IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA127/2017
[2021] NZCA 310

BETWEEN	MATHIAS ORTMANN First Appellant
	BRAM VAN DER KOLK Second Appellant
	FINN HABIB BATATO Third Appellant
AND	THE UNITED STATES OF AMERICA First Respondent
	THE DISTRICT COURT AT NORTH SHORE Second Respondent

CA128/2017

BETWEEN	KIM DOTCOM Appellant
AND	THE UNITED STATES OF AMERICA First Respondent
	THE DISTRICT COURT AT NORTH SHORE Second Respondent

Hearing:	6 May 2021
Court:	Kós P, French and Miller JJ
Counsel:	G M Illingworth QC, P J K Spring and A K Hyde for Messrs Ortmann and van der Kolk R M Mansfield and S L Cogan for Mr Dotcom D J Boldt, F R J Sinclair and Z A Fuhr for United States of America
Judgment:	12 July 2021 at 10 am

JUDGMENT OF THE COURT

A Messrs Ortmann and van der Kolk's application to adduce further evidence is declined.

B Mr Dotcom's application for orders enforcing requests made under the Privacy Act 1993 is declined.

C We find that there are no issues raised in the judicial review appeals that were not addressed in our judgment of 5 July 2018 and therefore dismiss the appeals in CA127/2017 and CA128/2017 remitted by the Supreme Court.

D The first and second appellants in CA127/2017 and the appellant in CA128/2017 are jointly and severally liable to pay the first respondent one set of costs calculated on the basis of a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.

E We make no award of costs in relation to the various interlocutory applications but order the first and second appellants in CA127/2017 and the appellant in CA128/2017 to pay the first respondent any disbursements relating to those applications.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] On 5 July 2018 we delivered a decision dismissing the appeals brought by the appellants under the Extradition Act 1999 and declining special leave to appeal other questions of law.[1] We also dismissed the appellants' judicial review appeals. On further appeal to the Supreme Court, the Supreme Court dismissed all bar one

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1 *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475 [Court of Appeal judgment].

aspect of the appeals to it under the Extradition Act[2] but allowed the appeals against our dismissal of the judicial review appeals.[3]

[2] In relation to the latter, the Supreme Court subsequently directed that the judicial review appeals be remitted to this Court for the purpose of:

(a) identifying what issues were outstanding in relation to the judicial review appeals, outstanding issues being issues which had not been addressed as part of the appeals under the Extradition Act; and

(b) resolving those outstanding issues.[4]

[3] This judgment is the outcome of that direction.

Background

[4] The United States has been endeavouring since 2012 to extradite Messrs Dotcom, Ortmann and van der Kolk to face trial for criminal infringement of copyright and other related charges in that country. Until very recently, it was also seeking the extradition of Mr Batato but due to health issues no longer does so.[5]

[5] Following a series of interlocutory decisions, in 2015 the District Court found that the appellants were eligible for extradition. It also dismissed applications for a stay of proceedings which were brought on the grounds that the United States had allegedly deprived the appellants of their ability to fund the defence and had otherwise abused the extradition process.[6]

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2 The one exception was the appeal relating to the count of conspiracy to commit money laundering (count 3). The Court held there was no equivalent New Zealand offence and therefore no available extradition pathway: *Ortmann v United States of America* [2020] NZSC 120 [Supreme Court judgment] at [470]–[473]. The appellants were accordingly discharged in respect of that count.

3 Supreme Court judgment, above n 2.

4 *Ortmann v United States of America* [2021] NZSC 9 [Supreme Court remittal judgment] at [8].

5 On 10 June 2021 the District Court formally discharged Mr Batato: *United States of America v Dotcom* DC Auckland CRI-2012-092-1647, 10 June 2021.

6 *United States of America v Dotcom* DC North Shore CRI-2012-092-1647, 23 December 2015 [District Court judgment].

[6] The appellants then exercised their right of appeal to the High Court under s 68 of the Extradition Act. It is the only appeal pathway under that Act and is limited to questions of law settled by the District Court (the case stated appeal). The case stated appeals the appellants filed were wide-ranging ones with over 300 questions of law. In addition to their case stated appeals, the appellants also applied for judicial review of the District Court's decision.

[7] The appellants failed in the High Court in respect of both their case stated appeals and the judicial review proceeding.[7] In relation to the latter, Gilbert J found there was significant overlap between the two proceedings (the case stated appeals and the judicial review proceeding) to the point that every alleged error of law bar one in the judicial review proceeding was replicated in the case stated appeals. The one exception was a pleaded ground of review alleging apparent bias and pre-determination on the part of the District Court,[8] an allegation which Gilbert J considered on its merits but rejected as unfounded.[9]

[8] Having failed in the High Court, the appellants brought a second appeal in this Court on two questions of law by leave of Gilbert J. Those two questions were:[10]

> (a) 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?
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> (b) Was the High Court Judge 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 the proof of this is not required for the purposes of s 24(2)(d) of the Extradition Act 1999?

[9] The appellants appealed Gilbert J's decision declining judicial review. They also sought special leave to appeal other questions of law in respect of which Gilbert J had declined to grant leave. In declining leave to appeal to this Court on

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7 *Ortmann v United States of America* [2017] NZHC 189 [High Court judgment].

8 At [8].

9 At [584]. The appellants have now abandoned that allegation: see Supreme Court judgment, above n 2, at [589].

10 *Ortmann v United States of America* [2017] NZHC 1809 [High Court leave judgment] at [49].

these matters, Gilbert J had reasoned they could be dealt with as part of a judicial review appeal.[11]

[10] Prior to the hearing in this Court, Miller J issued a directions minute. Under the heading "[j]oint or separate hearings for extradition appeals and judicial review", the minute relevantly stated:[12]

> A separate hearing of the leave applications is not feasible before the fixture on 7 February 2018. Accordingly, extradition and judicial review will be argued together. Counsel should assume that the Court will focus on the extradition proceedings and will entertain argument on the judicial review appeals only insofar as it adds to what has been said about extradition. Submissions will be structured accordingly.

[11] The appellants filed extensive submissions which we were obviously entitled to expect complied with the direction. That is to say, we were entitled to proceed and did proceed on the basis that any submissions raised under the judicial review heading were the only issues regarded by the appellants as being additional to those ventilated elsewhere. Only two pages of the 61-page submissions filed on behalf of Messrs Ortmann and van der Kolk dealt with the judicial review appeals. For Mr Dotcom, judicial review occupied four pages out of 60 pages, the submissions noting that the majority of the submissions were covered in the submissions on eligibility and the stay applications. The submissions went on to say that the argument in relation to pre-determination by the District Court did however "warrant some further comment". The submissions filed on behalf of Mr Batato did not address judicial review at all.

[12] At no stage did any of the appellants dispute Gilbert J's assessment of the degree of overlap. The only related argument was as to the effect of the overlap, Messrs Ortmann and van der Kolk submitting that the scope of argument available under judicial review was more expansive than that of similar issues by way of case stated appeal.

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11 At [48].

12 *Ortmann v The District Court at North Shore* CA302/2015, 28 September 2017 (Minute of Miller J) at [3].

[13] In our subsequent judgment of 5 July 2018, we answered "Yes" to the two questions in respect of which leave had been given and upheld the finding that the appellants were eligible to be extradited.[13]

[14] In relation to the first question, while upholding Gilbert J's conclusion that the appellants' alleged conduct amounted to extradition offences, we did so for different reasons. That was because we over ruled a previous decision that was binding on Gilbert J[14] and held that the alleged conduct had to amount to a criminal offence in not only the United States but also New Zealand (double criminality).[15] We concluded that copyright infringement was in any event criminalised in New Zealand and that the conduct alleged in the 13 counts would variously constitute offences under either the Copyright Act 1994 and/or the Crimes Act 1961.[16]

[15] The answer to the second question turned on whether the copyright status of the works was an essential feature of the offences relating to copyright infringement with which the appellants were charged. We held it fell outside the alleged conduct which the United States was required to prove and therefore in determining whether there was sufficient evidence to justify committing the appellants for trial, the court could assume copyright status did in fact exist in the works.[17]

[16] In our judgment, we also declined to grant leave to appeal on the remaining questions and we dismissed the appeal against Gilbert J's decision declining judicial review.[18] We found that the judicial review proceeding was an abuse of process.

[17] In making the latter finding, we accepted Gilbert J's assessment of the degree of overlap between the two proceedings.[19] We considered that by bringing judicial review proceedings replicating the same grounds as the case stated appeals, the appellants were attempting to circumvent the carefully circumscribed appeal rights

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13 Court of Appeal judgment, above n 1.
14 *United States of America v Cullinane* [2003] 2 NZLR 1 (CA).
15 Court of Appeal judgment, above n 1, at [104].
16 At [232].
17 At [130].
18 At [321].
19 At [305].

under the Extradition Act. And that, in our view, was an abuse of process and should not be permitted.[20]

[18] Dissatisfied with this Court's decision, the appellants sought and obtained leave to appeal to the Supreme Court.[21] The approved question was whether this Court was correct to dismiss the appellants' appeals. The Supreme Court declined to grant leave on any aspect of the applications for special leave to appeal which we had declined.

[19] When issuing the leave decision, the Supreme Court invited counsel to provide an indication of hearing time. In response, the United States filed a memorandum dated 21 December 2018 seeking clarification of the scope of the appeals, specifically whether the Court intended a full review of the various matters canvassed in the judicial review proceedings. The memorandum submitted that the Courts below had traversed the merits of the judicial reviews as part of the case stated appeals (aside from the allegation of bias) and that if the Supreme Court was proposing to undertake such a review, it would require at least two weeks' hearing time as had been required in this Court.

[20] Following receipt of that memorandum, the Supreme Court issued a direction on 24 December 2018, advising that the leave to appeal in relation to the judicial review proceeding was limited to the question of whether the Court of Appeal was correct to dismiss those proceedings as an abuse of process. The direction went on to state that if the Court were to hold the Court of Appeal was wrong to hold the proceedings were an abuse of process, it would seek further submissions as to whether the Court should address the issues that would then need to be resolved in another hearing or remit the proceeding to the Court of Appeal for that Court to do so. The direction concluded that the hearing would therefore deal with the extradition appeal and whether the judicial review proceedings were an abuse of process.

[21] The substantive hearing in the Supreme Court subsequently proceeded in June 2019.

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20 At [311].

21 *Ortmann v United States of America* [2018] NZSC 126.

[22] In a judgment issued on 4 November 2020, the Supreme Court dismissed the appellants' case stated appeals and upheld the finding of eligibility for extradition subject to the outcome of the judicial review proceedings.[22] As regards the judicial review proceedings, it held that this Court had erred in finding they were an abuse of process.[23] The Supreme Court said that the appropriate response in a proceeding where the judicial review claim duplicates grounds of appeal is to dismiss the judicial review claim or refuse relief, rather than to label the claim an abuse of process. However, a necessary first step was to inquire into the degree of overlap to ensure it was entirely duplicative, which meant addressing the judicial review claims, something it was not satisfied this Court had done because of its abuse of process finding.[24]

[23] The Supreme Court sought submissions from the parties as to which issues remained unresolved in the judicial review proceedings by which it said it meant issues that had not been addressed as part of the case stated appeals. It also sought submissions as to whether the appropriate forum for resolving any outstanding issues was this Court or the Supreme Court.[25]

[24] The parties could not reach agreement on which issues (if any) remained to be resolved. The United States took the position that there were none. The appellants contended there were numerous. Nor could the parties agree which Court should address any unresolved issues.

[25] In a subsequent decision, the Supreme Court determined that the matter should be remitted to this Court.[26] It further directed that it would not attempt itself to resolve the dispute about what issues (if any) remained unresolved but would leave that for this Court to do so whether as a preliminary issue or as part of a single hearing on the outstanding issues.[27]

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22 See [1] above.
23 Supreme Court judgment, above n 2, at [585].
24 At [586].
25 At [597].
26 Supreme Court remittal judgment, above n 4, at [6].
27 At [7].

[26] After receiving further submissions from the parties, we directed that both matters remitted to us would be dealt with at a single hearing.[28]

[27] Before turning to those matters, we address some preliminary procedural matters.

Application for recusal

[28] Prior to the hearing, the appellants contended that the remitted appeals should be heard by a fresh panel, and not the panel that had issued the 5 July 2018 judgment. The appellants therefore submitted that we should recuse ourselves because of our prior involvement. That request was declined and we advised the parties that reasons would be given in this judgment.

[29] The basis of the request for recusal was that although prior involvement in a proceeding is not of itself grounds to disqualify a judge, a fair minded and fully informed observer would have a reasonable apprehension the 2018 panel might not bring an impartial mind to the resolution of the outstanding issues. That was because of "clear views" we had expressed in our judgment regarding the merits of various issues which it was said have a direct bearing on the issues arising in the remitted appeals.

[30] In our view, the application for recusal was misconceived and failed to take into account the limited purpose of the referral back. It is not for the purpose of allowing the appellants to relitigate matters which we have already addressed on the merits. On the contrary, our brief is to identify the matters (if any) which we did not address on the merits and then to address the substance of those matters and only those matters. In short, the task is to complete the appellate hearing the Supreme Court held we may have left incomplete. In those circumstances and given the procedural history of this case, its volume and its complexity, we are confident that the fair minded observer would consider that the 2018 panel was the logical and fair choice.

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[28] *Ortmann v United States of America* CA302/2015, 15 March 2021 (Minute of Kós P) at [9].

Application for enforcement of requests under the Privacy Act 1993

[31] Counsel for Mr Dotcom filed an application seeking enforcement orders that information be released under the Privacy Act 1993 from various government agencies. The United States opposed the application.

[32] The application relates to a different proceeding involving different parties.[29] It should not have been filed for the purposes of these remitted appeals and is declined for want of jurisdiction.

Application to adduce further evidence

[33] Messrs Ortmann and van der Kolk seek to adduce further evidence in the form of affidavits from a retired United States Judge, Judge Kelly, and a United States attorney, Mr Reed. The affidavits seek to cast doubt on the strength of the United States' case. They contain expositions of the relevant United States law relating to pre-trial restraints and forfeiture orders, as well as the charges that the appellants are facing, and discuss take down notices and the ability of the appellants to access safe harbour provisions in the United States. The deponents also identify inferences favourable to the appellants that can be drawn from the evidence relied upon by the United States in its Record of Case (ROC). Messrs Ortmann and van der Kolk say the evidence is fresh because up until now they have been prevented from obtaining such evidence due to lack of funding caused by the United States.

[34] Similar evidence was however given in the District Court by a Harvard law professor and this, plus a finding that the appellants did have very substantial unrestrained funds at their disposal,[30] has prompted the United States to contend the evidence is not fresh.

[35] We accept that Judge Kelly and Mr Reed are experts and undoubtedly qualified to give the evidence they do about United States law. However, regardless of arguments about freshness, the more fundamental point also raised by

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29 See *Dotcom v Attorney-General* [2020] NZCA 551. This Court remitted that proceeding back to the Human Rights Review Tribunal.

30 Court of Appeal judgment, above n 1, at [282].

the United States is that expert evidence is only admissible if it is relevant and substantially helpful. And in our view the proposed evidence plainly does not satisfy those criteria.

[36] As the Supreme Court has confirmed, while it is the task of the New Zealand court in extradition proceedings to satisfy itself that the alleged offence is punishable under the law of the requesting country with the required level of penalty, the task is a limited one.[31] In particular, 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. 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 in the Extradition Act. That has been provided in this case. The detailed expositions of United States law in the affidavits sought now to be adduced are for the trial, not the proceedings in this country.

[37] Similarly, the issue of inferences including questions of safe harbour are for trial. The inferences the two experts identify may well be available but it cannot be said they are the only possible inferences. Nothing in either the Supreme Court's disclosure decision[32] or its 2020 decision regarding the scope of the meaningful judicial assessment of the ROC[33] — relied on by Messrs Ortmann and van der Kolk — means that the expert evidence sought to be adduced is capable of rendering an otherwise prima facie case against the appellants not a prima facie case.

[38] Finally we note that the affidavits seek to challenge the lawfulness of the forfeiture order. But that too has been the subject of findings in the New Zealand courts.[34]

[39] We therefore decline the application to admit this evidence. It follows that the application to adduce ancillary affidavits sworn by Messrs Ortmann and

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31 Supreme Court judgment, above n 2, at [155].
32 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [181] and [184].
33 Supreme Court judgment, above n 2, at [163].
34 See High Court judgment, above n 7, at [521]. This Court refused leave to appeal the broader question of whether a stay should have been ordered due to the effect of the forfeiture order: Court of Appeal judgment, above n 1, at [285].

van der Kolk and a New Zealand director of Mega Ltd explaining why and how the evidence from the United States was obtained must also fail.

[40] We now turn to address the task the Supreme Court has directed us to undertake.

Identifying any outstanding issues

[41] As mentioned, the Supreme Court explained that by "[o]utstanding issues", it meant issues which have not been addressed as part of the case stated appeals.[35] That must mean issues that have not already been addressed by either this Court or the Supreme Court itself. In the absence of any gap, we are not required to undertake a fresh consideration of the duplicative grounds.

The competing views

[42] For its part, the United States contends that the judicial review grounds pursued in this Court were truly duplicative of the contentions made by the appellants in the case stated appeals and special leave applications. In its submission, putting aside issues of bias and determination which this Court resolved separately, the overlap was complete and therefore there are no outstanding issues. Counsel for the United States, Mr Boldt, argues that the appellants are attempting to convert the remittal into a general re-opening of the appeal.

[43] The appellants dispute this. The central theme of their submissions is that while the case stated procedure can address errors of law, it has a narrow focus and is ill-suited to undertaking the broad consideration of issues that is possible in judicial review proceedings. In particular, it is contended that because of the way this Court dealt with the judicial review proceeding, it failed to address the fundamental issue of whether there had been breaches of natural justice which viewed either individually or collectively meant the extradition proceeding in the District Court had miscarried to such an extent that the finding of eligibility should be quashed. The breaches of

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35 Supreme Court judgment, above n 2, at [597].

natural justice relied upon are said to have arisen from either individually or cumulatively:

(a) The failure to undertake the required meaningful assessment as to whether there is a prima facie case against the appellants.

(b) Wrongly dismissing applications to adduce fresh evidence.

(c) The wrongful conduct of the United States in depriving the appellants of funding.

(d) The abuse of process by domestic agencies in withholding material from Mr Doctom.

Analysis

[44] The first point we make is that while case stated appeals are conceptually different from judicial review, in judicial review proceedings context is nevertheless all-important.[36] And of course the context in this case is an extradition proceeding involving a ROC. At times the appellants' submissions bordered on suggesting that as a matter of principle, there could never be a duplicative overlap. That however is contrary to established authority[37] and if correct would of course render the terms of the Supreme Court remittal direction meaningless.

[45] A second point which at times the appellants' submissions lost sight of is that extradition proceedings are to assist criminal proceedings in another state. They are not proceedings to determine criminal charges.[38]

[46] In deciding whether there are any outstanding issues, we have considered each of the alleged outstanding issues raised by the appellants, having regard to

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36 "In [administrative] law context is everything": *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [28] per Lord Steyn.

37 See *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94 (CA) at 103; and *City Financial Investment Co (New Zealand) Ltd v Transpower New Zealand Ltd* [2018] NZHC 1488 at [87]–[88] and [98], cited with apparent approval by the Supreme Court: Supreme Court judgment, above n 2, at [587].

38 *Minister of Justice v Kim* [2021] NZSC 57 at [469].

the pleadings filed in the High Court, the submissions advanced at the 2018 hearing in this Court and the content of our 2018 judgment. We have concluded for the reasons detailed below that correctly analysed none of the alleged outstanding issues are "outstanding". They were all addressed and resolved in our previous judgment.

[47] Turning first to the issue of the prima facie case.

[48] Section 24 of the Extradition Act sets out the pre-requisites for eligibility to surrender. They include the requirement in s 24(2)(d)(i) that the court must be satisfied that the evidence produced at the extradition hearing would according to the law of New Zealand justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand.

[49] As noted by the Supreme Court in its November 2020 judgment, 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.[39] It is to be a meaningful judicial assessment of the evidence tendered by the requesting country.[40]

[50] In this case, the United States was permitted to tender its evidence for the purposes of s 24(2)(d)(i) through what is known as the ROC procedure, meaning it was permitted to rely on a summary of the evidence supporting its request for surrender and other relevant documents. The summary is called the ROC.

[51] The District Court Judge found that the requirement of a prima facie case under s 24(2)(d)(i) was satisfied.[41] On appeal to the High Court, Gilbert J accepted that the District Court had erred in some aspects of its analysis, but himself undertook a fresh and comprehensive assessment of the evidence.[42] He concluded that a prima facie case had been established on each of the counts.[43]

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39 Supreme Court judgment, above n 2, at [161].
40 At [163].
41 District Court judgment, above n 6, at [700].
42 High Court judgment, above n 7, at [246]–[386].
43 At [386].

[52] The appellants sought to challenge that finding in this Court on the grounds of inadmissibility, unreliability (resulting from an alleged breach of the United States' duty of candour) and insufficiency. In our judgment we summarised the evidence in the ROC and addressed the substance of all those arguments.[44] Although the assessment was in the context of the applications for special leave and not under the judicial review heading, it was nonetheless a merits-based assessment. We found there was no reason to interfere with Gilbert J's finding that a prima facie case had been established and concluded:[45]

> The evidence contained in the ROC amounts to a strong prima facie case which would justify the committal of the appellants on each of the available New Zealand offences.

[53] In light of the above, we struggle to see how this can properly be classified as an "outstanding issue".

[54] Faced with these obvious difficulties, counsel for Mr Dotcom, Mr Mansfield contended that neither Gilbert J nor this Court applied the correct test in determining sufficiency and that the Supreme Court has confirmed this.

[55] The Supreme Court did not however direct us to reconsider findings by reference to a different test. The direction was to identify issues that we had not dealt with.

[56] In any event, we do not accept that the Supreme Court held we applied the wrong test. While Gilbert J did as it turned out wrongly eschew double criminality, that did not impact on the validity of his assessment of the sufficiency of the evidence for present purposes. That is because while he measured the evidence against the treaty only pathway, he also undertook an analysis demonstrating that there would be a prima facie case under the Crimes Act pathways as well.[46] Thus in relation to counts 1, 2 and 4–13 he measured the sufficiency of the ROC with reference to the same New Zealand offences identified by the Supreme Court as available extradition

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44 Court of Appeal judgment, above n 1, at [237]–[268].

45 At [265].

46 Gilbert J did not measure the sufficiency of the evidence against the offence under the Copyright Act but that was because he wrongly held that the Copyright Act did not criminalise copyright infringement. High Court judgment, above n 7, at [384].

pathways. Count 3 is irrelevant because the Supreme Court discharged the appellants on that count.

[57] The Supreme Court did find that this Court (and Gilbert J) had erred in its approach to whether the United States was required to provide evidence of the existence and ownership of copyright. As already mentioned, in our response to the second question before us, we held that the extradition court was entitled to assume the works enjoyed copyright status.[47] The Supreme Court however held that copyright status was an integral element of several of the charges and did therefore need to be proved to a prima facie standard under s 24(2)(d)(i).[48] However, that does not assist the appellants because the Supreme Court went on to hold that the evidence tendered by the United States in this case did in fact satisfy this requirement anyway. It was, the Supreme Court held, met by the material in the ROC either directly or by inference.[49]

[58] Contrary to a further submission made by Mr Mansfield, the Supreme Court also addressed the sufficiency of the evidence relating to the requirement under s 131 of the Copyright Act of knowledge of or wilful blindness to specific copyright-infringing files.

[59] The Supreme Court summarised the evidence in the ROC relied upon by the United States as bearing on actual knowledge or wilful blindness, the Court's discussion including a reference to inferences the United States is seeking to draw from the appellants' efforts to mask infringing content on the Megasites.[50] The Court expressly agreed that the inferences the United States sought to draw were available and that the conduct alleged showed sufficient specific knowledge of infringing copies to meet the knowledge requirement of s 131.[51] In the course of its discussion, the Court also rejected a submission made to it by the appellants that the evidence relied upon by the United States about knowledge was limited to receipt of take down notices. The Supreme Court said "there [was] much more".[52]

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47 Court of Appeal judgment, above n 1, at [130].
48 Supreme Court judgment, above n 2, at [422] and [424].
49 At [431].
50 At [320]–[323].
51 At [323]–[324].
52 At [385].

[60] In another part of its judgment, the Supreme Court also examined whether the appellants came within the safe harbour provisions as regards their responses to take down notices. It held that the alleged conduct meant that neither of the safe harbour provisions in the Copyright Act applied.[53] It further noted that safe harbour provisions in the United States would in any event be a focus at trial[54] and significantly for present purposes also expressly stated that the adequacy of the appellants' responses to take down notices was appropriately left to trial.[55]

[61] We conclude arguments about breach of natural justice arising from the District Court's assessment of a prima facie case are not outstanding issues.

[62] As regards breach of natural justice arising from the High Court's refusal to allow further evidence, Mr Mansfield contended the incorrect approach to s 24(2)(d)(i) adopted in the High Court and this Court caused both Courts to minimise the relevance of the fresh evidence the appellants sought to adduce to challenge the inferences the United States sought to draw. As a result, the required weighting of evidence could not meaningfully occur.

[63] In our 2018 judgment, we considered the issue of further evidence the appellants would have adduced in the District Court in the context of the application for leave to appeal the refusal of the funding stay application. We noted that it was characterised by the appellants as a breach of natural justice issue.[56] We again conducted a merits assessment. We stated:[57]

> We are satisfied that even if the appellants had called [in the District Court] all the evidence they wanted to call, it would not have made any difference to the outcome of the extradition hearing. To suggest otherwise is to confuse an extradition hearing with trial. At best for the appellants, all the proposed evidence would have achieved would have been to create conflicts in the evidence, the resolution of which was not the function of the extradition judge. To put it another way, correctly analysed, none of the evidence was the slam dunk necessary to preclude the finding of a prima facie case.

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53 At [385]–[386].
54 At [388].
55 At [387], n 454.
56 Court of Appeal judgment, above n 1, at [278].
57 At [283].

[64] We went on to support that conclusion by analysing the strongest item of evidence sought to be adduced by the appellants.[58]

[65] In the remitted hearing, Mr Mansfield was critical of the "slam dunk" reference because he said all that is required is evidence that shows the prima facie standard is not met. In this case, he says that would have constituted evidence which rendered the United States' inferences unavailable or unreasonable. The slam dunk reference was not intended to convey anything different. The problem for the appellants is that in our view the evidence they sought to adduce — and are still seeking to adduce — did not render the United States' inferences unavailable. Nor as we next address does it justify a stay.

[66] This too is not an outstanding issue.

[67] The third outstanding issue advanced by the appellants is breach of natural justice arising from the refusal to grant the funding stay. Again this was characterised as a breach of natural justice in 2018 and again it was considered and rejected by us on its merits.[59]

[68] An additional issue raised under the heading of "funding stay" at the remitted hearing by Mr Mansfield was that the High Court and this Court did not take into account that should Mr Dotcom be surrendered to the United States, "he will arrive penniless and unable to make bail or instruct Counsel".

[69] This contention was not pleaded in Mr Dotcom's notice of appeal filed in this Court nor was it an argument advanced in submissions on appeal in this Court. This argument then is a new matter, not before us at the 2018 hearing. The remitted hearing is not an opportunity to raise new matters.

[70] The fourth outstanding issue identified by the appellants is breach of natural justice arising from alleged misconduct on the part of the authorities. However, the merits of those allegations were also addressed in our 2018 judgment.

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58 At [284].
59 See the passage quoted at [63] above.

We concluded the conduct relied on did not "come close to" amounting to an abuse of process warranting a stay.[60]

[71] The allegations of misconduct we addressed included Mr Dotcom's complaint about the Attorney-General's handling of requests made of over 50 government agencies under the Privacy Act.[61] We therefore do not accept that this is an unresolved issue.

[72] To the extent that Mr Dotcom attempts to rely on events relating to his Privacy Act requests that have occurred since delivery of our 2018 judgment, that is a new matter that was obviously never part of the appeal and for that reason cannot qualify as an outstanding issue.

[73] Finally, we note that in the statement of claim filed by Messrs Ortmann and van der Kolk in the judicial review proceedings, a cause of action described as "innominate ground" was pleaded. It asserted that the cumulative effect of the errors made in the District Court required the exercise of the High Court's residual discretion to intervene. The key remedy sought was an order setting aside the eligibility determinations and permanently staying the extradition proceedings.

[74] Mr Illingworth QC contended this was an outstanding issue. However, it was never advanced orally at the 2018 hearing. He advanced this ground only sparingly contending in written submissions that Gilbert J erred by side-lining the judicial review proceeding and ignoring the benefit of the cumulative assessment that entails. No submissions identifying which particular errors cumulatively required intervention and why were advanced. Further the issue is self-evidently parasitic on the other judicial review challenges which we found were not tenable. That position is not capable of being improved by putting them altogether. We note too that in the notice of appeal filed in this Court, the issue of cumulative effect was in fact only directly raised in relation to the funding stay. Apart from that, there was simply a challenge on the basis Gilbert J erred by not addressing all grounds of judicial review —

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60 Court of Appeal judgment, above n 1, at [301].
61 At [302]–[303].

assumedly including the innominate ground. As with Mr Illingworth's submissions, the notice of appeal did not specify the component parts of the cumulative effect.

[75] Having found there are no outstanding issues, it is obviously unnecessary for us to embark on the second stage of the remittal to resolve the outstanding issues.

[76] Finally, for completeness we note that had we considered these issues under the "judicial review" heading in 2018, the reasoning and the outcome would have been exactly the same.

Result

[77] Messrs Ortmann and van der Kolk's application to adduce further evidence is declined.

[78] Mr Dotcom's application for orders enforcing requests made under the Privacy Act 1993 is declined.

[79] We find there are no issues raised in the judicial review appeals that were not addressed in our judgment of 5 July 2018 and therefore dismiss the appeals in CA127/2017 and CA128/2017 remitted by the Supreme Court.

[80] As regards costs, there is no reason why these should not follow the event. The first and second appellants in CA127/2017 and the appellant in CA128/2017 are jointly and severally liable to pay the first respondent one set of costs calculated on the basis of a standard appeal on a band A basis. We certify for two counsel.

[81] We make no award of costs in relation to the various interlocutory applications but order the first and second appellants in CA127/2017 and the appellant in CA128/2017 to pay the first respondent any disbursements relating to those applications.

Solicitors:
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