IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2012-404-1928
[2022] NZHC 1708

IN THE MATTER	of the Judicature Amendment Act 1972
IN THE MATTER	of an application for judicial review
BETWEEN	KIM DOTCOM First Plaintiff
	FINN BATATO Second Plaintiff
	MATHIAS ORTMAN Third Plaintiff
	BRAM VAN DER KOLK Fourth Plaintiff
AND	HER MAJESTY'S ATTORNEY-GENERAL First Defendant
	THE DISTRICT COURT AT NORTH SHORE Second Defendant

see over for further proceeding

Hearing: 9 and 10 June 2022

Appearances: S L Cogan for Plaintiffs/Applicants
D J Boldt and C L Charmley for Defendants/Respondents

Judgment: 25 July 2022

JUDGMENT OF HINTON J

This judgment was delivered by me on 25 July 2022 at 12.00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

CIV-2017-404-1679

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for judicial review
BETWEEN	KIM DOTCOM Applicant
AND	DEPUTY SOLICITOR-GENERAL (CROWN LEGAL RISK) Respondent

Counsel/Solicitors:
S L Colgan, Auckland
Crown Law, Wellington

[1] This judgment concerns two proceedings arising from the 2012 seizure of electronic devices from Kim Dotcom's residence and one other property. It was agreed they would be heard together.

[2] The first matter is the vestige of Mr Dotcom and associates' 2012 judicial review of the warrants issued for the abovementioned seizure. It is an application by the Attorney-General to release four former or serving police officers from their undertakings to not provide hard drive encryption codes to anyone, in particular any representative of the United States government.

[3] The second is an application for judicial review brought by Mr Dotcom challenging two decisions made by the Deputy Solicitor-General under the Mutual Assistance in Criminal Matters Act 1992 (MACMA). The first decision, made in 2017, was to send clones of the seized electronic devices to the United States authorities and the second, in 2022, was to send the original seized devices along with the clones.

[4] Finn Batato, Mathias Ortmann and Bram van der Kolk were Mr Dotcom's associates. They were parties to the 2012 judicial review and have been involved in other prior litigation. Although they are named in relation to the first proceeding, they did not take part in the present case.[1]

Background

[5] Mr Dotcom is under criminal investigation by the FBI. On 11 January 2012 the United States Department of Justice made a formal request to be sent electronic devices possessed by Mr Dotcom and associates, including computers and hard drives.

[6] On 20 January 2012, New Zealand Police seized electronic devices from Mr Dotcom and his associates under a MACMA warrant. Around 135 devices, which included nearly 300 separate computers, USB sticks, hard drives, memory cards and other electronic items were seized, mostly from Mr Dotcom.[2] Some of the data on these devices is encrypted and requires encryption codes to access.

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1 Mr Batato has since died.

2 Several items can be connected to, or form part of, the same device.

[7] In March 2012, FBI investigators visited New Zealand and made clones of 19 devices which Mr Dotcom and his associates had nominated as most likely to be rich in relevant evidence. The investigators took one set of clones back to the United States with them, and left a second set in New Zealand.

[8] Mr Dotcom and his associates entered into negotiations with the police where they proposed that they would provide passwords for the encrypted material in exchange for clones of the devices. These negotiations were unsuccessful at that time.

[9] Mr Dotcom challenged the validity of the search warrants under which the devices were seized. On 28 June 2012, Winkelmann J found the search warrants were invalid.[3] Her main concern was that the warrants were overly broad and permitted seizure of irrelevant material.

[10] Winkelmann J then issued a remedies judgment on 31 May 2013 making orders as follows:[4]

> 1. An order by way of declaration that the MACMA search warrants were unlawful;
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> 2. In respect of items that have not yet been cloned:
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> 2.1 An order that none of the items seized, nor copies or clones thereof, remaining in New Zealand be permitted to leave New Zealand or be accessed in any way other than in accordance with the processes set out in paragraph [2.2] below, subject to any further order of the Court;
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> 2.2 An order providing for the following process to be undertaken at the cost of the Police:
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> 2.2.1 The review of all items seized, including the contents of digital storage devices, for the purpose of identifying irrelevant material;
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> 2.2.2 Items containing only irrelevant material are to be returned to the plaintiffs;
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> **2.2.3 In respect of items identified as mixed content devices, two different clones must be prepared – one complete clone to be provided to the plaintiffs and one "disclosable" clone, with any personal photographs or film deleted, to be provided to**

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3 *Dotcom v Attorney-General* [2012] NZHC 1494.

4 *Dotcom v Attorney-General* [2013] NZHC 1269 at [65] (emphasis added).

United States authorities after the plaintiffs have received their clone;

2.2.4 In respect of items containing only relevant material, clones must be provided to the plaintiffs before a clone is provided to the United States;

3. In respect of items which have already been cloned:

3.1 An order that those clones created by the FBI and currently held by the Police (the existing clones) will be provided to the plaintiffs upon receipt of encryption passwords;

3.2 In respect of clones that have already been sent to the United States and the original devices that were cloned:

3.2.1 An order by way of declaration that the removal of clones from New Zealand was contrary to the Solicitor-General's direction to the Commissioner of Police dated 16 February 2012, was not authorised in accordance with s 49 of the MACMA, and was accordingly unlawful;

3.2.2 An order requiring the Police to provide confirmation in writing to the plaintiffs identifying those items the clones of which have been removed from New Zealand, and confirming whether or not the existing clones are effectively duplicates of the clones removed from New Zealand;

3.2.3 An order requiring the examination of the original devices that were cloned. If any of these devices are found to contain no relevant material, they are to be returned to the plaintiffs and the Police are to request the United States authorities to destroy clones of that device, and all material derived from that clone. The Police are to provide a copy of this judgment to the FBI so that they are aware of this possibility.

[11] Of these orders, order 2.2.3 ("the photo-stripping order") assumed significance and is of particular relevance here.

[12] Subsequent to Winkelmann J's 2013 judgment, the devices were preliminarily screened for relevance with the assistance of FBI staff in New Zealand. Those devices found to contain no relevant information were returned to Mr Dotcom (or his associates). This totalled around 99 devices. Those devices which contained at least some relevant information, and a further clone of those devices, were all retained by

police. The police therefore retained approximately 36 devices and clones of all of them.

[13] Between June 2013 and June 2014 there were further negotiations between the police and Mr Dotcom, attempting to facilitate the exchange of passwords and cloned devices, but the negotiations again failed.

[14] The Attorney-General appealed Winkelmann J's finding of invalidity and challenged inter alia the "photo-stripping" order (order 2.2.3). On 19 February 2014, the Court of Appeal overturned Winkelmann J's finding of invalidity and the search warrants were found to be valid.[5] The Court quashed the declaration of invalidity (order 1). Orders 3.1 and 3.2.1 were confirmed. However, the Court reserved leave to apply for further relief in relation to the remaining orders because further out of court steps may have made the orders unnecessary or inappropriate.[6]

[15] The Supreme Court granted the plaintiffs leave to appeal on 5 May 2014.

[16] On 2 July 2014, to safeguard the photo-stripping order, which remained in force at least in the interim, Winkelmann J directed that nominated police officers undertake not to disclose the encryption codes to anyone, and in particular to the United States authorities.[7] The rationale for the undertakings direction was to address the plaintiffs' concern that, if FBI investigators were given access to the passwords (that the police would obtain according to order 3.1), the FBI could use the passwords on the clones they already possessed and undermine the purpose of the photo-stripping order.[8] Undertakings were given in accordance with the order made, by four police officers, namely Detective Superintendent Quirinus (Ray) van Beynen, Detective Inspector Stuart Graham, Senior Sergeant Chris Moore and Detective Michelle Payne.[9] These undertakings are the subject of the Attorney-General's present application.

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5 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629.
6 At [118].
7 *Dotcom v Attorney-General* [2014] NZHC 1505.
8 At [19].
9 Michelle Payne has since changed rank.

[17] On 8 September 2014, the Court of Appeal made an order extending the undertakings to cover also the clones made following Winkelmann J's 2013 orders.[10] The purpose as expressed by the Court of Appeal was to preserve the parties' positions while the Supreme Court considered the validity of the warrants, and permit Mr Dotcom access to the material to prepare for his upcoming extradition proceedings.[11]

[18] On 23 December 2014, the Supreme Court dismissed the appeal and upheld the Court of Appeal's decision that the warrants were valid.[12] As a result, on 16 July 2015 the Court of Appeal set aside orders 2.1 and 2.2 in entirety, which meant the photo-stripping order was quashed. The Attorney-General had also applied to release New Zealand Police from the undertakings. However, the Court of Appeal remitted the issue to the High Court (and hence this proceeding). In the interim the undertakings remained in force.

[19] On 6 May 2016, the United States Department of Justice reiterated its request for the electronic devices. It advised that it required the original seized items rather than clones to satisfy certain United States evidentiary requirements and because some of the seized items contained encrypted materials or materials that may be hardware dependent.

[20] The Deputy Solicitor-General's 2017 decision was in response to this request. He consulted with Mr Dotcom and his associates, who strongly opposed the original devices being sent to the United States, but agreed that clones could be sent so long as personal and irrelevant information was first excised.

[21] The Deputy Solicitor-General therefore needed to decide whether (a) he should grant the United States' request for the original seized devices and (b) if not, whether he should require the excision of personal or irrelevant material from any clones sent to the United States.

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10 *Attorney-General v Dotcom* [2014] NZCA 444.
11 At [3] and [5].
12 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745.

[22] The Deputy Solicitor-General determined it would be premature to direct the transfer of the original devices while a proceeding challenging Mr Dotcom's eligibility for surrender was in progress. He decided to issue a direction under s 49 of MACMA to send (unmodified) clones of the devices to the United States. He noted he may revisit the decision regarding the original devices once the proceeding as to eligibility for surrender had concluded. Later the Deputy Solicitor-General undertook not to issue the direction he had determined upon with respect to the clones, pending the outcome of the plaintiffs' application for judicial review of his direction (the present judicial review).

[23] On 4 November 2020 the Supreme Court affirmed that the United States' criminal allegations against the plaintiffs represent offences under New Zealand law.[13]

[24] On 21 December 2021 the Supreme Court confirmed Mr Dotcom was eligible for surrender.[14]

[25] On 4 February 2022 the Deputy Solicitor-General consulted with Mr Dotcom again about the original devices. On 24 March 2022, the Deputy Solicitor-General determined – subject to a series of conditions under s 29 of MACMA – that he would direct the Commissioner of Police to send the original devices to the United States together with the clones.

Application to release from undertakings

[26] The Attorney-General asks the Court to release the four former or serving officers of the New Zealand Police from their obligations pursuant to the 2014 confidentiality undertakings on the basis that the conditions which led to their being directed have now ceased to apply, namely that Winkelmann J's orders 2.1 and 2.2 and in particular the photo-stripping order are now quashed.

[27] The undertakings were in the following form:[15]

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13 *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475.

14 *Ortmann v United States of America* [2021] NZSC 187.

15 As noted, the undertakings were subsequently amended by the Court of Appeal but the minor change in wording is not material here.

> UNDERTAKING to Mr Kim Dotcom concerning electronic devices seized from him by New Zealand Police on 20 January 2012:
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> I, [officer], of the New Zealand Police will maintain the confidentiality of any and all encryption codes provided to me by or on behalf of Mr Kim Dotcom; will not transmit the encryption codes electronically; and will not disclose the encryption codes to any other person, other than to Detective Michelle Payne, provided she has signed an undertaking in this form, or to any other party; and in particular to any representative of the Government of the United States of America.

[28] Undertakings given to or directed by the Court have the effect of a Court order, and it is open to the affected party to apply to be released from its obligations in the same way parties may, in appropriate cases, apply for orders to be modified or discharged. Where an undertaking is given in lieu of Court orders, the Court regards supervision and review as a necessary incident of the Court's power to control its own processes.[16] The test is whether circumstances have so changed as to afford good grounds for withdrawal.[17]

[29] However, where an undertaking is given as consideration or as part of a compromise, the change in circumstances must be "significant and render the continuation of the undertaking unjust" considering the perspective of both parties.[18] That is, the standard for upsetting the undertaking is higher.

[30] The Deputy Solicitor-General says the undertakings here fell into the former category. Mr Dotcom says this case falls into the second category. He says he acted in reliance on the undertakings when providing his passwords to police. He does not accept that the undertakings were tied to the photo-stripping order. The undertakings expressly provided that passwords were not to be released to any United States representative. He says that removing the undertakings does not restore the status quo, it puts him in a worse position.

[31] Mr Dotcom also contends that removing the undertakings means the United States authorities will receive more information than they are entitled to under the warrant, contrary to the Attorney-General's contention. He says he was under no

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16 *Ngati Te Ata v New Zealand Steel Mining Ltd* [2015] NZCA 547 at [30].
17 At [30].
18 *Commerce Commission v Air New Zealand Ltd* CIV 2008-404-008352, 3 November 2011 at [17].

obligation to provide the passwords because the warrant was issued prior to the Search and Surveillance Act 2012 (SSA). That Act now imposes an obligation to provide passwords.[19] Mr Dotcom asserts the Court had no power to order provision of passwords before the Act. Additionally, he says the Court orders only contemplated clones being provided to the United States authorities, not passwords. So, he contends if the undertakings were never provided, the passwords would not have been given to the police and accordingly the United States authorities would have no entitlement to them.

[32] Mr Dotcom says further that there is no prejudice to New Zealand Police. Any asserted injustice to the United States is irrelevant because it is not a party to the undertakings. Mr Dotcom says that on the other hand he has significantly changed his position by acting in reliance on the undertakings and revealing confidential information he otherwise would be under no obligation to give.

[33] I agree with the argument for the Deputy Solicitor-General. The undertakings are more properly treated as Court orders. They were, as Mr Boldt put it, made at the Court's direction with a view to maintaining the integrity of an existing remedial order.

[34] Further, the argument that Mr Dotcom would never have given the passwords without the undertakings, is contradicted by the clear record of his earlier position. Winkelmann J stated in her 2013 remedies judgment:

> [63] That leaves the issue of the existing clones currently held in New Zealand, and those which have already been shipped to the United States. The Police acknowledge that there are existing clones of some of the seized material, prepared by the FBI and held by the Police. The Police say that although there is no legal obligation on them to do so, they are prepared to give the existing clones to the plaintiffs on receipt of passwords which would enable investigators to access encrypted parts. **Mr Davison QC confirmed during the course of the hearing that the plaintiffs would provide those passwords**.

[35] Mr Dotcom was willing to provide the passwords well before the undertakings were conceived. It is clear from the oral argument before Winkelmann J, of which I

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19 Search and Surveillance Act 2012, ss 130 and 178.

have read a transcript, that the main concern was returning data to Mr Dotcom and associates.

[36] Further, it was common ground that the FBI would be involved in the investigation. It would have been obvious that they would have access to the passwords to access encrypted material.

[37] The Judge made order 3.1 (set out above) and it remains in force. It reflected the state of the parties' negotiations at that time and the assurances they were willing to give. It was unnecessary that Winkelmann J order that the passwords be given as Mr Davison QC (as he then was) had confirmed they would be.

[38] It was only after order 3.1 was made that complications arose in relation to safeguarding the photo-stripping order. The latter order was designed to remove personal information from the devices. If the passwords were provided to the police, and consequently to the United States, the personal information on the clones held by the United States could be accessed by them via the passwords, defeating the purpose of the photo-stripping order. Clearly the undertakings were given as recorded above, to safeguard order 2.2.3. The Court of Appeal has now quashed order 2.2.3, and the Supreme Court has confirmed the warrant was not invalid for overreach into irrelevant material.

[39] It follows that I accept the position of the Attorney-General that the change of circumstances being the quashing of orders 2.1 and 2.2 means there are good grounds for release from the undertakings.

[40] I record that even on the higher threshold put forward by Mr Dotcom, I consider the undertakings should be revoked. There is no injustice to Mr Dotcom, because if the photo-stripping order had never been made there would have been no impediment for the parties to continue with the agreement that was reflected in order 3.1. On the other hand, the police are significantly prejudiced in fulfilling their mutual assistance obligations to assist the FBI with evidence collected in New Zealand. The warrant was obtained and executed for the benefit of the United States authorities, and all the seized material, including the encrypted folders

and devices, is held on their behalf. Order 3.1 was designed to facilitate the FBI's investigation rather than obstruct it. Thus, Mr Dotcom's contention that the interests of the FBI are irrelevant is patently incorrect.

[41] The Attorney-General's application to release the four former or serving police officers from their undertakings is therefore granted.

Judicial review

[42] Mr Dotcom seeks judicial review of the two decisions made by the Deputy Solicitor-General under s 49 of MACMA to send the devices to the United States. The first decision was made on 28 June 2017 and the second on 24 March 2022. The Deputy Solicitor-General describes the decisions as straightforward – made by a decision-maker with an open mind who consulted carefully with the affected parties. The decisions are now challenged on a broad array of grounds.

[43] Section 49 of MACMA empowers the Attorney-General[20] to give directions about the custody and disposal of any thing seized pursuant to a warrant issued under s 44 of the Act. Section 49(2) provides the Attorney-General may direct that the thing be sent to an appropriate authority of a foreign country. At the time of the 2012 search and seizure, s 44 read:

> (1) Any District Court Judge who, on an application in writing made an oath, is satisfied that there are reasonable grounds for believing that there is in or on any place or thing—
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> (a) any thing upon or in respect of which any offence under the law of a foreign country punishable by imprisonment for a term of 2 years or more has been, or is suspected of having been, committed; or
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> (b) any thing which there are reasonable grounds for believing will be evidence as to the commission of any such offence; or
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> (c) any thing which there are reasonable grounds for believing is intended to be used for the purpose of committing any such offence—

[20] It is not disputed that the Deputy Solicitor-General was authorised to exercise this power by s 9C of the Constitution Act 1986.

may issue a search warrant in respect of that thing.

(2) An application for a warrant under subsection (1) may be made only by a constable authorised under section 43(2).

[44] As set out above, on 28 June 2017, the Deputy Solicitor-General decided that clones of the devices would be sent to the United States without any removal of irrelevant or private information, but declined to send the original devices.

[45] On 24 March 2022, the Deputy Solicitor-General determined that the balance of competing interests had shifted since his 2017 decision. He noted the dismissal of Mr Dotcom's final eligibility appeal means there is now no doubt the conduct in which Mr Dotcom is alleged to have engaged would represent criminal offending if it had occurred in New Zealand, nor is there any doubt the evidence discloses a prima facie case against him. Accordingly, the Deputy Solicitor-General concluded Mr Dotcom's proprietary and privacy interests in his devices are now outweighed by the fact the devices may be required as exhibits at a foreign trial concerning conduct which, if proved, would be criminal in both New Zealand and the United States.

[46] As a "preliminary point" Mr Dotcom argues that there is no proper evidence of decision-making in relation to the 2017 decision. This point can be dealt with cursorily. As his own counsel sets out, there is a record of correspondence between the Deputy Solicitor-General and counsel followed by a letter in which he sets out his direction and the justification. The other contentions raised under this heading are substantive points addressed below.

[47] Mr Dotcom says that the Deputy Solicitor-General made errors of law by:

(a) purporting to deal under s 49 of MACMA with material that is not subject to MACMA. (In particular irrelevant material, even if housed in a device alongside relevant material cannot be the subject of a MACMA warrant and therefore cannot be the subject of a s 49 direction);

(b) breaching and/or failing to have regard to his right under s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA) to be secure against unreasonable search or seizure;

(c) wrongly relying on the SSA, which does not apply to the warrants in question;

(d) failing to have regard to relevant considerations under s 27 of MACMA and to whether privacy safeguards should be applied;

(e) acting unreasonably by failing to adequately and independently enquire as to the practicability of removing personal/irrelevant material in New Zealand and as to the United States' evidential requirements; and

(f) acting in a manner inconsistent with the constitutional function of the Attorney-General.

[48] The above grounds are said to apply equally to both decisions.

[49] Further, in relation to the 2022 decision, Mr Dotcom claims:

(a) The 2022 decision serves no legitimate purpose and is entirely redundant. There is no material difference between the clones and the originals, either in terms of their contents or their evidential value.

(b) The 2022 decision is an illegitimate attempt to "shore up" the 2017 decision and outflank the judicial review after receiving Mr Dotcom's submissions, by providing additional reasons for what is in essence the same decision. There has been no material change in circumstances that justifies revisiting the decision.

No power under s 49 of MACMA to direct sending of irrelevant material and therefore of the devices/clones

[50] The first ground and Mr Dotcom's main contention is that the Deputy Solicitor-General had no power to deal with the irrelevant material contained

on the devices. Section 49 only authorises the sending of things seized under s 44. Mr Dotcom says the Court of Appeal in *Attorney-General v Dotcom* held that "thing" refers to both the devices and the information stored on them.[21] He says that seizure of the irrelevant material could not be authorised under s 44, because the irrelevant information is not a "thing" that falls into any of the categories under s 44(1). Further, he contends the Supreme Court accepted there was a need to sort and extract irrelevant material before it can be sent overseas.[22]

[51] The Deputy Solicitor-General argues that the devices themselves are a relevant thing and the Attorney-General can deal with the whole whether or not it contains some irrelevant material. He points out that in the domestic context, the positions prior to the enactment of the SSA and under the current statutory regime are identical with regard to such "mixed content" devices. This is that a seized computer or hard drive represents an indivisible thing that can be dealt with by the police. He says there is nothing to indicate the Supreme Court intended to alter the law either generally or in the MACMA context.

[52] Mr Dotcom's contention that each file must be treated as a separate thing, and must be confirmed as relevant before being sent offshore, is not supported by the Court of Appeal judgment on which he relies. The Court said merely that the s 44 warrant allowed the police to deal with clones because it would be meaningless if they could only deal with the physical device and not its contents. Thus "thing" had to refer to both the physical device and its contents.

[53] I agree with the argument advanced by the Deputy Solicitor-General. Under the common law (now governed by the SSA), police are entitled to retain entire computer devices, search them for relevant material, and make forensic clones.[23] I would add that irrelevant material must be dealt with appropriately in the circumstances of each case, such that privacy and s 21 rights are adequately protected. There is no reason to suggest the common law position is different with respect to MACMA, at least in this case. Indeed, as the Deputy Solicitor-General highlights, the

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21 *Attorney-General v Dotcom* [2014] NZCA 19 at [100].

22 Relying on *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [190]–[194].

23 *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433; and *Chief Executive, Ministry of Fisheries v United Fisheries Ltd* [2010] NZCA 356, [2011] NZAR 55.

MACMA scheme is designed to be more permissive, and facilitate rather than fetter the sharing of evidence with other states.[24] That assistance is to be to the fullest extent permissible under domestic law.

[54] The scheme of MACMA rests on cooperation and mutual trust between each country's policing and legal systems. The role of the Attorney-General's s 49 direction is as an independent oversight to ensure the particular circumstances appropriately justify the sending of seized things overseas. This includes whether the Attorney-General is satisfied that there are sufficient safeguards to protect the search subject's rights. In this case there is strong mutual respect between the United States and New Zealand regarding the integrity of each country's legal system, as demonstrated by the United States' designation as a "prescribed foreign country" under MACMA. New Zealand can expect that the United States authorities will deal with the irrelevant material appropriately and under the same general principles valued by the New Zealand legal system. The United States Central Authority has given assurances this is so. Thus, as I explain in more depth later, the rights that underpin the need for New Zealand police to appropriately deal with irrelevant material are not undermined by the United States receiving a mixed content device.

[55] The warrants were sought and obtained *by* the United States authorities *through* the New Zealand Police. The police are executing the warrant on behalf of the United States authorities. The evidential material is collected for their benefit. It is clearly consistent with the principles of MACMA that the United States authorities could execute the latter part of the search and seizure, that is, the search of the devices and seizure of relevant material, where the Attorney-General thought that was appropriate.

[56] Further, I agree with Mr Boldt that there is nothing in the Supreme Court judgment that suggests it intended to overrule or distinguish *Gill v Attorney-General* and *Chief Executive, Ministry of Fisheries v United Fisheries Ltd*.[25] The

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[24] Mutual Assistance in Criminal Matters Act 1992 (MACMA), s 4(1)(b). The Deputy Solicitor-General also points to the fact the regime governing items seized under a domestic warrant (subpart 6 of the SSA) is not incorporated into MACMA.

[25] *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433; and *Chief Executive, Ministry of Fisheries v United Fisheries Ltd* [2010] NZCA 356, [2011] NZAR 55.

Supreme Court held that the s 44 MACMA warrant covered not only the initial search but also the continued search of the devices for relevant content. In doing so it applied the main tenets of *Gill* and *United Fisheries*. It did not silently overrule those cases nor did it purport to disapply them in the MACMA context.

[57] In making its remarks about the sorting of relevant from irrelevant material, the Supreme Court was commenting generally on the requirements for a valid warrant. It was not concluding that irrelevant material must be excised from mixed content devices before they can be subject to a s 49 direction. Section 49 was not at issue before the Supreme Court. The Court stated that it did not take any view with regard to the interaction of a s 49 direction with the sorting exercise:[26]

> The warrants authorised searches of the computers' contents for material relevant to the alleged offending, and the seizure of any relevant material. … In the particular circumstances of this case, sending clones of the seized computers overseas may have been the only practical way of effecting the search, but **that is not something on which we should express any view** as it is the subject of separate proceedings.

[58] The Court recognised that the way seized electronic devices are dealt with after seizure will depend on the circumstances of the case.[27] In some cases the New Zealand Police will identify and extract relevant material before sending the evidence overseas. In other cases, as the Supreme Court noted, it will be reasonable for the devices to be sent overseas for the requesting authority to identify relevant material.[28] Its obiter comments on practicability should not be seen as establishing a new legal test or a presumption for the sorting exercise to be undertaken in New Zealand. They should be read in the context of its earlier comments on "downstream issues" relating to irrelevant material:[29]

> If relevant material is identified, downstream issues of some difficulty may arise, for example, as to how relevant material is to be preserved, **what steps should be taken in relation to irrelevant material** and how material is to be returned/made available to the suspect. **We are not in a position to provide specific guidance on these matters in the abstract as much will depend on the circumstances of particular cases and the particular characteristics of the technology involved.**

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26 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [204] (emphasis added).
27 At [194].
28 At [200].
29 At [194] (emphasis added).

[59] Clearly the Attorney-General has jurisdiction to deal with mixed content devices pursuant to s 49. That jurisdiction must be exercised with regard to the search subject's rights in relation to the irrelevant material.[30] This issue will be addressed below. But it cannot be said that the Deputy Solicitor-General's decisions in this case suffer from lack of jurisdiction as alleged by Mr Dotcom.

[60] Accordingly, Mr Dotcom's first ground of review fails.

Breach of/failure to have regard to s 21 of NZBORA

[61] Second, Mr Dotcom claims that the decision, in particular not to remove irrelevant material, breached his right under s 21 of NZBORA to be free from unreasonable search and seizure. He points to the comments of the Supreme Court that the power to make a direction under s 49 must be exercised in a manner consistent with NZBORA.[31] It is claimed that the unreasonable seizure at issue is the proposed transfer to the United States of personal information that is irrelevant to the investigation, which amounts to an additional seizure for the purposes of s 21 of NZBORA. Acknowledging that the reasonableness of a seizure involves weighing the relevant values and interests, Mr Dotcom says there is no law enforcement interest in the irrelevant private material, but a high privacy interest. Additionally, he says the weighing exercise cannot have been properly undertaken because the Deputy Solicitor-General did not have regard to the nature and content of each individual device. He says to the extent the weighing exercise was undertaken at all the privacy interest was weighed only against practicalities. These practicalities are said to be overstated.

[62] The Supreme Court found in 2014 that the warrants themselves were lawful, despite the large amount of irrelevant material that would inevitably be seized. It also found that the warrants did not require conditions relating to post-seizure management in order to be lawful. This was the context in which the Deputy Solicitor-General made his decisions.

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30 At [201].
31 At [102] and [201].

[63] As with all search and seizure, there is a balancing act between the right to privacy and the legitimate interests in acquiring the objects of the search, including law enforcement interests. That balancing act is, to some degree, within the discretion of the decision-maker. It is not for this Court on a judicial review to scrutinise whether that balance is correctly struck, rather, the more important focus is whether the decision-maker properly took Mr Dotcom's right into account. Nonetheless I consider whether the decision was in breach.

[64] The Deputy Solicitor-General took this right into account in his 2017 decision, stating:

> I have concluded this position reflects an appropriate balance between the rights of the respondents and the interests of the requesting state, and therefore ultimately reflects the public interest.

[65] Further, in his 2022 decision, the Deputy Solicitor-General relevantly concluded:

> It follows that, while I have considered whether the "logical evidence file" proposal alters my analysis about sending the original devices to the United States, I have concluded it does not. I do not consider that sending validly seized mixed-content devices to the United States breaches s 21 of the Bill of Rights Act, especially as domestic investigators would be entitled to retain original devices and/or unmodified clones if this were a domestic investigation. In reaching that conclusion, I am reassured by the United States Central Authority's recent advice about the manner in which the information will be treated, and that your clients' data will be handled in a manner similar to the way it would be handled in New Zealand. Nor does the evidence persuade me there is any reason (even assuming I have a general discretion to refuse a request on grounds not mentioned in s 27) to decline to direct the transfer of the original devices.

[66] Mr Dotcom asserts that an option that was less intrusive on his rights, being the sorting of material onshore, was available and should have been preferred. He says that placing an additional burden on New Zealand Police or other practical concerns cannot legitimately be balanced against his right.

[67] I consider that it was lawful for the Deputy Solicitor-General to conclude that removing material from the devices or clones would not be feasible in New Zealand and would compromise evidential integrity in the United States trial. Those matters are not merely practical but go to the public interest in efficiently allocating the

resources of the policing and wider justice system to facilitate swift justice, and the interest of New Zealand in upholding its international obligations under MACMA. They are interests that are legitimately weighed against Mr Dotcom's rights.

[68] Due to the nature of Mr Dotcom's alleged offending, including breach of copyright, it is not clear what material is relevant or irrelevant at face value. For example, Mr Dotcom suggests automatically identifying photo and video files, but this would bring up both personal family photos and video files and also potentially photos and videos relating to copyrighted content that is at issue in the United States investigation. Another example is given by Senior Sergeant Payne who points out that there is no way to identify whether music files are personal or relevant to the alleged offending.[32] There is also the added complication of evidence that Mr Dotcom personally used the Mega platform services to store content. This is not a case where the personal material is obviously discrete from the relevant material. Also, the volume of the material is considerable.

[69] While Mr Dotcom is concerned that he will lose access to New Zealand-based safeguards if the clones are sent to the United States, that is an inevitable consequence of New Zealand's participation in an international mutual assistance framework. In any event, Mr Dotcom's privacy is capable of being addressed through the imposition of conditions and the supervision of the trial court in the United States, including via the United States' constitutional protections. The Deputy Solicitor-General's 2022 decision was subject to the following conditions:

(a) If the Minister of Justice finally determines, under s 30 of the Extradition Act 1999, that none of the defendants are to be surrendered, the devices are to be returned to the Commissioner of Police within 28 days of the surrender decision.

(b) If the Minister of Justice determines that one or two of the defendants are not to be surrendered, the devices seized from those defendants are to be returned to the Commissioner of Police within 28 days of the surrender decision, unless the United States Central Authority certifies,

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[32] Affidavit of Michelle Payne, sworn 15 September 2021, at [9]–[10].

within that period, that the devices are required in connection with the trial of the remaining defendant or defendants. In that event, the devices are to be returned to the Commissioner of Police as soon as they are no longer required in connection with the relevant criminal proceedings.

(c) The information held on the devices and clones is to be stored in a way which ensures there are reasonable safeguards to prevent its loss, unauthorised access or disclosure, modification or other misuse. It must not be retained for longer than is required for the relevant criminal investigations and prosecutions (including any appeals and other forms of post-conviction challenge). The information is to be used and disclosed only in connection with the criminal investigation and prosecution(s) for which it was obtained, and must otherwise be kept confidential.

[70] The United States Department of Justice identified legislation, regulations and policies in its jurisdiction that operate to protect privacy rights in relation to evidential material. It also assured the Deputy Solicitor-General that the requirements of the (New Zealand) Privacy Act 2020 reflect the normal practice of United States investigators and prosecutors.

[71] Further, as the Supreme Court noted, MACMA builds in a number of safeguards which reflect the values of s 21 NZBORA.[33] These include the need for the underlying offence to be one of some gravity and the need to establish reasonable grounds to believe relevant evidence will be found before a warrant may be issued.

[72] In regard to Mr Dotcom's assertion that the nature and content of each device needed to be considered separately, this is unfounded. A review of the devices occurred in 2013 with the assistance of the FBI and around 99 devices containing no relevant material were returned. Each remaining device in the custody of the Commissioner of Police therefore shares the same characteristic that there is believed to be at least some relevant material on them. There was no need for the

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33 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [101].

Deputy Solicitor-General to be more granular or himself review the content of each device.

[73] For the above reasons, the two s 49 directions were not in breach of Mr Dotcom's s 21 NZBORA right and the Deputy Solicitor-General took that right into account appropriately. The second ground of review therefore fails.

Illegitimate reliance on Search and Surveillance Act 2012

[74] Mr Dotcom's third ground of review can be dismissed relatively briefly. The Deputy Solicitor-General did not apply or purport to act under the SSA in his 2017 decision. In the relevant part of the letter, the Deputy Solicitor-General explained that he would not impose any conditions on the transfer of clones. He went on to explain that the clones cannot be modified because they would lose evidential integrity. The reference to the SSA then followed:

> 6. This approach is consistent with the way cloned devices are treated under New Zealand law. For example, s 161(2) of the Search and Surveillance Act provides that where a clone (described in that Act as a forensic copy) is found to contain a mixture of data that is evidential material and data which is not, the Police may retain the device in its entirety, and may search within it.

[75] It is clear that the SSA was merely discussed as an analogy not as part of the reasoning as such. This was entirely appropriate in the circumstances because it explained why the decision under s 49 of MACMA was in principle consistent with the way the same type of "thing" was treated under the SSA. To the extent that Mr Dotcom seeks to argue the analogy was inapt or consistency is not desirable this goes to the merits of the decision and is not a proper ground of judicial review.

[76] In the 2022 decision, the Deputy Solicitor-General expressly noted that the SSA does not apply to the question of whether irrelevant material must be excised before transfer "because that Act was not in force in January 2012, but also because subpart 6 of Part 4 of the SSA is not incorporated into MACMA". No issue arises with that.

[77] Accordingly, Mr Dotcom's third ground of review is rejected.

Failure to take account of relevant considerations

[78] Fourth, Mr Dotcom says the Deputy Solicitor-General failed to have regard to relevant considerations. He points to "mandatory considerations" set out in s 27 of MACMA and says there is no express reference to any such considerations in the 2017 decision. Further Mr Dotcom claims the Deputy Solicitor-General failed to give any consideration to conditions or safeguards to protect his privacy interests.

[79] Section 27 provides as follows, so far as relevant:

> **Refusal of assistance**
>
> (1) A request by a foreign country for assistance under this Part shall be refused if, in the opinion of the Attorney-General,—
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> …
>
> (f) the granting of the request would prejudice the sovereignty, security, or national interests of New Zealand; or
>
> …
>
> (h) the request is for assistance of a kind that cannot be given under this Act, or would require steps to be taken for its implementation that could not be lawfully taken.
>
> …
>
> (2) Subject to subsections (3) and (4), a request by a foreign country for assistance under this Part may be refused if, in the opinion of the Attorney-General,—
>
> (a) the request relates to the prosecution or punishment of a person in respect of conduct that, if it had occurred in New Zealand, would not have constituted an offence against New Zealand law; or
>
> …
>
> (b) the request relates to the prosecution or punishment of a person in respect of conduct that occurred, or is alleged to have occurred, outside the foreign country and similar conduct occurring outside New Zealand in similar circumstances would not have constituted an offence against New Zealand law; or
>
> …
>
> (c) the request relates to the prosecution or punishment of a person in respect of conduct where, if it had occurred in New Zealand at the same time and had constituted an offence

against New Zealand law, the person responsible could no longer be prosecuted by reason of lapse of time or for any other reason; or

…

(e) the provision of the assistance requested could prejudice—

(i) a criminal investigation or criminal proceeding in New Zealand; or

…

(g) the provision of assistance—

(i) would impose an excessive burden on the resources of New Zealand; or

(ii) relates to a matter that is trivial in nature; or

(h) the request does not comply with the requirements of section 26.

(3) No request shall be refused solely on the grounds contained in subsection (2)(g) unless—

(a) the Attorney-General has first consulted with the Central Authority of the requesting country about the terms and conditions on which the request may be complied with; and

(b) the Attorney-General has been unable to reach agreement with the Authority in that regard.

(4) No request shall be refused solely on the grounds contained in subsection (2)(h) unless the Attorney-General has first requested further information from the requesting country and that country has failed or refused to provide that information.

(5) Subject to subsection (1), the Attorney-General may grant a request even though the request does not comply with the requirements of section 26.

[80] The relevant s 27 factors were detailed at length in a letter of 16 June 2017 of Mr Spring (counsel for Mr Dotcom's associates) and reiterated in Mr Cogan's 16 June 2017 letter. These were that the direction would place the clones/devices out of the control of New Zealand sovereignty (s 27(1)(f)); the request cannot lawfully be made because it is in breach of s 21 NZBORA (s 27(1)(h)); and eligibility proceedings were then underway (subss 27(2)(a), (b), (c) and (e)(i)). By 2021 Mr Dotcom asserted that s 27(2)(g)(i) was engaged.

[81] In the two letters counsel also accepted that clones could be sent to the United States, albeit subject to certain conditions. The Deputy Solicitor-General expressly accepted the points made in the letters as noted above when he made his 2017 decision to refuse, for the time being, the United States' request for the original seized devices.

[82] In relation to the Deputy Solicitor-General's decision to send intact rather than modified clones, Mr Boldt submitted that it is difficult to identify any s 27 factor which might have been material to that specific decision. I agree, with the exception of s 27(1)(h) which imports s 21 NZBORA (which has been previously addressed).

[83] Nonetheless the s 27 factors identified in the previous letters were clearly considered by the Deputy Solicitor-General in his 2017 direction when he stated:

> I have decided to direct, under s 49 of MACMA, that a complete set of forensic clones of the seized devices held by the Commissioner of Police, all of which contain at least some relevant material, be sent to the appropriate authorities in the United States. This should, as you observe, be sufficient for the American authorities to continue their investigations, while ensuring the original devices remain under my control (and, of course, subject to the authority of the New Zealand courts) while the eligibility process continues. I have concluded this position reflects an appropriate balance between the rights of the respondents and the interests of the requesting state, and therefore ultimately reflects the public interest.

[84] This paragraph addressed the concerns under s 27(1)(f) that the transfer would place the devices outside of the sovereignty of New Zealand while ongoing litigation on eligibility continued and explains why this balance has been struck.

[85] I also consider that the s 27(1)(f) claim made by Mr Dotcom and associates in their letters was misguided. The very purpose of MACMA is to place evidence outside the jurisdiction and sovereignty of New Zealand. This cannot be said per se to *prejudice* sovereignty which is what the section requires. Their argument is a strained interpretation of the subsection. The Deputy Solicitor-General was entitled to think the same.

[86] I have already discussed the s 21 NZBORA ground of review. However, I add that the passage of the Deputy Solicitor-General's decision quoted above noted that the rights of Mr Dotcom and associates have been balanced against the interest of the

requesting state. This addresses the contention that s 27(1)(h) was engaged because the assistance could not be lawfully given if it breached s 21 NZBORA. The Deputy Solicitor-General clearly considered it was a justified balance of rights and interests.

[87] It is important to point out the difference between the s 27(1) and s 27(2) factors. The s 27(1) factors *require* the Attorney-General to refuse the request if a factor is present (although an assessment is still required as to whether a factor is or is not present). However, under s 27(2) the Attorney-General *may* refuse the request if one of the factors is relevant. Discretion is clearly afforded to considerations under s 27(2).

[88] The Deputy Solicitor-General clearly had the extradition proceedings (said to engage subss 27(2)(a), (b), (c) and (e)(i)) at the forefront of his mind when he concluded it was premature to send the original devices to the United States. As he subsequently explained, the rationale was that if the outcome of the extradition proceedings were that Mr Dotcom was not eligible for surrender (one of the potential reasons being because his actions did not constitute criminal offending in New Zealand) then there would be no trial in the United States. Thus, there would be no reason for the United States to have possession of the original devices to use in evidence. (The position of the United States was that the clones would not be sufficient in evidence in the trial). However, supplying the clones would allow them to continue their investigation in the meantime.

[89] Not much is made by Mr Dotcom of the point that the Deputy Solicitor-General failed to consider whether complying with the request would be unduly burdensome for New Zealand (s 27(2)(g)(i)). The crux of his point is that the New Zealand Police were obligated to sort the material onshore to protect his rights and if that is unduly burdensome then the request for assistance should have been denied. This argument is contingent on whether the New Zealand Police are obligated to sort the material onshore which has already been answered in the negative.

[90] In relation to the Deputy Solicitor-General's alleged failure to have regard to privacy safeguards, he expressly enquired in 2017 as to what conditions Mr Dotcom

and associates considered necessary. Mr Spring and Mr Cogan's letters did not identify any formal conditions under s 29 of MACMA. In 2022 he imposed three conditions intended to protect Mr Dotcom's interests.

[91] The 2022 direction had clear regard to the s 27 factors. Mr Dotcom's submissions regarding the 2022 decision do not accuse the Deputy Solicitor-General of failing to have regard to any relevant s 27 factor.

[92] The fourth ground of review is declined.

Unreasonableness and failure to properly enquire

[93] Fifth, Mr Dotcom says the Deputy Solicitor-General's decision was unreasonable because he failed to recognise or investigate certain facts that demonstrate it is practicable to excise irrelevant material onshore. He says that the New Zealand Police had started a sorting exercise in response to the 2013 remedies judgment, which shows it does have the capacity to undertake such an exercise, at least with FBI assistance. The Deputy Solicitor-General did not enquire as to what would be required at a technological and resourcing level to achieve this. He failed to take into account that the volume of material is "not out of the ordinary in today's age". Also, Mr Dotcom says that there was a failure to enquire into the evidential requirements of United States law and to take into account that according to Mr Dotcom the United States has confirmed it already has sufficient evidence.

[94] The standard for unreasonableness is high. Mr Dotcom must establish that no reasonable decision-maker would have made the decision without enquiring into the technological and resourcing requirements involved in undertaking an onshore sorting. The Deputy Solicitor-General did not need to interrogate this factor in 2017 as he had already determined that modifying the clones was not tenable in principle because modification would undermine their evidential integrity. This conclusion was based inter alia on information from the Law Commission's Search and Surveillance Powers Report.

[95] Further the Deputy Solicitor-General addressed the problem that New Zealand Police would not be able to accurately screen for relevance because it is

not their investigation. So even if they had the technology and resourcing to screen the devices, they would face the higher problem of not knowing precisely what to screen for.

[96] In that context where there were more fundamental problems with the modification of clones it was reasonable for the Deputy Solicitor-General to not investigate further the technology and resourcing necessary to modify the clones onshore.

[97] In 2022 expert reports were introduced to assess the possible options for removing irrelevant material from the clones without compromising evidential integrity. The experts agreed in a joint report that it would be technically possible to create a "logical evidence file" or "case subset" that, properly documented, would ensure there was no loss of evidential integrity in the files that were not removed. This process would require Mr Dotcom himself to nominate the files he regards as irrelevant. Assuming he and the police agree particular files should be excluded, the police would then take, and document, a number of steps which would remove the irrelevant files from the evidence files disclosed to the United States.

[98] In relation to the 2022 direction, the Deputy Solicitor-General concluded based on case law that it was not necessary for irrelevant material to be excised before the devices could be subject to a s 49 direction. He considered, in light of Mr Dotcom's s 21 NZBORA right, whether the process to excise irrelevant material suggested by the joint expert report would be desirable. He concluded it would be "unacceptable and contrary to good law enforcement practice" to allow Mr Dotcom to identify irrelevant items. Additionally, a time-consuming sorting practice undertaken in New Zealand would be contrary to the policy underpinning MACMA that foreign authorities should be afforded the widest possible measure of assistance consistent with our law. Nothing in this reasoning suggests the Deputy Solicitor-General's 2022 decision was unreasonable for failing to take into account any established facts. In fact, he had the joint expert report before him in 2022 and noted he "carefully considered" it.

[99] In relation to the evidence point, based on the principle of mutuality in MACMA I consider the Deputy Solicitor-General was entitled to rely on the formal indication of the United States Department of Justice that the original devices were required for trial. Contrary to the submission by Mr Cogan, the Deputy Solicitor-General's decisions do not appear to be contrary to any accepted fact in this regard. Further in relation to the 2022 decision, the Deputy Solicitor-General specifically sought out further explanation of the point from the United States Department of Justice and that explanation is attached to the letter explaining his 2022 decision.

[100] Mr Dotcom claims the United States already has "sufficient evidence", thus does not require the original devices. He asserts the Deputy Solicitor-General was unreasonable to not account for this "fact". "Sufficient evidence" is a reference to the United States assuring the Court it had sufficient evidence to prosecute for the purpose of the extradition hearing.[34] For that purpose, the United States only needed to establish it had prima facie evidence that there was existence and ownership of copyrighted material. This is obviously a different standard than will be required to prove Mr Dotcom is guilty of such charges. Mr Cogan's submission that this constitutes an admission the United States already has sufficient evidence is misplaced. Further this assertion is contrary to the information directly before the Deputy Solicitor-General, being the request for original devices itself.

[101] Accordingly, this ground of review fails.

Inconsistency with constitutional function

[102] Sixth, Mr Dotcom claims the Deputy Solicitor-General acted in a manner inconsistent with the constitutional function of the Attorney-General. He alleges the Deputy Solicitor-General did not exercise open-minded or independent judgment and did not act in the public interest. Mr Dotcom says the decisions reflect only the interests of the United States.

[103] This ground of complaint must be considered in light of the purposes of MACMA. The object of MACMA is to facilitate the provision of international

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[34] *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475.

assistance, including the obtaining of evidence, documents and other articles. MACMA is founded on the principles of international co-operation and comity and the key feature of the Act is mutuality. New Zealand's international obligations require it to provide assistance "to the fullest extent possible" under its laws. In return, New Zealand can expect it will receive assistance from other countries when required. Failure by New Zealand to assist a foreign state, in circumstances where the assistance sought is lawful and appropriate, undermines the principle of reciprocity which lies at the heart of the scheme.

[104] Thus, it is not illegitimate for the Deputy Solicitor-General to take into account the interests of the United States, because in doing so he is taking into account the public interest of New Zealand to uphold its international obligations and preserve the relationship which allows reciprocal action by the United States when requested by New Zealand.

[105] This ground of review is rejected.

Legitimacy of 2022 decision

[106] Mr Dotcom claims the 2022 decision was illegitimate as there has been no material change which might warrant the status of the original devices being reconsidered. He says the confirmation that he is eligible for surrender does not shift the balance of competing interests as it stood in 2017. The Deputy Solicitor-General was wrong to take account of the need for the United States to be ready to try him promptly if he is extradited. There will still be plenty of time, after the Minister's surrender decision, for a s 49 decision (and presumably all stages of the resulting legal challenge).

[107] The Deputy Solicitor-General sets out in detail why the Supreme Court's decision that Mr Dotcom and his associates are eligible for surrender to the United States is a substantial change in circumstances that merits reconsideration of the 2017 decision. In 2017 there was a live issue before the courts which may have shown the extradition and the prosecution to be wholly misconceived. Now, the New Zealand courts have rejected each of the main points that Mr Dotcom and his associates sought to rely on to prevent extradition. Further the Supreme Court

confirmed the alleged conduct would constitute criminal offending in both jurisdictions. That was not known in 2017 when it was thought the copyright charges may not constitute criminal offending in New Zealand. By 2022 it was clear that the devices contained evidence of conduct which, if proved, constituted criminal offending in both New Zealand and the United States. In total, this was a substantial change in circumstances and in the legal position warranting a reconsideration of the decision.

[108] Further, the 2017 direction had been frustrated by these legal proceedings and the extradition proceedings. The additional clones were never in fact sent to the United States. At the conclusion of the extradition proceedings, with the United States' request still extant, the Deputy Solicitor-General still needed to address that request. Either he would need to reissue the 2017 direction or consider the matter afresh. In light of the above circumstances, it was appropriate and prudent to consider the decision afresh.

[109] Mr Dotcom further argues that the 2022 decision is an abuse of process. He characterises it as an "ex post facto" attempt to "shore up the [2017] decision and outflank the judicial review". He says the decision should wait until after extradition is confirmed or at least until after the present judicial review is concluded.

[110] As the Deputy Solicitor-General considered in some detail, it was appropriate to make his 2022 direction while the present proceeding was still live. The issues are broadly the same and the new decision does not substantially widen the scope of the proceeding. He was alive to the possibility that his 2022 decision would also be reviewed and then possibly appealed and that would have further extended the series of events that have now dragged on for a decade. Given those two factors it was expedient for the Deputy Solicitor-General to make his decision when he did and for the review of such to be subsumed into the present proceeding as it now is.

[111] This ground of review accordingly fails.

Relief

[112] As I have found that Mr Dotcom's judicial review fails on each ground, it is not necessary for me to consider the question of whether I should exercise my discretion to grant relief.

Result

[113] The Attorney-General's application for release from undertakings is granted.

[114] Mr Dotcom's application for judicial review is declined.

[115] The defendants/respondent are entitled to costs. If agreement cannot be reached on quantum, they are to file a memorandum within 15 working days and Mr Dotcom is to reply within 10 further working days.

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Hinton J