23, at [218], [220] and [223]; HC judgment, above n 22, at [222], [225] and [230]; and DC judgment, above n 21, at [672] and [674].

of “document”. Both the Court of Appeal and the High Court took the same view, namely, that the use of emails involved the use of documents.⁵⁵⁷ Secondly, the conduct alleged meets the description of dishonest use on the basis the messages were designed to deceive copyright owners about the action that had been taken in response to notifications of copyright infringement. Thirdly, the conduct alleged envisages that the dishonest use is accompanied by an intention to obtain (in the s 217 sense of retaining) property (namely, digital files the subject of a property right). Finally, retaining the digital files represented a pecuniary advantage as they remained available for distribution, with the consequent advantage of generating traffic for the Megasites and advertising and subscription income from people accessing the copyrighted material.

Section 240: Obtaining by deception or causing loss by deception

[485] Section 240(1) of the Crimes Act provides that:

- (1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,—
 - (a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or
 - (b) in incurring any debt or liability, obtains credit; or
 - (c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or
 - (d) causes loss to any other person.

[486] The elements of the s 240(1)(a) and (1)(d) offences are that the appellants:

- (a) first, obtained possession of, or control over, any property, pecuniary advantage, benefit or valuable consideration; or
- (b) caused loss to any person; and
- (c) second, did so:

⁵⁵⁷ CA judgment, above n 23, at [219]; and HC judgment, above n 22, at [220].

- (i) by deception;
- (ii) intending to deceive any other person; and
- (iii) without claim of right.

[487] We agree this is an available extradition pathway.⁵⁵⁸ This is on the basis the appellants retained digital files that breached copyright and obtained a pecuniary advantage by doing so through the additional revenue described above (or caused loss to the copyright holders through lost sales of that material). The deception is the false representation to the copyright owners with intent to deceive, namely, misrepresenting to the owners that repeat copyright infringers would have user access terminated and misrepresenting the abuse tool and notice-and-takedown procedure.⁵⁵⁹ There is no issue as to claim of right. On s 240, the Court of Appeal recorded it had been “accepted by the appellants that the essential conduct alleged (emails allegedly containing false representations) could fall within the scope of s 240”.⁵⁶⁰

[488] Sections 228(b) and 240(1)(a) and (d) are therefore all available extradition pathways.

Count 1: conspiracy to commit racketeering

[489] Count 1 is a charge of conspiracy to commit racketeering. This count alleges an enterprise, which included the appellants, which was engaged in interstate and foreign commerce. The alleged purposes of the enterprise included:

- a. Enriching the members and associates of the Enterprise through, among other things, copyright infringement, money laundering, and wire fraud.

⁵⁵⁸ The relevant penalties for obtaining by deception or causing loss by deception are specified in s 241 of the Crimes Act. The maximum penalty depends on the value of the loss caused or property obtained. Here, the appellants are alleged to have caused losses of over USD 500 million (see above at [208]) and obtained revenues of over USD 175 million (see above at [210]). Under s 241(a), the maximum penalty is therefore seven years’ imprisonment. This meets the requirement in s 4(2) of the Extradition Act that the maximum penalty for the New Zealand offence is imprisonment of not less than 12 months.

⁵⁵⁹ For example, the superseding indictment notes that copyright holders were notified that the abuse tool would “remove a batch of files from [Megaupload’s] servers”; and that the take-down tool would “remove” videos and/or files “from our system immediately”.

⁵⁶⁰ CA judgment, above n 23, at [222], citing HC judgment, above n 22, at [224]. Mr Illingworth, however, argued in the High Court that nothing had been obtained nor had any loss been caused.

- b. Promoting, enlarging, and enhancing the Enterprise and its members' and associates' activities.

[490] The alleged “means and methods” of the Enterprise are as follows:

- a. Members of the Enterprise and their associates criminally infringed copyrights, aided and abetted copyright infringement, and conspired to infringe copyrights, which affected interstate and foreign commerce;
- b. Members of the Enterprise and their associates committed money laundering, attempted to commit money laundering, and conspired to commit money laundering to facilitate and expand the Enterprise's criminal operations, which affected interstate and foreign commerce; and
- c. Members of the Enterprise and their associates devised a scheme to defraud, committed wire fraud, aided and abetted wire fraud, and attempted to commit wire fraud, which affected interstate and foreign commerce.

[491] The United States relies on s 98A of the Crimes Act as an extradition pathway for count 1. That section deals with participation in an organised criminal group. Section 98A was added to the Crimes Act in 1998 “to deal with the activities of New Zealand gangs”.⁵⁶¹ The section was later expanded to ensure compliance with the United Nations Convention against Transnational Organized Crime⁵⁶² to which New Zealand became a signatory in December 2000.⁵⁶³ Under s 98A(1) it is an offence punishable by a maximum term of 10 years' imprisonment to participate in an organised criminal group in the following circumstances:

- (a) knowing that 3 or more people share any 1 or more of the objectives (the **particular objective or particular objectives**) described in paragraphs (a) to (d) of subsection (2) (whether or not the person himself or herself shares the particular objective or particular objectives); and
- (b) either knowing that his or her conduct contributes, or being reckless as to whether his or her conduct may contribute, to the occurrence of any criminal activity; and
- (c) either knowing that the criminal activity contributes, or being reckless as to whether the criminal activity may contribute, to achieving the

⁵⁶¹ Transnational Organised Crime Bill 2002 (201-2) (select committee report) at 4. Section 98A was inserted by s 2 of the Crimes Amendment Act (No 2) 1997.

⁵⁶² United Nations Convention against Transnational Organized Crime 2225 UNTS 209 (opened for signature 15 November 2000, entered into force 29 September 2003).

⁵⁶³ Crimes Amendment Act 2002, s 5. See Transnational Organised Crime Bill 2002 (201-1) (explanatory note) at 1–2 and 5.

particular objective or particular objectives of the organised criminal group.

[492] For the purposes of the Crimes Act, a group is “an organised criminal group” where it comprises three or more people with one or more of the following objectives:⁵⁶⁴

- (a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
- (b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
- (c) the commission of serious violent offences; or
- (d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of serious violent offences.

[493] Section 98A(3) clarifies that a group can be an organised criminal group whether or not:

- (a) some of them are subordinates or employees of others; or
- (b) only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or
- (c) its membership changes from time to time.

[494] All three Courts accepted s 98A of the Crimes Act was an available pathway.⁵⁶⁵ The Court of Appeal agreed with the approach of the High Court noting that the “essence of the conduct alleged ... is the existence of a group that had, as one of its objectives, obtaining material benefits from the commission of serious offences”.⁵⁶⁶

[495] The only challenge with respect to count 1 is that there must be a relevant predicate offence for s 98A to apply. Having found that there are predicate offences with respect to counts 2 and 4–13, we consider that s 98A provides an extradition pathway for count 1.

⁵⁶⁴ Crimes Act, s 98A(2).

⁵⁶⁵ CA judgment, above n 23, at [231]; HC judgment, above n 22, at [237]; and DC judgment, above n 21, at [638].

⁵⁶⁶ CA judgment, above n 23, at [227].

Summary of conclusions on the Crimes Act pathways

[496] For these reasons we have upheld the findings of the Court of Appeal as to the availability of the Crimes Act pathways except in relation to count 3. Section 228(a) of the Crimes Act provides an extradition pathway for count 2 and s 228(b) provides an extradition pathway for counts 4–13. In addition, we agree that s 240(1)(a) and (1)(d) of the Crimes Act provide extradition pathways for counts 9–13 and s 98A for count 1. We disagree with the Court of Appeal that count 3 (money laundering) is an extradition offence. The appeal is allowed in respect of that count.

F CASE STATED

[497] The appellants argue that the High Court erred when it confirmed the decision of the District Court despite having found some serious flaws in the District Court process. This aspect of the case requires consideration of the nature of the appeal from the District Court to the High Court and the legal consequences of the findings made by the High Court Judge about the District Court decision.

[498] The appeal provisions in the Extradition Act that apply in this case are complex. The provision conferring a right of appeal, s 68, has since been amended.⁵⁶⁷ Sections 68 and 69 as they were at the relevant time provided for an appeal by way of case stated, importing some of the provisions applying to such appeals under the Summary Proceedings Act. But there was also a provision similar to the proviso to s 385(1) of the Crimes Act. The combination meant the appeal process under the Extradition Act had certain unique features.

⁵⁶⁷ Section 68 of the Extradition Act was amended from 1 July 2013 by s 413 of, and sch 3 to, the Criminal Procedure Act 2011. Section 68 now provides for an appeal on a question of law to the High Court. No consequential amendments were made to ss 72 or 73 of the Extradition Act so the powers of the High Court in dealing with appeals are the same under the old case stated process that applies in this case and the appeal on a question of law process that replaced it.

Relevant sections

[499] The appeal to the High Court was an appeal by way of case stated under s 68 of the Extradition Act.⁵⁶⁸ At the relevant time, that section provided:

68 Appeal on question of law only by way of case stated

- (1) This section applies if a District Court determines under section 24 or section 45 that a person is or is not eligible for surrender in relation to any offence or offences for which surrender is sought, and either party considers the determination erroneous in point of law.
- (2) If this section applies, the party may appeal against the determination to the High Court by way of case stated for the opinion of the High Court on a question of law only.
- (3) To lodge an appeal the party must, within 15 days after the determination, file in the office of the court that made the determination a notice of appeal in the prescribed form.

[500] Section 69 provided that certain provisions of the Summary Proceedings Act relating to appeals by way of case stated applied, with any necessary modifications, to appeals under s 68.

[501] Sections 72 and 73 set out the powers of the High Court in relation to an appeal under s 68. Those sections provided at the relevant time:

72 Powers of court on appeal

- (1) The High Court must hear and determine the question or questions of law arising on any case transmitted to it, and do 1 or more of the following things:
 - (a) reverse, confirm, or amend the determination in respect of which the case has been stated:
 - (b) remit the determination to the District Court for reconsideration together with the opinion of the High Court on the determination:
 - (c) remit the determination to the District Court with a direction that the proceedings to determine whether the person is eligible for surrender be reheard:

⁵⁶⁸ Section 397 of the Criminal Procedure Act provides that where a proceeding was commenced before the commencement date (1 July 2013), the proceeding must continue in accordance with the law as it was before the commencement date. The current proceedings commenced in 2012. Accordingly, the now repealed version of s 68 applies: see *Foodstuffs South Island Ltd v Queenstown Lakes District Council* [2013] NZCA 458, (2013) 17 ELRNZ 367.

- (d) make any other order in relation to the determination that it thinks fit.
- (2) In hearing and determining the question or questions of law arising on any case transmitted to it, the court—
 - (a) must not have regard to any evidence of a fact or opinion that was not before the District Court when it made the determination appealed against; and
 - (b) may in the same proceeding hear and determine any application for a writ of habeas corpus made in respect of the detention of the person whose surrender is sought.

73 Further provisions relating to powers of court on appeal

- (1) Without limiting section 72, if the appeal is against a determination that a person is eligible for surrender, and the court reverses the determination in respect of which the case has been stated, the court must also either—
 - (a) discharge the person; or
 - (b) remit the determination to the District Court with a direction that the proceedings to determine whether the person is eligible for surrender be reheard.
- (2) Without limiting section 72, if the appeal is against a determination that a person is eligible for surrender in respect of 2 or more offences, and the court determines that the determination includes an error of law that relates to only 1 or some of those offences, the court may amend the determination and—
 - (a) discharge the person in respect of that offence or those offences; or
 - (b) remit the determination to the District Court with a direction that the proceedings to determine whether the person is eligible for surrender be reheard in respect of that offence or those offences.
- (3) Despite subsections (1) and (2), if an appeal is against a determination that a person is eligible for surrender, and the court determines that there has been an error of law, it may nevertheless decline to reverse or amend the determination in respect of which the case has been stated if it considers that no substantial wrong or miscarriage of justice has occurred and that the determination ought to be upheld.
- (4) Without limiting section 72, if the appeal is against a determination that a person is not eligible for surrender, and the court determines that the determination includes an error of law, the court may,—
 - (a) if the proceedings are under Part 3, exercise the powers of a District Court under subsections (1) to (3) of section 26 as if

it were a District Court, though paragraph (d) of section 26(1) does not apply:

- (b) if the proceedings are under Part 4, exercise the powers of a District Court under subsections (1) to (3) of section 46 as if it were a District Court, though paragraph (b) of section 46(1) does not apply and, if the court makes a surrender order under section 47(1), subsections (2) and (3) of section 47 do not apply:
- (c) if it remits the determination to the District Court, issue a warrant for the arrest and detention of the person pending the District Court's reconsideration of the determination or rehearing of the proceedings to determine whether the person is eligible for surrender; and section 70(3) applies to any warrant issued under this paragraph as if the warrant were issued under section 70.

[502] Section 72(1) sets out the court's powers of disposition on hearing and determining a case stated appeal. The powers are orthodox and necessarily broadly stated. The court can reverse, confirm or amend the extradition eligibility determination made in the District Court, or it can remit the proceedings back to that Court on terms, and it can make any ancillary or consequential orders that may be necessary to give proper effect to the substantive determination on the case stated.

[503] Section 73 sets out the options for disposition where the court decides in accordance with s 72(1)(a) to reverse the determination of the District Court or identifies an error of law in relation to some offences. If the appeal court decides to reverse the determination, s 73(1) provides that it must either discharge the appellant or remit the matter to the District Court for rehearing. If the appeal court finds an error of law relating to only some offences, s 73(2) provides that it may amend the determination and discharge the appellant in respect of those offences, or in the alternative, the matter may be remitted to the District Court for rehearing on those offences.

[504] Section 73(3) is an express exception to the directives in s 73(1) and (2). It provides that "despite" those two subsections, the court will not be required to make the orders referred to if, having found that the extradition court made an error of law, it considers the error has not resulted in a substantial wrong or miscarriage of justice. In those circumstances the court may choose to uphold the determination of the extradition court despite the error.

[505] Because s 73(3) contemplates that the High Court will make an assessment as to whether a substantial wrong or miscarriage occurred, it also modifies the nature of the task of the High Court from that normally undertaken in a case stated appeal. In most case stated appeals, the High Court would be precluded from considering for itself the sufficiency of, or weighing, the evidence adduced in the District Court. But in order to address whether to apply s 73(3) in the event that it concludes that the decision under appeal should be reversed in relation to some or all offences, the High Court must do this in an appeal under s 68.⁵⁶⁹ We will expand on this later.

[506] In the present case there were case stated appeals both by the appellants and the United States. At the end of his judgment, the High Court Judge answered no fewer than 190 questions that had been posed in the case stated appeal initiated by Mr Dotcom, more than 200 questions posed in the case stated appeals initiated by the other appellants⁵⁷⁰ and, in addition, five questions in the case stated appeal commenced by the United States. So, while the adoption of the case stated process under the Extradition Act appeared to be designed to limit the scope of appeals, that objective spectacularly failed in the present case because of the voluminous number of questions placed before the High Court Judge.

The appellants' complaint

[507] The appellants argue that, given the nature of the errors identified in the District Court judgment by the High Court Judge, it was not open to the High Court Judge to confirm the determination made by the District Court Judge, even though the High Court Judge reached the same conclusions as the District Court Judge on the essential issues. The essence of their argument is that the High Court on appeal is not permitted to decline to reverse or amend the determination of the District Court where it has found a material error of law in the District Court decision unless it applies the proviso set out in s 73(3). They argue that the only available step for the High Court Judge in the present case was to remit the case to the District Court so that the

⁵⁶⁹ In *United States of America v Asiegbu* 2008 BCCA 519, (2008) 243 CCC (3d) 88 at [19], the British Columbia Court of Appeal observed: "Apart from the exercise of the jurisdiction under [the equivalent of s 73(3)], this Court cannot consider the sufficiency of or weigh the evidence".

⁵⁷⁰ Mr Ortmann and Mr van der Kolk filed a joint case stated. Mr Batato filed his own case stated, but this was identical to the case stated by Messrs Ortmann and van der Kolk. See HC judgment, above n 22, at [595].

District Court process could be undertaken in accordance with the legal rulings made by the High Court.

[508] The appellants accept that s 73(3) allows the High Court to confirm a District Court determination notwithstanding that there has been an error of law, but say this is permitted only where the High Court judge has concluded that no substantial wrong or miscarriage of justice occurred. They say that here, the High Court Judge did not address this issue. They argue that the High Court either applied s 72 incorrectly by not reversing or amending the District Court determination or, alternatively, purported to apply s 73(3) without having undertaken an analysis as to whether there had been any substantial wrong or miscarriage of justice.

[509] The appellants also argue the Court of Appeal acted beyond its powers under the case stated procedure in relation to their appeals to that Court.

Our approach

[510] We will deal with the issues that arise in relation to the case stated appeals as follows by:

- (a) considering the nature of the errors in the District Court judgment found by the High Court Judge;
- (b) setting out how the High Court Judge dealt with those errors;
- (c) assessing whether, in light of those errors, it was open to the High Court Judge to confirm the District Court determination under s 72 or to invoke the proviso in s 73(3); and
- (d) addressing the appellants' complaint about the way the Court of Appeal dealt with their appeals to that Court.

(a) The nature of the errors in the District Court judgment

[511] The appellants argue that there were two significant flaws in the District Court judgment. These were:

- (a) the failure of the District Court Judge to apply s 24(2)(c) of the Act; and
- (b) the District Court Judge’s assessment of whether the ROC and supplements disclosed a prima facie case for the purposes of s 24(2)(d)(i) of the Act.

(i) Failure to address s 24(2)(c)

[512] The High Court Judge accepted that the District Court Judge had given little attention to s 24(2)(c).⁵⁷¹ He said the Judge had focussed almost exclusively on the requirement in s 24(2)(d)(i), reflecting a misdirection at the outset of the District Court judgment where the Judge summarised the court’s task when determining eligibility under s 24 in terms that omitted reference to s 24(2)(c).⁵⁷²

[513] The High Court Judge acknowledged that the District Court Judge had addressed the requirements of s 24(2)(c) briefly in Part B of his judgment, which dealt with the stay applications. However, he found the District Court Judge misstated the requirement of s 24(2)(c); the District Court Judge had said the court must be satisfied that the offence is an extradition offence “in the extradition country”.⁵⁷³ The actual requirement is that the court be satisfied that the offence is an extradition offence *in relation to* the requesting country, which requires consideration of whether the conduct described in the indictment is covered by the offending listed in the NZ/US Treaty or deemed to have been listed in it by virtue of s 101B of the Extradition Act, as the High Court Judge correctly pointed out.⁵⁷⁴ The District Court Judge then made a finding that the certificate provided under s 25 of the Act met the s 24(2)(c) requirement because it established a prima facie case that the alleged offences are extradition

⁵⁷¹ HC judgment, above n 22, at [47].

⁵⁷² At [47], referring to DC judgment, above n 21, at [16].

⁵⁷³ At [49], referring to DC judgment, above n 21, at [526]. The District Court Judge did, however, correctly state the test at [435] and [580].

⁵⁷⁴ At [50].

offences in the United States. In fact, as the High Court Judge pointed out, s 25 was not relevant to the assessment required by s 24(2)(c).⁵⁷⁵

[514] Because of the approach he took, the District Court Judge did not address submissions made to him on behalf of the appellants on the s 24(2)(c) issue in relation to each of the counts in the superseding indictment. Rather, the Judge made only brief observations on the s 24(2)(c) requirement in relation to some, but not all, of the counts.⁵⁷⁶ Thus, the assessment of the issues raised by s 24(2)(c) was made only in a summary fashion and without any meaningful engagement with the submissions made by the appellants.

[515] The appellants argue that the errors made by the District Court Judge in relation to s 24(2)(c) “went to the heart of the District Court’s jurisdiction” and “tainted the eligibility assessment so seriously that they rendered the whole process ultra vires”. They say that, having made those findings, it was not open to the High Court to confirm the District Court decision, which Mr Illingworth described as a “decision so affected by things that have gone wrong” that it should have been ruled invalid. Mr Illingworth accepts that unfairness can be “cured” by an appellate hearing, but argues that requires a hearing de novo, which the appellants did not have.

[516] The appellants accept that the High Court Judge was correct in identifying the error of approach by the District Court Judge in relation to s 24(2)(c). But they argue that the High Court Judge failed to state the correct classification test, in part because the Judge applied the reasoning in *Cullinane*.

(ii) *Assessment of s 24(2)(d)(i)*

[517] There was no doubt that the District Court undertook an assessment in respect of each count under s 24(2)(d)(i) to determine whether the evidence contained in the ROC disclosed a prima facie case against the appellants in relation to the corresponding New Zealand offence. This assessment was not consistent with *Cullinane*, which was applied in the High Court. However, the Court of Appeal

⁵⁷⁵ At [52].

⁵⁷⁶ The Judge’s comments in relation to specific counts are set out in the HC judgment, above n 22, at [54].

overruled *Cullinane*, and we have upheld that aspect of the Court of Appeal decision.⁵⁷⁷ In addition, the District Court Judge did, in effect, undertake the exercise that we have found to be required under s 24(2)(c) in the course of his evaluation of the prima facie case under s 24(2)(d)(i).⁵⁷⁸

[518] The appellants argue, however, that the District Court failed to undertake the “limited weighing” of the evidence offered by the United States as required by the authorities.⁵⁷⁹ We do not propose to engage with the arguments in relation to s 24(2)(d)(i) because the grant of leave in this Court does not extend to issues relating to s 24(2)(d)(i) in relation to the appeal proceedings.

[519] This requires some explanation. In this Court’s leave judgment, the grant of leave was qualified by excluding from its ambit any applications for leave seeking to challenge any refusal of leave by the Court of Appeal.⁵⁸⁰ The only aspect of the s 24(2)(d)(i) exercise that was the subject of a grant of leave to appeal to the Court of Appeal was the question whether the High Court was “correct to conclude that copyright in a particular work does not form part of the accused person’s conduct constituting the extradition offences correlating to counts 4 to 8; and to conclude that proof of this is not required for the purposes of s 24(2)(d)”.⁵⁸¹ This question has been answered in this Court above at [435](b).

[520] Mr Dotcom sought special leave from the Court of Appeal on the question as to whether the High Court was correct to determine that there was evidence sufficient

⁵⁷⁷ See above at [128] and [149].

⁵⁷⁸ See above at [151]–[160] and [198]. The District Court Judge considered whether the offence was covered by the NZ/US Treaty and whether the conduct alleged correlated with a New Zealand offence: see, for example, DC judgment, above n 21, at [600] and [609] in relation to count 2. The Judge did, however, err in concluding that it was sufficient for the conduct to merely constitute an offence listed in art 2 of the Treaty. The Judge did not explicitly address the requirement that the conduct must be an offence in the United States punishable by not less than 12 months’ imprisonment. But he did set out the maximum penalty for each count in the indictment. All exceeded 12 months’ imprisonment: at [24].

⁵⁷⁹ See *R v Arcuri* 2001 SCC 54, [2001] 2 SCR 828 at [23]; *Ferras*, above n 181, at [39], [46] and [54]; and *MM v United States of America* 2015 SCC 62, [2015] 3 SCR 973 at [40] and [76] per McLachlin CJ, Cromwell, Moldaver and Wagner JJ.

⁵⁸⁰ SC leave judgment, above n 25, Order C.

⁵⁸¹ HC leave judgment, above n 35, at [49(b)].

to justify committal to trial pursuant to s 24(2)(d) for each of the counts.⁵⁸² All the applications for special leave were declined by the Court of Appeal.⁵⁸³ That means that the issues relating to the sufficiency of evidence under s 24(2)(d)(i) are outside the scope of the leave granted for the appeal to this Court.

[521] In any event, there does not appear to be anything in the appellants' complaint about the approach taken by the District Court Judge.⁵⁸⁴ Where inferences were relied on, the Judge was generally diligent in recording his view that the particular inference was reasonably available.⁵⁸⁵ The exercise the appellants appear to contemplate at the s 24(2)(d)(i) stage goes beyond what is required by the authorities. The Judge is not required to assess the evidence to determine which inference is more plausible. The assessment is limited to whether the inference the requesting country seeks to draw is reasonably available.⁵⁸⁶ Fundamentally, the appellants take issue with the Judge's conclusion that the necessary inferences were reasonably available on the evidence in the ROC, rather than the test he applied.

(b) The High Court Judge's approach

[522] The High Court Judge outlined the way the District Court Judge had addressed s 24(2)(c) and concluded that the District Court Judge "did not engage in any meaningful way with the extensive submissions he received on whether the essential conduct alleged in each count translates to an extradition offence".⁵⁸⁷ The High Court Judge then observed that it was necessary for him to undertake the exercise afresh for the purposes of answering the questions of law directed at the s 24(2)(c) issue in the case stated appeals. He then undertook that exercise dealing with each count in turn.

⁵⁸² The application for special leave filed by Mr Ortmann and Mr van der Kolk includes a question "Was the High Court correct to conclude that the requesting state had properly established that the applicants are each eligible for surrender in respect of each of the alleged charges that they face in the United States of America?" That would have necessarily required an assessment under s 24(2)(d)(i). Mr Batato's application for leave was the same as that of Mr Ortmann and Mr van der Kolk.

⁵⁸³ CA judgment, above n 23, Order D and at [331].

⁵⁸⁴ See above at [518].

⁵⁸⁵ See, for example, DC judgment, above n 21, at [613]–[614] in relation to count 2. See also at [688(ix)].

⁵⁸⁶ *MM*, above n 579, at [71] and [83] per McLachlin CJ, Cromwell, Moldaver and Wagner JJ.

⁵⁸⁷ HC judgment, above n 22, at [55].

Having done so, he concluded that all of the counts in the indictment qualified as extradition offences.⁵⁸⁸

(c) Was it open to the High Court Judge to confirm the District Court determination?

[523] In order to address this question, it is first necessary to analyse the nature of the appeal right under s 68 and the powers of the court under ss 72 and 73 in dealing with the appeal.

Case stated appeal has narrow compass

[524] The case stated procedure is a species of appeal that is narrow in compass and limited to points of law.⁵⁸⁹ Historically, it originated as a form of consultation by a lower court with an appellate court to answer a point of law.⁵⁹⁰ In *Accident Compensation Corporation v Ambros*, the Court of Appeal emphasised that a right of appeal by way of case stated was not a right of appeal by way of rehearing.⁵⁹¹ The Court observed that it was not appropriate for an appellate court to undertake a full review of the evidence adduced in the Courts below and make factual findings. The Court said:⁵⁹²

This means that it would be inappropriate for us to undertake a full review of the evidence in order to make factual findings on causation. We should limit ourselves to answering the question in the case stated and referring the matter back to be resolved in accordance with our opinion.

[525] It is notable that in *Ambros*, the factual findings required to reach a conclusion on the question posed by the case stated (causation) had not been made by the High Court or District Court. The Court of Appeal also considered that it was possible that further evidence would need to be adduced.⁵⁹³

⁵⁸⁸ At [238].

⁵⁸⁹ *Crequer v Chief Executive of the Ministry of Social Development (No 2)* [2015] NZHC 1602, [2015] NZAR 1395 at [21].

⁵⁹⁰ *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 at [110], citing *Harris Simon & Co Ltd v Manchester City Council* [1975] 1 WLR 100 (QB) at 105 per Lord Widgery CJ.

⁵⁹¹ At [110].

⁵⁹² At [111].

⁵⁹³ At [112]–[113].

The proviso in s 73(3)

[526] The proviso set out in s 73(3) is a highly unusual feature of the case stated appeal provided under the Extradition Act.⁵⁹⁴

[527] If the High Court decides to reverse the determination of the District Court under s 72(1)(a), s 73(1) requires the High Court either to discharge the person subject to the extradition request or remit the matter to the District Court for rehearing. Section 73(3) modifies this requirement by allowing the High Court to decline to reverse the District Court determination where no substantial wrong or miscarriage of justice has occurred. Section 73(3) applies similarly where the High Court has found an error of law in the District Court decision in relation to one or more, but not all, offences and decides to amend the determination under s 73(2). Section 73 does not, however, alter the power under s 72(1)(a) to confirm an eligibility decision even if the High Court has found one or more errors in the reasoning of the District Court.

[528] Section 73(3) qualifies s 73(1) and (2). It does not qualify s 72. Section 73(3) applies only if the High Court decides to reverse or amend the determination that the person is eligible for surrender. If the High Court decides under s 72(1)(a) to confirm the District Court determination, s 73(3) has no role to play.

[529] The legislative history of s 73 is instructive. The initial draft of the Extradition Bill did not include provision for appeals against a determination by a court that a person was eligible for surrender.⁵⁹⁵ The appeal provisions were added at the recommendation of the Foreign Affairs, Defence and Trade Committee.⁵⁹⁶ Given the limited scope of a case stated appeal, the decision to include the proviso in s 73(3) is surprising. It appears that s 73(3) was modelled off a similar provision in the Canadian Act.⁵⁹⁷ But unlike the New Zealand Act as enacted, the Canadian Act provides for a more orthodox appeal as of right on a question of law and, in addition, an appeal on mixed questions of fact and law with the leave of the relevant appellate

⁵⁹⁴ It is not entirely unique. A similar provision appears in s 72(3) of the International Crimes and International Criminal Court Act 2000.

⁵⁹⁵ Extradition Bill 1998 (146-1).

⁵⁹⁶ Extradition Bill 1998 (146-2) (select committee report) at iv–vii.

⁵⁹⁷ Canadian Act, s 53(b)(ii). See also the now repealed Extradition Act RSC 1985 c E-23, s 19.6(b)(ii).

court. Provision is also made for an appeal on any other ground if the appellate court considers it to be a sufficient ground of appeal.⁵⁹⁸

[530] The Canadian proviso has been variously described as follows:

- (a) it permits the court of appeal, as a reviewing court, to question the judgment of the extradition judge, not merely to decide whether there is a basis to support the decision;⁵⁹⁹
- (b) it allows the court to consider the sufficiency of or weigh the evidence;⁶⁰⁰
- (c) it bestows upon the appeal court powers similar to those that the court possesses in dealing with appeals in criminal matters;⁶⁰¹
- (d) it allows an appellate court to cure errors of law where no substantial wrong or miscarriage of justice has occurred;⁶⁰² and
- (e) it is a curative proviso.⁶⁰³

[531] In New Zealand, we have considerable experience dealing with a similar proviso in the context of criminal appeals governed by s 385 of the Crimes Act (now repealed). It was most recently considered in *Lundy v R*, in which this Court confirmed earlier authority to the effect that the proviso should not be invoked in circumstances where the errors made at trial are “fundamental” or “radical” or go to “the root of the proceedings” or “‘undermine the integrity of the trial’ so that it has lost the character of a fair trial according to law”.⁶⁰⁴ If the court was satisfied that no such error occurred, it could apply the proviso if it was satisfied of the appellant’s guilt beyond

⁵⁹⁸ Section 49.

⁵⁹⁹ *United States of America v St-Gelais* (1994) 90 CCC (3d) 83 (QCCA) at 89 and 91.

⁶⁰⁰ *Asiegbu*, above n 569, at [19].

⁶⁰¹ *United States of America v Stewart* (1997) 120 CCC (3d) 78 (BCCA) at [14].

⁶⁰² *United States of America v Chavez* 2014 ABCA 408, (2014) 588 AR 198 at [6].

⁶⁰³ *United States of America v Sharif* 2014 ABCA 256, (2014) 572 AR 1 at [40].

⁶⁰⁴ *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 at [25].

reasonable doubt.⁶⁰⁵ This required the appellate court to reach its own view as to the guilt of the appellant.⁶⁰⁶

[532] As mentioned earlier, the addition of the power under s 73(3) to the orthodox case stated provisions in ss 68–73 modifies the case stated process and the scope of the exercise that must be undertaken by the appellate court. Although s 73(3) is an awkward fit within the appeal regime in ss 68–73, it must be interpreted as indicating Parliament’s intention that the appellate court should, if it concludes an error of law has occurred in the District Court, broaden its task to encompass an overall assessment of the merits of the case to determine whether a miscarriage of justice has occurred, in the same way as for an appeal under s 385 of the Crimes Act. To apply the proviso, the court must be satisfied that the process leading to the finding of eligibility for surrender did not suffer from errors of the kind described in *Lundy*. It must also be satisfied that the criteria for eligibility are met. That necessarily requires the appellate court to engage with the facts of the case in order to satisfy itself the appellant is eligible for surrender.

Powers of appellate court

[533] The appellants argue that Parliament must have intended that the power to confirm an eligibility determination under s 72(1)(a) would be exercised only where the determination is substantially correct and legally valid. They argue that the defects in the District Court process were so fundamental that it was invalid and incapable of resuscitation on appeal. They argue that Parliament cannot have intended that a “fundamentally defective determination” could be confirmed as if it were correct in law, citing the following statement from the speech of Lord Pearce in *Anisminic Ltd v Foreign Compensation Commission*:⁶⁰⁷

It has been argued that your Lordships should construe “determination” as meaning anything which is on its face a determination of the commission including even a purported determination which has no jurisdiction. ... A more reasonable and logical construction is that by “determination” Parliament meant a real determination, not a purported determination.

⁶⁰⁵ *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31]; and *Lundy*, above n 604, at [30].

⁶⁰⁶ *Matenga*, above n 605, at [33]; and *Lundy*, above n 604, at [29] and [86].

⁶⁰⁷ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) at 199.

[534] That observation by Lord Pearce was made in the context of construing an ouster clause in the relevant legislation, the Foreign Compensation Act 1950 (UK), which provided that a determination by the Foreign Compensation Commission “shall not be called in question in any court of law”. Lord Pearce pointed out that if such an ouster clause was interpreted as applying to any purported determination, it would prevent a court from inquiring as to whether a purported determination “was a forged or inaccurate order which did not represent that which the commission had really decided”. It would also prevent the court from questioning the determination no matter how far the commission ranged outside its jurisdiction or that which it was required to do, or however far it departed from natural justice.⁶⁰⁸

[535] The passage in *Anisminic* quoted above rests on a theory of absolute invalidity. That approach has been eschewed in New Zealand.⁶⁰⁹ Many cases have established that a decision of an administrative decision-maker or a court that is subject to judicial review is treated as valid unless and until it is set aside by a court of competent jurisdiction.⁶¹⁰ There is no reason to depart from that approach here. The District Court decision was, in the absence of a decision of a court to the contrary, a valid “determination” in terms of s 68 and amenable to appeal under that section. As we will come to, it was also amenable to judicial review. It follows that the reference to “determination” in s 68 means a determination that may or may not have errors of law or procedural flaws, with those errors of law or procedural flaws being the subject of the case stated appeal and therefore within the purview of the High Court.⁶¹¹

⁶⁰⁸ At 199. *Anisminic* was recently applied by a majority of the United Kingdom Supreme Court in another case relating to the interpretation of an ouster clause: *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.

⁶⁰⁹ The exceptions have been some High Court cases relating to the interpretation of ouster clauses: see *Kaur v Ministry of Business, Innovation and Employment* [2012] NZHC 3563 at [71]; and *Malhi v Auckland Co-Operative Taxi Society Ltd* [2014] NZHC 2814, [2015] 2 NZLR 552 at [36]–[39]. The present case does not concern an ouster clause and we make no comment on the appropriateness of the approach taken in those cases in the ouster clause context. See also Josh Pemberton “The Judicial Approach to Privative Provisions in New Zealand” [2015] NZ L Rev 617.

⁶¹⁰ *Reid v Rowley* [1977] 2 NZLR 472 (CA) at 483 per Cooke J; *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) at 4 per Cooke J; *Love v Porirua City Council* [1984] 2 NZLR 308 (CA) at 311; *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314 (CA) at 323–324 per Somers J; and *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 236.

⁶¹¹ The appellants successfully argued before Asher J that procedural deficiencies could be included in a case stated appeal under s 68: *Ortmann v The United States of America* [2016] NZHC 522 [Asher J judgment] at [22].

Our analysis of this case

[536] The submission put to the High Court Judge by the appellants was that the District Court Judge had concluded they were eligible for surrender in circumstances where he had proceeded on the basis that all of the counts in the indictment qualified as extradition offences. In order to determine whether the District Court Judge was wrong in reaching that conclusion, it was necessary for the High Court Judge to address the issue himself, as he did, in some detail. Having addressed the issue, he concluded that all the counts in the indictment were, in fact, extradition offences so that the s 24(2)(c) requirement was met. We do not see anything unorthodox in that approach. The High Court Judge could not have answered the numerous questions in the case stated appeals in relation to s 24(2)(c) without undertaking the exercise that he did.

[537] Having answered the questions posed by the cases stated of all parties, the High Court Judge then had to determine which of the things listed in s 72(1) he should do. If his answers had led him to conclude that, contrary to the District Court determination, the appellants were not eligible for surrender, he no doubt would have reversed the District Court determination. If he had done so, s 73(1) would have required him either to discharge the appellants or remit the case to the District Court for rehearing, unless he found that the s 73(3) proviso should be invoked. But the High Court Judge found that, despite some errors in the reasoning, the District Court determination that the appellants were eligible for surrender was correct. In light of that, he decided to exercise the power under s 72(1)(a) to confirm the determination.⁶¹²

[538] The fact that the High Court Judge answered some of the questions in the case stated in a way that indicated the District Court Judge had made errors of law did not mean the District Court determination was wrong. Both ss 72 and 73 distinguish between errors of law and determinations. Section 72(1) requires the court to hear and determine the question of law, and then to decide what to do about the determination. Further, the whole point of s 73(3) is to allow the court to decide that despite the lower court reasoning containing errors of law, the determination itself is in substance the correct one. This can be illustrated by consideration of the answers given by the Judge

⁶¹² HC judgment, above n 22, at [599].

to the following questions relating to s 24(2)(c), in which the High Court Judge concluded that the District Court Judge had been in error:

- (a) The High Court Judge answered “No” to the question “Did I correctly set out the matters of which I was required to be satisfied under s 24 of the Act?”. This reflects what the High Court Judge considered to be a misstatement of the enquiry under s 24(2)(c). The District Court Judge “incorrectly stated that the relevant enquiry under s 24(2)(c) is whether the offence is an extradition offence *in* the United States”.⁶¹³ However, the High Court Judge later found that the District Court Judge correctly identified the relevant extradition offences with the exception of s 131 of the Copyright Act.⁶¹⁴
- (b) The High Court Judge answered “Not correct” to the District Court Judge’s assertion that the court can be satisfied that an offence is an offence in the requesting country if a person described in s 25(3A) has certified that in their opinion the ROC discloses sufficient evidence to justify prosecution under the law of the exempted country. That answer did not affect the eligibility determination because the High Court Judge concluded that whether the conduct is an offence in the requesting country is not relevant to the enquiry under s 24(2)(c). Rather, the High Court Judge said the question is whether it is an extradition offence in relation to the requesting country.⁶¹⁵
- (c) The High Court Judge answered “Not correct” to the District Court’s finding that s 131 of the Copyright Act was a deemed Treaty offence in relation to counts 2 and 4–8. Consistently with these answers, he said “Not correct” to the District Court’s findings that these counts corresponded to s 131 as an extradition offence. But given the High

⁶¹³ At [49].

⁶¹⁴ At [591]–[592].

⁶¹⁵ At [50]. Contrary to Gilbert J’s assertion, we have found that foreign law is relevant to the s 24(2)(c) exercise. As we have said, the court must be satisfied that the conduct alleged would constitute an offence in the requesting country punishable by not less than 12 months’ imprisonment. A statement from a law officer of the requesting country is sufficient for this purpose: see above at [151](b) and [155].

Court Judge concluded that the other Crimes Act and Treaty offences provided an available extradition pathway, these “Not correct” answers did not affect the overall correctness of the District Court’s determination of eligibility.⁶¹⁶

- (d) In relation to each count, the appellants asked whether the District Court Judge had correctly identified the conduct constituting the offence. For counts 5, 6 and 7 the High Court Judge answered “Not correct”. Why the High Court Judge considered the District Court had erred is not apparent from the face of the judgment. But, given the High Court Judge concluded each of these counts corresponded with an extradition offence, this error did not affect the correctness of the eligibility determination.
- (e) For counts 4–8, the High Court Judge found that the District Court was “Not correct” that these counts corresponded with the offence in art 2(16) of the Treaty. But, given the High Court Judge found that other Crimes Act pathways were available in respect of these counts, this answer did not affect the ultimate outcome.
- (f) On the issue of copyright, the case stated in relation to Mr Dotcom also asked a number of questions related to the District Court’s interpretation of the Copyright Act. The High Court Judge answered the majority of these “No”, meaning the District Court had erred. But, given the High Court Judge found that s 131 did not provide an available extradition pathway, these negative answers did not add anything further.⁶¹⁷
- (g) Mr Dotcom asked whether the District Court Judge correctly applied the requirements of s 25(3)(b), to which the High Court Judge responded “No”. This reflected the District Court Judge’s assertion that the court can be satisfied an offence is an offence in the requesting

⁶¹⁶ At [591]–[592].

⁶¹⁷ At [591].

country if a certificate to this effect has been given by a person described in s 25(3A). However, given the High Court Judge concluded that s 25(3)(b) was not relevant to the s 24(2)(c) assessment, this error was of no consequence.⁶¹⁸

[539] The District Court Judge had proceeded on the basis that s 24(2)(d)(i) required an analysis of the equivalent New Zealand offence to the United States offence that was the subject of each count.⁶¹⁹ In effect, therefore, the District Court Judge applied the double criminality approach that we have found to be the correct approach. The High Court Judge, bound by the Court of Appeal's decision in *Cullinane*, considered that that analysis had been in error,⁶²⁰ but then effectively also undertook the s 24(2)(d)(i) analysis of each count by reference to the equivalent New Zealand offence.⁶²¹ Therefore, while the High Court Judge was ostensibly applying *Cullinane*, there is no difference in substance between the approach he took to s 24(2)(d)(i) from that taken by the District Court Judge. Both Courts reached the same conclusion on the existence of a prima facie case for the purposes of s 24(2)(d)(i),⁶²² albeit that the High Court Judge had excluded from consideration s 131 of the Copyright Act, a conclusion on which we have found he was in error.⁶²³

[540] The High Court Judge was, therefore, entitled to conclude that the District Court Judge's failure to deal with s 24(2)(c) in any meaningful way had not prevented the District Court reaching the correct determination as to the eligibility of the appellants for surrender.

No obligation to remit the case to the District Court

[541] Having reached that point, it is hard to see why the High Court Judge should then have remitted the matter to the District Court for reconsideration, as the appellants submitted he should have. Their argument is that the High Court Judge should not have reached his own conclusion on s 24(2)(c) but, having identified a failure by the

⁶¹⁸ At [52].

⁶¹⁹ DC judgment, above n 21, at [16].

⁶²⁰ HC judgment, above n 22, at [279]–[281]. See, for example, at [364] in relation to count 8 and [385] in relation to count 1.

⁶²¹ At [294].

⁶²² At [593].

⁶²³ See above at [432]–[433].

District Court Judge to engage with the issue in any meaningful way, should have immediately remitted the case to the District Court for reconsideration.

[542] This argument is predicated on the proposition that a failure by a judge to address an issue is a breach of natural justice which renders a decision invalid. The appellants offered no authority to support their contention that a failure by a first instance judge to comprehend and respond to submissions made on an issue renders the resulting decision invalid.

[543] A more accurate description of what happened in the present case is that the District Court decision contained errors of law which could be corrected on appeal. Where the appeal is an appeal on a question of law raised by the case stated, there is no reason why the appellate court cannot correctly state the law, as the High Court Judge did in relation to s 24(2)(c) in this case. Indeed, he could not have answered the questions of law without doing so.

[544] Mr Illingworth argued that this Court's decision in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* illustrated the need for a proper process.⁶²⁴ In particular he referred to the following statement in this Court's judgment:⁶²⁵

... we conclude that the basis on which the concession applications were considered was flawed, and the Ngāi Tai Trust is entitled to have the decisions made after proper consideration of the application of s 4 which did not occur in relation to the decisions under review.

[545] He highlighted the fact that the Court did not consider it necessary to conclude that the decision maker had reached the wrong conclusion before setting the decision aside and requiring it to be reconsidered.

[546] We do not see that case as assisting Mr Illingworth's argument. The context is quite different from this case. *Ngāi Tai ki Tāmaki* was a judicial review case involving a decision made by an official under delegation from a minister. The value judgements required to be made were entrusted by Parliament to a minister, not the court. In the present context, a determination of eligibility requires a judicial decision, and the

⁶²⁴ *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.

⁶²⁵ At [100] per Elias CJ, Glazebrook, O'Regan and Ellen France JJ.

appellate court must reach its own view as to whether the determination at first instance should be reversed, confirmed or amended. In addition, s 73(3) specifically empowers the appellate court to come to its own substantive decision on the eligibility issue. The Court's position in *Ngāi Tai ki Tāmaki* was in marked contrast to the position of an appellate court dealing with a question of law that is the subject of an appeal to that court.

[547] In the event that an appellate court concludes that the first instance court reached the correct result despite one or more errors identified in answering the questions in the case stated, we see no impediment to the appellate court confirming the decision under appeal. An example of a case where this occurred is *Minister of Education v Bailey*.⁶²⁶ In that case, the Minister appealed to the Court of Appeal by way of case stated against a Labour Court decision that the respondent had established a personal grievance. The Court of Appeal held that the Labour Court had erred in one aspect of its determination but, because that error made no difference to the outcome for the respondent, the Court declined to remit the case to the Labour Court and dismissed the Minister's appeal.⁶²⁷

[548] In the present case, remitting the matter to the District Court, once the High Court Judge had decided the correct answer, would have been purely a matter of form. The District Court Judge would have been bound by the High Court decision and required to reach the same conclusion. In short, the exercise would have been futile.

[549] We do not consider that the High Court Judge's treatment of the s 24(2)(c) issue was inconsistent with the nature of the case stated appeal. Once he had concluded that, despite the errors in the District Court decision, the District Court had correctly concluded that the appellants were eligible for surrender, there was no impediment to the High Court Judge confirming the District Court Judge's conclusion to that effect.

[550] The appellants argued that it is not open to a judge to confirm a decision after dealing with a case stated appeal if the answers to any of the questions in the case

⁶²⁶ *Minister of Education v Bailey* [1992] 1 ERNZ 948 (CA).

⁶²⁷ At 955.

stated were contrary to the finding made by the court of first instance. That may be so where there are one or two questions and they are fundamental to the outcome, but it is not so when, as in this case, there were hundreds of questions in the cases stated, some of which had little relevance to the matters before the Court. A case stated appeal under s 68 is still an appeal: if having exercised the appellate jurisdiction within its scope the appellate court concludes that the persons subject to the extradition request are eligible for surrender, it is hard to see why it would do anything other than confirm that decision.

[551] We accept that the High Court Judge did not specifically mention that he was applying the proviso in s 73(3). That is because he was in fact exercising the power under s 72(1)(a) to confirm the decision under appeal on the basis that it was a legally correct decision, albeit one that was not correctly reasoned throughout.⁶²⁸ We do not think that was an error, but nor do we consider the Judge would have been wrong to apply s 73(3) if he had decided to reverse or amend the determination of the District Court. The reality was that the outcome reached in the High Court after correction of the errors made by the District Court Judge was essentially the same as that in the District Court. And if the High Court Judge was satisfied that the correct legal outcome was that the appellants were eligible for surrender, he must have considered that no substantial wrong or miscarriage of justice had occurred.

(d) The appeal to the Court of Appeal

[552] The appellants were granted leave to appeal to the Court of Appeal. For present purposes, the relevant question of law on which leave was granted was:⁶²⁹

Was the High Court Judge correct to find that the essential conduct with which the appellants are charged in each count constitutes an extradition offence for the purposes of s 24(2)(c) of the Extradition Act 1999?

[553] In relation to the Court of Appeal judgment, the appellants say that the Court of Appeal acted beyond its powers under the case stated procedure. They say they were prejudiced because the Court of Appeal corrected the High Court judgment (having overruled *Cullinane*) and applied its reformulated principles in the same

⁶²⁸ HC judgment, above n 22, at [599].

⁶²⁹ HC leave judgment, above n 35, at [49(a)].

breath without giving the appellants an opportunity to be heard on the case they had to meet under the revised interpretation of s 24(2)(c).

[554] We do not accept this complaint.

[555] The Court of Appeal undertook the evaluation that was required in order to determine the question on which leave to appeal to that Court had been given. The Court answered the question “Yes, though for somewhat different reasons”.⁶³⁰ If it had not answered the question, it would not have dealt with the appeal before it. Not only was it within its powers to do so, it was its duty.

[556] It was predictable that the Court of Appeal, when determining whether any error was made in the High Court, would apply its analysis to the case to determine whether any identified error had affected the outcome. It could not have answered the question for which leave was given without doing so. So, there is no substance to the appellants’ complaint that this was unexpected and that they should have had a chance to make further submissions on the application of the Court of Appeal’s approach to the present case.

Conclusion

[557] We conclude that the appellants’ arguments that the High Court and Court of Appeal acted beyond their powers in relation to the appeals before them fail.

G JUDICIAL REVIEW

[558] We now turn to the judicial review aspect of the appeal.

Limited scope of remaining issues

[559] The Court of Appeal dismissed the appellants’ appeals to that Court against the High Court’s decision to dismiss their judicial review claims.⁶³¹

⁶³⁰ CA judgment, above n 23, Order C(a) and at [330(a)].

⁶³¹ At [321].

[560] This Court’s decision granting leave to appeal provided that leave was given on a broad basis (the approved question was whether the Court of Appeal was correct to dismiss the appellants’ appeals to that Court) with a specific exclusion of matters in respect of which the Court of Appeal had refused leave to appeal.⁶³² After the leave judgment was issued, counsel for the United States sought clarification about the scope of the leave, raising a concern that if the leave related to judicial review without some limits, that would allow argument on all issues under that rubric, even though they were excluded in relation to the appeal aspect of the case. The Court then clarified the position in a message to counsel issued on 24 December 2018, the relevant part of which said:

... the leave to appeal in relation to the judicial review proceedings is limited to the question of whether the Court of Appeal was correct to dismiss those proceedings as an abuse of process.

If this Court were to find that the Court of Appeal was wrong to hold that the proceedings were an abuse of process, it would seek further submissions as to whether this Court should address the issues that would then need to be resolved in another hearing or remit the proceedings to the Court of Appeal for that Court to do so.

The hearing ... will therefore deal with the extradition appeal and whether the judicial review proceedings are an abuse of process.

[561] This message was confirmed in a minute issued by the Court on 24 January 2019.

[562] The scope of the judicial review aspect of the appeal is, therefore, limited at this stage to determining whether the Court of Appeal erred in holding that the judicial review proceedings were an abuse of process. We now address that question.

Court of Appeal’s decision

[563] The Court of Appeal concluded that the judicial review claims were an abuse of process. It saw this case as analogous to this Court’s decision in *Tannadyce*

⁶³² SC leave judgment, above n 25.

Investments Ltd v Commissioner of Inland Revenue.⁶³³ The relevant passage of the Court of Appeal judgment is as follows:

[310] We accept as a general principle that the existence of a right of appeal is not automatically fatal to the right to apply for judicial review. We also acknowledge the Extradition Act does not contain a privative clause. However, in our view, having regard to the nature of an extradition hearing and the comprehensive legislative scheme governing extraditions, the principles articulated in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* are engaged.

[311] In our view, if a ground of judicial review can be raised and adequately determined through the case-stated appeal process under s 68 – as, in our assessment, it has been in this case – judicial review is not available. Parliament cannot have intended it would be possible to bring duplicate sets of proceedings covering identical grounds. In effect, what the appellants are attempting to do by bringing judicial [review] proceedings replicating the same grounds is to circumvent the carefully circumscribed appeal rights under the Extradition Act. That in our view is an abuse of process and should not be permitted.

(footnote omitted)

[564] We emphasise the Court of Appeal did not say judicial review would *never* be available. The United States accepted this. Its case is that judicial review can be only a residual remedy and available only in exceptional circumstances. Where the grounds of challenge to an eligibility finding can be resolved in the appeal process, there is no room for judicial review proceedings covering the same ground.

[565] Mr Illingworth took issue with the Court of Appeal’s analysis. He isolated four reasons given by the Court of Appeal for its conclusion in the passage reproduced above that the judicial review proceedings were an abuse of process. He challenged them all. The four reasons are:

- (a) judicial review is inconsistent with the legislative scheme of the Extradition Act;
- (b) the nature of an extradition hearing makes it inappropriate for it to be subject to judicial review;

⁶³³ *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

- (c) duplication of appeal and review grounds cannot have been intended by Parliament; and
- (d) the judicial review applications were brought to circumvent the circumscribed appeal rights in the Extradition Act.

[566] We will deal with these in the above order.

Inconsistency with legislative scheme

[567] The Court of Appeal appears to have considered that the legislative scheme in the Extradition Act contemplated that any challenge to an eligibility finding would be through the case stated appeal process, which left little room for a judicial review challenge. Thus it saw the situation in the present case as analogous to that in *Tannadyce*.

[568] *Tannadyce* was a very different case from the present. It was a tax case. The taxpayer had failed to commence challenge proceedings within the timeframe provided by statute. It commenced judicial review proceedings alleging that the assessments in question were acts of conscious maladministration involving abuse of power and breaches of natural justice.

[569] The taxpayer's proceeding faced the obstacle of s 109(a) of the Tax Administration Act 1994, which provides that a disputable decision (in that case, tax assessments) may be disputed by challenge under Part 8A of the Tax Administration Act, but otherwise may not "be disputed in a court or in any proceedings on any ground whatsoever". This is a form of privative clause, channelling disputes into a statutory challenge procedure with an apparent complete exclusion of judicial review. The majority in *Tannadyce* said s 109 indicated that Parliament was concerned to ensure that disputes and challenges capable of being brought under the statutory procedures were brought in that way and were not made the subject of any other form of proceeding.⁶³⁴ They considered that the effect of s 109 was to exclude the right of judicial review of tax assessments unless the taxpayer could show that it was not

⁶³⁴ *Tannadyce*, above n 633, at [53] per Blanchard, Tipping and Gault JJ.

practicable to invoke the statutory challenge procedure.⁶³⁵ The majority was prepared to give effect to s 109 in this way because it found that the statutory challenge procedure provided for by the Tax Administration Act was the practical equivalent of, and, from the point of view of the taxpayer, better than a right of, judicial review.⁶³⁶

[570] There is no privative provision in the Extradition Act. On the contrary, there are indications in the Extradition Act that the existence of the case stated appeal right is not intended to exclude judicial review in extradition cases. For example, s 31(2)(b) of the Extradition Act precludes the Minister from making an order for surrender of a person subject to an extradition request “if an appeal, or an application for review or habeas corpus” of a determination under the Act is pending.⁶³⁷

[571] We also accept the appellants’ submission that the case stated process under s 68 of the Extradition Act is in any case more limited than the challenge process to which the Court referred in *Tannadyce*.⁶³⁸

[572] The Court of Appeal itself described the appeal rights in this case as “carefully circumscribed”.⁶³⁹ It saw the judicial review claims as a way of circumventing those carefully circumscribed appeal rights. This is in contrast to *Tannadyce*, where the Court’s concern was not that limited appeal rights were being circumvented by judicial review, but that the available appeal right (under the challenge procedure) was so broad that it left virtually no role for judicial review.⁶⁴⁰

⁶³⁵ At [61].

⁶³⁶ At [57] and [71].

⁶³⁷ See also Extradition Act, ss 36(1)(b), 47(2)(b), 50(2)(b) and 57(1). On the other hand, ss 26(1)(d), 31(3), 46(1)(b), 47(3), 50(3), 71 and 72(2)(b) refer only to appeals and habeas corpus but not to judicial review.

⁶³⁸ The case stated process in the present proceedings did, however, provide a forum for most of the issues the appellants wished to raise to be addressed. This was partly due to the decision of Asher J as to what could be included within the cases stated: see Asher J judgment, above n 611, at [22]–[24]. Another important reason for this was the sheer volume of the questions put before the High Court Judge and the broad scope of the issues raised by those questions. There was, therefore, very significant overlap between the case stated appeal and the judicial review proceedings in this case. But the case stated process did not provide as comprehensive an appeal right as the challenge procedure under the Tax Administration Act 1994 would have provided in *Tannadyce* if the taxpayer in that case had invoked it.

⁶³⁹ CA judgment, above n 23, at [311]. See above at [563].

⁶⁴⁰ The majority in *Tannadyce* saw the challenge process as leaving only very limited scope for judicial review, such as where there was a flaw in the statutory process that could be addressed only outside the statutory regime: *Tannadyce*, above n 633, at [59].

[573] We therefore disagree with the Court of Appeal’s conclusion that *Tannadyce* principles were engaged on the facts of this case.

The nature of an extradition hearing

[574] The Court of Appeal’s reference to “the nature of an extradition hearing”⁶⁴¹ appears directed at the preliminary nature of a determination of eligibility. A determination of eligibility does not, in itself, constitute a final decision about the rights of the person subject to the extradition request.

[575] Mr Illingworth argued that this was inconsistent with the observation made by McGrath and Blanchard JJ in this Court’s decision in the *Dotcom* disclosure case, in which the Court said the serious consequences that can follow an adverse finding of eligibility for such a person means that high standards of fairness are required by natural justice.⁶⁴² That observation needs to be seen in context, however. Later in their reasons, the same Judges observed that the natural justice requirements applying to an eligibility hearing “reflect what is required in relation to that preliminary decision”.⁶⁴³

[576] Mr Boldt argued that the Court of Appeal was correct to treat the nature of the extradition hearing as supporting the proposition that the *Tannadyce* approach was engaged. The eligibility hearing process adopts (via s 22 of the Extradition Act) the procedure that used to be followed in committal hearings under s 168 of the Summary Proceedings Act. Mr Boldt referred us to *C v Wellington District Court*, in which the Court of Appeal dealt with a claim for judicial review of the decision made at a committal hearing to commit the appellant in that case for trial.⁶⁴⁴ In that case, the Court of Appeal observed that “truly exceptional circumstances” would be required for a court to entertain an application for judicial review of a decision to commit a defendant for trial after a committal hearing where the sole ground is a challenge to the sufficiency of the evidence. The Court added that principle should apply even if an identifiable question of law (other than sufficiency of evidence) is said to arise.⁶⁴⁵

⁶⁴¹ CA judgment, above n 23, at [310]. See above at [563].

⁶⁴² *Dotcom* SC disclosure judgment, above n 69, at [118]. See also at [281] per Glazebrook J.

⁶⁴³ At [191(a)].

⁶⁴⁴ *C v Wellington District Court* [1996] 2 NZLR 395 (CA).

⁶⁴⁵ At 400.

[577] In that case, the Court of Appeal considered judicial review was unnecessary in the committal context because the Crimes Act provided “an alternative, adequate, and convenient procedure to obtain the same remedy”.⁶⁴⁶ The Court was referring to the rights of the accused under the Crimes Act to have the charge quashed (s 345(5)) or be discharged (s 347).⁶⁴⁷ Mr Boldt’s submission is that the availability of the case stated appeal procedure under the Extradition Act is an equivalent alternative procedure to obtain the same remedy as judicial review and that the rationale behind the decision in *C v Wellington District Court* applies in this case too. That assumes, however, that everything in issue in the appellants’ judicial review claims was, or could have been, dealt with in the case stated appeal. That is contested by the appellants and we do not consider we can proceed on that basis without having addressed whether or not that is so.

[578] Even if *C v Wellington District Court* were analogous to the present case, the outcome would be that an application for judicial review would fail (as the application did in that case), not that it would be an abuse of process.

Duplication of grounds

[579] As just discussed, we do not consider that we can accept the United States’ submission that the appeal grounds and judicial review grounds wholly overlap without having heard argument on the appellants’ judicial review claims. There is clearly extensive overlap. Mr Illingworth accepted there was some overlap. But that does not necessarily mean the judicial review grounds are entirely duplicative of the case stated appeal grounds. We do not consider the Court of Appeal should have concluded they were without addressing the judicial review claims.

Circumvention of appeal rights

[580] The Court of Appeal considered the judicial review proceedings were brought “to circumvent the carefully circumscribed appeal rights under the Extradition Act”.⁶⁴⁸ This appears to have been a reference to the United States’ submission that there was

⁶⁴⁶ At 400.

⁶⁴⁷ At 398–399. Sections 345(5) and 347 of the Crimes Act have been replaced by s 147 of the Criminal Procedure Act.

⁶⁴⁸ CA judgment, above n 23, at [311]. See above at [563].

no right to seek leave to appeal to this Court against the Court of Appeal decision in relation to the case stated appeals and that the judicial review proceedings were brought to facilitate an appeal to this Court that would otherwise have been unavailable. That argument was made to this Court and rejected in this Court's jurisdiction decision.⁶⁴⁹ Thus, the judicial review proceedings did not alter the availability of an appeal to this Court, contrary to the apparent view of the Court of Appeal.⁶⁵⁰

[581] Mr Boldt argued the judicial review proceedings still circumvented the appeal rights available under the Extradition Act. He pointed out that the appellants failed to obtain leave or special leave to appeal to the Court of Appeal on a number of the grounds of appeal they wanted to pursue. The refusal of leave was effectively the end of the road in relation to those points, as there is no right of appeal to this Court against a decision of the Court of Appeal refusing leave to appeal to that Court.⁶⁵¹ But the appellants could seek leave to appeal to this Court in relation to their judicial review claim (as they did, successfully), thus circumventing the above restriction.⁶⁵²

[582] We accept the differences in appeal pathways described by Mr Boldt, but we do not see that as, without more, leading to a conclusion that the judicial review proceedings were an abuse of process, especially when pursued at the same time as the appeal proceedings, as occurred in this case.

[583] That is not to say that pursuit of a judicial review challenge to a decision when an appeal is also commenced will never be an abuse of process. For example, a

⁶⁴⁹ SC jurisdiction judgment, above n 24.

⁶⁵⁰ Judicial review proceedings did make some difference to appeal rights, however, because of the different appeal pathways to the Court of Appeal from the High Court. Whereas there was an appeal as of right to the Court of Appeal against a judicial review proceeding under s 66 of the Judicature Act 1908 (now replaced by s 56 of the Senior Courts Act 2016), appeals against decisions on a case stated appeal were with leave only: Extradition Act, s 69(1)(p) (as it applied at the relevant time); and Summary Proceedings Act 1957, s 144(1). The leave requirement for a further appeal to the Court of Appeal is preserved by s 69(2) of the Extradition Act (as amended) and s 303(1) of the Criminal Procedure Act.

⁶⁵¹ *Simpson v Kawerau District Council* (2004) 17 PRNZ 358 (SC) at [5]; *Young v Land Transport Safety Authority* [2005] NZSC 51 at [2]; *Clarke v R* [2005] NZSC 60 at [2]; and *Taylor v R* [2009] NZSC 69 at [3]. But compare *Scott v Williams* [2016] NZSC 149 at [3], where this Court said that where the Court of Appeal grants leave on some issues and declines leave on others, if this Court grants leave, it is not prevented from addressing the issues in respect of which leave was declined by the Court of Appeal.

⁶⁵² Supreme Court Act 2003, s 7. Section 7 has been replaced by s 68 of the Senior Courts Act.

judicial review proceeding commenced after an appeal has been unsuccessful may be an abuse of process if it simply duplicates the grounds of appeal that were rejected. But in a proceeding where the court is considering a judicial review claim at the same time as an appeal, a finding that it duplicates grounds of appeal will normally lead to the judicial review claim being dismissed or relief being refused, rather than the claim being labelled an abuse of process.

[584] An example of that approach can be seen in *The Minister of Immigration v Vilceanu*.⁶⁵³ The Minister appealed against a decision of the Deportation Review Tribunal and also applied for judicial review of the same decision. The Minister's appeal was allowed and the matter was remitted to the Tribunal for reconsideration. Counsel for the Minister admitted the sole reason for the judicial review proceeding was that there was a right of appeal against an adverse decision to the Court of Appeal in relation to the judicial review claim but not in relation to the appeal. Miller J dealt with that as follows:

[55] The Minister has made out his case under the judicial review application, to the extent outlined above [in relation to the appeal]. Relief is available under the Judicature Amendment Act notwithstanding any right of appeal (s 4(1)), but the availability of an appeal may count against relief. In this case the application also adds nothing to the appeal under s 117 and has been brought only to secure a right of further appeal that the legislation precludes. I decline any relief, including declaratory relief, under the judicial review application.

(citations omitted)

Conclusion: abuse of process

[585] We conclude that the reasons that led the Court of Appeal to determine that the judicial review proceedings were an abuse of process do not substantiate that conclusion.

⁶⁵³ *The Minister of Immigration v Vilceanu* HC Wellington CIV 2007-485-377, 11 December 2007. An appeal against Miller J's decision was dismissed: *Vilceanu v The Minister of Immigration* [2008] NZCA 486. But compare *Accident Compensation Corporation v Wellington District Court* (2000) 14 PRNZ 507 (HC), where the Accident Compensation Corporation had commenced appeals and duplicative judicial review proceedings in relation to three District Court decisions. Goddard J upheld an application to strike out the judicial review proceedings on the basis that they were an abuse of process because allowing judicial review proceedings in tandem with the appeals "would be to permit the statutory process to be so circumvented": at [28]. As will be apparent, we do not consider that such duplication is necessarily an abuse of process.

Our approach

[586] We consider that rather than characterising the judicial review proceedings as an abuse of process, the Court of Appeal ought to have engaged with the grounds of judicial review to determine whether all of the grounds were truly duplicative of the contentions made by the appellants in the case stated appeals. It is obvious that there was, in fact, considerable duplication of grounds. Resolution of points against the appellants in the case stated appeals would likely have meant that the Court would not engage in detail with the same or similar points made in the context of judicial review, or would grant no remedy in the judicial review proceedings if the consideration of the point in the appeal had covered the ground. The difficulty with the approach the Court of Appeal took is that it led the Court not to undertake this exercise.

[587] We accept that if there were complete overlap between the grounds of appeal and grounds of judicial review then it would be appropriate for the court to dismiss the judicial review claim without undertaking a full review of the duplicative grounds. Mr Boldt drew our attention to the decision of the Court of Appeal in *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd*, where the judicial review proceeding was dismissed because it covered the same questions as the concurrent appeal by way of case stated.⁶⁵⁴ He argued that this case was the same. However, we do not think that can be assumed without engaging with the degree of overlap.

[588] Given the confined nature of the argument on the judicial review aspect of the case, it is not appropriate for us to now make findings as to the overlapping matters that render the judicial review proceedings duplicative of the appeals. In the written submissions filed by Mr Illingworth, the question of overlap was addressed (in a footnote) in the following terms:

The overlap relates only to errors of law, and not the other pleadings in the amended statement of claim, namely: procedural unfairness and breach of natural justice; errors of fact; unreasonableness; bias/predetermination; application for a stay of proceedings (*Bennett* jurisdiction); and the cumulative effect of errors requiring the exercise of residual discretion to intervene (innominate ground).

⁶⁵⁴ *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94 (CA) at 103. See also *City Financial Investment Co (New Zealand) Ltd v Transpower New Zealand Ltd* [2018] NZHC 1488 at [87]–[88] and [98].

[589] The appellants no longer pursue the bias/predetermination ground. The reference to the *Bennett* jurisdiction is to the inherent jurisdiction described by the House of Lords in *R v Horseferry Road Magistrates' Court, ex parte Bennett*.⁶⁵⁵

Conclusion

[590] The Court of Appeal was in error in concluding that the judicial review proceedings were an abuse of process. We therefore allow the judicial review appeals. In accordance with the indication given by the Court to counsel (referred to above at [560]), we will now seek submissions as to the issues in the judicial review claims that remain unresolved and whether this Court should engage with those outstanding issues or remit the matter to the Court of Appeal for that Court to do so.

H DISPOSITION

The case stated appeals

[591] We have concluded that s 98A of the Crimes Act provides an available extradition pathway for count 1;⁶⁵⁶ s 131(1)(c), (d)(i), (d)(iii) and (e) of the Copyright Act and s 228(a) of the Crimes Act provide available extradition pathways for count 2;⁶⁵⁷ and s 228(b) and s 240(1)(a) and (1)(d) of the Crimes Act provide available extradition pathways for counts 9–13.⁶⁵⁸ Subject to the outcome of the judicial review proceedings, we confirm the determination that the appellants are eligible for surrender on these counts.

[592] We have also concluded that s 131(1)(c), (d)(i), (d)(iii) and (e) of the Copyright Act and s 228(b) of the Crimes Act provide available extradition pathways for counts 4–8.⁶⁵⁹ But we have found that the Court of Appeal erred in concluding that proof of copyright was not required under s 24(2)(d)(i) of the Extradition Act for these counts.⁶⁶⁰ We do not, however, consider it necessary to remit the case to the District Court.

⁶⁵⁵ *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 (HL).

⁶⁵⁶ See above at [495].

⁶⁵⁷ See above at [389] and [434] for the Copyright Act and [465] for the Crimes Act.

⁶⁵⁸ See above at [488].

⁶⁵⁹ See above at [389] and [434] for the Copyright Act and [478]–[479] for the Crimes Act.

⁶⁶⁰ See above at [422].

[593] Applying the proviso in s 73(3),⁶⁶¹ we consider that no substantial wrong or miscarriage of justice has occurred as a result of this error.⁶⁶² After reviewing the evidence in the ROC, we have concluded that the United States has proved the existence and ownership of copyright to a prima facie standard.⁶⁶³ Accordingly, we consider that the finding of eligibility for surrender on counts 4–8 ought to be upheld (again, subject to the outcome of the judicial review proceedings).

[594] We have concluded that there is no available extradition pathway in respect of count 3.⁶⁶⁴ The appellants are discharged in respect of count 3 in accordance with s 73(2)(a).

[595] Finally, we have found that the High Court and Court of Appeal acted within the scope of their powers in relation to the case stated appeals before them.⁶⁶⁵

Judicial review: next steps

[596] As noted above at [559]–[562], the scope of the judicial review aspect of the appeal was limited to determining whether the Court of Appeal erred in holding that the judicial review proceedings were an abuse of process. We have found the Court of Appeal did err in that respect. In this Court’s minute of 24 January 2019, we said:

... if this Court were to find that the Court of Appeal was wrong to hold that the proceedings were an abuse of process, [we] would seek further submissions as to whether this Court should address the issues that would then need to be resolved in another hearing or remit the proceedings to the Court of Appeal for that Court to do so.

[597] We now seek such submissions. Those submissions must identify which issues remain outstanding in the judicial review proceedings and set out the relevant party’s view as to which court should resolve these issues. Outstanding issues are those which have not been addressed as part of the case stated appeals. The submissions should not seek to relitigate issues that have already been resolved by the outcome of the case

⁶⁶¹ Section 144B of the Summary Proceedings Act provided that the powers of the Supreme Court on appeal are the same as those of the High Court. The relevant powers are set out in ss 72 and 73 of the Extradition Act and are reproduced above at [501].

⁶⁶² See above at [505] and [532].

⁶⁶³ See above at [431].

⁶⁶⁴ See above at [473].

⁶⁶⁵ See above at [557].

stated appeals. Submissions should not exceed ten pages in length. Reply submissions should not exceed five pages. We ask the appellants to confer to avoid duplication.

[598] The timetable for submissions is as follows:

- (a) The appellants' submissions are to be filed and served on or before 25 November 2020.
- (b) The United States' submissions are to be filed and served on or before 9 December 2020.
- (c) The appellants' submissions in reply are to be filed and served on or before 16 December 2020.

Result

[599] For the reasons given above:

- (a) The judicial review appeals of Messrs Ortmann, van der Kolk and Batato (SC 54/2018) and of Mr Dotcom (SC 58/2018) are allowed. The Court of Appeal's finding that the judicial review proceedings were an abuse of process is set aside and we seek submissions as outlined above at [597]–[598].
- (b) The case stated appeals of Mr Batato (SC 55/2018), Messrs Ortmann and van der Kolk (SC 56/2018) and Mr Dotcom (SC 57/2018) are allowed in relation to count 3. The appellants are discharged in respect of count 3. The appeals in SC 55/2018, SC 56/2018 and SC 57/2018 are otherwise dismissed.

Costs

[600] The United States did not seek costs in relation to the case stated appeals.⁶⁶⁶ We therefore make no award of costs in relation to them.

[601] We consider that the appellants are entitled to costs in relation to the judicial review appeals. However, given the very limited scope of those appeals and the relatively minor part they played in the hearing of the appeals, we see an overall award of costs of \$15,000 and disbursements of \$5,000 as sufficient. We therefore order the United States to pay the appellants costs of \$15,000 and disbursements of \$5,000.

[602] As our decision does not resolve the judicial review aspect of the proceedings, we consider that any determination of costs in the High Court and Court of Appeal in relation to that aspect of the proceedings in those Courts should be deferred until after the judicial review issues that remain outstanding have been resolved.

Solicitors:

Keegan Alexander, Auckland, for Messrs Ortmann and van der Kolk
Anderson Creagh Lai Ltd, Auckland, for Mr Dotcom
Crown Law Office, Wellington, for United States of America

⁶⁶⁶ The United States did, however, seek costs in the event the Court found the judicial review proceedings to be an abuse of process.

Appendix: Glossary of defined terms

Full term	Defined term	Other uses
Record of Case	“the ROC”	
Uniform resource locator	“URL”	
A unique 32-digit identification number for each file	“MD5 hash”	
Extradition Act 1999	“the Extradition Act”	“the Act”
Extradition Act 1870 (Imp) 33 & 34 Vict c 52	“the 1870 Act”	
Extradition Act 1965	“the 1965 Act”	
Extradition Act 1988 (Cth)	“the Australian Act”	
Extradition Act SC 1999 c 18	“the Canadian Act”	
Treaty on extradition between New Zealand and the United States of America 791 UNTS 253 (signed 12 January 1970, entered into force 8 December 1970)	“the NZ/US Treaty”	“the Treaty”
Agreement on Extradition between the Government of New Zealand and the Government of the Republic of Fiji [1992] NZTS 3 (signed 21 March 1992, entered into force 14 April 1992)	“the NZ/Fiji Treaty”	
Copyright Act 1994	“the Copyright Act”	“the 1994 Act”
Copyright Act 1926	“the 1962 Act”	
Digital Millennium Copyright Act 1998 (USA)	“the DMCA”	

Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 1161 UNTS 3 (opened for signature 24 July 1971, entered into force 10 October 1974)	“the Berne Convention”	
World Intellectual Property Organisation	“WIPO”	
Marrakesh Agreement establishing the World Trade Organization 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1995), annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights)	“TRIPS Agreement”	“TRIPS obligation(s)”
WIPO Copyright Treaty (WCT) (1996) (opened for signature 20 December 1996, entered into force 6 March 2002) 2186 UNTS 121	“WCT”	
WIPO Performances and Phonograms Treaty (WPPT) (1996) (opened for signature 20 December 1996, entered into force 20 May 2002) 2186 UNTS 203	“WPPT”	

Case citation	Reference tag
<i>United States of America v Dotcom</i> DC North Shore CRI-2012-092-1647, 23 December 2015 (Judge Dawson)	DC judgment
<i>Ortmann v The United States of America</i> [2017] NZHC 189 (Gilbert J)	HC judgment
<i>Ortmann v The United States of America</i> [2017] NZHC 1809 (Gilbert J)	HC leave judgment
<i>Ortmann v United States of America</i> [2018] NZCA 233, [2018] 3 NZLR 475 (Kós P, French and Miller JJ)	CA judgment
<i>Ortmann v United States of America</i> [2018] NZSC 125	SC jurisdiction judgment
<i>Ortmann v United States of America</i> [2018] NZSC 126	SC leave judgment
<i>Dotcom v United States of America</i> [2014] NZSC 24, [2014] 1 NZLR 355	<i>Dotcom</i> SC disclosure judgment